

# Free Speech Censorship in the Philippines: The Push to Decriminalize Libel

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## ABSTRACT

*Philippine criminal libel law is unjustly being used to suppress and censor the media and press; libel should be decriminalized and redefined to uphold the ideals of due process and freedom of expression enumerated in the Philippine Constitution.*

## I. INTRODUCTION

The unjust suppression of speech is deep-rooted in Philippine history. Unfortunately, the Philippines is a third-world country riddled with corruption. Reporters, media outlets, and activists seeking to effectuate meaningful change have often tried to expose such inadequacies. Rather than being embraced, these groups have been faced with great opposition. Philippine media and activists taking critical or controversial stances have routinely dealt with significant harassment, criminal charges, and in severe cases, death.

This issue of censorship in the Republic of the Philippines is not new, but recently, there has been a tremendous push toward greater media and speech freedom. The recent movement has focused on the decriminalization of libel. Libel is published, written defamation.<sup>1</sup> The Philippine government largely defined libel and its provisions in 1930; this construction is still being enforced today.<sup>2</sup> Philippine libel law is severely outdated in light of the internet and the modern media.

Under its current iteration, Philippine libel law heavily infringes upon due process and freedom of speech, rights enumerated in the Philippine Constitution.<sup>3</sup>

Nonetheless, the problematic law has routinely been upheld in the Philippine courts.<sup>4</sup> The troubling libel law coupled with its criminal punishments have spelled disaster for the Philippine media and activists. Notably, Maria Ressa, Nobel Peace Prize winner and known critic of

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1. REVISED PENAL CODE, art. 353–55, Act No. 3815, as amended (Phil.) [hereinafter Revised Penal Code].

2. *Id.*; Luis V. Teodoro, *Impunity Plus*, BUSINESS WORLD: VANTAGE POINT (Dec. 22, 2022, 6:08 PM), <https://www.bworldonline.com/opinion/2022/12/22/494791/impunity-plus/> [<https://perma.cc/HUT2-SQNA>].

3. CONST. (1987), art. III, §§ 4, 14 (Phil.).

4. *E.g.*, *Disini, Jr. v. The Sec’y of Just.*, 727 PHIL. REP. 28, 145–47 (Feb. 18, 2014); *People v. Santos, Jr.*, CA-G.R. CR No. 44991, 40 (June 7, 2022) (Phil.).

former authoritative president, Rodrigo Duterte, was convicted for cyber libel on appeal in 2022.<sup>5</sup>

Evidence indicates criminal libel cases are largely initiated as a deterrent to unfavorable press, a scare-tactic used to chill free speech.<sup>6</sup> The suspicion is the government charges reporters with libel to silence criticisms.<sup>7</sup> Many of these filed cases are ultimately dropped, thus exacerbating the problem.<sup>8</sup> Not only does the threat of potential litigation and criminal punishment act a deterrent, but precious and invaluable resources are wasted in the process.<sup>9</sup>

As alluded to, reputable reporters, such as Maria Ressa, were convicted during Rodrigo Duterte's contentious term. However, despite the recent change in guard with the election of Ferdinand "Bongbong" Marcos Jr. in 2022, the future still looks grim.<sup>10</sup> Bongbong is the son of former infamous dictator of the Philippines, Ferdinand Marcos Sr.<sup>11</sup> Moreover, Bongbong's vice-president is Sara Duterte, Rodrigo Duterte's daughter.<sup>12</sup>

All signs have indicated the suppression of media members and activists through criminal libel is going to continue under the Bongbong administration.

5. Santos, CA-G.R. CR No. 44991 at 40; *Maria Ressa – Facts*, THE NOBEL PRIZE (2021) [hereinafter Nobel Peace Prize], <https://www.nobelprize.org/prizes/peace/2021/ressa/facts/> [<https://perma.cc/7SSK-VZKX>]; Joshua Hammer, *Maria Ressa's Dangerous Battle for the Truth*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/magazine/rappler-philippines-maria-ressa.html> [<https://perma.cc/D84M-6AR7>].

6. *Disini*, 727 PHIL. REP. at 382, 388 (Leonen, J., dissenting and concurring).

7. *Id.*

8. Lian Buan, *Decriminalize libel: PH junked one-third of cyber libel cases filed since 2012*, RAPPLER (July 20, 2022), <https://www.rappler.com/newsbreak/in-depth/decriminalize-philippines-junked-cyber-libel-cases-since-2012/> [<https://perma.cc/7BQA-YJLC>].

9. *Id.*

10. Karen Lema & Neil Jerome Morales, *Marcos, song of strongman, triumphs in Philippines presidential election*, REUTERS (May 9, 2022), <https://www.reuters.com/world/asia-pacific/prospect-marcos-revival-looms-philippines-votes-new-president-2022-05-08/> [<https://perma.cc/52W3-DBTH>]; Rebecca Ratcliffe, *Ferdinand Marcos Jr praises dictator father during swearing in as Philippines president*, THE GUARDIAN (June 30, 2022), <https://www.theguardian.com/world/2022/jun/30/ferdinand-marcos-jnr-bongbong-philippines-president-swearing-in> [<https://perma.cc/U7FD-M54N>].

11. Mely Caballero-Anthony, *A Marcos returns to power in the Philippines*, BROOKINGS (May 13, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/05/13/a-marcos-returns-to-power-in-the-philippines/> [<https://perma.cc/GR3C-XBP9>].

12. *Id.*

Recently, Walden Bello, social activist and former congressman and vice-presidential candidate, was arrested for cyber libel.<sup>13</sup>

This Comment takes a deep dive into Philippine libel law and argues for its decriminalization and redefining from an international perspective.

## II. PHILIPPINE LIBEL LAW DEFINED

Philippine libel law is codified in the Revised Penal Code of the Philippines and the Cybercrime Prevention Act of 2012.<sup>14</sup>

### A. *The Revised Penal Code of the Philippines*

The Revised Penal Code of the Philippines (RPC) was approved December 8, 1930.<sup>15</sup> The RPC addresses libel in Chapter One of Title Thirteen, CRIMES AGAINST HONOR. Criminal libel is defined in Article 353 of the RPC as follows:

A libel is 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.<sup>16</sup>

Article 354 makes clear, “[e]very defamatory imputation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown.”<sup>17</sup> There are two exceptions to this rule: (1) the defamatory imputation is “[a] private communication made by any person to another in the performance of any legal, moral or social duty;” or (2) the accusation is “[a] fair and true report, made in good faith,” and is not about a non-confidential official proceeding or a public officer exercising their functions.<sup>18</sup>

Article 355 requires the statement to be by “writings or similar means.”<sup>19</sup> Further, [a] libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatric ended party. al exhibition, cinematographic exhibition, or any similar means, shall be punished by prison correctional in its minimum

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13. Carlos Conde, *Philippine Activist Arrested for Cyber-Libel*, HUM. RTS. WATCH (Aug. 9, 2022), <https://www.hrw.org/news/2022/08/09/philippine-activist-arrested-cyber-libel> [<https://perma.cc/8GBN-TKFL>].

14. REVISED PENAL CODE, art. 1, Act No. 10175, as amended (Phil.).

15. REVISED PENAL CODE, *supra* note 1.

16. *Id.* art. 353.

17. *Id.* art. 354.

18. *Id.*

19. REVISED PENAL CODE, *supra* note 1, art. 355.

and medium periods or a fine ranging from 200 to 6,000 pesos, or both, in addition to the civil action which may be brought by the offended party.<sup>20</sup>

Libel liability is not limited to the author(s) of the work.<sup>21</sup> Article 360 specifies responsibility applies to “[a]ny person who shall publish, exhibit, or cause the publication or exhibition of any defamation in writing or by similar means.”<sup>22</sup> More specifically, editors or managers of books, pamphlets, newspapers, magazines, or serial publications “shall be responsible for the defamations contained therein to the same extent as if [t]he[y] were the author thereof.”<sup>23</sup>

Under Article 361, the truth may be a defense to criminal libel “if it appears that the matter charged as libelous is true, and, moreover, that it was published with good motives and for justifiable ends.”<sup>24</sup>

Article 362 further clarifies truth alone is not a defense for libelous comments; the author(s) and editor(s) will still be criminally liable for “[l]ibelous remarks or comments connected with the matter privileged under the provisions of Article 354, if made with malice.”<sup>25</sup>

Lastly, after a 1966 amendment, “[t]he crime of libel or other similar offenses shall prescribe in one year” (prescription period is synonymous with statute of limitations).<sup>26</sup>

### B. The Cybercrime Prevention Act of 2012

The RPC was passed in 1930, well before the advent of the internet.<sup>27</sup> In 2012, the Philippine Congress enacted Republic Act Number 10175, or the Cybercrime Prevention Act of 2012 (CPA), recognizing the “vital role” of the internet.<sup>28</sup> The purpose of the CPA was to “safeguard the integrity of [computer and internet communications] from all forms of misuse, abuse, and illegal access by making punishable under the law such conduct or conducts.”<sup>29</sup>

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20. *Id.*

21. *Id.* art 360.

22. *Id.*

23. REVISED PENAL CODE, *supra* note 1, art. 360.

24. *Id.* art. 361.

25. *Id.* art. 362.

26. *Id.* art. 90.

27. REVISED PENAL CODE, *supra* note 1, art. 360.

28. CYBERCRIME PREVENTION ACT OF 2012, ch. 1, § 2, Rep. Act No. 10175, as amended (Phil.) [hereinafter CYBERCRIME PREVENTION ACT].

29. *Id.*

Libel was among the cybercrime offenses set forth in the CPA, addressed in Section 4(c)(4) under Content-related Offenses.<sup>30</sup> The CPA essentially extended the RPC definition of libel to include online sources; “[t]he unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed through a computer system or any other similar means which may be devised in the future.”<sup>31</sup>

Additionally, Section 6 states “[t]hat the penalty to be imposed shall be one (1) degree higher than that provided for by the [RPC],” for all the amended RPC crimes in the CPA.<sup>32</sup> Because the CPA amended RPC libel law, libel “committed through a computer system or any other similar means,” or cyber libel, is one degree more severe than traditional libel.<sup>33</sup>

Further, the CPA extends the prescription period, or statute of limitations, for cyber libel to fifteen years.<sup>34</sup>

### C. *Synthesis of the Law*

Criminal libel is any written, or similarly expressive, defamatory work that has been published.<sup>35</sup> This includes online and computer sources.<sup>36</sup> If the libelous work is from a computer source (e.g., cyber libel), the punishment is one degree more severe.<sup>37</sup> Moreover, the prescriptive period is one year for traditional libel and fifteen years for cyber libel.<sup>38</sup>

Criminal libel liability entails the work is defamatory and malicious.<sup>39</sup> Essentially, defamatory content includes anything published that is injurious to an individual’s name or reputation.<sup>40</sup> Every defamatory statement, even if true, is presumed to be malicious.<sup>41</sup>

To defend against liability, the work needs to appear to be true and there needs to be a good or justifiable motive for publication.<sup>42</sup> Complete liability extends to the author(s), editor(s), and manager(s) of the publication.<sup>43</sup>

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30. *Id.* ch. 2, § 4.

31. *Id.*

32. CYBERCRIME PREVENTION ACT, *supra* note 28, at ch. 2, § 6.

33. *Id.* § 4.

34. *Disini*, 727 PHIL. REP. at 223.

35. REVISED PENAL CODE, *supra* note 1, arts. 353–55.

36. CYBERCRIME PREVENTION ACT, *supra* note 28, at ch. 2, § 4.

37. *Id.* § 6.

38. REVISED PENAL CODE, *supra* note 1, art. 90; *Disini*, 727 PHIL. REP at 157.

39. REVISED PENAL CODE, *supra* note 1, art. 353; Clarisse Anne G. Peralta, *The truth defense in defamation*, ACCRA L. (June 14, 2022), <https://accralaw.com/2022/06/14/the-truth-defense-in-defamation/> [<https://perma.cc/9W8Y-7MSB>].

40. REVISED PENAL CODE, *supra* note 1, art. 353; Peralta, *supra* note 39.

41. REVISED PENAL CODE, *supra* note 1, art. 354; Peralta, *supra* note 39.

42. REVISED PENAL CODE, *supra* note 1, art. 354.

43. *Id.* art. 360.

Libel is punishable by imprisonment, a fine, and any additional civil action brought by the aggrieved party.<sup>44</sup>

### III. PROBLEMS WITH PHILIPPINE LIBEL LAW CONSTRUCTION

This current statutory construction is problematic. Libel is incongruent with the constitutional guarantee of due process; its statutory construction is not conducive to criminal punishment and impermissibly disfavors defendants. Further, criminal libel law is at odds with the ideals of freedom of speech protected in the Philippine Constitution.

#### *A. Philippine Libel Violates Due Process*

The criminal libel law as drafted violates constitutionally protected due process and is not consistent with the established burdens of proof in criminal proceedings.

In criminal cases, defendants face substantial personal freedom losses given potential punishments of imprisonment and severe fines, as evidenced in criminal libel law.<sup>45</sup> Thus, certain protections and standards of proof in criminal cases are needed to prevent undue punishment on defendants.

The Philippine Constitution guarantees due process; “[i]n all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved.”<sup>46</sup> Further, the Philippines’s Revised Rules of Evidence clarify criminal cases have the higher standard of “[p]roof beyond reasonable doubt. In a criminal case, the accused is entitled to an acquittal, unless [their] guilt is shown beyond reasonable doubt.”<sup>47</sup> The Supreme Court of the Philippines also made clear, “[i]n criminal cases, the prosecution has the [burden] of establishing the guilt of the accused. . . . He who asserts—not he who denies—must prove.”<sup>48</sup> Moreover, the concept of mens rea is fundamental in criminal law.<sup>49</sup> The basic principle is defendants need to have the

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44. *Id.* art. 355.

45. *Id.*

46. CONST. (1987), art. III, § 14 (Phil.).

47. 2019 Proposed Amendments to the Revised Rules on Evidence, A.M. No. 19-08-15-SC, rule 133, § 2 (Oct. 8, 2019) (Phil.) [hereinafter PRRE].

