THE INHERENT DIFFICULTY OF ART: AN ANALYSIS OF ARTISTIC EXPRESSION AS A FUNDAMENTALLY PROTECTED RIGHT *

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Every idea is an incitement.
Justice Oliver Wendell Holmes, *dissenting*
in Gitlow v. People of New York,
268 U.S. 652.

Each piece of art begins with an idea emerging from the depths of the artist's psyche. It is a by-product of a creative process that initiates in the mind and is ultimately manifested in the artwork. A work of art is, therefore, necessarily an extension of its maker. As such, art is also fundamentally abstract—initiating from the metaphysical and later evolving into a physical expression perceivable by other people who, as a consequence of this act, form their own ideas, which may or may not agree with it. The beauty of art is that the mental process does not end with the artist's piece. Rather, from this physical portrayal, another train of thought centered on the metaphysical is triggered anew. This interplay between the concrete and the abstruse is what contributes to the mystique, as well as the immense difficulty of art as an object of judicial review.

When Justice Holmes and Justice Brandeis, two of the most progressive and learned members of the U.S. Supreme Court, dissented in the 1925 case of *Gitlow v. People of New York*, they acknowledged that ideas offer

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themselves to the public. Thus, there can be two possible reactions: *first,* for it to be believed (and thus acted upon), or *second,* that of disbelief (where some other belief outweighs it).[1] The latter is a consequence of what they labeled as "a failure of energy that stifles the movement at its birth."[2] In modern Philippine Constitutional parlance, this stifling act could be interpreted as prior restraint and to an extent subsequent punishment (insofar as it creates a chilling effect on others engaged in similar artistic endeavors). It is precisely this "stifling energy" that tends to smother rather than nurture the development of artistic ideas that the libertarian principles enshrined in Art. III of the 1987 Constitution seek to prevent—after all, "ideas are bulletproof."[3] It is with these in mind that one ought to approach the experience of *Kulô* when it was first displayed in the Cultural Center of the Philippines (CCP); the circumstances that led to its eventual withdrawal by the CCP's board in what can be considered as the perfect embodiment of "heckler's veto" at work.

Kulô and *Poleteismo*

In 2011, the CCP featured *Kulô*,[4] a group exhibition of 32 artists, which included the works of Mideo Cruz from the University of Santo Tomas (UST). Cruz's exhibit, entitled *Poleteismo*, quickly became the most controversial piece in the collection, eliciting harsh condemnation from Catholic and Christian groups, as well as a number of prominent politicians. The images incorporated in Cruz's *Poleteismo* were like kindling that fed the uproar following its display:

1. a wooden replica of a penis attached to the image of Jesus Christ, purporting to be a nose
2. a crucifix draped with a stretched out condom
3. juxtaposition of religious icons and posters of lingerie models
4. a statue of Christ vandalized with facial features purporting to resemble Mickey Mouse
5. a poster image of Christ with black ink, simulating tears[5]

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[1] Gitlow v. People of New York, 286 U.S. 652.

[2] *Id.*

[3] "V for Vendetta" (Released on 2005; produced by Joel Silver, Larry Wachowski, Andy Wachowski, and Grant Hill).

[4] Exhibition from June 17 to August 21, 2011, CCP Main Gallery.

[5] Carmela Lapeña & Jesse Edep, *CCP closes down gallery with controversial 'Kulo' exhibit*, GMA News Online, August 9, 2011, *available at* http://www.gmanetwork.com/news/

The entire exhibit itself is a collage of mixed-media, and though the unifying idea of these items includes the conjunction of Christ's image with phallic symbols, a significant space is also devoted to several facets of popular culture and their artistic disfigurations. Cruz has said that his work studies the worship of relics and explores the evolution of idolatry in modern culture.

The controversial images were not the central or core feature of the exhibit as the spectator is presented with a wide array of artworks and is hardly directed to a specific focal piece. Nevertheless, the presence of the aforementioned works caused religious groups and citizens' organizations to label the *Poleteismo* exhibit as "blasphemous" and "sacrilegious." Immense pressure was placed on the CCP Board to close down the exhibit as criticism of the contents of Cruz's grew significantly. The ensuing days would prove too much for the leadership of the CCP.

