# The Conviction of Maria Ressa and the Unequal Enforcement of the Truth

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The cyber libel conviction of Maria Ressa and Reynaldo Santos Jr. by a regional trial court in Manila last week threw into sharp relief the manifestly different standards of accuracy enforced against citizens and the government. In a country presently governed by an administration that has allegedly been the source of widespread disinformation, private media and citizen reporters are subjected to ever stricter anti-falsehood laws. The case provokes to rethink private and state accountability for the spreading of falsehoods.

## The judgment

The criminal case against Maria A. Ressa, the CEO and executive editor of the Philippine news magazine Rappler, and Reynaldo Santos Jr., a former researcher and writer, originated from a complaint filed with the Department of Justice in 2017 by a businessman over an article that had been published on the magazine's website in May 2012. The article established a connection between him and then Chief Justice of the Supreme Court, Renato Corona, who was about to be found guilty in an impeachment trial for failure to disclose his assets. It quoted from an "intelligence report" according to which the businessman was under surveillance by state authorities for his alleged involvement in human trafficking, drug smuggling and a murder case. Santos Jr. was the author of the article.

It has been speculated, without evidence though, whether the businessman filed the rather late complaint on the request of the presidential office in order to intimidate Rappler. Whereas President Rodrigo Duterte denied knowing him, the businessman appears to have at least indirect connections. His construction firm built a large drug rehabilitation center inaugurated by the President, and his daughter received a presidential appointment as a member of the Philippine Commission on Women.

The verdict found Ressa and Santos Jr. guilty of cyber libel, based on Section 4(c)(4) of the Cybercrime Prevention Act (Republic Act No. 10175) which had entered into force in October 2012, more than four months after the publication of the article in question. Between October 2012 and February 2014, the Supreme Court suspended the implementation of the Act while reviewing its constitutionality. In the respective decision, *Disini Jr. v. Secretary of Justice* (2014), the Supreme Court found that Section 4(c)(4) is constitutional as far as it criminalizes the original author of a post, and unconstitutional with respect to others who receive a post and react to it.

One day after the Supreme Court's decision in *Disini*, Rappler updated the subject article on its website. Ressa and Santos Jr. argued in court that this was done only to correct a spelling mistake. The trial judge, however, found that the update constituted a republication so that the principle of non-retroactivity did not prevent application of the Cybercrime Prevention Act. In addition, the judge held that the offence had not yet prescribed even though libel under the Revised Penal Code (Articles 353–355) prescribes after one year. The judge argued that cyber libel under the Cybercrime Prevention Act was a new and separate crime to which the prescription periods for Special Acts under Act No. 3326 of 1926, predating the 1930 Revised Penal Code, applied. Thus, the prescription period jumped to twelve years. This interpretation seems problematic as the Supreme Court in *Disini* held that Section 4(c)(4) of the Cybercrime Prevention Act was "actually not a new crime (…) [but] merely affirms that online defamation constitutes 'similar means' for committing libel".

Regarding the elements of criminal libel, the judgment finds the article in question defamatory because official records did not show any criminal conviction or pending investigations under the businessman's name. The judge also found that both defendants had acted maliciously, Santos Jr. as the author and Ressa as Rappler's executive editor and CEO. As the prosecution had established a *prima facie* case and the defendants did not provide any evidence to prove that their allegations were in fact true, the judge sentenced them to the yet indeterminate penalty of imprisonment ranging from six months and one day as minimum to six years as maximum. In addition, they were ordered to pay damages to the businessman. Ressa and Santos Jr. said they will appeal the judgment.

## Free speech and defamation in Philippine law

Section 4, Article III of the Bill of Rights of the 1987 Constitution, in conjunction with the Philippine Supreme Court's jurisprudence, provides a protection of freedom of expression that is strikingly robust when compared to other Southeast Asian countries. Several decisions have emphasized the importance of a free press for the Philippine democracy. Libel cases have been a particular domain in which the Supreme Court has established important free speech standards that have extended privileges beyond the wording of the penal code, often with references to U.S. constitutional law.

Thus, in *Ayers Production Pty., Ltd. v. Capulong* (1988), the Supreme Court adopted the public official or public figure doctrine, according to which public personages cannot claim damages for defamatory falsehoods relating to their conduct unless they prove that the statement was made with actual malice. *Borjal v. Court of Appeals* (1999) treated fair commentaries on matters of public interest as privileged communication. Moreover, the decision in *Guingguing v. Court of Appeals* (2005) reiterated truth as a defense against libel charges and held that actual malice cannot be inferred from "mere error, inaccuracy or even falsity (…); there must be some room for misstatement of fact as well as for misjudgment. Only by giving them [the press] much leeway and tolerance can they courageously and effectively function as critical agencies in our democracy."

*Chavez v. Gonzales* (2008) entrenched the clear and present danger test for prior restraint of free speech in Philippine constitutional law. And the above-mentioned decision in *Disini* (2014) made it clear that, for actual malice to be established, an accused must in fact have entertained "serious doubts as to the truth of the statement he published. Gross or even extreme negligence is not sufficient".