48. *Macayan, Jr. v. People*, 756 PHIL. REP. 202, 228, (Mar. 18, 2015) (Phil.).

49. *Manzanaris v. People*, 212 PHIL. REP. 190, 191 (Jan. 30, 1984) (Phil.).

requisite guilty mind associated with the crime.<sup>50</sup> Simply put, there needs to be the proper criminal intent for criminal liability.<sup>51</sup>

However, libel law does not reflect due process. To be clear, the standard of proof for criminal libel is still proof beyond a reasonable doubt.<sup>52</sup> The issue here is not what the standard of proof is; rather, it is what the prosecutor must prove for liability.

Under the RPC, libel is essentially published, written defamation.<sup>53</sup> Liability for criminal libel requires the published work to be defamatory and malicious.<sup>54</sup> But, the prosecution only needs to prove that the work injured, discredited, or dishonored the alleged victim's character or reputation to show defamation, without regard to the truth of the claims.<sup>55</sup> Malice is then presumed if the work is defamatory.<sup>56</sup> Functionally, this means prosecutors only need to prove the work is defamatory on its face beyond a reasonable doubt.<sup>57</sup>

Thus, once defamation is shown it is automatically presumed the publication is malicious and criminal liability is established.<sup>58</sup> As discussed in length later, Philippine caselaw highlights the low evidentiary bar needed to prove defamation, disproportionately affecting media members working on emerging and controversial issues. Ultimately, this presumption impermissibly disfavors defendants in criminal libel cases and violates due process.

First, presuming malice violates the defendant's presumed innocence. Malice is the requisite criminal intention, or *mens rea*, for libel;<sup>59</sup> “[m]alice connotes ill will or spite and speaks not in response to duty but merely to injure the reputation of the person defamed and implies an intention to do ulterior and unjustifiable harm.”<sup>60</sup> Thus, malice is undisputedly an essential and major element of libel. As the Supreme Court made clear in *Manila Bulletin v. Domingo*, 813 Phil. Rep. 37, (July

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50. *Id.*

51. *Id.*

52. PRRE, *supra* note 47, rule 133, § 2.

53. REVISED PENAL CODE, *supra* note 1, arts. 353–55.

54. *Id.* arts. 353–54; Peralta, *supra* note 39.

55. REVISED PENAL CODE, *supra* note 1, art. 353–54; Peralta, *supra* note 39.

56. REVISED PENAL CODE, *supra* note 1, art. 354.

57. Jhayrone De Roxas, *THE TRUTH SHALL SET YOU FREE: Criminalization of Defamation and Similar Offenses in a Modern Democracy*, UST L. Rev. 1, 8-10 (Mar. 13, 2022), <https://lawreview.ust.edu.ph/the-truth-shall-set-you-free/> [https://perma.cc/CQB9-G6EN].

58. REVISED PENAL CODE, *supra* note 1, art. 354.

59. *See Manzanaris*, 212 PHIL. REP. at 191.

60. *Manilla Bulletin Publishing Corp. v. Domingo*, 813 PHIL. REP. 37, 56 (July 5, 2017) (Phil.).



5, 2017) (Phil.), “[malice] is the essence of the crime of libel.”<sup>61</sup> Thus, the presumption of malice directly conflicts with the constitutionally protected ideal of due process and presumption of innocence.<sup>62</sup>

Second, the burden of proof is wrongly cast upon the defendant to prove innocence. The defendant must prove both the truthfulness of the work and the absence of malice.<sup>63</sup> Again, malice is a critical determinant of guilt, but the prosecution does not have to prove it.<sup>64</sup> This is fundamentally at odds with the Supreme Court’s directive; “[h]e who asserts—not he who denies—must prove.”<sup>65</sup>

This situation is highly analogous to the United States (U.S.) case *Mullaney v. Wilbur*, 421 U.S. 684 (1975).<sup>66</sup> The Philippine Constitution and legal system is largely derivative and inspired by the U.S. system, so the comparison is fruitful.<sup>67</sup>

In *Mullaney*, the defendant was facing the crime of murder.<sup>68</sup> Similar to Philippine libel law, malice is an essential element in proving guilt for murder.<sup>69</sup> At trial, the jury was instructed that malice could be presumed if the act was “intentional and unlawful.”<sup>70</sup> Ultimately, malice was presumed and the burden shifted to the defendant to prove its absence.<sup>71</sup> The Supreme Court determined this presumption violated due process.<sup>72</sup> Given malice was an essential element of the offense, the prosecution had

61. *Id.*

62. CONST. (1987), art. III, § 14 (Phil.).

63. REVISED PENAL CODE, *supra* note 1, art. 354.

64. *Id.*; Peralta, *supra* note 39.

65. *Macayan*, 756 PHIL. REP. at 228.

66. *See Mullaney v. Wilbur*, 421 U.S. 684, 693–94 (1975) (deciding on whether Defendant’s due process was violated given malice was implied by law and the burden of proof was shifted).

67. De Roxas, *supra* note 57, § III(b); Baer Reed Philippine LPO, *Similarities of the U.S. and Philippine Legal Systems*, Baer Reed (Jan. 5, 2018), [https://baerreed.com/codeless\\_portfolio/similarities-us-philippine-legal-system-white-paper/](https://baerreed.com/codeless_portfolio/similarities-us-philippine-legal-system-white-paper/) [<https://perma.cc/KXK2-L82A>].

68. *Mullaney*, 421 U.S. at 685.

69. *Id.* at 693 (finding malice as the key element in distinguishing between liability for murder or manslaughter).

70. *Id.* at 686 (“the jury was further instructed, however, that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied”).

71. *Id.* at 687.

72. *Mullaney*, 421 U.S. at 703–04.

to prove the existence of the element beyond a reasonable doubt.<sup>73</sup> Requiring and shifting the burden to the defendant violated due process.<sup>74</sup>

This rationale is equally applicable for Philippine libel law. Like *Mullaney*, malice is an essential element for liability.<sup>75</sup> The Supreme Court declared malice “is the essence of the crime of libel.”<sup>76</sup> Thus, the law’s inherent presumption of malice violates due process by wrongly placing the burden on the defendant. Therefore, this libel law is unsuitable for the criminal process.

While in some instances, “a presumption of criminal intent may arise from proof of the commission of a criminal act,”<sup>77</sup> this is not appropriate for libel. Again, malice, the mens rea component of libel, is the essence of the issue.<sup>78</sup> *Mullaney* held presuming malice in such an instance violated due process<sup>79</sup> because the defendant becomes responsible for proving their innocence instead of the prosecution proving guilt.<sup>80</sup> When a defendant’s “guilty” intention is presumed, the defendant is forced to bolster a defense.<sup>81</sup>

In order to successfully defend against the charge, the defendant not only has to show the truth of the work, but also prove their good intentions for publishing the work.<sup>82</sup> Ironically, the prosecution does not have this burden, it is on the defendant to show the lack of the requisite mens rea;<sup>83</sup> prejudicing the defendant, the individual potentially facing significant punishment. This is the antithesis of what was intended by the fundamental principles of due process.

Even worse, if the defendant published the work online, the punishment is more severe.<sup>84</sup> This is problematic because the severity of the crime increases although the mens rea and requirements for guilt remain the same.<sup>85</sup>

The rationale justifying the increased punishment is because of the greater accessibility and potential reach of online sources.<sup>86</sup> However, this

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73. *Id.* at 704.

74. *Id.*

75. *Domingo*, 813 PHIL. REP. at 56.

76. *Id.*

77. *Manzanaris*, 212 PHIL. REP. at 191.

78. *Domingo*, 813 PHIL. REP. at 56.

79. *See Mullaney*, 421 U.S. at 693–94, 703-04 (although the common law presumed malice, the Due Process clause requires that malice is proven beyond a reasonable doubt).

80. *De Roxas*, *supra* note 57, § III(b).

81. *See id.*

82. REVISED PENAL CODE, *supra* note 1, art. 354.

83. *See De Roxas*, *supra* note 57, § III(b).

84. CYBERCRIME PREVENTION ACT, *supra* note 28, ch. 2, §§ 4, 6.

85. *See De Roxas*, *supra* note 57, § III(c).

86. *Disini*, 727 PHIL. REP. at 115; *Santos*, CA-G.R. CR No. 44991, at 33.

increased punishment is incompatible with the modern world, where individuals are publishing on the internet instead of print. The use of online sources is tied to the modern exercise of speech.<sup>87</sup> Yet, under the law, individuals are performing the same action but are punished more harshly for following the modern platform.<sup>88</sup> This issue becomes even more significant as the prescriptive period for cyber libel is fifteen years, compared to the one year for traditional libel.<sup>89</sup>

The problematic standard of establishing liability is exacerbated by the large net cast by the law. Under the current libel law, an individual does not need to be an author to be criminally liable.<sup>90</sup> An editor and manager of the publication are equally responsible under the law.<sup>91</sup>

Thus, in contrast with the ideals of due process, libel law unduly burdens the defendant and creates an unfair and more incriminating standard for establishing liability. Moreover, the scope of liability for libel is incredibly broad, which subjects more individuals to its prejudice.

Philippine libel law's construction is simply inconducive to due process and criminal punishment.

### *B. Philippine Libel Violates Free Speech*

Compounding on the aforementioned issues, Philippine libel law also runs contrary to the constitutionally protected ideals of freedom of speech.

The Philippine Constitution is explicit; “[n]o 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.”<sup>92</sup>

But, under appropriate circumstances, civil defamation is internationally accepted as a viable restriction on free speech.<sup>93</sup>

In principle, filing a civil claim for damages can be a proportionate response for harm to reputation. This is only the case, however, under certain conditions. For example, defendants must have the opportunity to present a proper defence,

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87. *Disini*, 727 PHIL. REP. at 115; *Santos*, CA-G.R. CR No. 44991, at 33.

88. *See De Roxas*, *supra* note 57, § III(c).

89. REVISED PENAL CODE, *supra* note 1, art. 90; *Disini*, 727 PHIL. REP. at 65.

90. REVISED PENAL CODE, *supra* note 1, art. 360.

91. *Id.*

92. CONST. (1987), art. III, § 4 (Phil.).

93. *International Standards on Criminal and Civil Defamation Laws*, MEDIA L. DATABASE: INT'L. PRESS INST., <http://legaldb.freemedia.at/international-standards/> [<https://perma.cc/M3AA-R32F>] (last visited Mar. 10, 2023) [hereinafter *International Standards*].

including pleas of truth, reasonable publication, opinion, privileged reporting, and reporting the statements of others.<sup>94</sup>

However, Philippine libel law is particularly problematic. Namely, libel is a criminal offense, and the law denies the defendant a proper defense. Ultimately, these problems create a chilling effect and greatly curtail freedom of speech, especially for activists and members of Philippine media.

### *1. Principle of Criminal Libel Incompatible With Free Speech*

Setting aside for a moment the grave problems unique to Philippine criminal libel, the international consensus is criminalizing libel in general is incompatible with freedom of speech.

International organizations and their respective free speech specialists have overwhelmingly supported decriminalization. The United Nations (UN) has advocated for the decriminalization of defamation laws.<sup>95</sup> Irene Khan, the current UN Special Rapporteur for Freedom of Opinion and Expression, vehemently stated, “[t]he criminalisation of journalists for libel impedes public interest reporting and is incompatible with the right to freedom of expression. Criminal libel law has no place in a democratic country and should be repealed.”<sup>96</sup> Further, in UN General Comment 34, the Human Rights Committee expressed, “[s]tates parties should consider the decriminalization of defamation . . . and imprisonment [for defamation] is never an appropriate penalty.”<sup>97</sup>

Likewise, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and the Organization for American States (OAS) Special Rapporteur on Freedom of Expression have published multiple joint declarations advocating for the decriminalization of defamation law.<sup>98</sup> In a joint declaration after a 2002 meeting, the organization representatives stated “[c]riminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should

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94. *Id.*

95. *See generally* Press Release, Special Procedures, Philippines: UN expert slams court decision upholding criminal conviction of Maria Ressa and shutdown of media outlets, Special Procedures Press Release (July 14, 2022) [hereinafter UN Expert], <https://www.ohchr.org/en/press-releases/2022/07/philippines-un-expert-slams-court-decision-upholding-criminal-conviction> [<https://perma.cc/8WD9-LXXD>]; General Comment No. 34 on Article 19: Freedoms of opinion and expression, ¶ 47, U.N. Doc. CCPR/C/GC/34 (July 29, 2011), [hereinafter UN General Comment 34].

96. UN Expert, *supra* note 95.

97. UN General Comment 34, *supra* note 95, ¶ 47.

98. ORG. SEC. AND COOP. EUR., Joint Declaration on Freedom of expression and the Internet (June 1, 2011).

be abolished and replaced, where necessary, with appropriate civil defamation laws.”<sup>99</sup>

Moreover, in 2010, the three organizations, along with the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, released another joint declaration addressing the “Ten Key Threats to Freedom of Expression.”<sup>100</sup> The second key threat listed was criminal defamation.<sup>101</sup> In particular, the declaration established, “[l]aws making it a crime to defame, insult, slander or libel someone or something, still in place in most countries (some ten countries have fully decriminalised defamation), represent another traditional threat to freedom of expression.”<sup>102</sup>

Similarly, Reporters Without Borders (RSF) called for decriminalization of defamation given its impact on speech.<sup>103</sup> RSF secretary-general, Robert Ménard, said, “[i]t is urgent that we ensure that defamation is no longer used to gag the news media.”<sup>104</sup> Further, “we must decriminalize defamation so that no journalist is ever given a prison sentence again . . . These are laws from another age, unworthy of a modern democracy.”<sup>105</sup>

The Human Rights Watch (HRW) has also reported on the detrimental impacts of criminal defamation on free speech.<sup>106</sup> Specifically, HRW noted criminal defamation laws create a “chilling effect.”<sup>107</sup> “[C]riminal defamation laws jeopardize the rights to freedom of information and to participate in public affairs. These rights are vital in a democratic society.”<sup>108</sup> “Criminal defamation laws can also impair citizens’ exercise of their rights to assemble peacefully; form, join, or participate in and communicate with

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99. *Id.*

100. Frank Larue (Special Rapporteur on Freedom of Opinion and Expression) et al., Addendum Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade A/HRC/14/23/Add.2 (Mar. 25, 2010).