On August 2, some UST alumni visited the CCP, urging them to immediately close down the exhibit in 48 hours or otherwise face legal consequences.[6] On the same day another religious group, Pro-Life Philippines, sent a letter to the CCP and the artists involved demanding the same, giving August 4 as their deadline.[7] On August 4, unidentified vandals defaced several exhibits including Cruz's *Poleteismo.* Former First Lady Imelda Marcos, an incumbent member of the House of Representatives, found the exhibit offensive and appealed to the Board for its withdrawal.

Overwhelmed by the largely negative public response, the CCP management decided to close down the Main Gallery from the public on August 9, citing the multiple threats to persons and property.[8] Mideo Cruz and ten officials of the CCP were charged criminally by lay Catholic groups, citing as basis Article 201 of the Revised Penal Code on immoral doctrines, obscene publications and exhibitions and indecent shows.[9]

Concerned Artists of the Philippines and National Artist Bienvenido Lumbera, as well as several artistic groups from the University of the

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story/228841/news/nation/ccp-closes-down-gallery-with-controversial-kulo-exhibit (last accessed: July 17, 2012).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Kristine Alave, *CCP Execs Sued,* Inquirer.net, August 12, 2011, *available at* http://newsinfo.inquirer.net/40281/ccp-execs-sued (last accessed: July 17, 2012).

Philippines (U.P.), communicated their support for the artwork and protested against the exhibit's closure.[10] Curiously, there were reports that *Poleteismo* had in fact been shown publicly since 2002 in various galleries including universities such as U.P. and Ateneo.[11]

As a result of the brewing controversy, the Senate invited the artist and officials of the CCP in a legislative inquiry headed by Senator Edgardo Angara, Chairman of the Education, Arts and Culture committee.[12]

The debate that ensued in numerous legal, academic and religious circles was not insignificant. On one side, the majority, or those who cried foul at the obscenity and grave abuse of the freedom of expression considering the work an affront to their religious sensibilities; on the other side, the minority, who decried how the narrow-minded view of the mob had smothered these freedoms, especially that of artistic expression.

It is with the foregoing factual antecedents that this paper endeavors to extract the root cause of the difficulty that surrounds the controversy's main focus: art. It is the author's submission that art in itself is ambiguous, complex, and ultimately impossible to examine in a vacuum as an isolated phenomenon. In *no way* can art be examined objectively or at a distance. Thus, there is no such thing as a neutral judge, perched atop his ivory tower, applying the law as a detached and impartial magistrate would. Art, by its very nature, reduces him to an individual-molded by the social norms that he was brought up with and influenced by his experiences.

I. LEGALLY PROTECTED RIGHTS TO FREE SPEECH AND THE FREEDOM OF EXPRESSION

This is True liberty, when free born men
Having to advise the public may speak free
Which he who can, and will, deserves high praise.

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[10] Julie Aurelio, *Artists protest Censorship*, INQUIRER.NET, August 12, 2011, *available at* http://newsinfo.inquirer.net/40285/artists-protest-censorship (last accessed: July 17, 2012).

[11] *Supra* note 5.

[12] David Dizon, *Mideo snubs Senate probe, risks Subpoena*, ABS-CBN News, August 16, 2011, *available at* http://beta.abs-cbnnews.com/nation/08/16/11/mideo-cruz-absent-senate-probe (last accessed: July 17, 2012).

Who neither can, nor will, may hold his peace;
What can be juster in a State than this?

