# Suppression through Subterfuge: The Inhibition of Offensive Art Based on Hostile Audience Response

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## I. ART AND THE RELUCTANT PATRON

All three Philippine Constitutions contain at the very least a single provision which fastens the State into its position as patron of the arts. While both the 1935 and 1973 Constitutions placed a single patronage clause in their General Provisions,[1] the 1987 Constitution ventured so far as to assign to it an independent section in the Declaration of Principles and State Policies, and expounded its mandate in Article XIV on Education, Science and Technology, Arts, Culture, and Sports.[2] By its very words, it decrees that "[a]rts and letters shall enjoy the patronage of the State."[3] But even as the Constitution undertakes to fervently promote the arts, hardly has art ever been the subject of popular discussion in the Philippines. By a turn of events, however, it has advanced itself into the foreground, stirring dialogue on the extent of freedom allowed to artistic expression. It inquired into the guaranty of free speech and its limitations, the malleable definition of obscenity, religious speech and profanity, and disputed the community's right to claim offense, and consequently demand art's removal from public exhibition.

### *A. Kulô: The Abbreviated Display*

On 17 June 2011, the Cultural Center of the Philippines (CCP) opened "*Kulô*," an exhibit which gathered pieces from 32 artists. Of all these, the lone artwork upon which the public's critical eye narrowed was Mideo M. Cruz's art installation, *Poleteismo* (Polytheism).[4]

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1. Section 4, Article XIV of the 1935 Philippine Constitution provides that "[t]he State shall promote scientific research and invention. Arts and letters shall be under its patronage. The exclusive right to writings and inventions shall be secured to authors and inventors for a limited period." 1935 PHIL. CONST. art. XIII, § 4 (superseded 1973). Additionally, Section 9 (2), Article XV of the 1973 Constitution states that the "Filipino culture shall be preserved and developed for national identity. Arts and letters shall be under the patronage of the State." 1973 PHIL. CONST. art. XV, § 9 (2) (superseded 1987).
2. PHIL. CONST. art. XIV, § 15.
3. PHIL. CONST. art. XIV, § 15.
4. Lito B. Zulueta, *Shock for shock's sake*, PHIL. DAILY INQ., Aug. 8, 2011, *available at* http://lifestyle.inquirer.net/8837/shock-for-shock%e2%80%99s-sake (last accessed Mar. 31, 2014).

*Poleteismo* is an alcove of three walls strewn with vivid posters of Jesus Christ and the Holy Family.[5] These images are interspersed among depictions of personalities from popular culture.[6] At the center of the installation, a thick post features a large wooden crucifix with a bleeding hand, adorned with a host of medallions. A red wooden penis was placed at its lower portion.[7]

The response of the audience was precipitous and violent. A number found irreverent the manner in which Christian icons had been placed adjacent to figures of excess and capitalism, but what ultimately sparked the protests are the several phalluses among the rosaries and crucifixes that decked the faces of these images.[8]

The CCP and the artist became subject to numerous complaints and frantic expressions of condemnation.[9] Raul M. Sunico, President of the CCP, received demands for the exhibit's closure.[10] Threats of criminal charges were poised for violation of Article 201, on immoral exhibitions, under the Revised Penal Code (RPC).[11] A chorus of disapproval was heard from Manila Representative Amado S. Bagatsing,[12] former first lady Imelda R. Marcos,[13] and more notably, President Benigno C. Aquino III himself.[14]

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5. Ina Alleco R. Silverio, Who is Mideo Cruz and why are people baying for his head?, *available at* http://www.interaksyon.com/article/10524/who-is-mideo-cruz-and-why-are-people-baying-for-his-head (last accessed Mar. 31, 2014).
6. Josephine Cuneta, Philippines Astir Over Art Exhibit, *available at* http://blogs.wsj.com/scene/2011/09/01/philippines-astir-over-art-exhibit/ (last accessed Mar. 31, 2014).
7. Reuters & Jocelyn R. Uy, *'Sacrilegious' artwork stirs uproar in exhibit*, PHIL. DAILY INQ., Aug. 3, 2011, *available at* http://newsinfo.inquirer.net/35347/%e2%80%98sacrilegious%e2%80%99-artwork-stirs-uproar-in-exhibit (last accessed Mar. 31, 2014).
8. Silverio, *supra* note 5.
9. Reuters & Uy, *supra* note 7.
10. *Id.*
11. *Id.*
12. Cynthia D. Balana, *Lawmaker wants CCP head to resign over 'blasphemous' exhibit*, PHIL. DAILY INQ., Aug. 17, 2011, *available at* http://newsinfo.inquirer.net/37795/lawmaker-wants-ccp-head-to-resign-over%E2%80%98blasphemous%E2%80%99-exhibit (last accessed Mar. 31, 2014).
13. *Imelda Marcos to see controversial artwork at CCP*, PHIL. DAILY INQ., Aug. 8, 2011, *available at* http://lifestyle.inquirer.net/8883/imelda-marcos-to-see-controversial-artwork-at-ccp (last accessed Mar. 31, 2014).
14. Norman Bordadora, *Aquino voices disapproval over CCP exhibit*, PHIL. DAILY INQ., Aug. 9, 2011, *available at* http://newsinfo.inquirer.net/38853/aquino-voices-disapproval-over-ccp-exhibit (last accessed Mar. 31, 2014).

Eventually, the disputes turned from the verbal into the physical, with an unidentified couple smashing one of the phallic ashtrays attached to a poster, and attempting to set the entire collage on fire.[15]

Cruz attempted to explain that his work depicted the worship of relics and the evolution of idolatry "through history and modern culture[,]"[16] and, in one interview, pointed to several Filipino artists before him who have created art which made arguably irreverent use of Christian iconography.[17] But despite a CCP-initiated forum[18] and defenses poised by CCP's Head of the Visual Arts Department, Karen Ocampo Flores, the Cultural Center capitulated and withdrew the exhibit from public display.[19] Flores also heeded calls for resignation.[20]

In the Senate Investigation, Emily Abrera, Chairwoman of the CCP, professed the lack of the CCP Board's participation in the pre-screening of the exhibited pieces.[21] This evaluative function is entrusted to the Head of

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15. Agence France-Press, *'Blasphemous' art vandalized*, PHIL. DAILY INQ., Aug. 4, 2011, *available at* http://newsinfo.inquirer.net/36359/blasphemous-art-vandalized (last accessed Mar. 31, 2014).
16. Reuters & Uy, *supra* note 7.
17. Cruz said that —

    > [a] lot has been done before using the imagery of the [C]atholic faith. In CCP[,] Jose Legaspi did a Madonna and Child with Mary vomiting [on] the child Jesus, Paul Piper did a Sto. Nino out of a [B]arbie doll and dressed it with co[n]doms. Alwin Reamillo did a Mickey Mouse Sto. Nino [and] Louie Cordero did a painting of Christ the King with a McDonald's figure.

    Kenneth Keng, An Interview with Mideo Cruz, *available at* http://filipinofreethinkers.org/2011/08/04/an-interview-with-mideo-cruz/ (last accessed Mar. 31, 2014).
18. Interaksyon.com, Intense CCP forum, a clash of values and views on 'blasphemous' art, *available at* http://www.interaksyon.com/article/10529/intense-ccp-forum-a-clash-of-values-and-views-on-blasphemous-art (last accessed Mar. 31, 2014).
19. Cynthia D. Balana & Philip C. Tubeza, *CCP shuts down controversial exhibit on Imelda Marcos's prodding*, PHIL. DAILY INQ., Aug. 9, 2011, *available at* http://newsinfo.inquirer.net/38597/ccp-shuts-down-controversial-exhibit-on-imelda-marcos%e2%80%99s-prodding (last accessed Mar. 31, 2014).
20. Carmela Lapeña & Candice Montenegro, CCP official resigns amidst 'blasphemous' art furor, *available at* http://www.gmanetwork.com/news/story/229023/news/nation/ccp-official-resigns-amid-blasphemous-art-furor (last accessed Mar. 31, 2014).
21. Jonathan de Santos & Katrina Alvarez, Senator still wants heads to roll over 'sacrilegious' mural, *available at* http://www.sunstar.com.ph/manila/local-news/2011/08/16/senator-still-wants-heads-roll-over-sacrilegious-mural-173455 (last accessed Mar. 31, 2014) & David Dizon, CCP officials divided over

the Visual Arts Department.[22] Notably revealed was the fact that some members of the CCP Board of Trustees themselves were shocked by the images presented by the artwork and felt its potential to offend.[23]

The threatened criminal and administrative complaints were indeed filed against Cruz and officials of the CCP.[24] The officials were accused of violating "their public trust and duty to the Filipino people"[25] by allowing the installation of *Poleteismo* at the CCP main gallery, which is allegedly a public forum. These complaints have recently been dismissed by the Ombudsman.[26]

*B. The Perils of Interpretation*

Much of the frenetic commentary on *Poleteismo* pertained to its alleged crassness and slipshod method of creation. The work contained an accumulation of objects which, because of their ubiquity, seem to the average person devoid of artistic value. The artwork, if the critics may agree to call it as such, is plainly unfamiliar, and not, in the common standard, "beautiful." It may bewilder that the once recognizable brushstrokes have transformed into a mash of cultural debris.