101. *Id.*

102. *Id.*

103. *OSCE and Reporters Without Borders call for defamation to be decriminalized*, REPORTERS WITHOUT BORDERS (Jan. 20, 2016) [hereinafter RSF decriminalize], <https://rsf.org/en/osce-and-reporters-without-borders-call-defamation-be-decriminalized> [<https://perma.cc/2VJ9-2A7L>].

104. *Id.*

105. *Id.*

106. HUMAN RIGHTS WATCH, “There Is a Price to Pay:” The Criminalization of Peaceful Speech in Lebanon 2 (2019) [hereinafter Price to Pay], [https://www.hrw.org/sites/default/files/report\\_pdf/lebanon1119\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/lebanon1119_web.pdf) [<https://perma.cc/XZB4-9MBR>].

107. *Id.* at 6.

108. *Id.* at 94.

associations; know, seek, or obtain information about human rights and fundamental freedoms; and publish, discuss, or otherwise impart such information.”<sup>109</sup>

The need to decriminalize defamation laws has been recognized in the democratic world given its readily apparent, detrimental impact on free speech.

The desire to decriminalize defamation has long been present in the US. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), Justice Hugo Black stated, “under the Constitution, there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel.”<sup>110</sup>

Similarly, the European Union (EU) has made strides toward decriminalizing defamatory laws. Over recent years, Balkan countries have applied for admission into the EU.<sup>111</sup> The Parliamentary Assembly of the Council of Europe has requested these countries first decriminalize defamation to promote greater freedom of expression.<sup>112</sup>

The United Kingdom (UK) has completely decriminalized defamation.<sup>113</sup> In 2009, the UK passed the Coroners and Justice Act, which repealed criminal offenses for sedition and libel.<sup>114</sup> The UK recognized the chilling effects of criminal defamation and its revocation was a demonstration that criminal defamation is not needed in a modern legal system.<sup>115</sup>

Following this trend, several African countries decriminalized defamation after the African Court on Human and Peoples’ Rights’s (ACtHR) landmark 2014 decision in *Konaté v. Burkina Faso*, App. No. 004/2013 (2014).<sup>116</sup> In *Konaté*, the defendant’s criminal defamation conviction was overturned because the punishment of imprisonment disproportionately interfered with the right to freedom of expression.<sup>117</sup> Subsequently, Burkina

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109. *Id.* at 94–95.

110. *Garrison v. Louisiana*, 379 U.S. 64, 80 (1964).

111. *Candidate Countries and Potential Candidates*, EUR. COMM’N., <https://ec.europa.eu/environment/enlarg/candidates.html> [<https://perma.cc/UM5C-AHZZ>] (last visited Mar. 10, 2023).

112. Aneta Spaic et al., *Decriminalization of defamation – The Balkans case a temporary remedy or a long term solution?*, 47 INT’L. J.L., CRIME, & JUST. 21, 26 (2016).

113. Laura Holt et al., *Decriminalizing Defamation: A Comparative Law Study*, GW LAW: INT’L L. & POL’Y BRIEF § III(B)(i) (Mar. 19, 2022), <https://studentbriefs.law.gwu.edu/ilpb/2022/03/19/decriminalizing-defamation-a-comparative-law-study/> [<https://perma.cc/U4KF-95QD>].

114. *Id.*

115. *UK: defamation decriminalized*, HUM. RTS. HOUSE FOUND., (Nov. 17, 2009), <https://humanrightshouse.org/articles/uk-defamation-decriminalized/> [<https://perma.cc/486A-UXBM>].

116. Holt et al., *supra* note 113, § III(A).

117. *Konaté v. Burkina Faso*, No. 004/2013, Decision, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 167–71 (Dec. 5, 2014).

Faso was ordered to amend its defamation legislation.<sup>118</sup> Four justices concurred expressing criminal punishment is never appropriate in defamation cases.<sup>119</sup>

This ultimately inspired the highest courts in other African countries.<sup>120</sup> For instance, in 2017, the Kenyan High Court found criminal defamation to be unconstitutional in *Okuta v. Attorney General*, Petition No. 397 of 2016 (2017).<sup>121</sup> Noting, “the invocation of criminal defamation to protect one’s reputation is . . . unnecessary, disproportionate and therefore excessive and not reasonably justified in an open society based on human dignity, equality and freedom.”<sup>122</sup>

Alternatively, authoritative governments, like Russia, have continued to criminalize defamation. In 2012, President Vladimir Putin reinstated criminal defamation, which was met with great international criticism given the detriment to freedom of expression.<sup>123</sup> Since criminalization, evidence indicates Russia’s defamation law has been used to target and silence activists and journalists speaking out against the government.<sup>124</sup> The situation regarding Alexei Navalny is particularly compelling. Navalny is a Sakharov Prize for Freedom of Thought winner, anti-corruption activist, and outspoken critic of Putin. Navalny’s work is renowned worldwide and has amassed

118. *Id.* ¶ 176

119. *Id.* ¶¶ 167–71.

120. Holt et al., *supra* note 113, § III(A).

121. Hanibal Goitom, *Kenya: High Court Declares Penal Code Provision on Criminal Defamation Unconstitutional*, LIBR. CONG. (Feb. 14, 2017), <https://www.loc.gov/item/global-legal-monitor/2017-02-14/kenya-high-court-declares-penal-code-provision-on-criminal-defamation-unconstitutional/> [<https://perma.cc/ETE5-TE2M>].

122. *Id.* (quoting *Okuta v. Attorney General* (2017), Petition No. 397 of 2016 (Kenya)).

123. Peter Roudik, *Russia: Defamation is Criminalized Again*, LIBR. CONG. (Aug. 20, 2012), <https://www.loc.gov/item/global-legal-monitor/2012-08-20/russia-defamation-is-criminalized-again/> [<https://perma.cc/UM8Q-B5KL>]; see *Russia: Criminal Libel Law a Blow to Free Expression*, HUM. RTS. WATCH (July 16, 2012, 3:52 AM), <https://www.hrw.org/news/2012/07/16/russia-criminal-libel-law-blow-free-expression> [<https://perma.cc/GFQ9-W6WV>].

124. See generally *Kremlin critic Navalny fined*, DEUTSCHE WELLS (Apr. 22, 2014) [hereinafter *Navalny Slander Charge*], <https://www.dw.com/en/russian-opposition-activist-alexei-navalny-found-guilty-of-slander/a-17582985> [<https://perma.cc/UND5-69BR>]; *Navalny back in court for slander trial*, DEUTSCHE WELLS (Feb. 5, 2021) [hereinafter *Navalny Return to Court*], <https://www.dw.com/en/russia-alexei-navalny-returns-to-court-for-slander-case/a-56464613> [<https://perma.cc/94LV-9GPB>]; Carl Schreck, *Russian Journalist Sentenced To Prison On Extremism Charges*, RADIOFREEEUROPE/RADIOLIBERTY (Aug. 10, 2017, 2:20 PM), <https://www.rferl.org/a/russia-journalist-sokolov-sentenced-extremism/28669536.html> [<https://perma.cc/4L8G-7J2W>].

millions of followers.<sup>125</sup> Despite this, Navalny has been harassed with criminal charges, including multiple criminal defamation suits.<sup>126</sup> As detailed later, the Russian government's suspected abuse of criminal defamation is eerily similar to the situation in the Philippines with activists and reporters like Maria Ressa.

Thus, it is internationally accepted that criminal defamation laws present a great danger to free expression and are unfit for modern democracies. By criminalizing libel, the Philippines creates a significant chilling effect on free speech, which conflicts with its constitutional protections.

## 2. *Philippine Libel Law Provisions Exacerbate Free Speech Issues*

Although criminal libel places a strain on free expression, this burden is worsened by the specific, troublesome provisions of Philippine libel law. Namely, under Philippine libel law, plaintiffs do not need to prove falsity or malice, the truth is not a defense, and libel is punishable by imprisonment and excessive fines.<sup>127</sup>

The UN, OSCE, OAS, and ACHPR addressed the problematic nature of these particular elements in a 2010 joint declaration.<sup>128</sup>

While all criminal defamation laws are problematic, we are particularly concerned about the following features of these laws:

- a) The failure of many laws to require the plaintiff to prove key elements of the offence such as falsity and malice.
- b) Laws which penalise true statements, accurate reporting of the statements of official bodies, or statements of opinion.
- ...
- g) Unduly harsh sanctions such as imprisonment, suspended sentences, loss of civil rights, including the right to practise journalism, and excessive fines.<sup>129</sup>

These three provisions in Philippine libel ultimately heighten the threat to freedom of speech. The chilling effect of these provisions is only increased for cyber libel due to the lengthened prescription period and more severe punishment.

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125. See *Alexei Navalny*, BIOGRAPHY (Apr. 4, 2022) [hereinafter *Navalny Biography*], <https://www.biography.com/activists/alexei-navalny> [<https://perma.cc/WBQ2-5R9Q>].

126. Navalny Slander Charge, *supra* note 124; Navalny Return to Court, *supra* note 124.

127. REVISED PENAL CODE, *supra* note 1, art. 354–55.

128. Larue, *supra* note 100.

129. *Id.*



a. *Malice and Falsity do not Need to be Proven*

As discussed, plaintiffs do not have to prove malice or falsity, violating due process. This impermissibly prejudices defendants, the individuals expressing speech, by shifting the burden and subjecting them to harsh punishment. Although the Philippine Constitution claims “[n]o 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,” it is exactly this expression that is unduly sacrificed by the ill drafted criminal libel law.<sup>130</sup>

U.S. jurisprudence has detailed how the absence of actual malice in civil libel is detrimental to free speech. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was a pivotal case on this matter.<sup>131</sup> In this case, the New York Times published an advertisement criticizing the city of Montgomery, Alabama for responses to civil rights demonstrations led by Dr. Martin Luther King Jr.<sup>132</sup> Plaintiff, a city commissioner, brought a civil libel suit against the New York Times.<sup>133</sup> Alabama had a “libelous per se” liability standard for general damages, where malice was presumed if the work was defamatory.<sup>134</sup> The Supreme Court stated, “freedom of expression upon public questions is secured by the First Amendment.”<sup>135</sup> Further, the “debate on public issues should be uninhibited, robust, and wide-open.”<sup>136</sup> Thus, Alabama’s libel law was unconstitutional because it did not require proof of actual malice in an action brought by a public official for criticisms about their official conduct.<sup>137</sup>

In cases following *New York Times*, the Supreme Court clarified the actual malice jurisprudence was not strictly for public officials.<sup>138</sup> For

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130. CONST. (1987), art. III, § 4 (Phil.).

131. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

132. *Id.* at 256–57.

133. *Id.*

134. *Id.* at 261–62.

135. *Sullivan*, 376 U.S. at 269.

136. *Id.* at 270.

137. *Id.* at 282–84.

138. See *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 754–755 (1985); See also *Gertz v. Robert Welch*, 418 U.S. 323 (1974); *Defamation and False Statements Under the First Amendment*, FINDLAW (July 18, 2022) [hereinafter *Actual Malice Jurisprudence*], <https://constitution.findlaw.com/amendment1/defamation-and-false-statements-under-the-first-amendment.html#figures> [<https://perma.cc/U8PZ-HG4Z>] (“Commentary about matters of public interest when it defames someone is apparently, after *Firestone* and *Gertz*, to be

damages, even private individuals need to make a showing of actual malice if the work is of public concern.<sup>139</sup> Not requiring proof of actual malice would violate the freedom of expression protected in the First Amendment.<sup>140</sup>

Thus, the presumption of malice in Philippine libel law places a great hinderance on free speech.

*b. The Truth is not a Defense*

Adding to the problem, the truth alone is not a complete defense to defamation.<sup>141</sup> In order to defend against liability, defendants need to show both the truth of the statement and a good intention for publishing.<sup>142</sup> However, this necessarily implies the truth itself is not a justifiable motive for publication.<sup>143</sup>

This is perturbing considering the truth as a complete defense for defamation is internationally accepted as a vital protection for free expression.<sup>144</sup>

In *Catells v. Spain*, App. No. 11798/85 (Apr. 23, 1992), the European Court of Human Rights (ECtHR) upheld truth as a defense.<sup>145</sup> The ECtHR found denying a truth defense in a defamation case was an impermissible interference of the defendant's right to free speech.<sup>146</sup>

Likewise, in the U.S., the "[t]ruth is accepted as a complete defense to all defamation claims."<sup>147</sup> The UN Human Rights Committee has also reaffirmed this idea, stating, "all such laws, including penal defamation laws, should include defences such as the defence of truth."<sup>148</sup>

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protected to the degree that the person defamed is a public official or candidate for public office, public figure, or private figure").

139. *Dun & Bradstreet*, 472 U.S. at 751 (citing *Gertz*, 418 U.S. at 537–40).

140. *Id.*

141. REVISED PENAL CODE, *supra* note 1, art. 354, 361.

142. *Id.*

143. *See id.*

144. *See* Christopher Phiri, *Criminal Defamation Put to the Test: A Law & Economics Perspective*, 9 U. BALT. J. MEDIA L. & ETHICS 49, 55 (2021) [hereinafter *Defamation Put to the Test*], [https://heinonline-org.sandiego.idm.oclc.org/HOL/Page?collection=usjournals&handle=hein.journals/ubjmlth9&id=49&men \[https://perma.cc/4WQ4-5D9Q\]](https://heinonline-org.sandiego.idm.oclc.org/HOL/Page?collection=usjournals&handle=hein.journals/ubjmlth9&id=49&men=https://perma.cc/4WQ4-5D9Q).