Euripid[13]

A. Freedom of Speech and Expression Protection in the Philippine Democratic Context

No less than the fundamental law of the land declares the significance of this right, as Section 4 of the Bill of Rights of the 1987 Constitution states that "[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."[14]

The Bill of Rights is a declaration of largely broad normative rules that the Drafters of the Constitution deemed of utmost importance, according upon the rights therein enumerated the status of considerable significance. The right to free speech and freedom of expression are, in the hierarchy of rights, given an even higher rank. As aptly stated by Justice Carpio in his dissenting opinion in the fairly recent case of *Soriano v. Laguardia*, "[a]ll of the protections expressed in the Bill of Rights are important, but the courts have accorded to free speech the status of a preferred freedom."[15]

It is worthy to note that the Philippine Supreme Court was one of the first to ever rule on the freedom of speech, preceding its American counterpart by more than three decades. The Court speaking through Justice Malcolm in *U.S. v. Bustos*[16] in 1918 held that though libel may be beyond the ambit of constitutional protection, courts in the exercise of their mandate to ascertain whether the elements of such an offense are attendant, should be "ever mindful that no violation of the right of freedom of expression is allowable."[17]

The importance of protecting this freedom becomes all the more evident in light of libertarian democratic principles. Historically, democracy

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[13] Euripid *cited in* JOHN MILTON, AREOPAGITICA 1 (1918).

[14] CONST. art. III, § 4.

[15] Soriano v. Laguardia, G.R. No. 164785, 615 SCRA 268 (2010) (Carpio, J. *Dissenting*)

[16] G.R. L-12592, 37 Phil 731 (1918).

[17] Gonzalez v. Kalaw Katigbak, G.R. No. L-69500, 137 SCRA 717 (1985) *citing* U.S. v. Bustos, G.R. L-12592, 37 Phil 731 (1918).

has, both as an ideological construct and a system of government, survived and outlived almost all other forms of government—to the point that some scholars in political discourse have already heralded its "triumph."

This is largely attributable to the legitimacy that the system derives from its constituents. Thus there exists a *quid pro quo* between democracy and the individual. Democracies give primacy to the fortification of the individual's rights and in return the individual bestows legitimacy in the democratic government, bridging the divide between the ideological and the practical.

In the discourse on democratic legitimacy vis-à-vis the guarantees of free speech in the legal academe, scholars have acknowledged the merits of this "bridge." Ward identifies three most prominent claims in guaranteeing free speech:

> The *first claim* assumes that guarantees of free speech are a condition of political legitimacy, because they ensure that the government treats citizens with the respect that human beings deserve. A *second claim* conditions political legitimacy on benefits citizens receive when the government guarantees free speech. It contends that these benefits compensate for any coercion suffered through the exercise of governmental authority. *Guarantees of free speech allow citizens to accept political authority.* They ensure that citizens have a tighter rein on their representatives, and they contribute to a political environment that enhances citizens' deliberations about particular interests. A *third claim* bases legitimacy on citizens' desire to strengthen their character, a desire that citizens express when they endorse principles of free speech. (emphasis supplied)[18]

In the protection of the fundamental right to free speech, the enrichment of ideas through diversity should always be preferred to censorship. Thus, the ubiquitously quoted ambition of fostering the proverbial "marketplace of ideas" is not entirely alien to the idea of protecting free speech as in fact the former is the endeavored result of the latter.

In socio-democratic thought, the ideal sought for is the recognition that the minority is as important as the majority, i.e. the idea of power being singly held by a dictator or an elite few, as in an oligarchy, is just as abhorrent as government by a tyrannous majority swayed by the rule of the mob. To

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[18] Kenneth Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies involving Flag-burning and Hate Speech,* 52 U. MIAMI L. REV. 733, 736 (1998).

paraphrase one scholar, the very essence of freedom is not found in protecting simply the minority that wants to talk, but more importantly, by limiting the abuse of rights by the majority that refuses to listen.[19]

Democratic governments are mandated by the very social contracts in which they are grounded to develop a veritable cesspool of diverse thought, one that the government may itself participate in. While governments are not given a free hand to influence public debate by suppressing private speech, it is allowed to participate in the marketplace of ideas and to voice its own point of view in that marketplace in order to influence the course of public debate.[20] Furthermore, Ward adds that this may also constitute a check on governmental power in that:

> Free speech checks governmental power: *It ensures that representatives direct their energy toward advancing the public good rather than particular interests.* It also forces representatives to consider their constituents' particular interests as well as their own. Thus, *free speech is a precondition for legitimate democratic government.* It advances a collective interest in promoting good legislation. Representatives will perform better if they must strive to satisfy the expectations of informed.[21] (emphasis supplied)