The audience is often confounded by the very presence of art. To this experience, Jeanette Winterson remarks that "[a]rt takes time."[27] An average person will find it difficult to sustain his or her gaze at a piece of art given the discomfort it may produce, or the ever present distractions of the mundane. In every encounter with an artistic work, what is palpable is distance, particularly the invisible distance between the artist and the

'blasphemous' exhibit, *available at* http://www.abs-cbnnews.com/-depth/08/16/11/ccp-officials-divided-over-blasphemous-exhibit (last accessed Mar. 31, 2014).

22. de Santos & Alvarez, *supra* note 21.

23. Dizon, *supra* note 21.

24. Marlon Anthony R. Tonson, CCP officials, artist dragged to court for offensive art, *available at* http://www.gmanetwork.com/news/story/229203/news/nation/ccp-officials-artist-dragged-to-court-for-offensive-art (last accessed Mar. 31, 2014).

25. *Id.*

26. Tetch Torres-Tupas, *Ombudsman dismisses raps vs Mideo Cruz, CCP execs over 'Kulo' exhibit*, PHIL. DAILY INQ, March 4, 2013, *available at* http://newsinfo.inquirer.net/368423/ombudsman-dismisses-raps-vs-mideo-cruz-ccp-execs-over-kulo-exhibit (last accessed Mar. 31, 2014).

27. Kelly Young, The Pedagogic Force of Ekphrastic Poetics 16, *available at* http://ejournals.library.ualberta.ca/index.php/langandlit/article/viewFile/17810/14151 (citing JEANETTE WINTERSON, ART OBJECTS: ESSAYS ON ECSTASY AND EFFRONTERY 7 (1995)) (last accessed Mar. 31, 2014).

spectator. Unless the artist is alive or can be compelled to disclose the meaning of his or her art, there is no possibility of consultation regarding motive or intent at the actual moment of viewing.

Manuel Bilsky explained that before the viewer can move on to the problem of meaning or signification, the art object must first be located.[28] Aside from the inquiry of what is the art object, there is the crucial related question of what is a "work of art."[29] These two questions are significant to determine the point at which aesthetic inquiry begins.[30] But these are questions respectfully within the province of aesthetics, a discipline which calls for a mind trained to approach the art object in a manner which is nothing less than academic.[31]

In the absence of the artist, the layman and critic alike have no option but to direct their inquiry towards the artwork alone. In the opening paragraph of *La Mort de L'auteur*, Roland Barthes alludes to Honoré de Balzac's story, *Sarrasine*, in which the author describes a castrato disguised as a woman.[32] Barthes inquires what the intents of the author are, but soon answers his queries himself — "[w]e shall never know, for the good reason that writing is the destruction of every voice, of every point of origin. Writing is that neutral, composite, oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing."[33] The same conclusion holds true for the visual arts. At the point of encounter with the artwork, the artist had long vanished. At this vanishing point begins the experience of the audience.

The critic creates perspective by stepping back from the work, and examining it according to his or her personal criteria, informed by the criteria of his or her time. But more volatile is the response of the layman. In the controversy of *Poleteismo*, what is definite is the power of art to move people into action. The layman, without actual education on art appreciation and without access to the artist for explanation, cannot but respond in the immediate experience of art, especially when it is as physically rousing as *Poleteismo*. In *Poleteismo*, the response materialized as protest and threats of criminal charges, as well as attempts to deface, and the successful vandalism

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28. *See* Manuel Bilsky, *The Significance of Locating the Art Object*, 13 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 531, 531-36 (1953).

29. *Id.* at 531-32.

30. Ruth Saw, *What is a "Work of Art," in* PROBLEMS IN CRITICISMS OF THE ARTS 127 (1968).

31. *See* Paul Ford, What is Aesthetics?, *available at* http://paulford.com/what-is-aesthetics/ (last accessed Mar. 31, 2014).

32. Roland Barthes, *The Death of the Author*, *in* IMAGE-MUSIC-TEXT 142 (Stephen Heath trans., 1977).

33. *Id.*

of the artwork.[34] Freedom to believe, or in the present case, to interpret, is boundless, but once the response translates into action, the action can be curtailed by authority.[35]

All these cast a difficult question. Upon whose inquiry must the law intervene, whose point of view warrants executive or judicial interference, the layman or the well-versed critic? Must there be a correct interpretation? Must we consider interpretation as a "philistine refusal to leave the work of art alone[?]"[36] Or must the law disregard interpretation entirely and make the public reaction the singular focal point of legal inquiry?

Courts explain that the reason a facial invalidation of statutes is allowed in censorship cases is to avoid a great chilling effect on speech.[37] This recognizes that some socially valuable speech might not be made "because [the] speaker feel[s] threatened by the risks of legal liability."[38]

The inherent uncertainty in determining whether an artistic expression is beyond the protection of the Constitution allows enraged and confused spectators to challenge its value and, with legal processes in mind such as the dated Article 201 of the RPC,[39] they have every incentive to threaten the

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34. *See* Agence France-Press, *supra* note 15 & Tonson, *supra* note 24.

35. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

36. Susan Sontag, *Against Interpretation*, *in* AGAINST INTERPRETATION AND OTHER ESSAYS 8 (1966 ed.).

37. Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, 632 SCRA 146, 186 (2010).

38. Andrew T. Kenyon, *Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore, and Australia*, 4 INT'L J. OF COMMUNICATION 440, 442 (2010).

39. Article 201 provides —

> Art. 201. *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) [t]hose 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

artist and the exhibitors with criminal charges. At the moment of threat, however, there is no definite judicial determination of artistic value, so that in effect, the administrative surrender to these public remonstrations can qualify as more than a preservative remedy, but instead, as a premature conviction of the artist.

Amy Adler observes that "'[a]rt,' by its nature, will call into question any definition that we ascribe to it. As soon as we put up a boundary, an artist will violate it, because that is what artists do."[40] It therefore becomes necessary to question the limitations that have been set upon the Filipino artwork if it is to reflect what the former first lady Imelda Marcos contemplates to be "the true, the good, and the beautiful."[41]

In light of the recent CCP controversy, where threats and hate messages proved sufficient to induce the government to shut down an exhibit which espoused an unpopular message, it becomes imperative to assess whether the public may be allowed to "veto," so to speak, speech which had been legitimately accepted for exhibition.

*C. Problematic Lacuna*

Art is guarded from any form of prior restraint or "official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination."[42] The guarantee of freedom of expression also limits the State's power to impose subsequent punishment.[43] From these two guarantees, it is definite that art can neither be censored in advance nor can its display be penalized as long as it is not speech excluded from constitutional protection. In the instance presented, there is an evident absence of legal protection for art which had been screened and admitted for public exhibition, but which generates a hostile response. The course of action taken, the closure of the exhibit, was pragmatic and not completely within any established legal rules.

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> prohibited drugs; and (5) are contrary to law, public order, morals, and good customs, established policies, lawful orders, decrees and edicts; [and]
>
> (3) [t]hose who shall sell, give away or exhibit films, prints, engravings, sculpture or literature which are offensive to morals.