145. *Id.* (citing *Castells v. Spain*, App. No. 11798/85, 236 Eur. Ct. H.R. (ser. A), at 19–20, ¶ 48 (Apr. 23, 1992)).

146. *Id.*

147. *Defamation*, CORNELL L. SCH., [hereinafter *US Defamation Jurisprudence*], [https://www.law.cornell.edu/wex/defamation \[https://perma.cc/X4Q3-EUZV\]](https://www.law.cornell.edu/wex/defamation [https://perma.cc/X4Q3-EUZV]).

148. UN General Comment 34, *supra* note 95, ¶ 47.

*c. Imprisonment and Severe Fines*

Another compounding impediment to free speech are the punishments of imprisonment and harsh fines permitted by Philippine libel law.<sup>149</sup> These severe penalties curtail speech rather than promoting it. Again, there is tremendous international authority denouncing criminal punishments.

The Kenyan High Court struck down criminal defamation and the harsh penalties associated with it in *Okuta*.<sup>150</sup> Prior to the decision, Kenyan defamation law was criminal and punished individuals with imprisonment and fines.<sup>151</sup> The Kenyan Constitution also had a freedom of expression clause.<sup>152</sup> The Court found the punishments for defamation were “clearly excessive and patently disproportionate.”<sup>153</sup> Thus, the continued enforcement of criminal defamation and its penalties “would be unconstitutional and/or a violation of their fundamental right to the freedom of expression.”<sup>154</sup>

Similarly, in *Konaté*, the ACtHR overruled the imprisonment and harsh fines levied against the defendant because the punishment was disproportionate and violated the defendant’s freedom of expression.<sup>155</sup>

The Parliamentary Assembly of the Council of Europe likewise urged, “states whose laws still provide for prison sentences—although prison sentences are not actually imposed—to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.”<sup>156</sup>

Further, the ECtHR has routinely held imprisonment for defamation should be excluded given it suspends the right to freedom of expression and to practice journalism.<sup>157</sup>

*d. Chilling Effect Increased With Cyber Libel*

The aforementioned provisions create a liability standard inconsistent with due process and free speech. Speech is chilled because the risk of conviction and punishment is so great under the ill drafted law.

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149. REVISED PENAL CODE, *supra* note 1, art. 355.

150. *Kenya: High Court*, *supra* note 121.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Kenya: High Court*, *supra* note 121.

155. *Konaté*, App. No. 004/2013 ¶¶ 167–71.

156. *International Standards*, *supra* note 93.

157. *See id.*

These discerning provisions in Philippine libel law are worse for cyber libel. Online publications are punishable for fifteen years and are one degree more severe.<sup>158</sup> This increased punishment is upheld because online sources are more accessible and can potentially reach a wider audience.<sup>159</sup> However, the use of online sources is commonplace in society and is undeniably tied to modern expression and speech.<sup>160</sup>

The extensive fifteen-year prescription period is contrary to international precedent. For example, in the UK, Kenya, and the majority of states in the U.S., the statute of limitations for their civil defamation laws is only one year.<sup>161</sup>

The increased period also marks a change from the Philippines's own history. Previously, the prescription period for traditional libel was two years.<sup>162</sup> However, after the 1966 amendment, the period was reduced to one year because the two-year period was too harsh.<sup>163</sup> By this rationale, a fifteen-year period should be untenable. Nonetheless, the statute of limitations has consistently been reaffirmed in recent case law.<sup>164</sup>

The prescription period disparity and increased punishment of cyber libel increase the chilling effect and have further sparked the controversy of Philippine libel law.

#### IV. PROBLEMATIC LIBEL LAW UPHELD IN CASELAW

These issues with Philippine libel law have not gone unnoticed. The constitutionality and validity of criminal libel law in the Philippines has

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158. CYBERCRIME PREVENTION ACT, *supra* note 28, ch. 1, § 6; *Disini*, 727 PHIL. REP. at 65.

159. *See Disini*, 727 PHIL. REP. at 115; *Santos*, CA-G.R. CR No. 44991, at 33.

160. *See Disini*, 727 PHIL. REP. at 218, 230 (Sereno, C.J., dissenting and concurring).

161. *Defamation, Libel, & Slander Claims*, SAUNDERS L., [hereinafter *UK Statute of Limitations*], <https://www.saunders.co.uk/services/litigation-individuals/defamation/> [https://perma.cc/58SD-B548]; *Kenya Media Law Guide*, CARTER-RUCK, [hereinafter *Kenya Statute of Limitations*], <https://www.carter-ruck.com/law-guides/defamation-and-privacy-law-in-kenya/> [https://perma.cc/77EN-KSTM]; David Goguen, *Time Limits to File a Defamation Lawsuit*, ALLLAW, [hereinafter *US Statute of Limitations*], <https://www.alllaw.com/personal-injury/defamation-lawsuit-statutes-limitation-state-laws.html> [https://perma.cc/M7W8-JZAE].

162. *Disini*, 727 PHIL. REP. at 225 (Sereno, C.J., dissenting and concurring) (“Notably, the prescription period for libel used to be two years, but was reduced to one year through Republic Act No. 4661 on 18 June 1966. Although the law itself does not state the reason behind the reduction, we can surmise that it was made in recognition of the harshness of the previous period, another act of grace by the State”).

163. *Id.*

164. *See Disini*, 727 PHIL. REP. at 65; *see also Santos*, CA-G.R. CR No. 44991, at 17.

been challenged numerous times in recent years.<sup>165</sup> The modern debate has largely been fueled by the passing of the CPA in 2012, which made cyber libel a more severe crime and increased the prescription period despite having the same culpability requirement as traditional libel.<sup>166</sup> This has caused many to not only question the legitimacy of the CPA with respect to cyber libel, but criminal libel as a whole.<sup>167</sup> Despite these concerns, the current construction of criminal libel and cyber libel has been routinely upheld, which is on full display in the landmark cases of *Disini v. The Secretary of Justice*, 727 Phil. Rep. 28 (Feb. 18, 2014) (Phil.), and *People v. Santos, Jr.*, CA-G.R. CR No. 44991 (July 7, 2022) (Phil.).<sup>168</sup>

#### A. *Disini, Jr. v. The Secretary of Justice*

In 2014, this libel controversy reached the Supreme Court in *Disini*.<sup>169</sup> *Disini* was a monumental case including consolidated petitions seeking to declare several provisions of the CPA and the RPC unconstitutional.<sup>170</sup> Among petitioners were those disputing the constitutionality of the RPC libel provisions, as well as Section 4(c)(4) of the CPA on cyber libel, and Section 6 of the CPA making the crime of cyber libel one degree more severe (for a refresher on these provisions, see Heading II).<sup>171</sup> Ultimately, the constitutionality of RPC libel and CPA cyber libel were upheld.<sup>172</sup>

In *Disini*, petitioners argued the libel provisions in the RPC, and subsequently the CPA provisions, burdened petitioners with “presumed malice” instead of “actual malice,” infringing on their constitutionally guaranteed freedom of expression.<sup>173</sup> Petitioners thus argued criminal libel was unconstitutional and should be decriminalized.<sup>174</sup>

The Supreme Court controversially noted the higher standard of actual malice is only applied to libel cases involving public officials and figures

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165. See *Disini*, 727 PHIL. REP. at 96-97; see also *Santos*, CA-G.R. CR No. 44991, at 10-13.

166. See CYBERCRIME PREVENTION ACT, *supra* note 28, ch. 2, §§ 4, 6; see also *Disini*, 727 PHIL. REP. at 65; see also *Santos*, CA-G.R. CR No. 44991, at 17.

167. *Disini*, 727 PHIL. REP. at 96-97.

168. *Disini*, 727 PHIL. REP. at 145-47; *Santos*, CA-G.R. CR No. 44991 at 13-14.

169. *Disini*, 727 PHIL. REP. at 111-12.

170. *Id.* at 96-97.

171. *Id.* 112-13.

172. *Id.* at 114.

173. *Id.* at 111.

174. *Id.* at 112.

because society “demand[s] a full discussion of public affairs.”<sup>175</sup> However, the Court stated these laws “mainly target libel against private persons[.]”<sup>176</sup> As in most cases, when the offended party is a private individual:

[T]he prosecution need not prove the presence of malice. The law explicitly presumes its existence (malice in law) from the defamatory character of the assailed statement. For his defense, the accused must show that he has a justifiable reason for the defamatory statement even if it was in fact true.<sup>177</sup>

Petitioners further argued the absence of the truth as a defense unjustly restricted their freedom of expression.<sup>178</sup> Petitioners cited UN General Comment 34 as support for their truth defense position and their argument to decriminalize libel due to its speech curtailment.<sup>179</sup>

The Court was not swayed and reaffirmed the validity of the RPC and subsequently CPA provisions.<sup>180</sup> The Court claimed, “[f]ree speech is not absolute. It is subject to certain restrictions, as may be necessary and as may be provided by law.”<sup>181</sup> Further, UN General Comment 34 did not urge the Philippines to decriminalize libel or entail the truth should be an “all-encompassing defense.”<sup>182</sup> Rather, “[i]t simply suggested that defamation laws be crafted with care to ensure that they do not stifle freedom of expression.”<sup>183</sup> Given “libel is not a constitutionally protected speech[.]” the government is obligated to protect individuals from this speech and can institute restrictions as it deems necessary.<sup>184</sup>

Thus, the Court upheld libel as defined in the RPC, with its presumed malice and its absence of a truth defense.<sup>185</sup> Cyber libel in the CPA was also upheld because it “merely affirmed” the RPC provisions.<sup>186</sup>

Petitioners’ remaining argument that Section 6 of the CPA unnecessarily increases the degree of punishment for cyber libel even though Section 4(c)(4) merely reiterates the RPC, was only dealt with in passing.<sup>187</sup> The Court never analyzed Section 6 within the context of libel, but rather addressed it in general,<sup>188</sup> stating:

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175. *Disini*, 727 PHIL. REP. at 112.

176. *Id.* at 112.

177. *Id.* at 113.

178. *See id.* at 113–14.

179. *Id.*; UN General Comment 34, *supra* note 95, ¶ 47.

180. *See Disini*, 727 PHIL. REP. at 114.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.* at 114–15

186. *Disini*, 727 PHIL. REP. at 115.

187. *See id.* at 44, 126.

188. *See id.* at 126.

Section 6 merely makes commission of existing crimes through the internet a qualifying circumstance [. . .] In using [internet and cyber technology], the offender often evades identification and is able to reach far more victims or cause greater harm. The distinction, therefore, creates a basis for higher penalties for cybercrimes.<sup>189</sup>

Additionally, the upholding of Section 6 affirmed the fifteen-year prescriptive period for cyber libel.<sup>190</sup>

Thus, the petitioners were unsuccessful. The Supreme Court upheld the constitutionality of the relevant libel provisions in the RPC and CPA, as well as the increased punishment for cyber libel.<sup>191</sup>

This decision was met with great criticism. With respect to libel, five out of the thirteen presiding Justices dissented in the opinion.<sup>192</sup> Chief Justice Sereno dissented with respect to the constitutionality of Section 6 as applied to libel<sup>193</sup> noting, “the increase in penalty under this seemingly innocuous provision insofar as it is applied to libel, will practically result in chilling the right of the people to free speech and expression.”<sup>194</sup> Section 6 does this by “creat[ing] an additional in terrorem effect on top of that already created by Article 355 of the Revised Penal Code.”<sup>195</sup>

Chief Justice Sereno reasoned that the RPC is designed to guide individuals’ actions, as each offense is given a particular punishment and weight.<sup>196</sup> Section 6 adds an additional penalty for work published through a computer or similar device.<sup>197</sup> Therefore, individuals seeking to publish statements online have more risk to weigh given this increased punishment, which ultimately dissuades free speech.<sup>198</sup> Thus, “[o]ne begins to see at this point how the exercise of freedom of speech is clearly burdened.”<sup>199</sup> These implications are particularly noteworthy when considering that computer systems are the most widely used means of communication and are inextricably tied to the modern exercise of free speech.<sup>200</sup>

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189. *Id.*

190. *Id.* at 65.

191. *See id.* at 145–47.

192. *Disini*, 727 PHIL. REP. at 148.

193. *See id.* at 215–16 (Sereno, C.J., dissenting and concurring)

194. *Id.* at 216.

195. *Id.*

196. *See id.* at 216–17.

197. *Id.* at 217–18.

198. *See Disini*, 727 PHIL. REP. at 218.

199. *Id.*

200. *See id.* 218–19.

Chief Justice Sereno further noted, the increase in the prescription period to fifteen years only creates “additional factors in the public’s rational calculation of whether or not to exercise their freedom of speech [. . .] yet again—tilt[ing] the scales, heavily against the exercise of this freedom.”<sup>201</sup>

Justices Brion, Carpio, and Mendoza all agreed with Chief Justice Sereno, but took their dissents further.<sup>202</sup> They believe Article 354 is also unconstitutional because it is contradictory to the ideals of actual malice and denies the truth as a defense to private individuals.<sup>203</sup> Arguing, contrary to the majority’s opinion, Article 354’s presumed malice is not merely focused on private individuals but equally applies to public officials.<sup>204</sup> In other words, the law as written does not recognize the distinction between public officials and private individuals.<sup>205</sup> Thus, upholding its constitutionality would go against the “actual malice” jurisprudence in *New York Times*, which the Philippines has long adopted.<sup>206</sup> Moreover, the truth as a defense is integral to this jurisprudence, yet it is denied to private individuals under Article 354.<sup>207</sup> Therefore, Article 354 should be deemed unconstitutional.<sup>208</sup>

Justice Leonen’s dissent was particularly historic and momentous, spanning over one hundred pages.<sup>209</sup> Like Chief Justice Sereno, Justice Leonen also noted the modern dependency on the internet and computer systems.<sup>210</sup> Moreover, Justice Leonen concurred with the other dissenting Justices’ analysis of the unconstitutionality of Article 354.<sup>211</sup> But, Justice Leonen’s holding went deeper:

The *ponencia* claims that “libel is not a constitutionally protected speech” and “that government has an obligation to protect private individuals from defamation.”