A democratic government that places paramount importance in affirming its liberal as well libertarian character towards freedom of expression and speech has a stronger claim of legitimacy. Indeed the pedestal in which the freedom of expression is placed in Philippine law comes from the fact that it is integral to the exercise of almost every other right.[22]

B. Freedom of Speech and Expression as Protected in International Law

Under international law the rights to freedom of expression is fundamentally guaranteed by the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights

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[19] *See* Chafee on Freedom and Speech 1955 p 13-14 *quoted in* Philippine Blooming Mills Employees v. Philippine Blooming Mills, G.R. No. L-21223, 51 SCRA 189 (1973)

[20] John Taylor, *Tinker and Viewpoint Discrimination,* 77 UMKC L. REV. 569, 62 (2009).

[21] *Supra* note 18.

[22] *Supra* note 15.

(ICCPR).[23] The UDHR, unlike the ICCPR, is a non-binding document, however, it has already attained the status of custom and, as a consequence of customary international law, largely been accepted by states. The duty of the Philippine Government becomes all the more vital since it has signed and ratified the ICCPR. Article 19 states:

> 2. Everyone shall have *the right to freedom of expression*; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, *in the form of art,* or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. *It may therefore be subject to certain restrictions*, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[24] (emphasis supplied)

By virtue of the Incorporation clause in the Constitution, this mandated duty becomes glaring, hence:

> *Section 2.* The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations. (emphasis supplied).[25]

It is beyond cavil therefore that the right to express one's self freely finds protection in both the international and local realms. Thus in the ICCPR, the only ground for validly restricting the right is solely when there is legislative fiat necessary to respect the rights or reputations of others or to protect national security or public order.[26]

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[23] Rebecca Dobras, *Is The United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws* 37 GA. J. INT'L & COMP. L. 339 (2009).

[24] International Covenant on Civil and Political Rights, art. 19 (Dec. 16, 1966).

[25] CONST. art. II, § 2.

[26] *Supra* note 24.

Undeniably, there are, in the Philippine context, sufficient safeguards present in both international and domestic realms for the protection of these fundamental rights. The question that arises is: why, then, is there such an immense difficulty when it comes to legally dealing with art, specifically, those works that offend the religious sense? Why have not the laws or the courts been able to appease the growing divisiveness between those proponents and opponents of censorship with such effectiveness as in common legal issues?

II. THE UNIQUENESS OF ART[27]

The dilemma with the protection of art as free speech stems from its very fluid and often arbitrary nature, exacerbated by the lack of one truly legal standard of what art is. What is art at one period in history may not be so in the next. Consequently, what was considered lewd, offensive, and obscene in the past would probably not have been as appalling at present. To compare, for instance, the social mores that governed Elizabethan society and that which now pervades modern day England would be an amusing, if not comical, exercise. The perception of art changes through time. Justice Sarmiento writes:

> What shocked our forebears, say, five decades ago, is not necessarily repulsive to the present generation. James Joyce and D.H. Lawrence were censored in the thirties yet their works are considered important literature today. Goya's *La Maja desnuda* was once banned from public exhibition but now adorns the world's most prestigious museums. [28]

The morality that governs one era is not necessarily carried on to the next as the significant socio-political changes which that particular age undergoes affect not just socio-political structure, but more importantly, the social mindset. Had the Renaissance in Medieval Europe, or the French and American Revolutions, never happened, one could surmise that present norms of perception would be drastically different. Time is determinative of the morals that dominate society.

The social dictates of the modern era are so radically different now that the evolution of art has reached a level where the effect on the viewer is given as much importance as the aesthetic content. Shock is increasingly being

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[27] Edward J. Eberle, *Art as Speech* 11 U. PA. J. L. & SOC. CHANGE 1,3 (2007).

