OF ART, FREEDOM AND *POLETEISMO*[*]

Earla Kahlila Mikhaila C. Langit[**]

> *...[B]ut if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.*[1]
>
> – Justice Oliver Wendell Holmes,
> *Dissenting opinion* in U.S. v. Schwimmer,
> 279 U.S. 644.

Art is a form of expression. As such, it is constitutionally protected and anything that stultifies it is proscribed. But do all art and other modes of expression, even as they make a mockery of religious symbols, fallabsolutely within the purview of the protection of freedom of speech and expression? What then is the limit of the constitutional guarantee of freedom of speech and expression in relation to the freedom to exercise religion? This article seeks to answer this fundamental question, drawing from the brouhaha caused by the *Kulô* art exhibit in the Cultural Center of the Philippines (CCP).[2]

The first part of this article will outline the basic facts from which the controversy arose and the reactions this issue elicited. It follows with a narration of jurisprudence recognizing the right to freedom ofspeech and

---

[*] *Cite as* Earla Kahlila Mikhaila Langit, Feature, *Of Art, Freedom and Poleteismo*, 86 PHIL. L. J 988, (page cited) (2012). This article is the article submitted to the PLJ Editorial Board qualifying examinations last August 2011, with some minor changes.

[**] Vice-Chairman, PHILIPPINE LAW JOURNAL Vol. 86; J.D., University of the Philippines (2012); B.A. Public Administration, University of the Philippines (2007). Ms. Langit is a firm believer in Jesus Christ as the only way, the truth and the life, but takes on a liberal view on controversial matters concerning religion. She believes that there is a better way to combat the growing immorality in the world today and resorting to censorship and vociferous protest would only result in making Christianity obnoxious to others.

[1] U.S. v. Schwimmer, 279 U.S. 644 (1929) (Holmes J., *Dissenting*).

[2] Genalyn Kabiling& Hannah Torregoza, *Blasphemous art exhibit closed down*, MANILA BULLETIN NEWSPAPER ONLINE, Aug. 15, 2011 *available at* http://www.mb.com.ph/articles/330082/aquino-pleased-with-closure-alleged-blasphemous-art-exhibit (date last visited: May 24, 2012).

expression and the parameters by which speech is adjudged to fall within the ambit of legal protection.

The next part of this paper will endeavour to apply these jurisprudential tests in relation to the alleged offensive art. Using the result of this analysis, it will build on the thesis that, art, even in its multifarious and eccentric forms, as a form of speech and expression, enjoys a preferred freedom that may only be defeated after passing a regimen of strict scrutiny test. Rather than condemning the author and censuring the same, this form of expressions should be cultivated to test the ideas and ideologies, which the society, since time immemorial, has forced on us to treat as moral and sensible.

What Happened?

In commemoration of Jose Rizal's 150th birthday, the CCP held an art exhibit called *Kulô* to honor and showcase the works of Filipino artists. Among those included in the exhibit were *Poleteismo*, a series of art works created by Mideo Cruz, which started the whole controversy.

The members of the Catholic community took immediate action in rallying support for their cause in removing the alleged sacrilegious and perverse art. They found the *Poleteismo* particularly degrading and offensive to their religious feelings due to the insulting treatment and the shocking disrespect with which the art used the images of the cross, Jesus Christ, and the Virgin Mary.[3]Senator Jinggoy Estrada manifested his support with uncharacteristic alacrity in a privilege speech delivered before the Senate, lambasting the officials of CCP for allowing the art to be exhibited in that forum.Following this, more members of the Congress joined the fray and even threatened to cut the budget of CCP, while the President opted to reprimand its Board Members. The Catholic church and its lawyers reacted by filing suits against Cruz and the CCP Board Members for allegedly offending religion.[4] Others similarly affronted resorted to vandalism and continuous threats of violence against the CCP.[5]

---

[3] *Id.*

[4] Marlon Anthony Tonson, *CCP officials, artist dragged to court for 'offensive' art*, GMA NEWS ONLINE, Aug. 15, 2011, *available at* http://www.gmanews.tv/story/229203/nation/catholic-lawyers-make-good-on-threat-to-drag-kul-to-court (date last visited: May 24, 2012).