An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 201 (1932).

40. Amy M. Adler, *Post-Modern Art & the Death of the Obscenity Law*, 99 YALE L.J. 1359, 1378(1990).

41. *See* Balana & Tubeza, *supra* note 19.

42. JOAQUIN BERNAS, S. J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 233 (2009 ed).

43. *Id.* at 234.

To fill this gap, this Note will approach the issue in accordance with the framework established by United States (U.S.) jurisprudence regarding the unconstitutionality of the "heckler's veto," and will appraise the *Poleteismo* controversy based on these standards. Ultimately, this Note will test whether the American heckler's veto framework is compatible with international covenants, and whether it suited for assimilation into Philippine art law.

## II. ARTISTIC AUTONOMY IN PHILIPPINE LAW AND JURISPRUDENCE

### *A. A Brief Survey of Art in Jurisprudence*

The first recorded jurisprudential reference to art can be found in the 1955 case of *People v. Go Pin*,[44] which was correspondingly the principal case tried under Article 201 of the RPC on immoral exhibitions.[45] *Go Pin* made important assertions as to which art falls within constitutional protection. First, it placed an intent requirement: the picture, sculpture, or painting must have been exhibited "for the cause of art."[46] It regarded exhibitions which secure earnings from the venture as inconsistent with an artistic cause and are, therefore, unprotected.[47] The commercial aspect of an exhibit, which places the "cause of art" in a subordinate position, was considered reflective of the exhibitor's intent and determinative of the nature of the speech consigned in the gallery.[48] Aside from intent, protection was made dependent on the character of its potential audience.[49] If nude paintings were displayed for an artistically inclined crowd, the exhibit will be protected.[50] If it will attract the youth who are "not in a position to resist and shield themselves from the ill and perverting effects"[51] of the artworks, the risk of criminal prosecution of the artist or exhibitor is present.[52] Yet for all its attempts at distinctions, *Go Pin* has altogether failed to define a reasonable framework to determine a work of art. Instead, it skirted this crucial issue. *Go Pin* concentrated not on art itself but art's periphery.

The 1957 case of *People v. Padan y Alova, et al.*[53] did not supply the shortfall made by *Go Pin*. The case involved an exhibition inside a building

44. People v. Go Pin, 97 Phil. 418 (1955).
45. *Id.* at 418.
46. *Id.* at 419.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Go Pin*, 97 Phil. at 419.
51. *Id.*
52. *Id.*
53. People v. Padan y Alova et al., 101 Phil. 749 (1957).

of highly immoral and indecent live sexual acts between Maria Padan y Alova and Cosme Espinosa y Abordo.[54] In convicting the accused, *Padan* made clear that an actual performance of the sexual act has no redeeming feature and that it can never contain an element of art.[55] Once more, in determining what the "element of art" is, the Court has placed focus on its audience — the connoisseurs, the artists themselves — who may be stirred by the portrayals.[56] There followed no itemization or dissection of what the "elements" of art could be, which is markedly dissimilar to the manner courts are wont to fastidiously define the components of an offense or of a contractual obligation.

It was *Gonzalez v. Kalaw Katigbak*[57] which repositioned the slant of jurisprudence in favor of the artist's point of view. In *Gonzalez*, the Court had the occasion to classify motion picture as art.[58] It cited the U.S. case of *Kingsley v. Regents*[59] and also stated that "[t]here is no orthodoxy in what passes for beauty or for reality. It is for the artist to determine what for him is a true representation."[60]

The test in *Go Pin* was transformed essentially by *Gonzalez* in its decision to accord full emphasis on the autonomy of the artist. It inquired as to the artistic vision of its author, not on the purpose for its exhibition nor the audience.[61] But *Gonzalez* did not ignore the audience, in fact, it ruled that television broadcasts will not be given a similarly liberal approach as television has a more pronounced audience and reaches every household.[62] However, the notable departure of *Gonzalez* from *Go Pin* is that even as it considers the audience, it does not place them in so privileged a position as to be determinative of the artwork's worthiness of protection. It also impliedly abandoned the distinction between commercial and purely artistic work by reviewing the film's artistic merit without regard to its commercial aspect, the possibility of earning from its several viewings in the theatre.

In *Pita v. Court of Appeals*,[63] the Court discussed the development of obscenity in American jurisprudence and the latest case on the subject, *Miller*

54. *Id.* at 750.
55. *Id.* at 752.
56. *Id.*
57. Gonzalez v. Kalaw Katigbak, 137 SCRA 717 (1985).
58. *Id.* at 723.
59. Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 695 (1959).
60. *Gonzalez*, 137 SCRA at 727.
61. *Id.*
62. *Id.* at 729.
63. Pita v. Court of Appeals, 178 SCRA 362 (1989).

*v. California*,[64] which the Court adopted in the ruling.[65] Perhaps taking to heart *Gonzalez*'s dictum that delving offhandedly into distinctions may inadvertently augment the danger artistic expressions are subjected to, *Pita* provided a relatively less clarified definition of protected art while maintaining its peculiarity from obscenity. The guidelines it adopted from *Miller* provided a framework, albeit an arguably problematic one, by which obscenity may be measured, impliedly protecting the rest of the artworks which do not fit the *Miller* test. In essence, it adhered to a negative definition of art. Further, in alluding to James Joyce, D.H. Lawrence, and Francisco de Goya, artists who were once publicly castigated for their creations, Justice Abraham F. Sarmiento observed how their works have been elevated to milestones in art and literary history.[66] While earlier jurisprudence emphasized subjectivity in art appreciation, *Pita* drew attention to the temporality of artistic opinion.

For all its elocution, Philippine art jurisprudence remains reluctant to define with exactness the form of art it seeks to protect, but relies for its comprehension of art on the expression which it has determined as not constitutive of art. In these situations, the Court's power to interpret is exercised through negation. Despite its shortcomings, this benefits the artistic field in that artistic creations are protected to the extent that they do not become obscene or indecent. This still leaves out several artistic expressions, particularly those which rely on their power to move on strong, disagreeable, and mostly visceral content. But until the tastes have attuned themselves to these new variations of expression, the arts are subject to the risk of intolerance of contemporary opinion. Philippine jurisprudence, even as it lauds art, recognizes at the same time that freedom of expression is not unqualified, but may be limited upon evidence of a substantive evil whose existence poses a clear and present danger.[67]

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64. Miller v. California, 413 U.S. 15 (1973).

65. The Court said that —

> The latest word, however, is *Miller v. California* [ ] expressly abandoned [*Memoirs v. Massachusetts*][ ] and established 'basic guidelines,' to wit: '(a) whether 'the average person, applying contemporary standards' would find the work, taken as a whole, [as one that] 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; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Pita*, 178 SCRA at 371.

66. *Id.* at 372-73.

67. *Gonzalez*, 137 SCRA at 724.

*B. An Inventory of Restrictions*

Freedom of expression comprises four aspects. As enumerated in *Chavez v. Gonzales*,[68] these are: (1) freedom from prior restraint; (2) freedom from punishment subsequent to publication; (3) freedom of access to information; and (4) freedom of circulation.[69] However, the third aspect is inapplicable to artistic expression because art is not primarily concerned with the enterprise of disseminating information.[70]

1. Prior Restraint

Prior restraint indicates official governmental restrictions on expression which precede actual publication or dissemination.[71] This includes any manner of censorship, whether imposed by the executive, legislative, or judicial branch of the government.[72] As stated in *Social Weather Stations, Inc. v. Commission on Elections*,[73] "any system of prior restraint comes to [ ] court bearing a heavy burden against its constitutionality."[74] It is the government which must show "justification for enforcement of the restraint."[75]

Restraint may either be content-neutral or content-based. Content-neutral regulation refers to restraint which is concerned merely with "the incidents of speech, or one that merely controls the time, place[,] or manner, and under well-defined standards."[76] Content-neutral restraint is subject only to an "intermediate approach,"[77] which is "somewhere between the mere

68. Chavez v. Gonzales, 545 SCRA 441 (2008).

69. *Id.* at 489-90.