[28] Pita v. Court of Appeals, G.R. No. 80806, 178 SCRA 362 (1989).

considered a legitimate response to an artwork in more progressive societies. In New York, for instance, an emerging strain of burlesque—unofficially labeled *noveau* burlesque—mixes sexual shock value with certain elements of burlesque.[29] It is amusing to note that burlesque itself had undergone a redemption of sorts, being viewed now as an art form—a variation of dance—and a far cry from its roots as adult entertainment. Author Salman Rushdie describes it perfectly when he said that "[o]nce the new was shocking, not because it set out to shock, but because it set out to be new. Now, all too often, the shock *is* the new. And *shock, in our jaded culture, wears off easily.*"[30] Rushdie himself is not unfamiliar with the effects of offensive art—once being the subject of a *fatwa* for earning the ire of fundamentalist Muslims for his work.

Then there is always that all-encompassing phrase of "art for art's sake." At the socio-political level of analysis, art, in itself, already poses a distinct dilemma. This becomes all the more problematic at the level of legal scrutiny as the latter is generally confined to the rigid interpretation of the law; in fact, where the letter of the law is unambiguous and categorical, the answer is inevitable if not perfunctory—apply the law, no matter how harsh. *Dura lex sed lex.* This rigidity juxtaposed with the volatility that characterizes art leads to the conundrum that courts are faced with when dealing with this subject matter. Eberle, in discussing on the "uniqueness" of art as approached from a legal perspective, pinpoints these varying unique traits, thus:

> First, art is special because it partakes of the creative process central and unique to human existence. Second, art provides an avenue to dimensions of human life *less accessible by ordinary rational or cognitive processes.* Art is a portal to nonrational, non-cognitive, nondiscursive dimensions to human life, offering a fuller conception of the human person. Third, *art functions as a private sphere of freedom not subject or susceptible, on the whole, to the normal rules of society.*[31] (emphases supplied)

The law, for it to be an efficient mechanism for stability, must itself be stable, i.e., it must possess a certain sense of consistency relinquished only in instances where a grave injustice may result. Hence principles such as *stare decisis et non*

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[29] Joe E. Jeffreys, *Transfixed by Rosewood*, NEBULA, *available at* http://nobleworld.biz/rosewood.html (last accessed: July 17, 2012).

[30] LuAnn Bishop, *Writer Salman Rushdie ponders the effect of fear on free societies in this 'frontier time'*, Yale Bulletin & Calendar, March 8, 2002, *available at* http://www.yale.edu/opa/arc-ybc/v30.n21/story2.html (last accessed: July 17, 2012).

[31] *Supra* note 27.

quieta movere and *res judicata* are considered hornbook law doctrines that warrant compliance. Herein lies the fundamental dilemma of analyzing art as a constitutionally protected fundamental right—it is not stable. Law and jurisprudence cannot keep up with the constant state of flux that the artistic realm is in—to adapt to it with an equal pace is impossible to do. Moreover, usual constraints on the power of judicial review, such as the presence of a valid case or controversy and the political question doctrine, can work against progressive development in the law as judges are more likely to engage in judicial restraint than be chastised for engaging in judicial activism. Stated otherwise, the judiciary's hands are tied.

A Conundrum Compounded: Religiously Offensive Art and Judicial Review

Speaking again of the trend among modern artists to see shock as a legitimate reaction to art form, Rushdie notes: "[s]o the artist who seeks to shock must try harder and harder, must go further and further, and this escalation may now have become the worst kind of artistic self-indulgence."[32] Indeed the limit of social tolerance of what is to be considered offensive has never been stretched by any other sector of society. That these artists have offended, however, does not remove them from the ambit of the Constitution's protective mantle for the law values the freedom not just "for those that agree with us but freedom for the thought that we hate."[33] This is the very essence of democracy.

It is in the "creative" step, from the mere aesthetically offensive form of artistic expression to the much more controversial "morally offensive," or so called "blasphemous" art, that the difficulty in legal analysis is aggravated. Present in the *Kulô* situation are the ingredients for the perfect storm: *art* and *religion*. There is, consequently, a compounding of complexities as the judge is now not only asked to determine what is acceptable as a legitimate form of art, he is also required to take into context whether it is not also offensive to the moral sentiments of the religious—a circuitous exercise, as what may be blasphemous for one may not be so for another. This two-pronged dilemma is not confined solely to the theoretical; rather it also has serious legal, as well as

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[32] *Supra* note 30.