[5] *Id.*

On the other side of the spectrum, the CCP, in its press statement claimed that even as the art works initially offended some of their members, it forced them to pause and think critically of how the purported message affects the psyche:

> Even among us in the art world, many were offended when we first viewed *Poleteismo*. But it served as an awakening. It roused our senses, challenged us to take a deeper look, woke us up to a less innocent world: What is the artist trying to say? Why am I reacting this way? Should I be angry? Or should I be more introspective? Should I judge the art work for what I see on the surface or should I try to understand what it is doing to affect me?[6]

In support of Cruz, the CCP, and the larger area of protecting freedom of speech and expression, law professors like Dean Raul Pangalangan and Prof. Florin Hilbay of the University of the Philippines College of Law expressed the view that since the artwork falls within the area of protected freedom of speech, it is incorrect to claim that a material ought to be censured by the mere fact that people find it offensive. There is similarly neither rhyme nor reason in claiming that exhibiting irreligious art offends against religious neutrality, for the same line of argumentation would necessarily follow in displaying a religious art.[7]

Freedom of speech as constitutionally-protected right

The Philippine Constitution provides that no law shall be passed abridging the freedom of speech, of expression, or of the press.[8] It further provides that the State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture *based on the principle of unity in diversity in a climate of free artistic and intellectual expression.*[9](emphasis supplied)

---

[6] Chris Millado, *Statement of CCP exec on controversial art exhibit*, Aug. 16, 2011, *available at*http://www.gmanews.tv/story/229244/nation/statement-of-ccp-exec-on-controversial-art-exhibit(date last visited: May 24, 2012). Millado is the Vice-President and Artistic Director of the CCP.

[7] Raul Pangalangan, *Passion for Reason: 'Freedom for the thought we hate'*, Aug. 16, 2011, *available at* http://opinion.inquirer.net/9801/%E2%80%98freedom-for-the-thought-we-hate%E2%80%99(date last visited: May 24, 2012).

[8] CONST. art.II, § 4.

[9] CONST. art.XIV, § 14.

In areas of protected freedom, it is axiomatic that a regulation that limits the enjoyment of the protection may only be sustained after passing through a strict scrutiny test. This is in recognition of the people's constitutionally-protected right and the myriad of possibilities by which this right is susceptible to curtailment. Thus courts have been increasingly adamant in defending the vanguards of free speech and expression and in preventing a chilling effect on the free intercourse of debates.

In judging whether a state regulation infringes on the protected area of speech, jurisprudence provides various tests by which this matter may be judged. The first of these tests provides that the regulation must only relate to the time, place and manner of expression and not specifically on the message or content conveyed. Thus, using this test, the court has held that the requirement of a permit to hold a rally is a permissible state regulation within the police power of the State:

> The right to freedom of speech, and to peacefully assemble and petition the government for redress of grievances, are fundamental personal rights of the people recognized and guaranteed by the constitutions of democratic countries. But it is a settled principle growing out of the nature of well-ordered civil societies that the exercise of *those rights is not absolute for it may be so regulated that it shall not be injurious to the equal enjoyment of others having equal rights, nor injurious to the rights of the community or society.* The power to regulate the exercise of such and other constitutional rights is termed the sovereign "police power."[10] (emphasis supplied)

In *Hill v. Colorado*, the US Supreme Court held that a regulation prohibiting a person from knowingly approaching within eight feet of another person near a health care facility without the latter's consent is a valid time, place and manner regulation.[11]Nor is this practice a prior restraint on speech since the regulation was aimed at those who give leaflets, counsels or advice to persons near a health care facility without regard to the content of their speech. There was thus no restraint on a particular kind of message that would justifiably offend the areas of protection.[12]

---

[10] Primicias v. Fugoso, G.R. No. 1800, 80 Phil. 75, Jan. 27, 1948.

[11] 530 U.S. 703 (2000).

[12] *Id.*

The clear and present danger test is another tool by which the court determines whether a certain speech is constitutionally-protected. This involves determining whether the speech sought to be prevented presents a clear and present danger of an evil of a substantive character that the State has a right to prevent.

In *Navarro v. Villegas*,[13] the Court opined that the decision of the Mayor of Manila to permit the holding of a rally in the Sunken Gardens as an alternative to Plaza Miranda is a permissible State regulation in light of the clear and present danger that assemblies such as the one sought to be held by petitioners in the case, inevitably brings:

> [E]xperiences in connection with present assemblies and demonstrations do not warrant the Court's disbelieving respondent Mayor's appraisal that a public rally at Plaza Miranda, as compared to one at the Sunken Gardens as he suggested, *poses a clearer and more imminent danger of public disorders, breaches of the peace, criminal acts, and even bloodshed as an aftermath of such assemblies*, and petitioner has manifested that it has no means of preventing such disorders;
>
> That, consequently, every time that such assemblies are announced, the community is placed in such a state of fear and tension that offices are closed early and employees dismissed, storefronts boarded up, classes suspended, and transportation disrupted, to the general detriment of the public.[14] (emphasis supplied)

Accordingly, the petitioners in *Navarro* failed to show that no undue risks will be caused by the holding of the rally in Plaza Miranda. On the other hand, the court justified the grant of a permit to supporters of the anti-American Military Bases near the United States Embassy in Manila, absent a clear showing of a clear and present danger that may result with the planned activity.[15]

The overbreadth doctrine and the vagueness test are also employed by the court in ascertaining whether a state regulation governingspeech is already constitutionally-proscribed. In applying the overbreadth doctrine, the court is tasked to scrutinize the regulation and determine whether it invariably covers

---

[13] G.R. No. 31687, 31 SCRA 731, Feb. 26, 1970.