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201. *Id.* at 226.

202. *Id.* at 148 (“*Mendoza, J.*, joins Justice Brion in all his positions”), 191–92 (Brion, J., dissenting and concurring), 277 (Carpio, J., dissenting and concurring).

203. *Id.* at 148 (“*Mendoza, J.*, joins Justice Brion in all his positions”), 149, 189 (Brion, J., dissenting and concurring), 264 (Carpio, J., dissenting and concurring).

204. *Disini*, 727 PHIL. REP. at 148 (“*Mendoza, J.*, joins Justice Brion in all his positions”), 189 (Brion, J., dissenting and concurring), 264–66 (Carpio, J., dissenting and concurring).

205. *See id.*

206. *See id.* at 148 (“*Mendoza, J.*, joins Justice Brion in all his positions”), 189 (Brion, J., dissenting and concurring), 261–63 (Carpio, J., dissenting and concurring).

207. *See id.* at 148 (“*Mendoza, J.*, joins Justice Brion in all his positions”), 189 (Brion, J., dissenting and concurring), 263 (Carpio, J., dissenting and concurring).

208. *Id.* at 148 (“*Mendoza, J.*, joins Justice Brion in all his positions”), 189 (Brion, J., dissenting and concurring), 266 (Carpio, J., dissenting and concurring).

209. *Id.* at 303–430.

210. *Disini*, 727 PHIL. REP. at 314–16, 429.

211. *Id.* at 373–74, 429.



I strongly dissent from the first statement. Libel is a label that is often used to stifle protected speech. I agree with the second statement but only to the extent that defamation can be protected with civil rather than criminal liabilities.

*Given the statutory text, the history of the concept of criminal libel and our court's experience with libel, I am of the view that its continued criminalization especially in platforms using the internet unqualifiedly produces a "chilling effect" that stifles our fundamental guarantees of free expression. Criminalizing libel contradicts our notions of a genuinely democratic society.*<sup>212</sup>

Justice Leonen argued the text defining criminal libel law, particularly Article 353, is arbitrary.<sup>213</sup> The arbitrariness of the text leaves too much room for law enforcers to determine what is defamatory; the defamatory limits are then not clear to the writer or speaker.<sup>214</sup> Ultimately, the writer or speaker is forced to calibrate speech not on what the law provides, but rather on who enforces it.<sup>215</sup> This problem is only amplified in cyber libel cases because the requirements for liability are the same as traditional libel, but the punishment is more significant.<sup>216</sup> "This is quintessentially the chilling effect of this law. The threat of being prosecuted for libel stifles the dynamism of the conversations that take place in cyberspace."<sup>217</sup>

Libel's "broad bright lines, thus is an anachronistic tool that may have had its uses in older societies: a monkey wrench that will steal inspiration from the democratic mob."<sup>218</sup> Justice Leonen provided historical support for this position.<sup>219</sup> Fundamentally, Philippine libel law is "a 'fusion' of the Spanish law on *defamacion* and the American law on libel."<sup>220</sup> Under both the Spanish and American colonial regimes, criminal libel was largely used to quell criticisms against the foreign rule and speech advocating for Philippine independence.<sup>221</sup>

"This attests to the propensity to use the advantages of criminal libel by those who are powerful and influential to silence their critics."<sup>222</sup> "Libel law now is used not so much to prosecute but to deter speech. . . . There

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212. *Id.* at 366.

213. *Id.* at 380–82.

214. *Id.* at 380, 382.

215. *Id.* at 382.

216. *Disini*, 727 PHIL. REP. at 382.

217. *Id.*

218. *Id.*

219. *Id.* at 385–86.

220. *Id.* at 386.

221. *Id.* at 385.

222. *Disini*, 727 PHIL. REP. at 388.

is very little to support the view of the majority that the law will not continue to have this effect on [protected] speech.”<sup>223</sup>

Thus, Justice Leonen argued libel should be decriminalized and the RPC and CPA provisions enforcing it should be deemed unconstitutional.<sup>224</sup> Decriminalizing libel is consistent with democratic values and “[t]he state’s interest to protect private defamation is better served with laws providing for civil remedies for the affected party.”<sup>225</sup>

Unsurprisingly, the controversy surrounding criminal libel remains unsettled and still rages on today. The issues articulated in these dissents and the disdain for the troublesome law resonate throughout the continued push for decriminalization and comes to fruition in the ongoing case of *Santos*.

### B. *People v. Santos, Jr.*

*Santos*, the current marquee case on criminal libel, has garnered worldwide attention. In *Santos*, the validity of criminal libel was upheld.<sup>226</sup> The accused, Reynaldo Santos Jr. and Maria Ressa, were held liable for cyber libel at trial.<sup>227</sup> The Court of Appeals affirmed the decision and denied a motion for rehearing.<sup>228</sup> This decision has been extremely controversial, especially in lieu of the facts which the conviction was based on. The accused are now requesting the Supreme Court to review.<sup>229</sup>

On May 29, 2012, Rappler published, then-Rappler reporter, Reynaldo Santos Jr.’s article titled, “CJ Using SUVs of ‘controversial’ businessmen[.]”<sup>230</sup> Rappler is an independent Philippine digital media outlet.<sup>231</sup> Maria Ressa, a Nobel Peace Prize winner, is the Chief Executive Officer and Executive Editor of Rappler.<sup>232</sup>

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223. *Id.* at 388.

224. *Id.* at 389.

225. *Id.* at 392.

226. *Santos*, CA-G.R. CR No. 44991, at 13–14.

227. *Id.* at 10.

228. *Id.* at 40; *Santos* Motion for Reconsideration, CA-G.R. CR No. 44991 at 16.

229. *Philippine Nobel laureate Maria Ressa appeals to Supreme Court*, ALJAZEERA (Oct. 11, 2022) [hereinafter *Supreme Court Appeal*], <https://www.aljazeera.com/news/2022/10/11/philippine-nobel-laureate-maria-ressa-appeals-to-supreme-court> [https://perma.cc/743G-AXBM].

230. *Santos*, CA-G.R. CR No. 44991, at 4–5; Reynaldo Santos Jr., *CJ using SUVs of ‘controversial’ businessmen*, RAPPLER (May 29, 2012) [hereinafter *Santos Article*], <https://r3.rappler.com/newsbreak/6061-cj-using-suvs-of-controversial-businessmen> [https://perma.cc/G8L2-LS2L].

231. *Santos*, CA-G.R. CR No. 44991, at 3.

232. *Id.*; NOBEL PEACE PRIZE, *supra* note 5.

The businessman the title referred to is Wilfredo Keng and “CJ” referred to former Chief Justice Renato Corona.<sup>233</sup> Keng is one of the wealthiest individuals in the Philippines. The article reports on Keng’s potential involvement in a controversy surrounding former Chief Justice Renato Corona, who was later impeached.<sup>234</sup> The article also cited to an intelligence report on the National Security Council’s investigation of Keng and his alleged involvement in “human trafficking and drug smuggling,” an unsolved “murder case,” “smuggling fake cigarettes[,]” and illegal immigration practices.<sup>235</sup> The full article is linked in the footnote and the relevant provisions are quoted below:

Shady past?

At the time we were tracing the registered owner of the Chevrolet in early 2011, **we got hold of an intelligence report that detailed Keng’s past.** Prepared in 2002, **it described** Keng as a “naturalized Filipino citizen” whose exact birthdate is unknown. In the report, he was also identified as bearing the alias “Willy”, using a surname also spelled as “Kheng”.

**The report stated** that Keng had been under surveillance by the National Security Council for **alleged involvement** in illegal activities, namely “human trafficking and drug smuggling.” He is **supposedly** close to lawmakers and had contacts with the US embassy at the time.

**The document also said** Keng was involved in a murder case for which he was “never jailed”. It **could be** referring to the death of Manila Councilor Chika Go in 2002 where Keng had been identified as a mastermind. Go was also the architect of Keng’s Reina Regente condominium residence in Binondo, Manila.

**According to a 2002 Philippine Star report,** Keng was also accused of smuggling fake cigarettes and granting special investors residence visas to Chinese nationals for a fee. **Keng has denied his involvement** in this illegal transaction, saying it’s easy to get visas to the Philippines.

**In less than 10 years after the release of these reports, Keng has reinvented himself as one of the more reputable businessmen in the country.** He was listed by Forbes as the 32nd richest Filipino in 2010 with a net worth of US\$100 million (emphasis added).<sup>236</sup>

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233. Santos, CA-G.R. CR No. 44991, at 5–6; Santos Article, *supra* note 230.

234. Santos, CA-G.R. CR No. 44991, at 5-6; Santos Article, *supra* note 230; *Philippines Chief Justice Impeached by Congress*, BBC (Dec. 12, 2011), <https://www.bbc.com/news/world-asia-16144786> [<https://perma.cc/DKS2-7MX7>].

235. Santos, CA-G.R. CR No. 44991, at 2; Santos Article, *supra* note 230.

236. Santos Article, *supra* note 230.

Further, “Keng has denied his involvement” includes a hyperlink which leads to a Philippine Daily Inquirer article that details Keng’s denial of the accusations.<sup>237</sup>

Santos and Ressa were both found criminally liable for this seemingly ordinary article.<sup>238</sup> Interestingly, the last paragraph quoted above was not included in the facts at trial or on appeal.<sup>239</sup> Similarly, there was no mention of the linking to Keng’s denial.<sup>240</sup>

Santos was held liable as the author.<sup>241</sup> Ressa was found liable merely because she oversees the management and organization of Rappler as the CEO.<sup>242</sup> Ressa is not the Editor-in-Chief and does not edit stories.<sup>243</sup>

Notably, this article was published before the CPA was passed in 2012.<sup>244</sup> On February 19, 2014, a Rappler employee updated the article when they edited a typo; changing “evation” to “evasion” (substantively, the article remained unchanged).<sup>245</sup> In 2016, four years after the initial publication, Keng reached out to Rappler to have the article changed to incorporate his evidence.<sup>246</sup> While there was ongoing communication with editors, Rappler did not decide to change the article.<sup>247</sup> Rappler noted there was no promise to edit the article.<sup>248</sup>

Ultimately, Keng filed a cyber libel complaint with the National Bureau of Investigation (NBI) in 2017; the NBI filed a complaint for cyber libel against Santos and Ressa in 2018.<sup>249</sup> The complaint targeted Santos because he was the reporter of the article and Ressa because she is the CEO and Executive Editor of Rappler.<sup>250</sup> To reiterate, Ressa does not edit the stories.<sup>251</sup>

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237. Santos Article, *supra* note 230; Ramon Tulfo, *Lacson is caught lying again*, PHILIPPINE DAILY INQUIRER (Sept. 8, 2001) [hereinafter Keng Denial], <https://news.google.com/newspapers?nid=2479&dat=20010908&id=NahjAAAAIIBAJ&sjid=hiUMAAAAIIBAJ&pg=1513,32293216> [https://perma.cc/D2VL-F9NP].

238. Santos, CA-G.R. CR No. 44991, at 10, 40.

239. Santos, CA-G.R. CR No. 44991, at 2; Santos Article, *supra* note 230.

240. Santos, CA-G.R. CR No. 44991, at 2; Santos Article, *supra* note 230.

241. Santos, CA-G.R. CR No. 44991, at 21.

242. *Id.* at 27.

243. *Id.*

244. *Id.* at 3–4, 15; CPA, *supra* note 14; Mike Navallo, *How Correcting a Typo Got Maria Into Trouble: The Cyberlibel Case vs Rappler*, ABS-CBN (June 14, 2020) [hereinafter Ressa Overview], <https://news.abs-cbn.com/spotlight/06/14/20/how-correcting-a-typo-got-maria-into-trouble-the-cyberlibel-case-vs-rappler> [https://perma.cc/4UR6-L5M7].

245. Ressa Overview, *supra* note 244.

246. Santos, CA-G.R. CR No. 44991, at 5; Ressa Overview, *supra* note 244.

247. Santos, CA-G.R. CR No. 44991, at 5–6.

248. *Id.* at 6.

249. Ressa Overview, *supra* note 244.

250. Santos, CA-G.R. CR No. 44991, at 7.

251. Santos, CA-G.R. CR No. 44991, at 8.

Subsequently, the Department of Justice (DOJ) recommended the filing for the cyber libel charges and the trial began in 2019.<sup>252</sup> The trial court found the article was subject to the CPA, the article content was libelous, and reaffirmed the constitutionality of the CPA.<sup>253</sup> The court particularly emphasized that cyber libel is a more serious crime noting, the “keyboard is now mightier than the pen.”<sup>254</sup> In addition to civil monetary damages, Santos and Ressa were sentenced to imprisonment ranging from a minimum of six months and a day to a maximum of six years.<sup>255</sup> Santos and Ressa appealed the decision and challenged these findings.<sup>256</sup>

On appeal Santos and Ressa argued against the retroactive application of the CPA, as the article in question was originally published before the CPA’s enactment.<sup>257</sup> However, the appellate court held firm, noting a minor typographical update to the article in 2014 served as a republication of the defamatory article.<sup>258</sup> Thus, concluding the article is properly subject to the CPA.<sup>259</sup>

Moreover, Santos and Ressa contended the statute of limitations on the claim had already run.<sup>260</sup> Noting, the prescription period for libel under the RPC is one year.<sup>261</sup> But, this argument also failed.<sup>262</sup> Following *Disini*, the court held that the prescription period for cyber libel is fifteen years under Section 6 of the CPA; thus, the crime had not prescribed.<sup>263</sup>

The appellate court further determined that the article qualified as libel.<sup>264</sup> The court began its analysis stating, “[i]n determining whether a statement is defamatory, the words used are to be construed in their entirety and should always be taken in their plain, natural and ordinary meaning as they would naturally be understood by persons reading them, unless it

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252. Ressa Overview, *supra* note 244.