[33] Raul C. Pangalangan, *Freedom for the Thought We Hate*, INQUIRER.NET, August 11, 2011, *available at* http://opinion.inquirer.net/9801/%E2%80%98freedom-for-the-thought-we-hate%E2%80%99 (last accessed: July 17, 2012).

socio-democratic repercussions. Should the judiciary undertake this "task," it would be establishing a legal standard of what is to be deemed "religiously offensive," one that forms part of the laws of the land. By coming up with such ruling, the Supreme Court would effectively be promulgating a blasphemy law—an indirect circumvention of and affront to the democratic principle of separation between Church and State.

The dearth of rulings by the Supreme Court on what could be considered religiously offensive artistic expression contributes significantly to the analytical predicament previously discussed. As of writing, there has yet to be a ruling that squarely addresses the issue of what could be considered religiously offensive. Perhaps the closest that the Court got to coming up with a standard is in obscenity cases, although the analysis is confined only to the level of the aesthetic, and does not really delve deeper into what is morally and religiously offensive. The struggle that the Court faced in coming up with a satisfactory formulation of what to consider obscene is readily apparent in its pronouncements. One could note, rather amusingly, the language in which the Justices themselves expressed their frustration in the absence of a clear-cut standard for obscenity.

The earliest word on the matter was laid down by no less than Justice Malcolm himself nearly a century ago in the case of *People v. Kottinger*[34] decided in 1923 where obscenity was defined as that which is offensive to chastity, decency or delicacy. The test to determine obscenity is "whether the tendency of the matter charged as obscene, is to deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication or other article charged as being obscene may fall."[35] Another test laid down by the same case is where it is "that which shocks the ordinary and common sense of men as an indecency."[36] Furthermore, *Kottinger* was careful in adding that whether the picture there was to be considered obscene or not would depend: 1) on the circumstances of the case; and 2) on the aggregate sense of the community reached by it.[37]

A few decades after, the Court once again had opportunity to pass upon the issue in the cases of *People v. Go Pin*[38] decided in 1955, and *People v.*

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[34] G.R. No. L-20569, 45 Phil. 352 (1923).

[35] *Id.* at 356.

[36] *Id.* at 356-357.

[37] *Id.* at 357-359.

[38] G.R. No. L-7491, 97 Phil. 418 (1955).

Padan,[39] decided in 1957. Both cases dealt with prosecutions involving Article 201 of the Revised Penal Code[40] targeting the authors, publishers and sellers of obscene publications. The tests prescribed therein were, unfortunately, of little help in narrowing down the general rules set by *Kottinger.*

In *Go Pin* the Court made the purpose for which the pictures were being shown as determinative of obscenity, holding that:

> If such pictures, sculptures and paintings are shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed. However, the pictures here in question were used not exactly for art's sake but rather for commercial purposes. In other words, the supposed artistic qualities of said pictures were being commercialized so that the cause of art was of secondary or minor importance. Gain and profit would appear to have been the main, if not the exclusive consideration in their exhibition.[41]

Padan reiterated the standard set by *Go Pin*, supplementing it with the "redeeming feature" element, thus:

> [A]n actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room

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[39] G.R. No. L-7295, 101 Phil. 749 (1957).

[40] REV. PEN. CODE, art. 201, as amended by Pres. Dec. Nos. 960 and 969, provides: *Immoral doctrines, obscene publications and exhibitions and indecent shows.* — The penalty of prision mayor or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:

(1) Those who shall publicly expound or proclaim doctrines openly contrary to public morals;

(2) (a) the authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same;

(b) Those who, in theaters, fairs, cinematographs or any other place, exhibit, indecent or immoral plays, scenes, acts or shows, whether live or in film, which are prescribed by virtue hereof, shall include those which (1) glorify criminals or condone crimes; (2) serve no other purpose but to satisfy the market for violence, lust or pornography; (3) offend any race or religion; (4) tend to abet traffic in and use of prohibited drugs; and (5) are contrary to law, public order, morals, and good customs, established policies, lawful orders, decrees and edicts;

(3) Those who shall sell, give away or exhibit films, prints, engravings, sculpture or literature which are offensive to morals.