70. The freedom of access to information of public concern is enshrined in Section 7, Article III of the 1987 Constitution. Although related to freedom of expression to a certain extent, it is more particular to journalistic expression in that reporter's may be permitted to scrutinize public records for purposes of imparting urgent information. *Id.* at 490. This endeavor to impart factual information is foreign to art in that what it depicts is ultimately separated from the actual world. In the words of Theodor W. Adorno, "[a]rtworks are afterimages of empirical life[.] ... Although the demarcation line between art and the empirical must not be effaced, and least of all by the glorification of the artist, artworks nevertheless have a life *sui generis*." THEODOR W. ADORNO, AESTHETIC THEORY 5 (2012).

71. BERNAS, *supra* note 42, at 233.

72. *Chavez*, 545 SCRA at 491.

73. Social Weather Stations, Inc. v. Commission on Elections, 357 SCRA 496 (2001).

74. *Id.* at 501.

75. *Id.*

76. *Chavez*, 545 SCRA at 493.

77. *Id.*

rationality that is required of any other law and the compelling interest standard applied to content-based restrictions."[78] Referring to *United States v. O'Brien*,[79] the case of *Osmeña v. COMELEC*[80] defined the test in the following manner —

> A governmental regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incident restriction on alleged [freedom of speech and expression] is no greater than is essential to the furtherance of that interest.[81]

Content-based regulation similarly requires "substantial governmental interest, which is unrelated to the restriction of free speech[,]"[82] and said restriction must also be narrowly drawn and not be overbroad.[83] In addition, it is subjected to strict scrutiny and are only permissible after proof of a "clear and present danger of an evil of a substantive character that the State has a right to prevent."[84] These substantive evils may take the form of dangers "to public safety, public morals, public health, or any other legitimate public interest."[85]

There are a number of legislatively established institutions which permit the exhibition of visual arts, like the CCP,[86] the National Museum,[87] and the National Commission for Culture and the Arts (NCCA).[88] However, these statutes furnish no method for screening art pieces and no standard to assess the propriety of an exhibition.

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78. *Id.* at 493-94.
79. United States v. O'Brien, 391 U.S. 367 (1968).
80. Osmeña v. Commission on Elections, 228 SCRA 447 (1998).
81. *Id.* at 477.
82. *Chavez*, 545 SCRA at 495.
83. *Id.* at 496.
84. *Gonzalez*, 137 SCRA at 725.
85. Reyes v. Bagatsing, 125 SCRA 553, 562 (1983).
86. Creating the Cultural Center of the Philippines, Defining its Objectives, Powers, and Functions, and for Other Purposes, Presidential Decree No. 15 (1972) [hereinafter P.D. No. 15].
87. An Act Establishing a National Museum System, Providing for its Permanent Home and for Other Purposes [National Museum Act of 1998], Republic Act No. 8492 (1998).
88. An Act Creating the National Commission for Culture and the Arts, Establishing National Endowment Fund for Culture and the Arts, and for Other Purposes [Law Creating the National Commission for Culture and the Arts], Republic Act No. 7356, § 12 (1987).

2. Subsequent Punishment

The guaranty of free speech never intended to inoculate all forms of expression against governmental regulation. Similar to prior restraint on speech, subsequent punishment is permissible when it has satisfied the clear and present danger test.[89] In both prior restraint and subsequent punishment, the clear and present danger rule does not find application to what is considered unprotected or "low value speeches."[90] It cannot authorize defamation, seditious speech,[91] "fighting words,"[92] profanity,[93] and obscenity.[94]

Art cannot come under "fighting words" for these are "utterances" which involve verbal speech. Visual media cannot come within its scope. Even installation art, which involves partial film footage, is not covered because they are not "face-to-face words."[95] Motion picture footages are recordings and not actual utterances.[96] Even assuming an artistic statement becomes verbally abusive, the proscription against speech for being insulting, vulgar, or offensive has been frequently dispensed with by the courts.[97]

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89. Eastern Broadcasting Corporation (DYRE) v. Dans, Jr., 137 SCRA 628, 634 (1985).
90. *See* Iglesia ni Cristo v. Court of Appeals, 259 SCRA 529, 551 (1996).
91. *See* United States v. Bustos, 37 Phil. 731 (1918) & People v. Perez, 45 Phil. 599, 604-05 (1923).
92. Fighting words are not protected because they form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Social Weather Stations, Inc.*, 347 SCRA at 505 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
93. *Id.*
94. *Gonzalez*, 137 SCRA at 725.
95. *Chaplinsky*, 391 U.S. at 573.
96. "Motion picture" is defined by the Movie and Television Review and Classification Board (MTRCB) as

    > [a] series of pictures projected in a screen in rapid succession, with objects shown in successive positions slightly changed so as to produce the optical effect of a continuous picture in which the objects move, whether the picture be black and white or colored, silent or with accompanying sound, on whatever medium and with whatever mechanism or equipment they are projected, and in whatever material they are *preserved or recorded* for instant projection.

    Creating the MTRCB, Presidential Decree No. 1986, § 10 (1) (1985) (emphasis supplied).
97. *See* MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc., 396 SCRA 210, 231-32 (2003).

Nevertheless, artistic expressions may become the subject of prosecutions for libel or defamation[98] and a concomitant independent civil action under Article 33 of the New Civil Code.[99] But the artwork is permitted to escape subsequent liability if it is proven to be a form of satire or parody since "no reasonable reader or viewer would ... [regard] it as factual assertions."[100]

Visual art may also be penalized under Article 201 of the RPC, which prohibits profanity and obscenity. The present standard for determining obscenity is the test developed under *Miller*,[101] as adopted in *Pita*.

Finally, the artist may be prosecuted for inciting to sedition through artworks which deliver reactionary and rebellious messages. Article 142 of the RPC criminalizes the incitement to the crime of sedition through "speeches, proclamations, writings, emblems, cartoons, banners, or other representations tending to the same end."[102]

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98. Article 355 of the RPC provides that —

> A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by *prision correccional* in its minimum 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.

REVISED PENAL CODE, art. 355.

99. Article 33 of the Civil Code states that —

> In cases of defamation, fraud, and physical injuries, a civil action for damages, entirely separate and distinct from the criminal action, may be brought by the injured party. Such civil action shall proceed independently of the criminal prosecution, and shall require only a preponderance of evidence.

An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 33 (1950).

100. *MVRS Publications*, 396 SCRA at 229.

101. The tests are as follows:

> (a) whether 'the average person, applying contemporary standards' would find the work, taken as a whole, [as one that] 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; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Miller*, 413 U.S. at 24-25.

102. Article 142 of the RPC states that —

> The penalty of *prision correccional* in its maximum period and a fine not exceeding 2,000 pesos shall be imposed upon any person who, without taking any direct part in the crime of sedition, should incite others to

3.Freedom of Circulation

Freedom to circulate speech grants "unhampered distribution of newspapers and other media among customers and among the general public."[103] Censorship of this freedom may come in the form of a permit or license fee requirement, or taxation, which causes dissemination to become more burdensome.[104] In whatever form, they are persistently struck down as impermissible limitations.[105] The jurisprudence on this aspect is more specific to press freedom, however, and passes over the freedom to disseminate artistic expression in the form of display or exhibition.

*C. The Phases of Exhibition*

The exhibition of a work of art comprises three phases — "pre-exhibition, exhibition proper, and post-exhibition."[106] In pre-exhibition, an artist may either be invited to display his works in a gallery or his proposal to do so may be approved by the museum directors.[107] As observed earlier, there is no statutorily specified standard for the acceptance of an artwork into a museum or designated exhibition space. Statutes nevertheless furnish the method for selecting officers competent to administer government art

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> the accomplishment of any of the acts which constitute sedition, by means of speeches, proclamations, writings, emblems, cartoons, banners, or other representations tending to the same end, or upon any person or persons who shall utter seditious words or speeches, write, publish, or circulate scurrilous libels against the Government (of the United States or the Government of the Commonwealth) of the Philippines, or any of the duly constituted authorities thereof, or which tend to disturb or obstruct any lawful officer in executing the functions of his office, or which tend to instigate others to cabal and meet together for unlawful purposes, or which suggest or incite rebellious conspiracies or riots, or which lead or tend to stir up the people against the lawful authorities or to disturb the peace of the community, the safety and order of the Government, or who shall knowingly conceal such evil practices.