253. *People of the Philippines v. Santos, Ressa and Rappler*, GLOB. FREEDOM OF EXPRESSION (June 15, 2020) [hereinafter Santos Trial Court], <https://globalfreedomofexpression.columbia.edu/cases/people-of-the-philippines-v-santos-ressa-and-rappler/> [<https://perma.cc/83Q5-CU6Q>].

254. *Id.*

255. *Santos*, CA-G.R. CR No. 44991, at 10–11.

256. *Id.* at 11.

257. *Id.* at 15.

258. *Id.*

259. *Id.*

260. *Id.* at 16–17.

261. *Santos*, CA-G.R. CR No. 44991 at 16–17.

262. *Id.* at 15–18.

263. *Id.*

264. *Id.* at 19.

appears that they were used and understood in another sense.”<sup>265</sup> Moreover, defamatory works “pertains to the publication of anything that is injurious to the good name or reputation of another.”<sup>266</sup>

The court held the subject of the article was defamatory; “[w]ithout a doubt . . . [the article’s] plain and ordinary meaning . . . painted Keng as someone involved in several illegal activities[.]”<sup>267</sup> Ultimately, the article was determined to be defamatory and “libelous per se” because it reported on criminal accusations made about Keng.<sup>268</sup>

Although Santos and Ressa argued Keng was a public figure because he was one of the most prominent business figures in the Philippines, Keng was determined to be a private individual.<sup>269</sup> Thus, under criminal libel law, the essential element of malice was presumed after the statements were determined to be defamatory.<sup>270</sup> However, the court took its analysis further and emphasized that there was also malice in fact here.<sup>271</sup> That is, even without the presumption, malice was present.<sup>272</sup> The court reasoned that the article was published with reckless disregard given appellants knew the accusations’ probability of falsity and posted the story anyway.<sup>273</sup> The court further noted Rappler’s failure to publish a clarifying article expressing Keng’s side and the accessibility of the original article as evidence of actual malice.<sup>274</sup>

The appellate court also emphasized Ressa could not excuse liability and was equally responsible for the work, even though she did not take part in publishing the story.<sup>275</sup> The court quoted Article 360 of the RPC, “[t]he author or editor of a book or pamphlet, or the editor or business manager of a . . . publication, shall be responsible for the defamations . . . to the same extent as . . . the author.”<sup>276</sup> The court reasoned that Ressa oversees the entirety of the organization as the CEO; thus, she is just as criminally liable as the author.<sup>277</sup>

Santos’s and Ressa’s arguments for constitutional protection under freedom of expression suffered the same fate.<sup>278</sup> The court was explicit;

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265. *Id.*  
266. *Id.*  
267. Santos, CA-G.R. CR No. 44991, at 19.  
268. *Id.*  
269. *Id.* at 2, 20–21; Santos Article, *supra* note 230.  
270. Santos, CA-G.R. CR No. 44991, at 20–21.  
271. *Id.* at 21.  
272. *See id.*  
273. *Id.* at 21–22.  
274. Santos, CA-G.R. CR No. 44991, at 21–22.  
275. *Id.* at 25.  
276. *Id.*  
277. *Id.* at 25, 27.  
278. Santos, CA-G.R. CR No. 44991, at 28–29.

“appellants cannot simply hide under the blanket of freedom of expression” or justify their publication as a lawful exercise of such freedom of expression.<sup>279</sup>

Thus, the appellate court affirmed the criminal conviction and civil damages, citing the apparent “danger” modern media members pose and the subsequent necessity for criminal cyber libel.<sup>280</sup>

We find that the RTC was correct in imposing the penalty of imprisonment against Ressa and Santos, considering the seriousness of the crime of cyberlibel. It is necessary to highlight that a person, especially those engaged in the media, can easily damage and destroy the reputation and honor of public figures, public officials, and in this case, a private individual, if they are not required to make the slightest effort to verify the accusations. Journalists are supposed to be reporters of facts, not fiction, and must be able to back up their stories with solid research. . . . [This case] warrants the penalty of imprisonment[.]<sup>281</sup>

However, the appellate court did amend one aspect of the trial court’s decision.<sup>282</sup> The appellate court increased the severity of the maximum imprisonment penalty by one degree in accordance with the CPA.<sup>283</sup> Santos and Ressa’s new maximum imprisonment sentence increased to six years, eight months and twenty days.<sup>284</sup>

In their final stand, Santos and Ressa are now trying to bring their case in front of the Supreme Court.<sup>285</sup>

### *1. International Outcry to Santos Decision*

This decision was met with a flurry of international disdain; calls to drop the case and decriminalize libel began to pour in.

In response to the conviction on appeal, UN Special Rapporteur on Freedom of Opinion and Expression, Irene Khan, stated, “I am deeply concerned by recent developments in the Philippines to silence independent and investigative journalism in the country. I call on the new Administration of President Ferdinand Marcos Jr. to put an end to the criminalisation of libel [and to] withdraw the charges against Maria Ressa.”<sup>286</sup>

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279. *Id.* at 28.

280. *Id.* at 14, 33, 37.

281. *Id.* at 33.

282. *Santos*, CA-G.R. CR No. 44991, at 40.

283. *Id.* at 34–35, 40.

284. *Id.* at 40.

285. Supreme Court Appeal, *supra* note 229.

286. UN Expert, *supra* note 95.

This sentiment was reiterated by the HRW.<sup>287</sup> Noting, the government should drop the criminal libel charges against the Rappler employees, decriminalize libel, and stop the harassment against journalists.<sup>288</sup> Moreover, RSF and the International Federation of Journalists (IFJ) also condemned the appellate decision and supported the call to decriminalize libel.<sup>289</sup>

## 2. *Troubling Aspects of Santos Decision*

This worldwide outcry was well warranted. This appellate decision hoists a myriad of issues highlighting the deeply troubling aspects of the criminal libel law (as discussed in Heading III).

For starters, although the potentially defamatory “words used are to be construed in their entirety,” crucial facts for the appellants are blatantly misrepresented or conveniently left out of the opinion entirely.<sup>290</sup> The significance of this cannot be underscored, especially considering the criminal ramifications of the decision.<sup>291</sup>

The narrative in the case was Santos’s article painted Keng as an individual who was involved in crimes, which is ultimately why it was defamatory.<sup>292</sup> Yet, Santos never took a position on whether Keng committed the crimes.<sup>293</sup> Rather, Santos merely reported on the criminal allegations made by other sources.<sup>294</sup> Further, Santos not only made it clear Keng denied his involvement, but included a link to a news article where Keng’s denial is laid out.<sup>295</sup> Moreover, Santos explicitly stated Keng had become “one of the more reputable businessmen” since the accusations were made.<sup>296</sup> Taking the “plain and ordinary meaning” of these facts would suggest the character of Keng was not disparaged.<sup>297</sup> However, none of these facts are adequately

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287. *Philippines: Submission to the UN Human Rights Committee*, HUM. RTS. WATCH (Sept. 12, 2022) [hereinafter HRW UN Submission], <https://www.hrw.org/news/2022/09/12/philippines-submission-un-human-rights-committee> [<https://perma.cc/2CH3-6KFY>].

288. *Id.*

289. *Philippines: Cyber-libel charges against Maria Ressa dismissed*, INT’L FED’N OF JOURNALISTS (Aug. 13, 2021) [hereinafter IFJ Libel], <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/philippines-cyber-libel-charges-against-maria-ressa-dismissed.html> [<https://perma.cc/AJ67-RX8T>]; Julie Posetti et al., *Maria Ressa faces extended jail sentence in the Philippines*, RSF (Aug. 7, 2022) [hereinafter RSF Ressa], <https://rsf.org/en/maria-ressa-faces-extended-jail-sentence-philippines> [<https://perma.cc/8QPJ-ZMY5>].

290. *Santos*, CA-G.R. CR No. 44991, at 19.

291. *Id.* at 40.

292. *Id.* at 19.

293. *See id.* at 2; Santos Article, *supra* note 230.

294. *Santos*, CA-G.R. CR No. 44991, at 2; Santos Article, *supra* note 230.

295. Santos Article, *supra* note 230.

296. *Id.*

297. *Santos*, CA-G.R. CR No. 44991, at 19.



represented in the opinion. The statement and link to Keng's denial, as well as the reputable businessman information, were completely absent from the appellate decision.<sup>298</sup>

Another interesting point not properly discussed in the appellate decision is the article had already been published for over four years before Keng reached out to Rappler, and over five years before any complaint was filed.<sup>299</sup> This highlights how damning the extended prescription period is; if Santos had mass printed his article instead of publishing online, Keng would not even have a case. Keng's four-year delay in going after the article coincides with Rodrigo Duterte's election, drawing further suspicion about his motives, more on this in Heading V.

The absence of these facts illustrates the lackluster evidence needed for a statement to be defamatory under criminal libel law. This case makes clear, that in the most literal sense, "the publication of anything that is injurious to the good name or reputation of another" is considered defamatory regardless of the truth of the statements.<sup>300</sup> The article was found defamatory simply because Santos covered past criminal allegations made about Keng.<sup>301</sup> Again, Santos did not make the allegations and only reported on the allegations made by another source.<sup>302</sup>

Further, Santos mentioned and linked Keng's denial and emphasized Keng's status as a reputable figure.<sup>303</sup> However, this was not relevant to the court's discussion; the court found the work defamatory "without a doubt" merely because it discussed past criminal accusations made about Keng.<sup>304</sup> Simply put, given the criminal accusations "injure" Keng's good name, the article is defamatory because it covers the topic.<sup>305</sup>

This defamation standard, which presumes malice, means works covering defamatory subjects are "libelous per se," even if the coverage is charitable, as in Santos's article.<sup>306</sup> This, coupled with the extension of liability for these "libelous" works is far reaching; Ressa took no part in the writing

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298. See generally *Santos*, CA-G.R. CR No. 44991.

299. Ressa Overview, *supra* note 244.

300. *Santos*, CA-G.R. CR No. 44991, at 19.

301. *Id.*

302. Santos Article, *supra* note 230.

303. *Id.*

304. *Santos*, CA-G.R. CR No. 44991, at 19.

305. *Id.*

306. *Id.* at 19–21.

or editing of the article but was still targeted and deemed criminally liable for its content.<sup>307</sup>

The defendants in these criminal cases are then unfairly burdened with disproving their presumed malicious intent.<sup>308</sup> Santos's and Ressa's inability to present a successful defense at trial and appeal illustrates the difficulty of fulfilling this burden.<sup>309</sup> The court wrote off any defense raising the constitutional protections of free speech.<sup>310</sup>

Despite the relatively fair coverage of the topic in Santos's article, the court indicated this caliber of reporting was not worthy of freedom of speech protection.<sup>311</sup> Instead, for the court, this case served to bolster the efficacy of criminal libel and cyber libel to protect against "dangerous" media members, like Santos and Ressa.<sup>312</sup>

Unfortunately, this case only scratches the surface of the deep-rooted injustice inherent in Philippine libel law. The implementation of the law and how it is being used spells disaster for free speech and expression, particularly for media members and activists.

#### V. LIBEL LAW BEING USED TO TARGET AND HARASS MEDIA AND ACTIVISTS

Evidence indicates the Philippine's severe libel law is largely being used to target, harass, and silence media members and activists.<sup>313</sup> This is especially relevant in the cyber libel space, considering individuals can be charged for their work fifteen years from publication and the punishment is one degree more severe.<sup>314</sup>

The Philippine Department of Justice Office of Cybercrime has reported 3,770 cyber libel claims were filed as of May 2022.<sup>315</sup> Data from the Philippine National Police shows cyber libel cases makes up 20% of the cybercrimes they investigate.<sup>316</sup> Of these 3,770 cases, 1,317 were pending in court, 1,240

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307. *Id.* at 25.

308. *Id.* at 20–21.

309. *Id.*

310. *Santos*, CA-G.R. CR No. 44991, at 28.

311. *Id.* at 28.

312. *Id.* at 14, 28, 33.

313. HRW UN Submission, *supra* note 287; Walden Bello, *Why Walden Bello's Arrest and Detention for Cyberlibel Demands Attention*, THE NATION (Aug. 18, 2022) [hereinafter Bello Arrest], <https://www.thenation.com/article/world/why-walden-bellos-arrest-and-detention-for-cyberlibel-demands-attention/> [https://perma.cc/U29N-ES6F]. See HRW Bello, *supra* note 313; Cyber Libel Statistics, *supra* note 8.

314. CPA, *supra* note 14, §§ 4, 6; *Disini*, 727 PHIL. REP. at 56.

315. Cyber Libel Statistics, *supra* note 8.

316. *Id.*

were in preliminary investigation, and 1,131 were dismissed.<sup>317</sup> The fact that nearly one-third of these cyber libel cases are dismissed is significant, especially considering the low standard needed to prove criminal libel, as shown in *Santos*. Not only does it highlight the waste of precious resources in a third-world country, but it also begins to illuminate the frivolousness of cyber libel cases and its use as a scare tactic to suppress speech.<sup>318</sup> The underlying facts surrounding *Santos* help fully paint this picture.

Santos's words after the trial conviction are telling; "I'm scared to go to jail, I'm not as fearless as Maria [Ressa]."<sup>319</sup> Santos's statement encapsulates the very real threat of imprisonment for individuals facing criminal and cyber libel charges in the Philippines. The criminal punishment attached to the law, the law's poor construction, and the continued upholding of the law cannot be taken lightly. Individuals need to take all these previously discussed problems into their decision to publish a statement. This greatly chills speech. Reporters and activists working on important, controversial issues are a natural and vulnerable target for speech stifling.