[41] *Supra* note 38 at 419.

> for art. One can see nothing in it but clear and unmitigated obscenity, indecency, and an offense to public morals, inspiring and causing as it does, nothing but lust and lewdness, and exerting a corrupting influence specially on the youth of the land.[42]

The 1985 case of *Gonzales v. Kalaw Katigbak*[43] applied the "contemporary community standards" of *Kottinger,* but was distinct from the rulings of *Kottinger, Go Pin,* and *Padan* in that the Court examined obscenity in terms of the "dominant theme" of the material taken as a "whole" rather than its isolated passages. The test then was "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest."[44]

The Court's 1989 decision in *Pita v. Court of Appeals*[45] involving alleged pornographic publications acknowledged *Kottinger's* failure to come up with a definition of obscenity. In the words of Justice Sarmiento:

> *Kottinger*, in its effort to arrive at a "conclusive" definition, succeeded merely in generalizing a problem that has grown increasingly complex over the years. Precisely, the question is: When does a publication *have* a corrupting tendency, or when can it be said to be offensive to human sensibilities? And obviously, it is to beg the question to say that a piece of literature has a corrupting influence *because* it is obscene, and *vice-versa*.[46]

He correctly pointed out the inherent flaws of the standards also set in *Padan* and *Go Pin*, thus:

> *Padan y Alova*, like *Go Pin*, however, raised more questions than answers. For one thing, if the exhibition was attended by "artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes," could the same legitimately lay claim to "art[?"] For another, suppose that the exhibition was so presented that "connoisseurs of [art], and painters

[42] *Supra* note 39 at 752.

[43] 137 SCRA 717 (1985).

[44] *See* Fernando v. Court of Appeals, G.R. No. 159751, 510 SCRA 351 (2006) *citing* People v. Kottinger, 45 Phil. 352 (1923), Gonzales v. Kalaw Katigbak, 137 SCRA 717 (1985), People v. Go Pin, 97 Phil. 418 (1955) and People v. Padan, 101 Phil. 749 (1957). *See also* Pita v CA G.R. No. 80806, 178 SCRA 362 (1989).

[45] G.R. No. 80806, 178 SCRA 362 (1989).

[46] *Id.* at 369.

> and sculptors might find inspiration," in it, would it cease to be a case of obscenity?
>
> *Padan y Alova*, like *Go Pin* also leaves too much latitude for judicial arbitrament, which has permitted an *ad lib* of Ideas and "two cents- worths" among judges as to what is obscene and what is art.[47]

Interestingly, the Court in *Pita* does not proceed to come up with its own definition or standard of obscenity. Rather, it resorts to the clear and present danger rule to address the issue of whether State interference was warranted. The Court's attitude in *Pita*, tending towards an avoidance of its task of procuring a sufficient standard for obscenity, was reiterated, if not immortalized in the 2006 case of *Fernando v. Court of Appeals*.[48] Justice Quisumbing echoed perfectly Justice Sarmiento's sentiment pointing to this difficulty, *viz*:

> The Court in *Pita* also emphasized the difficulty of the question and pointed out how hazy jurisprudence is on obscenity and how jurisprudence actually failed to settle questions on the matter. Significantly, the dynamism of human civilization does not help at all. It is evident that individual tastes develop, adapt to wide-ranging influences, and keep in step with the rapid advance of civilization. *It seems futile at this point to formulate a perfect definition of obscenity that shall apply in all cases.*[49] (emphasis supplied)

At this point it would be helpful to engage in a hypothetical situation where, by some chance, a case as divisive and furor-inducing as the one involving the *Kulô* exhibit at the CCP is brought before the Supreme Court. One can only imagine the proceedings in the deliberations among the justices themselves after the termination of oral arguments. It would not be farfetched to surmise that the ostensibly united Court will be reduced to war between beliefs. The oft-quoted truism that the life of the law is experience comes to fore, as Justices will be forced to make very personal choices based on their internal biases, for few questions can be as discordant as: what is art, and when is it protected by the Constitution?