The Supreme Court has thus developed a comprehensive constitutional framework for litigation involving defamation and free speech. The adjudication of libel charges by lower courts therefore takes place along the Supreme Court's guidelines. Nonetheless, the high-profile case against Maria Ressa, who is one of the strongest critics of President Duterte and the drug war, sheds additional light on the practice of adjudication as well as on the standards of accuracy that individuals must observe when making statements about others.

## The burden of proving the truth

After having found that the article's content was false and defamatory, the judgment turns to the question of malice – often the key question in defamation cases. As factual mistakes can occur, only publications with "ill will" trigger liability. The Philippine law on defamation distinguishes presumed malice in case the defamed person is a private person, and actual malice in case of public figures. While actual malice needs to be proved by the prosecution, presumed malice triggers a shift of the burden of proof to the defendant "if no good intention and justifiable motive" is shown and if it was not a "fair and true report, made in good faith" (Article 354 of the Revised Penal Code). Maria Ressa and Reynaldo Santos Jr. were found to have defamed a private businessperson. Thus, the presumption meant that they had to disprove malice. However, according to the judgment, "the defense miserably failed in this regard".

Presumed malice means for defendants that they ideally prove the truth of their statements. Though the proof of truth can by law only be a successful defense if

the matter "was published with good motives and for justifiable ends" (Article 361 of the Revised Penal Code), truth is generally a strong argument according to the Supreme Court in *Guingguing*. For the media, however, this proof would often involve disclosing research and sources, which is a potentially high price to pay – and a deep interference with press freedom. This has most likely also been the reason why Ressa and Santos Jr. "miserably failed" in this regard.

To resolve all doubts, however, the judgement holds that also actual malice had been proven in the trial. The ruling states that the article was published in reckless disregard of the truth, arguing that Santos Jr. did not contact the relevant authorities to verify the allegations made. In addition, the decision emphasizes that Rappler failed to publish a correction sought by the businessman.

## The government's monopoly on falsehoods

It is certainly possible that errors have been made during the research of the story in question. Maybe an article got published without proper prior verification of the facts. If so, the person concerned deserves protection of his personal reputation. Whether a punishment of up to six years imprisonment is a proportionate response is another question to be discussed elsewhere. More importantly, the case demonstrates the manifestly different standards of factual accuracy that apply to private individuals including the media, on the one hand, and governmental representatives, on the other.

In recent months and years, governments across Southeast Asia have created multiple anti-fake news laws to enforce factual accuracy on the internet. Malaysia, Singapore, Thailand and Vietnam are prominent examples where the duty to truthful communication has been entrenched in new laws. The fight against Covid-19 has triggered spikes of arrests and prosecutions in response to alleged spreads of false information. The Philippines enacted the "Bayanihan to Heal As One Act" (Republic Act No. 11469) in March, which gives the President emergency powers and creates an ad-hoc legal basis for criminal prosecutions against persons spreading fake news about the Covid-19 situation. A draft Anti-False Content Act is pending in the Philippine Senate.

The anti-fake news laws create new truth duties for the public on top of existing defamation legislation. Though the laws do not explicitly exempt state representatives from liability, there appears to be no known case of enforcement against any government official throughout the region. At the same time, political figures such as the President of the Philippines have not only personally spread falsehoods but allegedly even engaged internet trolls to do the job. A 2019 report from the Oxford Internet Institute found that all seven Southeast Asian countries under investigation have actively engaged in social media manipulation. Thus, whereas private individuals are held to ever higher standards of accuracy, governments in the region enjoy a virtual monopoly on falsehoods.

To be sure, online falsehoods can be a serious challenge to democratic discourse and personal reputation. But law enforcement's exclusive focus on private perpetrators appears increasingly misguided. The effects of government-sponsored fake news could be seen in Myanmar, to name a particularly grave example. The absence of any meaningful legal measures against governmental falsehoods is hardly reconcilable with the most basic tenet of the rule of law, according to which everyone, including the government, is under the law.

In the Philippines, spreading falsehoods is surely not among the impeachable offenses listed in Section 2, Article XI of the Constitution. In 2018, however, Senator Grace Poe introduced a bill to amend Republic Act No. 6713, otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees. The bill seeks to introduce the duty for all public officials "not to publish or disseminate, or cause to publish or disseminate, in their official and personal capacities, false news or information that shall erode the reliability, accuracy and truthfulness accorded by the public to the government". The bill is still pending further deliberation.

## Correcting the imbalance

In a "final note", the judgment against Ressa and Santos Jr. emphasizes in solemn words the importance of a free press while also pointing to its responsibilities. It even includes a reference to Nelson Mandela. Nonetheless, the case demonstrates how elaborated standards of truth are enforced against private individuals. This stands in sharp contrast to the lack of any similar implementation against governments.

Rappler and Maria Ressa have been internationally praised for their in-depth reporting, vigor and courage in an environment where journalists are facing a real risk of being killed. The Philippine President said that journalists are not exempted from assassination. Now, legal proceedings over a possibly false story threaten the magazine's executive editor. Besides, Ressa faces seven other criminal charges. At the same time, government-aligned fake news troll armies continue spreading falsehoods without accountability.

While the law on defamation fills whole libraries and is broadly enforced, the law on state-sponsored falsehoods is virtually nonexistent. There is limited hope that this imbalance will be corrected.

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