[14] *Id.* at 731-732.

[15] Reyes v. Bagatsing, G.R. No. 65366, 125 SCRA 553, Nov. 9, 1983.

even those that clearly fall within the ambit of protection of the guarantee. In *Ashcroft v. American Civil Liberties Union*, the US Supreme Court held that the use of community standards as a measure to determine whether a material posted in the Internet for commercial purposes is harmful to minors is narrow enough and provides an identifiable marker by which speech is judged.[16] Thus, the statute, on its face, is not overbroad. However in a sequel,[17] the Court decided that the statute, as applied, may violate the First Amendment protection. Accordingly, a regulation limiting free speech must be the least restrictive means to achieve a desired goal:

> The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary toachieve the goal, for it is important to ensure that legitimate speech is not chilled or punished...the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.[18]

In this case, the availability of other less restrictive means[19] to curtail child pornography is sufficient to maintain the injunction issued by the lower court to restrain the implementation of the statute.

In *California v. Miller*,[20] the US Supreme Court formulated three tests by which a material could be judged as obscene:

a. whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;

---

[16] 535 U.S. 564, 580 (hereinafter, "Ashcroft 1").

[17] Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004) (hereinafter "Ashcroft 2").

[18] *Id.* at 666.

[19] According to the Court, the use of filters at the receiving end is a more likely alternative rather than controlling the content of websites as espoused in COPA. The Court also reiterated that the respondents need not show that the alternative is the least restrictive and most efficient, but rather, the Government should show that they are not what they claimed to be. For having failed to carry out this burden, the Court invalidated the COPA, as applied. *Id.* at 667.

[20] 413 U.S. 15, 25 (1973).

c. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

These three pronged-tests have subsequently been followed and applied in numerous cases, among which are the Ashcroft 1 and 2, respectively.[21]

In all statutes regulating free speech, it is also fundamental that these regulations have a rational relationship to a permissible state objective.[22] Using this test, the US Supreme Court invalidated a zoning ordinance prohibiting all forms of live dancing since it is not only overbroad; it also does not further a sufficiently substantial state interest.[23]

Towards a clearer understanding of art as protected speech

Many say that beauty is in the eye of the beholder. It is perfectly reasonable then for a person to have a different view than what the majority has. It is equally comprehendibleto have a lone dissenter amidst the mob of conformists or those in agreement. In Cruz's case, it became a battle between the voice of the beleaguered and the loud "wang-wang"[24] of the leaders and their allies on the one hand, and the common man, on the other.

A careful scrutiny of the arguments wielded by the majority evinces the clear and pervasive misunderstanding of the metes and bounds of free speech. Since speech is a constitutionally-protected area, any regulation limiting it must only be upheld after passing through a test of strict scrutiny. In this case, it is patent that censuring the art exhibit in CCP is a clear violation of the artist's right to free speech.

Even as we admit that the State has a reasonable interest in protecting its citizens from offensive and insulting materials, this interest must be

---

[21] *See supra* notes 16-17.

[22] Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68-69(1981).

[23] *Id.* at 62.

[24] This word became popular after President Aquino used this in his inaugural speech after being sworn in to Presidency in 2010 in describing the pervasiveness of corruption in the country. *See* Jun Pasaylo, *P-Noy highlights 'wang-wang' policy in SONA*, THE PHILIPPINE STAR, Jul. 25, 2011, ¶ 3, *available at* http://www.philstar.com/nation/article.aspx?publicationsubcategoryid=63&articleid=709870 (May 24, 2012).

balanced with the underlying goal of protecting the area of free speech. As stated in *Schad v. Bourough of Mount Ephraim*,[25] such regulations must show that there is a rational relationship with a permissible state objective.

In this case, what precisely is the permissible state objective which can legitimately topple the freedom of expression in its pedestal? From the facts before us, the answer is clearly none.

Freedom of Religion

The state cannot claim that the same offends religious sensibilities, otherwise, it would necessarily bring to fore the issue on non-establishment of religion. The Constitution clearly provides that no law shall be made respecting an establishment of religion.[26] If the same is offensive just by the fact that it makes a mockery of sacred symbols by organized religions, then the state, in its reasoning, clearly engages in a slippery slope policy, where the non-establishment clause may be equally used to justify any position. As Dean Pangalangan opines: "[t]he seventh fallacy is that the CCP violates religious neutrality by exhibiting irreligious art. So conversely it violates religious neutrality if it exhibits religious art?"[27]

The reality is, what may be deemed sacred by the Catholics may be quite as easily offensive to non-members of this religious institution. To arguethen on the basis of religion and offense to religious sensibilities, as a way to limit freedom of expression, is to engage in a battle that from its commencement has already been prematurely lost. Therefore, arguing on the basis of freedom of religion in cases relating to freedom of expression is the weakest and should be the argument of last resort.