REVISED PENAL CODE, art. 142.

103. *See Chavez*, 545 SCRA at 490 (citing Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Murdock v. Pennsylvania, 319 U.S. 105, 136 (1943); & American Bible Society v. City of Manila, 101 Phil. 386, 401 (1957)).

104. *Id.*

105. *Id.*

106. Silvana Diaz, The Artists and the Gallery, *available at* http://www.ncca.gov.ph/about-culture-and-arts/articles-on-c-n-a/article.php?igm=1&i=173 (last accessed Mar. 31, 2014).

107. *Id.*

space.[108] In effect, the exhibition of art is made dependent on their discretion, and these officers are therefore of crucial involvement in the pre-exhibition stage.

From exhibition proper to post-exhibition, the artwork is open to charges for the offenses of libel, defamation, immoral exhibition, and incitement to sedition as all contain the element of publication. The exhibition proper is crucial for both the artist and the gallery as it is the phase in which both endeavor to market the exhibit as well as the art piece.[109] According to Silvana Diaz, this is what "keeps the arts scene on its toes. This can spell the survival of both the artist and the gallery."[110] Post-exhibition entails the egress or physical dismantling of the exhibit.[111]

There is a glaring vacuum in the legal measures capable of being employed in the event that the public remonstrates during the exhibition phase. In *Eastern Broadcasting Corporation (DYRE) v. Dans, Jr.*,[112] the Court prohibited the summary closure of a broadcast station and required the compliance with the primary due process requirements in *Ang Tibay v. Court of Industrial Relations etc.*[113] for administrative proceedings.[114] There is no similar legal guideline for public fora in which artworks are displayed. Statutes for subsequent punishment are unavailable as grounds for the summary closure of exhibits.[115]

108. *See* P.D. No. 15, § 6; Law Creating the National Commission for Culture and the Arts, § 9; & National Museum Act of 1998, §§ 8 & 9.

109. Diaz, *supra* note 106.

110. *Id.*

111. *Id.*

112. *Eastern Broadcasting Corporation*, 137 SCRA at 628.

113. The requirements are: (1) the right to a hearing, which includes the right to present one's case and submit evidence in support thereof; (2) the tribunal must consider the evidence presented; (3) the decision must have something to support itself; (4) the evidence must be substantial. Substantial evidence means such reasonable evidence as a reasonable mind might accept as adequate to support a conclusion; (5) the decision must be based on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; (6) the tribunal or body or any of its judges must act on its or his own independent consideration of the law and the facts of the controversy and not simply accept the views of a subordinate; (7) the board or body should, in all controversial questions, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decision rendered. Ang Tibay v. Court of Industrial Relations, 69 Phil. 635, 642-44 (1940).

114. *Eastern Broadcasting Corporation*, 137 SCRA at 633-34.

115. *Iglesia ni Cristo*, 259 SCRA at 548-49.

## III. SUMMARY OF INTERNATIONAL COMMITMENTS

### *A. Article 15 (1) (a), ICESCR: The Right to Take Part in Cultural Life*

The International Covenant on Economic, Social, and Cultural Rights (ICESCR)[116] establishes the right of persons to "take part in cultural life,"[117] which encompasses the right to make art. This right presents three obligations — the obligations to respect, to protect, and to fulfill.[118] The obligation to respect indicates the adoption of measures to achieve respect for the right to seek, receive, and impart all forms of artistic expression, and the abolition of censorship of cultural activities in the arts.[119] The obligation to protect requires the state to formulate policies aimed at "prevent[ing] third parties from interfering [with] the exercise of [the] right."[120] The obligation to fulfill requires the adoption of policies to facilitate the "right to take part in cultural life."[121] Further, among the minimum core obligations of states under the ICESCR, as defined by the *General Comment No. 21*, are the obligations to respect and protect everyone's right to engage in their own cultural practices, and to eliminate barriers that inhibit a person's access to culture.[122] Violations of the right to participate in cultural practices may take the form of a: (1) direct action of the state or insufficient regulation of private or public institutions; (2) failure to take measures to comply with the ICESCR obligations; or (3) failure to resist practices which harm the well-being of individuals or a collective.[123] Limitations may be imposed on the right to cultural life, if the following requirements are met:

(1) They have a legitimate aim;

(2) They are compatible with the nature of the right; and are

(3) Strictly necessary for the general welfare.[124]

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116. *See* United Nations (U.N.) Committee on Economic, Social, and Cultural Rights (CESCR), *General Comment No. 21*, *Right of everyone to take part in cultural life (art. 15, ¶ 1a of the Covenant on Economic, Social, and Cultural Rights)*, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter *General Comment No. 21*].

117. International Covenant on Economic, Social, and Cultural Rights (ICESCR), art. 15 (1) (a), *adopted and opened for signature*, Dec. 16, 1966, 993 U.N.T.S. 3, (entered into force Jan. 3, 1976).

118. *General Comment No. 21*, *supra* note 116, at ¶ 48.

119. *Id.*

120. *Id.* ¶ 50.

121. *Id.* ¶ 54.

122. *Id.* ¶¶ 55 (c) & (d).

123. *Id.* ¶¶ 62–64.

124. *General Comment No. 21*, *supra* note 116, at ¶ 19.

However, cultural diversity may not be invoked to suppress or limit the scope of another's human rights guaranteed by international law.[125] In addition, because the right is connected with other guarantees of international instruments, any restriction must be measured against the standards of the ICESCR, in conjunction with the standards placed by other treaties.[126]

*B. Article 19, ICCPR: The Right to Freedom of Expression*

An international guarantee significantly related to the right to take part in cultural life is the freedom of expression, as provided by the International Covenant on Civil and Political Rights (ICCPR).[127] The ICCPR obligates the parties to respect the freedom of expression, including those manifested in the form of art, at whatever level of government.[128] Legislative measures must be adopted for its promotion, and remedies must be set and available in the event of their violation.[129] There may be permissible limitations on expression provided they are compliant with the three-tiered test of paragraph 3 of Article 19 —

(1) The restriction must be provided by law;[130]

(2) They may only be imposed on the following grounds:

   a) To respect the rights or reputation of others;[131] or

   b) The protection of national security or public order, or of public health or morals;[132] and

(3) They must conform to the strict tests of necessity and proportionality.[133]

Except for the requirement of compatibility, the ICCPR test mirrors in essence that of the ICESCR, particularly the requisite of legislation and public welfare. However, the ICCPR provides better specificity in

125. ICESCR, *supra* note 117, at art. 4.

126. *General Comment No. 21*, *supra* note 116, at ¶ 17.

127. International Covenant on Civil and Political Rights (ICCPR), *adopted and opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

128. *Id.* art. 19 (2).

129. U.N. Human Rights Committee, *General Comment No. 34, Article 19, Freedom of opinion and expression*, par. 8, U.N. Doc. CCPR/C/GC/34 (Sep. 12, 2011).

130. ICCPR, *supra* note 127, at art. 19 (3).

131. *Id.*

132. *Id.*

133. *Id.*

enumerating the grounds for restriction, as well the standards of necessity and proportionality.

On one hand, restrictions grounded on reasons of public order may be made using the location criteria,[134] allowing for a content-neutral regulation. On the other hand, limitations concerning public morals are permissible if they are based on principles not derived from a single social, philosophical, or religious tradition.[135] A legislative restriction must also be necessary, which means that there is an absence of any alternative method of promoting a right other than curtailment of speech.[136] It must likewise be proportional or in accordance with these principles: (1) it must be the least intrusive instrument or method to achieve protection; (2) proportionate to the interest being protected; and (3) must consider the form of expression and the means of its dissemination.[137]

The issue of compatibility presented in the ICESCR was expounded in Article 19 of *General Comment No. 34*. It made determinate one incompatibility with the ICCPR, which is a restriction based on traditional, religious, or other customary law.[138] More importantly, in creating restrictions on freedom of expression, states are not permitted a margin of appreciation to determine for itself the reasonableness of the regulation.[139] A state must "demonstrate the precise nature of the threat, and the necessity and proportionality of the [measure adopted] by establishing a direct and immediate connection between the expression and the threat."[140]

Article 5 of the ICCPR imposes a final criterion of permissibility on speech restriction.[141] Even after it has complied with Article 19 (3), the regulation will be in violation of the ICCPR if the limitation amounts to the destruction of the right or freedom guaranteed by the ICCPR.[142] A

134. U.N. Human Rights Committee, *Patrick Coleman v. Australia*, *Communication No. 1157/2003*, par. 7.3, CCPR/C/87/D/1157/2003 (Aug. 10, 2006).