Maria Ressa's situation is a clear example; she is no stranger to such targeting. In addition to the charges in *Santos*, Ressa was subject to two other frivolous cyber libel claims.<sup>320</sup> In both cases, the courts dismissed the claims.<sup>321</sup> Notably, one of the dismissed cases was also filed by Keng.<sup>322</sup> In this complaint, Keng went after Ressa for posting a screenshot of a Philstar article on Twitter.<sup>323</sup> Interestingly, Keng only went after Ressa and not Philstar.<sup>324</sup>

This case is similar to the circumstances in *Santos*, where Keng included Ressa in the complaint even though she took no part in the writing or

317. *Id.*

318. Bello Arrest, *supra* note 313.

319. Lin Buan, 'I'm scared to go to jail, I'm not as fearless as Maria,' RAPPLER (June 18, 2020), <https://www.rappler.com/newsbreak/in-depth/264125-profile-reynaldosantos-jr/> [<https://perma.cc/KNN2-9KLM>].

320. *Philippine court dismisses libel case against journalist Maria Ressa*, REUTERS (Aug. 12, 2021) [hereinafter Reuters Ressa], <https://www.reuters.com/world/asia-pacific/philippine-court-dismisses-libel-case-against-journalist-maria-ressa-2021-08-12/> [<https://perma.cc/ZCC3-VGCR>]; IFJ Libel, *supra* note 289.

321. Reuters Ressa, *supra* note 320; IFJ Libel, *supra* note 289.

322. Liam Scott, *Libel Case Dismissed, But Philippines Journalist Still Faces Legal Challenges*, VOICE OF AMERICA (June 3, 2021), <https://www.voanews.com/a/press-freedom-libel-case-dismissed-philippines-journalist-still-faces-legal-challenges> [<https://perma.cc/HHF8-LAS3>].

323. *Id.*

324. *See id.*

editing of the article.<sup>325</sup> Keng did not file a complaint against the original reporter of the allegations discussed in Santos’s article or any of the individuals who edited the article.<sup>326</sup> Further, Keng did not reach out about Santos’s 2012 article until August 2016 and did not file a complaint until October 2017.<sup>327</sup>

This time gap in reaching out and particular focus on Ressa is controversial. While Keng argues his libel claims are purely to protect his reputation, Ressa believes the attacks are attempts to suppress her speech given her criticisms of former President Rodrigo Duterte.<sup>328</sup> Although Keng is one of the most prominent businessmen in the Philippines and Duterte gave Keng’s daughter a presidential appointment, Duterte has denied knowing Keng.<sup>329</sup>

Nonetheless, Ressa’s claims are not unsubstantiated, especially when looking at Duterte’s anti-free speech practices during his term. To start, both of Keng’s claims against Ressa were filed after Duterte was elected in 2016, which adds suspicion to Keng’s four-year delay in reaching out.<sup>330</sup> Further, Ressa was an openly staunch critic of Duterte throughout his campaign run and eventual presidency.<sup>331</sup> Ressa found particular onus with Duterte’s violent tendencies and infamous “war on drugs.”<sup>332</sup>

Ressa’s disdain was fruitful. Duterte’s “war on drugs” was notoriously deadly and hardly limited to drugs; the estimated deaths ranged from 12,000 to 30,000, with more than 300 coming in the first month of his presidency.<sup>333</sup> Many of these killings were journalists and human rights defenders speaking out against the government.<sup>334</sup> This evidence of media suppression under Duterte was rampant.<sup>335</sup> For instance, between 2018

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325. Santos, CA-G.R. CR No. 44991, at 7, 25.

326. *Id.* at 1, 7.

327. Ressa Overview, *supra* note 244.

328. Reuters Ressa, *supra* note 320.

329. Pin Ranada, *Fast Facts: Who is Wilfredo Keng?*, RAPPLER (Mar. 2, 2019), <https://www.rappler.com/newsbreak/iq/224092-fast-facts-wilfredo-keng-huang-rulun/> [<https://perma.cc/48GG-84KZ>]; Pin Ranada, *Duterte gives Wilfredo Keng’s daughter a government post*, RAPPLER (Oct. 9, 2019), <https://www.rappler.com/nation/240481-duterte-gives-wilfredo-keng-daughter-government-post/> [<https://perma.cc/8WXF-C2U9>].

330. Ressa Overview, *supra* note 244.

331. NYT Ressa, *supra* note 5.

332. *Id.*

333. *World Report 2022: Philippines*, HUM. RTS. WATCH (2022), <https://www.hrw.org/world-report/2022/country-chapters/philippines> [<https://perma.cc/C2TK-2WP2>]; NYT Ressa, *supra* note 5; Rep. U.N. High Comm’r for Hum. Rts., *Situation of human rights in the Philippines*, U.N. Doc. A/HRC/44/22, ¶ 22 (July 3, 2020) [hereinafter OHCHR Report Philippines], [www.ohchr.org/sites/default/files/Documents/Countries/PH/Philippines-HRC44-AEV.pdf](http://www.ohchr.org/sites/default/files/Documents/Countries/PH/Philippines-HRC44-AEV.pdf) [<https://perma.cc/33BK-GNT2>].

334. OHCHR Report Philippines, *supra* note 333, ¶¶ 49–50.

335. *See id.* ¶¶ 49–61.

and 2019, twenty media organizations were subject to DDoS attacks after making critical remarks about government officials.<sup>336</sup>

Moreover, in the last days of Duterte's term, many media outlets were ordered to shut down, including Rappler (Rappler has continued to run despite the order).<sup>337</sup> The Duterte administration even went as far as to call Rappler a "fake news outlet sponsored by American spies" (Ressa is a dual U.S.-Philippine citizen).<sup>338</sup> These examples are far from exhaustive; the depth of human rights atrocities and free speech suppression under Duterte's term simply goes beyond the scope of this Comment.

Ressa's suspicions about the multiple cyber libel cases brought against her were far from unwarranted. Ressa was at the forefront of these controversies and was privy to Duterte's anti-speech tendencies from the onset of his campaign.<sup>339</sup> Her reporting during these dangerous times garnered worldwide recognition, including winning the Nobel Peace Prize in 2021.<sup>340</sup> But, while her work has been praised internationally, it was locally despised. The frequent cyber libel claims and eventual conviction brought against Ressa signal targeted attempts to suppress her speech, particularly when looking at the trends of the Duterte administration.<sup>341</sup>

Although Duterte's term came to an end in 2022, he was succeeded by Ferdinand "Bongbong" Marcos Jr., son of the former dictator of the Philippines, Ferdinand Marcos Sr.<sup>342</sup> Moreover, Bongbong's running mate and new vice-president is former President Rodrigo Duterte's daughter, Sara Duterte.<sup>343</sup> To put it bluntly, the future looks bleak for Maria Ressa and all other Philippine media members and activists.

Among other things, Marcos Sr. was infamous for his abolishment of Congress, implementation of martial law, human rights abuses, and cruel

336. *Id.* ¶ 61.

337. *Rodrigo Duterte administration orders the shutting down of news portal Rappler*, PEOPLES DISPATCH (June 29, 2022), <https://peoplesdispatch.org/2022/06/29/rodrigo-duterte-administration-orders-the-shutting-down-of-news-portal-rappler/> [<https://perma.cc/P2S9-KCTW>].

338. Reuters Ressa, *supra* note 320.

339. See NYT Ressa, *supra* note 5.

340. Nobel Peace Prize, *supra* note 5.

341. Maria Ressa, *Targeted by Duterte*, COLUMBIA JOURNALISM R. (2019), [https://www.cjr.org/special\\_report/maria-ressa-duterte.php](https://www.cjr.org/special_report/maria-ressa-duterte.php) [<https://perma.cc/QA5B-3SS5>]; see also NYT Ressa, *supra* note 5.

342. Bongbong Election, *supra* note 10; see also Marcos Returns, *supra* note 11.

343. Bongbong Election, *supra* note 10.

suppression of free speech.<sup>344</sup> Rather than denounce his father's misgivings, Bongbong praised his father's efforts in his inauguration speech.<sup>345</sup> Stating, "I once knew a man who saw what little had been achieved since independence in a land of people with the greatest potential for achievement. And yet they were poor. But he got it done. Sometimes with the needed support, sometimes without. So will it be with his son. . . ."<sup>346</sup>

Bongbong has stayed true to following in his father's footsteps; reporters and activists continue to be suppressed and harassed with criminal libel and cyber libel claims. During Bongbong's regime, Santos and Ressa's convictions were not only upheld on appeal, but their sentences were made more severe.<sup>347</sup>

Further, Walden Bello, prominent human rights activist and former congressman and vice-presidential candidate, was arrested and detained on cyber libel charges only six weeks into Bongbong's presidency.<sup>348</sup> Jefry Tupas, the former press information officer for Sara Duterte when she was Mayor of Davao, filed cyber libel charges against Bello for a Facebook post.<sup>349</sup> The Facebook post occurred during Bello's vice-presidential run; the post listed criticisms of Sara Duterte's management capabilities, Bello's then opponent in the vice-presidential race.<sup>350</sup> While working for Sara Duterte, Tupas was caught at a party raided by the Philippine Drug Enforcement Agency for illegal drug use.<sup>351</sup> In one point, Bello criticized Sara for not knowing of Tupas's alleged involvement with drugs.<sup>352</sup>

Tupas's presence at the raided party was covered by various news outlets and reporters; however, Tupas only went after Bello for cyber libel.<sup>353</sup> Bello has been a public critic of Marcos Sr., Bongbong, Rodrigo Duterte, and Sara Duterte.<sup>354</sup> Although Sara Duterte has denied any involvement in the libel case, many have suspected this is one of the first major attacks of Bongbong's administration.<sup>355</sup>

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344. See *Ferdinand Marcos*, Britannica (last updated Mar. 4, 2023), <https://www.britannica.com/biography/Ferdinand-E-Marcos> [<https://perma.cc/JQY3-4E87>].

345. Bongbong Inauguration, *supra* note 10.

346. *Id.*

347. Santos, CA-G.R. CR No. 44991 at 40.

348. HRW Bello, *supra* note 313; Bello Arrest, *supra* note 313.

349. HRW Bello, *supra* note 313; Bello Arrest, *supra* note 313.

350. HRW Bello, *supra* note 313; Bello Arrest, *supra* note 313; Walden Bello, *Walden Bello's Response to Sara Duterte Team on the mayor's Boycotting the Vice Presidential Debate*, FACEBOOK (Mar. 1, 2022) [hereinafter Bello Facebook Post], <https://www.facebook.com/WaldenBelloOfficial/posts/pfbid0CnKcoCJDBQ4Mb8uqNQuMoX7ncL6zavdW4fgdnG9iTrMqp8p1UTcQojdZax3Gd5hDl> [<https://perma.cc/SY8M-2QMX>].

351. HRW Bello, *supra* note 313; Bello Arrest, *supra* note 313.

352. Bello Facebook Post; *supra* note 350; Bello Arrest, *supra* note 313.

353. Bello Arrest, *supra* note 313.

354. HRW Bello, *supra* note 313.

355. See HRW Bello, *supra* note 313; Bello Arrest, *supra* note 313.

Most recently under Bongbong's term, Frank Cimatu, Rappler contributor and Baguio Chronicle journalist, was convicted for cyber libel at trial for a five-year old Facebook post critiquing then long-term government official and agribusinessman, Emmanuel Piñol.<sup>356</sup>

While these criminal and cyber libel cases involving notable figures garner more attention, the harassment is widespread and impacts all press and activists. The threat and fear of suppression is well-known; in a 2021 public opinion poll, 45% of adult Filipinos agreed, "it is dangerous to print or broadcast anything critical of the administration, even if it is the truth."<sup>357</sup>

The government's practice of targeting critical journalists and media outlets has also been internationally noticed and denounced.<sup>358</sup> The harassment media members face from libel charges is one of the significant reasons why RSF ranked the Philippines 147th out of 180 countries in its 2022 World Press Freedom Index.<sup>359</sup>

Moreover, as discussed in Heading III(B)(i), this use of criminal libel in the Philippines is reminiscent of the Navalny situation and authoritative speech stifling practices in Russia.<sup>360</sup>

The evidence overwhelming indicates the poorly crafted libel law is intentionally being weaponized to silence critics. This is simply incompatible with free speech and the ideals of a true modern democracy; Philippine libel law needs to be decriminalized and redefined.

## VI. ARGUMENT FOR DECRIMINILIZATION OF LIBEL

As discussed throughout this Comment, Philippine libel law is riddled with tremendous problems which chill free speech.

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356. *Philippines urged to decriminalise defamation after another reporter is sentenced to imprisonment*, RSF (Dec. 15, 2022) [hereinafter *Cimatu Conviction*], <https://rsf.org/en/philippines-urged-decriminalise-defamation-after-another-reporter-sentenced-imprisonment> [<https://perma.cc/SP4Y-Y5SR>].

357. Margaret Simmons, *The Philippines Is Losing Its 'War on Drugs'*, FOREIGN POL'Y (Jan 11, 2023), <https://foreignpolicy.com/2023/01/11/philippines-drug-war-manila-marcos/> [<https://perma.cc/4JW7-PXRR>].

358. UN Expert, *supra* note 95; HRW UN Submission, *supra* note 287; IFJ Libel, *supra* note 289; RSF Ressa, *supra* note 289; *Index 2022: Philippines*, REPORTERS WITHOUT BORDERS (2022) [hereinafter *World Press Freedom Index*], <https://rsf.org/en/country/philippines> [<https://perma.cc/LQU6-KVRD>].

359. World Press Freedom Index, *supra* note 358.

360. Navalny Slander Charge, *supra* note 124; Navalny Return to Court, *supra* note 124; Russian Journalist Conviction, *supra* note 124.