The typical response of any judge, practitioner, professor or student of the law to the latter question would be to automatically trigger the "clear and

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[47] *Id.* at 370.

[48] G.R. No. 159751, 510 SCRA 351 (2006).

[49] *Id.* at 360.

present danger test" so prolifically reiterated by the Supreme Court whenever faced with cases of this nature. Hence, in constitutional parlance, limitation on the fundamental freedom is warranted where they are "of such a nature as to create a clear and present danger that they will bring about the substantive evils that the lawmaker has a right to prevent."[50] This would seem the constitutionally sound response to the legal with which it is faced. However, taking the analysis a step further, it is can be said that there is really no concrete risk of harm to individuals or society that art poses.[51] Frankly, the only "danger" incurred is simply observation of the messages that the piece attempts to convey[52]—a message that is in essence the very form of free speech that the Constitution seeks to protect. There consequently arises the question as to whether the application of the clear and present danger rule would be proper in cases involving religiously offensive art.[53]

CONCLUSION

It cannot be gainsaid that the 1987 Constitution, in its Bill of Rights, accords rights to free speech and expression the status of "preferred freedoms." However, there persists a dilemma in dealing with such freedoms when analyzed vis-à-vis the concept of art. This inherent difficulty is based on the innate nature of art as an essentially abstract concept, and on the inadequacy of the law to adapt to this nature. The Courts are thus rendered helpless.

In coming up with a decision on a burning issue such as whether or not to uphold the censorship of blasphemous or religiously offensive art, courts are left in deciding which of two social desires would be given primacy over the other. Thus the judicial dilemma that arises in the legal analysis of art brings back the oft-quoted truism of Justice Holmes' that the life of the law is experience. This is true also for his conception of the fallacy of logical form, since by its very essence the artistic problem cannot be limited to the confines of legal syllogism. Rather it is one that necessitates the drawing of biases from

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[50] Eastern Broadcasting Corporation v. Dans, Jr., G.R. No. L-59329, 137 SCRA 628 *cited in* Soriano v. Laguardia, G.R. No. 164785, 615 SCRA 268 (Carpio, J. *Dissenting*).

[51] *Supra* note 27.

[52] *Id.*

[53] *See* BERNAS, CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS: NOTES AND CASES, PART II, 406(2004). Bernas raises the question of whether the application of the clear and present danger rule by the Court in *Pita v. Court of Appeals* was proper.

the well that is the judge's mind. Thus, he or she does not decide in an intellectual vacuum but is affected by internal as well as external factors. In this matter there is *no Supreme Court, only the Supreme Court Justice.*

To quote Eberle:

> The absence of a convincing theory for the status of art speech as protected speech likely leads to the form's underestimation. Art speech is often not valued for the uniqueness and worth it possesses. For example, art can appeal to sensory, subliminal, emotional or other non-cognitive dimensions of human life, instilling inspiration, rapture or disgust. Art can be beautiful or ugly. Or art can be soothing or arresting. But these qualities of art can be missed when no solid rubric exists upon which to evaluate art speech as protected speech because it is art.[54]

If the Supreme Court has seemingly given up on establishing a steadfast legal standard as regards obscenity (as shown in *Pita* and *Fernando*), all the more will it wilt if faced with the daunting, if not impossible, task of establishing one for religiously offensive art. There is again that two-pronged difficulty of analyzing religion and art within purely legal strictures; the complexity of art entrenched in its very essence and nature, aggravated by religious sentiment, which is also, in and of itself, a separate complication altogether. *There exists, therefore, similarity between the beholder and the believer*; that he adheres to the message of the medium, be it art or religion, is ultimately something that cannot be taken from him, an act or choice that is entirely personal; and it is this quintessential freedom that democracy protects from encroachment by the overbearing majority.

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[54] *Supra* note 27.