135. *General Comment No. 34*, *supra* note 129, at ¶ 32.

136. *See* U.N. Human Rights Committee, *Communication No 736/1997: Canada. 10/26/2000*, par. 11.6, U.N. Doc. CCPR/C/70/D/736/1997 (Oct. 26, 2000) [hereinafter *Communication No 736/1997*].

137. *Id.* par. 4.8.

138. *General Comment No. 34*, *supra* note 129, at ¶ 24.

139. U.N. Human Rights Committee, *Länsman et al. v. Finland, Communication No. 511/1992*, par. 9.4, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994) [hereinafter *Länsman et al.*].

140. *General Comment No. 34*, *supra* note 129, at ¶ 35.

141. *See* ICCPR, *supra* note 127, at art. 5.

142. *Id.* art. 5 (1).

guideline which accounts for both standards in the ICCPR and ICESCR is provided below:

(1) The restriction must be provided by law;[143]

(2) It must be compatible with the nature of the right, meaning it must not be based on traditional, religious or other customary law;[144]

(3) The restriction must be imposed only based on the following grounds:

a) Protection of the rights and reputation of others;[145]

b) Protection of national security or public order;[146]

i. It must be content-neutral;[147]

c) Protection of public morals;[148]

i. It must not be derived from a single social, philosophical, or religious tradition;[149] and

(4) The restriction must be necessary and proportional;[150]

a) It is necessary when there exists no other alternative to attain the goal other than the suppression of speech;[151]

b) It is proportional if:

i. It is the least intrusive instrument;[152]

ii. It is proportionate to the interest being safeguarded;[153] and

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143. ICCPR, *supra* note 127, at arts. 5 & 19 (3).

144. *General Comment No. 21*, *supra* note 116, at ¶ 19 & 24.

145. ICCPR, *supra* note 127, at art. 19 (3) (a).

146. *Id.* art. 19 (3) (b).

147. *See General Comment No. 21*, *supra* note 116, at ¶ 19 & 24.

148. ICCPR, *supra* note 127, at art. 19 (3) (b).

149. *See General Comment No. 21*, *supra* note 116, at ¶ 19 & 24. *See also Communication No. 736/1997*, *supra* note 136, at par. 4.8 & *Länsman et al.*, *supra* note 139, at ¶ 9.4.

150. *See* ICCPR, *supra* note 127, at art. 19 (3).

151. *See Communication No 736/1997*, *supra* note 136, at ¶ 6.9 & ICCPR, *supra* note 127, at art. 19 (3).

152. *General Comment No. 21*, *supra* note 116, at ¶ 19.

153. *See* ICCPR, *supra* note 127, at art. 19 (3).

iii. It considers both the *form* of expression and the *means* of its dissemination.[154]

(5) The restriction as a whole is permitted no margin of appreciation, which means the threat arising from the expression delimited must be unquestionably demonstrated;[155] and

(6) The restriction must not result in the destruction of a right.[156]

## IV. OFFENSIVE ART AND HOSTILE AUDIENCE RESPONSE IN AMERICAN JURISPRUDENCE

In incidents of hostile audience response, the essential problem is whether to place on the police the burden of preserving peace, or to silence the speaker on account of possible disturbance — what Harry Kalven, Jr. calls "heckler's veto."[157] Ruth McGaffey observes that in these cases, three elements are involved: (1) the speaker; (2) the opponents of the speech; and (3) the State through law enforcement authorities.[158] American First Amendment jurisprudence prohibits constraint on freedom of expression based on hostile audience response.[159] In the words of *Cantwell v. Connecticut*, states "may not unduly suppress free communication of views, religious or other [forms of speech], under the guise of conserving desirable conditions."[160] Speech may not be curtailed if it constitutes only public advocacy, if only a possibility of physical retaliation exists, or there is mere shock on the part of the audience.[161] The only instance when possible disturbance may be the basis of restriction of speech is when there is proof of a clear and present danger of a substantive evil which will arise if the speech is allowed to continue.[162] Nevertheless, this clear and present danger must constitute more than "public inconvenience, annoyance, or unrest[;]"[163] otherwise, the restriction will be invalidated.

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154. *See General Comment No. 21*, *supra* note 116, at ¶ 15 & 16.

155. *See generally General Comment No. 21*, *supra* note 116, at ¶ 19 & 24; ICCPR, *supra* note 127, at arts. 5 & 19 (3); *Communication No 736/1997*, *supra* note 136, at ¶ 4.8; & *Länsman et al.*, *supra* note 139, at ¶ 9.4.

156. *Id.*

157. HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140 (1965).

158. *See generally* Ruth McGaffey, *The Heckler's Veto*, 57 MARQ. L. REV. 39 (1973).

159. *See* Nelson v. Streeter, 16 F.3d. 145, 150 (7th Cir. 1994) (U.S.).

160. *Id.* at 308.

161. Street v. New York, 394 U.S. 576, 591-92 (1969).

162. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

163. *Id.*

Chicago city officials wanted to burn a controversial painting in *Nelson v. Streeter*.[164] The artwork, entitled "Mirth and Girth," depicted the recently deceased black mayor, Harold Washington, as clad in women's underwear.[165] The City removed the artwork from exhibition based on public outrage against it.[166] In the damage suit filed by the artist, the court ruled against the City, explaining that "First Amendment rights are not subject to the heckler's veto. The rioters are the culpable parties, not the artist whose work unintentionally provoked them to violence."[167]

*Nelson* reiterated that the clear and present danger standard must first be complied with for a legitimate seizure of art or the closure of an exhibit.[168] Absent this degree of danger, it is the government's obligation to maintain the peace, and hold the rioters accountable for the injuries they have inflicted. This is true in particular to artistic expressions which did not incite or intend to cause disorder.

In *Cuban Museum of Arts and Culture, Inc. v. City of Miami*,[169] the Miami City Commission refused to renew the lease granted to the Cuban Museum on the ground that the Museum's Board of Directors violated the terms of the lease because of its decision to auction works by artists who have not renounced the Castro Regime.[170] This decision provoked public fury — one of the controversial paintings was burned, demands for resignation of museum directors were made, and a bomb was detonated underneath the car of the museum vice-president.[171] Nevertheless, the court granted an injunction against the City Commission, explaining that government cannot deny benefits to a person based on reasons which infringe constitutionally protected interests, especially freedom of expression.[172] The City was in effect refusing the Museum the continued use of city-owned property as penalty for the exercise of its constitutional freedom to speak.[173] It was pointed out that the City even neglected its duty to avert impending dangers by not increasing police protection despite two bombings at the Museum.[174]

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164. *Nelson*, 16 F.3d. at 147.

165. *Id.*

166. *Id.*

167. *Id.* at 150.

168. *Id.*

169. Cuban Museum of Arts and Culture, Inc. v. City of Miami, 766 F. Supp. 1121 (Dist. Ct. 1991) (U.S.).

170. *Id.* at 1124.

171. *Id.* at 1122.

172. *Id.*

173. *Id.* at 1130.

174. *Id.* at 1128.