The decision to close down the exhibit is essentially a prior restraint on the ability of the people to engage in discussions. If continuously repeated, a chilling effect on speech is inevitable. Instead of expressing themselves freely, artists like Cruz, will then opt to portray the conventional; to stay at the forefront of what is normal and blasé and passé, instead of challenging the limits of artistic and intellectual possibilities.

---

[25] *Supra* note 23.

[26] CONST. art.III, § 5.

[27] Pangalangan, *supra* note 7.

Community standards

Were we to apply the community standards test enunciated in Miller and subsequently reiterated and expanded in Ashcroft, we are faced with the following questions: What exactly are the community standards? Is it enough to invoke that the Philippines is a predominantly Catholic country and it will suffice to conclude that since it offends Catholic clergies' sensibilities, the rest of the Philippine population also do?

In *Ashcroft 1*, the Court noted that the community standards are not to be judged according to the most puritan of sensibilities, but according to the judgment of the average man that the material is "patently offensive." This posed a serious problem to the Court because of the nature of the Internet where viewers are not limited to one geographical location, which made the identification of the extent and breadth of "community standards" very problematic. The Court however, brushed off these claims and decreed that the standard to be used is the community standards, taken as a whole, and not merely the standards of the few.[28]

Thus, applying the foregoing in the matter before us, the community standards that should be used in determining whether a material is protected by the freedom of speech should be the standards of the community, taken as whole, and not merely those of religious leaders. Freedom of religion therefore is not the strongest argument by which censorship can be automatically had, hook, line and sinker.

Content-based regulation

Aside from these, the censorship undertaken with respect to the exhibit is clearly not the least restrictive means, as enunciated in *Ashcroft 2*, to achieve a legitimate government objective, assuming there is such a compelling state interest. This is especially in light of the fact that the *Kulô* art exhibit was held at a private gallery in CCP where people may easily opt out of viewing it by simply not going there. With this in mind, neither can it be said that the precipitate closure of the exhibit is a reasonable time, place and manner regulation, since the closure was impelled by the content of the exhibit and not merely the goals of necessity and convenience.

---

[28] Ashcroft 1 at 577.

Does *Poleteismo* then present a clear and present danger of a substantive evil that the State has a right to protect? But what precisely is the evil sought to be protected? In *Navarro*, the Court held that holding a rally in Plaza Miranda presents a clear and present danger to the nearby community because of the unrest it brings and the admitted inability of the petitioners to prevent the attendant dangers and risks brought about by their rally. On the other hand, the Court in *Reyes* allowed the rallyists to hold a peaceful assembly near the US Embassy in Manila, absent a clear showing of a clear and present danger of a possible social unrest. In both these cases, the reason behind the regulation was the underlying considerations for public welfare and national security.In contrast, the alleged clear and present danger posed by an alleged irreligious art is difficult to grasp. Will it similarly endanger national security or disrupt the peace in the community? A careful reflection on this question reveals that there is no similar danger, and neither is there a genuine compelling State interest. Consequently, there can be no justification to the closure other than sheer strength of political clout.

Conclusion

History has shown us that great ideas are developed in the crucible of free, robust and impassioned debate. The guarantees of freedom of speech and expression were established to foster exchange of ideas. It is therefore proper to encourage the proliferation of discussions in areas traditionally thought of as taboo and open the floodgates of discourse so that people may be enlightened. In suppressing information and discourse, people are robbed of opportunities to look at the facts in relation to the existing realities and draw rational and objective conclusions from them.

It is precisely because of the evils so prevalent in the past that constitutional freedoms are asserted and stated in the Constitution, in various international agreements and in judicial decisions. Since our laws expressly provide for the protection of free speech and discourse,religious leaderscannot have a superior right in suppressing an otherwise informative discussion.

- o0o -

ACKNOWLEDGEMENT

The Editorial Board of PHILIPPINE LAW JOURNAL Volume 86 would like to acknowledge the invaluable contribution of our Interns for this volume, for whose generous assistance we remain grateful:

Remy Rose Alegre
Jauhari Azis
Victoria Alessandra Caranay
Efren Dominique Chatto
John Edward Lee Dayog
Ivan Mark Galura
Russell Stanley Geronimo
Cielo Marjorie Goño
Marianne Karyl Ko
Jose Mari Carlo Lacas
Maria Ofelia Leano
Charles Icasiano
Jude Amadeus Marfil
Ken Molave
Xel Alessandra Quitain
Jill Angeline Te
Christian Viliran
Andrew Velasco