Justice Leonen's dissent in *Disini* is on point: those that are powerful and influential have a propensity for abusing the law's prejudicial construction to silence their critics.<sup>361</sup>

As laid out in Heading III, the construction of Philippine libel is problematic on two key fronts: it violates due process and is incompatible with the ideals of freedom of speech protected in the Philippine Constitution.<sup>362</sup>

As a reminder, any criticism of traditional criminal libel only applies more strongly to cyber libel. The difference being, when a source is published from a computer device, the crime is one degree more severe and the prescription period lasts fifteen years instead of one.<sup>363</sup>

The law is unfit for due process because it impermissibly prejudices the criminal defendant, the individual facing the penalty of imprisonment and significant fines. Libel liability hinges on two key elements: the content must be both defamatory and malicious.<sup>364</sup> Yet, malice is presumed by law if the first element of defamation is satisfied.<sup>365</sup> Effectively, this means the only burden for the prosecutor is proving the work is defamatory.<sup>366</sup> But, as reinforced by *Santos* and Leonen's dissent in *Disini*, the law's definition and standard for defamation is incredibly broad and liberally applied.<sup>367</sup> For example, even if a work is true, it is nonetheless defamatory if it injures one's name in any capacity.<sup>368</sup> As *Santos* indicates, this standard for liability is incredibly lenient. Furthermore, the net cast for liability is wide-reaching, subjecting even more individuals to its prejudice.<sup>369</sup> One does not need to take part in the writing, editing, or publication of the work to be held liable.<sup>370</sup> Moreover, if the work is published online, it is punishable for fifteen years.<sup>371</sup> The end result is criminal defendants are unfairly subject to severe punishments of imprisonment and fines, in addition to any civil damages brought by the offended party.<sup>372</sup>

International authority largely supports the concept of decriminalizing libel because it is incompatible with freedom of speech. The detriment to free speech brought upon by criminal libel is exacerbated by Philippine

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361. *Disini*, 727 PHIL. REP. at 388 (Leonen, J., dissenting and concurring).

362. See Philippine Constitution, *supra* note 3, art. III, §§ 4, 14.

363. CPA, *supra* note 14, §§ 4, 6; see also *Disini*, 727 PHIL. REP. at 65.

364. Truth Defense, *supra* note 39.

365. See e.g., Revised Penal Code, *supra* note 1, art. 354; Truth Defense, *supra* note 39.

366. SET YOU FREE, *supra* note 57, § III(b).

367. See e.g., *Santos*, CA-G.R. CR No. 44991, at 19; *Disini*, 727 PHIL. REP. at 382 (Leonen, J., dissenting and concurring).

368. *Santos*, CA-G.R. CR No. 44991, at 19.

369. REVISED PENAL CODE, *supra* note 1, art. 360.

370. *Santos*, CA-G.R. CR No. 44991, at 27.

371. *Disini*, 727 PHIL. REP. at 65; *Santos*, CA-G.R. CR No. 44991, at 17.

372. REVISED PENAL CODE, *supra* note 1, art. 355.



libel's particularly troublesome provisions. Namely, malice and falsity do not need to be proven, the truth is not a defense, and defendants face imprisonment and severe fines.<sup>373</sup> These provisions effectively create a more lenient and prejudicial standard for conviction. As all the dissenting justices in *Disini* point out, this results in a chilling effect in speech.<sup>374</sup> Individuals are ultimately deterred from publishing given the significant risk of punishment from the ill drafted law.<sup>375</sup>

The chilling effect is furthered in cyber libel cases because of the fifteen-year prescription period and the increased penalty.<sup>376</sup> This is significant considering internet sources have largely replaced traditional print and are essential for expression.<sup>377</sup>

Despite these statutory issues, the efficacy of this suppressive libel law has been reaffirmed in pivotal cases.<sup>378</sup> The closing remarks of the appellate court in *Santos* make perfectly clear that criminal libel is believed necessary to prevent potentially damaging media stories.<sup>379</sup> Making the fear of punishment more real for individuals who wish to speak out on important, controversial issues.

Unfortunately, the chilling of speech does not end there. Not only has this problematic libel law been upheld, it has also routinely and historically been weaponized to suppress the speech of activists and press members.<sup>380</sup> Moreover, there is no indication that this will change under the current administration. The harassment and targeting of individuals with criminal libel charges further perpetuates the in terrorem effect and silencing of speech.<sup>381</sup>

Libel should be decriminalized and redefined to resolve these issues. Holding individuals accountable for truly defamatory and libelous work

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373. REVISED PENAL CODE, *supra* note 1, art. 354–55.

374. See e.g., *Disini*, 727 PHIL. REP. at 148 (“*Mendoza, J.*, joins Justice Brion in all his positions”), 156–57 (Brion, J., dissenting and concurring), 216 (Serenio, C.J., dissenting and concurring), 279 (Carpio, J., dissenting and concurring), 301 (Leonen, J., dissenting and concurring).

375. *Id.* at 226 (Serenio, C.J., dissenting and concurring).

376. *Id.* at 225–26.

377. *Id.* at 218–19.

378. See *Disini*, 727 PHIL. REP. at 115; see also *Santos*, CA-G.R. CR No. 44991, at 33.

379. *Santos*, CA-G.R. CR No. 44991, at 33.

380. HRW UN Submission, *supra* note 287; Bello Arrest, *supra* note 313; Cyber Libel Statistics, *supra* note 8.

381. Cyber Libel Statistics, *supra* note 8; see also *Disini*, 727 PHIL. REP. at 226 (Serenio, C.J., dissenting and concurring), 366, 388 (Leonen, J., dissenting and concurring).

is reasonable and internationally accepted when the legal remedy is civil and the defendants have an appropriate defense.<sup>382</sup> Philippine libel law should be revised to uphold the constitutionally protected ideals of free speech and due process like modern democracies.

First, libel should be decriminalized and made a civil issue. This is paramount in reducing the chilling effect of the law. One of the most suppressive features of Philippine libel is that it is criminal and carries daunting punishments of imprisonment and severe fines.<sup>383</sup> These punishments are not proportional to the act and make the risk of publishing great.<sup>384</sup> An individual can get thrown in jail for a critical Facebook post.<sup>385</sup> To correct this, libel should be made civil. While civil damages would still be appropriate for libelous works, this would eliminate the possibility of imprisonment and excessive fines. Thus, significantly reducing the in terrorem effect and helping bring Philippine libel into balance with the modern world.

However, decriminalizing alone is not enough. The particularly troublesome aspects of Philippine libel law also need to be redefined to give defendants a fair shot and an appropriate defense. Namely, the automatic presumption of malice from a defamatory statement needs to be revised, the truth needs to be a defense, individual liability needs to only extend to those who directly worked on the piece, and cyber libel needs to be judged on the same basis as traditional libel.

For criminal libel, the presumption of malice is impermissible because it is an essential element.<sup>386</sup> The presumption violates due process and prejudices the criminal defendant who is supposed to be afforded greater protections due to the severity of the punishments. As evidenced in *Santos*, presuming malice results in a “libelous per se” standard, which increases the chilling of free speech.<sup>387</sup> The *New York Times* jurisprudence makes clear the absence of actual malice also curtails speech in the civil setting; however, the analysis changes.<sup>388</sup> For instance, the US recognizes and allows malice to be presumed from a defamatory statement when the work does not involve matters of public concern and deals purely with private issues.<sup>389</sup> But, when the work is a matter of public interest or concern, the

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382. International Standards, *supra* note 93.

383. REVISED PENAL CODE, *supra* note 1, art. 355, *Disini*, 727 PHIL. REP. at 226 (Serenio, C.J., dissenting and concurring).

384. See e.g., *Kenya: High Court*, *supra* note 121; *Konaté*, App. No. 004/2013 ¶¶ 167–71; *Disini*, 727 PHIL. REP. at 389 (Leonen, J., dissenting and concurring).

385. See e.g., HRW *Bello*, *supra* note 313; *Bello Arrest*, *supra* note 313; *Cimatu Conviction*, *supra* note 356.

386. *Domingo*, 813 Phil. Rep. at 56.

387. *Santos*, CA-C.R. CR No. 4491, at 13.

388. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

389. *Id.*

plaintiff must prove the defendant's malicious intent in publication for damages.<sup>390</sup>

This public concern analysis is distinct from purely analyzing whether an individual is a public or private figure. A work can be directed at a private individual but can still deal with a subject of public concern.<sup>391</sup> *Santos*, provides a prime example: even if Keng is a private individual, the article was reporting on the investigation into the then Supreme Court Chief Justice's credibility, which is absolutely a matter of public concern. This standard ensures purely private issues are not publicly aired in a defamatory light, while also providing a fair standard for proving liability.<sup>392</sup> Thus, the Philippines should redefine this provision to properly fit within the civil context.

Moreover, in addition to making libel civil, the truth should be a complete defense. The element of truth is internationally recognized as fundamental for freedom of expression.<sup>393</sup> The Philippines also gives credence to this in its Constitution.<sup>394</sup> Moreover, this is internationally recognized as a viable and critical defense for defendants in civil defamation suits.<sup>395</sup> In order to protect freedom of speech and provide the defendant with a viable defense and a just trial, the truth as a defense should also be granted for civil libel.

Libel liability should also not be as wide-reaching. An individual should not be held liable for work they took no part in drafting, editing, or otherwise producing to the same extent as the author. Ressa's conviction illustrates this need; despite taking no part in editing or publishing the article, she was still held fully liable.<sup>396</sup>

Lastly, there should be no distinction in treatment between traditional libel and cyber libel. Currently, the law automatically makes the punishment more severe if a publication is from an online source given the increased accessibility of the internet.<sup>397</sup> Computer systems are the most widely used means of communication and are essential to the modern exercise of free

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390. *Dun & Bradstreet* 472 U.S. at 751; *see also* Actual Malice Jurisprudence, *supra* note 138.

391. *Dun & Bradstreet* 472 U.S. at 751.

392. *Id.* at 758–60.

393. *Defamation Put to the Test*, *supra* note 144, at 55.

394. *See* Philippine Constitution, *supra* note 3, § 4.

395. *Castells*, App. No. 11798/85, ¶ 42; *US Defamation Jurisprudence*, *supra* note 147; *see also* UN General Comment 34, *supra* note 95, ¶ 47.

396. *Santos*, CA-G.R. CR No. 44991, at 25.

397. *Id.* at 33; CPA, *supra* note 14, §§ 4, 6.

speech.<sup>398</sup> The online forum has largely replaced the traditional print; the calculation of damages or standard for liability should not be any different for the same act.<sup>399</sup> Thus, the prescription period for cyber libel should match traditional libel's one year period. This one-year statute of limitations is in line with modern international standards.<sup>400</sup> Moreover, civil damages for cyber libel should be determined on the same basis as traditional libel.

By decriminalizing and redefining libel in this way, the in terrorem effect of the law is drastically reduced. Civil remedies are appropriate for the offense of libel; individuals would no longer face the substantial threat of imprisonment or excessive fines. Moreover, by requiring plaintiffs to prove malice for issues connected to public concern, it creates a fair liability standard in the civil sphere. This is much better than the current more frivolous standard of presuming malice in a criminal setting. Further, the truth should be a complete defense; it provides defendants a reasonable opportunity to defend themselves if plaintiffs fulfill their burden of proving defamation and malice. Individuals should also not be held liable for work they did not take part in producing. Additionally, this solution eliminates the discrepancy in punishment and prescription for cyber and traditional libel. Individuals like Ressa, Santos, and Cimatú could no longer be sued for five-year-old posts and punished more severely because they were published online. These solutions greatly reduce the chilling effect of the law and are in line with international standards; an honest judiciary could no longer allow frivolous claims of libel through and issue severe punishments.

The argument that the current statutory construction is needed in order to protect people from damage and unwarranted attacks to their reputation is a nonstarter.<sup>401</sup> As evidenced throughout this Comment, the current construction comes at the painful expense of freedom of speech, particularly for members of the media and activists. The Philippines's current use of criminal libel is similar to authoritative governments like Russia. Modern international democracies do not use the troublesome provisions in Philippine libel to protect against defamation. Rather, the revised construction is internationally accepted and widely adopted. Thus, the Philippines should decriminalize and redefine its libel laws.

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398. *Disini*, 727 PHIL. REP. at 218–19.

399. *Id.*

400. *See e.g., UK Statute of Limitations*, *supra* note 161; *Kenya Statute of Limitations*, *supra* note 161.

401. *Santos*, CA-G.R. CR No. 44991, at 33.

## VII. CONCLUSION

The time for change is here and now. In a recent speech at the UN General Assembly, Bongbong stated:

For amidst challenging global tides, an important ballast stabilizes our common vessel. That is, our open, inclusive, and rules based international order that is governed by international law and informed by the principles of equity and of justice. As I have underscored, the Philippines shall continue to be a friend to all and an enemy of none.<sup>402</sup>

For far too long, the Philippines has been an enemy to human rights activists and members of the media.<sup>403</sup> Evidence of corruption, harassment, and free speech suppression is rampant.<sup>404</sup> Philippine libel law has notoriously been used to perpetuate such speech chilling, particularly with its problematic construction and criminal punishment.<sup>405</sup>

The criminal nature and erroneous provisions inherent in Philippine libel law have been denounced worldwide.<sup>406</sup> Further, international organizations have heavily criticized the Philippines for continuing to uphold its libel law and convicting reputable reporters, such as 2021 Nobel Peace Prize winner, Maria Ressa.<sup>407</sup>

In order to truly be a friend to all, to act in accordance with international order, and uphold the constitutionally protected right of free speech and due process, Philippine libel law should be decriminalized and redefined.

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402. *FULL: Bongbong Marcos speech at UN General Assembly (UNGA) |ANC, YOUTUBE*, at 1:10-1:41 (Sept. 20, 2022), <https://youtu.be/gxA6RhyJ3zA> [<https://perma.cc/L39L-MGN5>].

403. *See* OHCHR Report Philippines, *supra* note 333, ¶¶ 49–61.

404. *See id.*

405. *Disini*, 727 PHIL. REP. at 382–88.

406. UN General Comment 34, *supra* note 95, ¶ 47; 2002 Joint Declaration, *supra* note 98; 2010 Joint Declaration, *supra* note 98.

407. UN Expert, *supra* note 95; HRW UN Submission, *supra* note 287; IFJ Libel, *supra* note 289; RSF Ressa, *supra* note 289; World Press Freedom Index, *supra* note 358; Nobel Peace Prize, *supra* note 5.