*Brooklyn Institute of Arts and Sciences v. City of New York*[175] is a case similar to *Cuban Museum*. Mayor Rudolph Guiliani threatened to terminate funding unless the Brooklyn Museum cancelled "The Sensation Exhibit."[176] The Mayor was outraged by two pieces from the exhibit, particularly Chris Ofili's "The Holy Virgin Mary," which was made of elephant dung, and Damien Hirst's works involving pigs in formaldehyde.[177] The Mayor accused the museum of violating the lease contract for mounting an exhibit which it made inaccessible to children without the City's permission.[178] The New York court reiterated that the government is prohibited from censoring works which are offensive, sacrilegious, morally improper, and even dangerous.[179] Citing *Speiser v. Randall*[180] and *Hannegan v. Esquire, Inc.*,[181] it ruled that governmental efforts to violate the freedom of expression may take the form of a denial of a property tax exemption or denial of second-class postal privileges.[182] In essence, the freedom of speech may not be subject to indirect violations.[183] In response to the City's assertion that taxpayers are not obliged to fund the exhibition of controversial art, the court cited *Buckley v. Valeo*[184] in stating that —

> [V]irtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object ... Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a congressional decision to suppress speech.[185]

The New York court also considered the concept of the right of the government to speak as significant in the issue of government regulation of art.[186]

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175. The Brooklyn Institute of Arts and Sciences v. The City of New York and Rudolph Guiliani, 64 F.Supp.2d 184 (Dist. Ct. 1999) (U.S.).

176. *Id.* at 191.

177. *Id.*

178. *Id.*

179. *Id.* at 198.

180. Speiser v. Randall, 357 U.S. 513 (1958).

181. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

182. *See Brooklyn Institute*, 64 F.Supp.2d at 198-99.

183. *Id.* at 199.

184. Buckley v. Valeo, 424 U.S. 1 (1976).

185. *Brooklyn Institute*, 64 F.Supp.2d at 201.

186. *Id.* at 201.

*A. The Government Speech Doctrine*

The doctrine established in *Rust v. Sullivan*[187] essentially means that the freedom of expression clause is inapplicable in instances of governmental speech. It may choose what to say, and favor even controversial expressions with no duty to allow equal time for the opposing side to air its view.[188] However, the doctrine applies only when the speech is the government's own, and not when the government disfavors or endorses private speech, in which case such must be appraised based on the rules of viewpoint neutrality.[189] In *Brooklyn Museum*, for example, the court found the City's denial of funding not to be an exercise of government speech, but an invidious discrimination of subsidies motivated by intolerance of the exhibit's content and viewpoint.[190]

*B. The Character of the Forum*

The parameters of restriction also depend on the character of the forum in which expression is delivered.[191] Government interference is specifically prohibited in private fora,[192] except perhaps when the speech becomes unprotected expression. There are very contentious areas, however, when the exhibition space is government property. Public fora have been segregated into the traditional public forum, the designated public forum, and the non-public forum.[193] *Perry Education Association v. Perry Local Educators Association*[194] elucidated the disparities between these three.[195]

A traditional public forum is one which has been quintessentially devoted to assembly and debate, either by tradition or government fiat.[196] These include streets and parks which have been immemorially open for communication and discussion of public questions.[197] In these fora, the

187. Rust v. Sullivan, 500 U.S. 173 (1991).

188. Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1358 (2001).

189. William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 31-32 (2011).

190. *Brooklyn Institute*, 64 F.Supp.2d at 200.

191. *See* Cornell University Law School, Forums, *available at* http://www.law.cornell.edu/wex/forums (last accessed Mar. 31, 2014) [hereinafter Forums].

192. *Nelson*, 16 F.3d. at 148.

193. *See* Forums, *supra* note 191.

194. Perry Education Association v. Perry Local Educators Association, 460 U.S. 37 (1983).

195. *Id.* at 45-47.

196. *Id.* at 45.

197. Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939).

State's ability to suppress and regulate expressive activity is "sharply circumscribed."[198] To legitimately enforce content-based exclusion, it must demonstrate that it will "serve a compelling state interest[,] and that [the regulation] is narrowly drawn[.]"[199] For content-neutral restrictions to be valid, the regulation must be narrowly tailored to serve significant government interest and must leave other alternative channels of communication open.[200]

A designated public forum is one which the state has made available to the public as a place of expressive activity.[201] Examples of this include university meeting facilities, school board meetings, and municipal theaters.[202] The State is not required to retain the availability of these fora, but so long as it does, it is "bound by the same strict standards as [are applicable to the] traditional public forum."[203] A species of designated public forum is the limited public forum, where government may permit only select topics or classes of speakers.[204] Here, the standards are indistinct from the other kind of forum, which is the non-public forum.[205]

The non-public forum is "[p]ublic property which is not[,] by tradition or designation[,] a forum for public communication[.]"[206] The mere fact that it is government property does not automatically open it to public access. *Perry* discusses the standard to be used in the non-public forum, to wit —

> In addition to time, place, and manner regulations, the [s]tate may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, '*[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.*'[207]

198. *Perry*, 460 U.S. at 45.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 45-46.

203. *Id.* at 46.

204. *See* Cornelius v. NAACP Legal Defense Fund and Educational Fund, Inc., 473 U.S. 788, 806 (1985).

205. Warren v. Fairfax County, 196 F.3d 186, 194 (4th Cir. 1999) (U.S.).

206. *Perry*, 460 U.S. at 46.

207. *Id.* (emphasis supplied).

Both content-based and content-neutral restrictions are thus permissible in non-public fora; the governmental rights over it are similar to that of the private owner.[208]

As regards artistic expression, the amount of permissible regulation is determined by first identifying the character of the forum.[209] In *Claudio v. United States*,[210] the court considered a federal building as a non-public forum, allowing the Field Office Manager to revoke the artist's license to display an allegedly vulgar painting in the lobby.[211] The work caused crowds to gather, congestion, and it also prevented the management from maintaining the order and security in the building.[212]

The court upheld the refusal, considering it not as a regulatory or law-making action, but an action by the government as proprietor.[213] The court said that —

> Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Mere 'common sense' is sufficient to uphold agency action under the reasonableness standard.*[214]

Indeed, the standard in non-public fora can be reduced to "mere common sense."[215] There is little doubt, therefore, that when the court determines a public property to be a non-public forum, any reason for governmental interference will most likely be upheld.[216]

Another case determined a community college exhibition as a non-public forum.[217] *Piarowski v. Illinois Community College*[218] involved a faculty exhibition on the main floor of Prairie State College's principal building.

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208. *Id.*

209. National Campaign for Freedom of Expression, Understanding, *available at* http://www.thefirstamendment.org/ncfechap1.htm (last accessed Mar. 31, 2014).

210. Claudio v. United States, 836 F.Supp. 1230 (Dist. Ct. 1993) (U.S.).

211. *Id.* at 1236-37.

212. *Id.* at 1233-34.

213. *Id.* at 1237.

214. *Id.* at 1236 (emphasis supplied).

215. *Id.*

216. Steven Emanuel, Wolters Kluwer MBE Bar Prep — Chapter 10: Freedom of Expression, *available at* https://www.inkling.com/read/wolters-kluwer-mbe-bar-prep/mbe-constitutional-law/chapter-10-freedom-of-expression (last accessed Mar. 31, 2014).

217. Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985) (U.S.).

218. *Id.*

Three of eight stained-glass windows contained lurid depictions of naked women.[219] Because of "a number of complaints from students, cleaning women, and black clergymen,"[220] the college ordered Piarowski, the chairman of the art department, to remove the windows and suggested that they be exhibited in a smaller gallery on the fourth floor of the art department.[221] Because of Piarowski's refusal, the art department closed the exhibit.[222] The court upheld the closure and found the gallery a non-public forum since it is not generally open to the public, even if artists from outside are sometimes invited to exhibit their works there.[223]

The *Piarowski* court also considered the availability of the work to the audience. The windows were placed on a gallery which is an alcove of the principal building's large open area called the "mall."[224] The cafeteria, a book store, and other facilities are near this part since the mall is the college's main thoroughfare.[225] This will collect an audience who may find these displays unwelcome. In effect, *Piarowski* made a decision based on a variation of the captive audience theory.

### *C. The Captive Audience*

As a default rule, persons are required to tolerate outrageous, offensive, and insulting speech. However, the government may legitimately curb private speech in the instances that they are directed towards a "captive audience."[226] This considers the listener's privacy interest, who may find the time or place of expression inconsiderate. In these cases the freedom of expression yields to the freedom to refuse to listen. According to Kaufman, this theory may be understood better as a "default time, place, or manner restriction placed on a plaintiff by a court when no time, place, or manner restrictions had been explicitly adopted by the defendant prior to the conflict."[227]

Corbin explains that there are two requisite elements before the captive audience theory may operate: (1) that "the audience cannot readily avoid the

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219. *Id.* at 627.

220. *Id.* at 628.

221. *Id.*

222. *Id.*

223. *Piarowski*, 759 F.2d at 628-29.

224. *Id.* at 627.

225. *Id.*

226. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943 (2009).

227. ROY S. KAUFMAN, ART LAW HANDBOOK 198 (2000 ed.).

message[;]"[228] and (2) the audience has to "quit the space to avoid the message."[229] Hence, the doctrine cannot be applied if the audience has the option to avert their eyes.[230]

In *Close v. Lederle*,[231] the court upheld the removal of nude paintings from a corridor used regularly by the public, particularly children.[232] As stated previously, *Claudio* also considered the captive audience in allowing the removal of the artwork from the Raleigh Federal Building. The court explained that the offensive artwork was physically attached to the courthouse itself and that because of its size and location, everyone entering the building had to see it.[233] The painting was displayed in the direct line of vision of those who entered the courthouse.[234]

Thus, in the field of art, there will be a captive audience if the visual piece is placed in a location of great human traffic or when it is in the direct line of vision of unsuspecting and unwilling viewers.

American jurisprudence involving hostile audience response against art is more comprehensive in comparison to that developed in the Philippines. In many respects, this is preferable, as the available remedies have been firmly set. It becomes important, therefore, to evaluate the compatibility of these doctrines with the principles of international covenants, and more importantly, their suitability to the framework of freedoms and restrictions established in Philippine jurisprudence.

## V. THE HECKLER'S VETO PROHIBITION VIS-À-VIS ICCPR AND ICESCR STANDARDS

The prohibition against a heckler's veto on art, along with its allowable limitations, is consistent with the principles of the ICCPR and ICESCR in considering the validity of limitation on freedom of expression.

First, the ICCPR requires for every restriction on free speech to be set by legislation.[235] The prohibition against the heckler's veto of offensive speech complies with this requirement, in that it applies not merely to legislation which allows for censorship based on audience response, but it prohibits suppression carried out without legislative fiat.

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228. Corbin, *supra* note 226, at 943.

229. *Id.* at 944.

230. *See* Cohen v. California, 403 U.S. 15, 21-22 (1971).

231. Close v. Lederle, 424 F.2d 988 (1st Cir. 1970) (U.S.).

232. *Id.* at 990-91.

233. *Claudio*, 836 F.Supp. at 1235.

234. *Id.*

235. ICCPR, *supra* note 127, at art. 19 (3).

Second, the ICESCR requires the restriction to be compatible with the nature of the right to be limited.[236] Limitations based on traditional, religious, or other customary law are incompatible with freedom of expression.[237] The heckler's veto is prohibited precisely because it is centered on speech content and is viewpoint discriminatory. In the same vein as the ICCPR and ICESCR, the prohibition protects expression no matter how deeply offensive to a certain sector or cultural tradition.

Third, the ICCPR enumerates exclusive grounds for the limitation on the freedom of expression, and those are the rights and reputation of others, national security, public order, public morals, public health, and safety.[238] It also entails proof of necessity and proportionality.[239] The heckler's veto doctrine operates when the expression being sought to be suppressed is protected speech. In the event that it constitutes obscenity, libel, or defamation, the protection against hostile audience response cannot be invoked.[240] Its operation is also subject to content-neutral limitations like the public forum doctrine and the captive audience doctrine.

These limitations are consistent with the emphasis of the ICCPR on content-neutral regulations based on public order and public morals. The public forum doctrine, for example, suppresses speech depending on the character of the forum in which the expression is made, which is a time, place, and manner regulation.[241] The captive audience doctrine is in accordance with the rights of others, particularly the right to privacy contained in Article 17 of the ICCPR.[242]

Fourth, the heckler's veto doctrine assures that there is no other alternative method to attain governmental objectives other than by the suppression of speech, and that the curtailment of speech will be proportionate to the interest sought to be protected. In fact, it mandates that in the confrontation between offensive expression and public unrest, it becomes the duty of the local authorities to suppress the riot instead of the

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236. *General Comment No. 21*, *supra* note 116, at ¶ 19.

237. *General Comment No. 34*, *supra* note 129, at ¶ 24.

238. ICCPR, *supra* note 127, at art. 19 (3).

239. *Id.*

240. *See Miller*, 413 U.S. at 18-19 & *Chaplinsky,* 315 U.S. at 571-72.

241. *See* Cornell University Law School, CRS Annotated Constitution, *available at* http://www.law.cornell.edu/anncon/html/amdt1efrag3_user.html (last accessed Mar. 31, 2014) [hereinafter CRS Annotated].

242. Article 17 of the ICCPR provides that: "(1) [n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation[; and] (2) [e]veryone has the right to the protection of the law against such interference or attacks." ICCPR, *supra* note 127, at art. 17.

speech.[243] Further, the public forum doctrine constrains the government to make use of the least intrusive restraint considering the different tests it requires.[244] In all public, designated, and non-public fora, the government is required to legislate narrowly so as to subject to regulation the smallest variation of speech.[245] In public and designated fora, a compelling state interest is further required.[246] The captive audience doctrine similarly limits the restrictions on speech only in cases where the offensive message is completely unavoidable so as to destroy the privacy rights of the audience.[247]

Proceeding from Article 5 of the ICCPR which dictates that the limitation of a right should not amount to a destruction of it,[248] the captive audience doctrine in effect is a safeguard that the right to privacy is not eliminated by unmitigated offensive expression.[249] In this, it considers that the restriction is proportionate to the interest being safeguarded, and it also takes into account both the expression's form and the means of dissemination.

Finally, it should be noted that the freedom of expression is a derogable right.[250] Derogable rights are those which are permitted to be "limited or adapted [by a] [s]tate [to fit its] interest to promote public safety, public morals, public health[,] or national security."[251] The heckler's veto doctrine provides that the freedom of expression may be restricted only upon a showing of a clear and present danger of a substantive evil that will arise in the event the speech is permitted to continue.[252] This standard is significantly similar to that adopted by the *Siracusa Principles on Limitation and Derogation of Provisions in the ICCPR* (*Siracusa Principles*).[253] In public emergencies which threaten the life of the nation, the *Siracusa Principles* allow for derogation of rights only when the situation is of "exceptional and actual or imminent

243. *Hague*, 307 U.S. at 516.

244. CRS Annotated, *supra* note 241.

245. *Id.*

246. *Id.*

247. Corbin, *supra* note 226, at 943.

248. ICCPR, *supra* note 127, at art. 5.

249. Corbin, *supra* note 226, at 943.

250. *General Comment No. 34*, *supra* note 129, at ¶ 5.

251. Maria Socorro I. Diokno, Chapter 1. The Philippine Human Rights Framework for Development Planning, *available at* http://www.hrbatoolkit.org/?page_id=47 (last accessed Mar. 31, 2014).

252. *Terminiello*, 337 U.S. at 4.

253. U.N. Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, (Sep. 28, 1984) [hereinafter *Siracusa Principles*].

danger[.]"[254] Also, when limitation is based on situational exigencies, "the principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger[,] and may not be imposed merely because of an apprehension of potential danger."[255]

In the more general sense, the prohibition against a heckler's veto is compliant to the mandates of the ICESCR to respect, protect, and fulfill the right to participate in cultural life.[256] It satisfies most of the minimum core obligations of a state in promoting cultural life, specifically the obligation "[t]o eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to the other cultures, without discrimination and without consideration for frontiers of any kind."[257]

It provides for an immediate measure in situations of administrative or private censorship of offensive art, thereby evading any violation of Article 15, 1 (a) of the ICESCR through direct action of the state or insufficient regulation of private or public institutions, through omission or failure to take necessary measures to comply with core obligations.[258]

Essentially, the doctrine of heckler's veto as applied to hostile audience response is in consonance with the tenets established by the provisions of the International Covenants.

## VI. RIPENESS OF THE PHILIPPINE JURISPRUDENTIAL LANDSCAPE FOR THE ADOPTION OF THE HECKLER'S VETO DOCTRINE

### *A. Doctrinal Developments on Hostile Audience Response*

#### 1. Distinction Based on the Character of Prohibition; Content-Based and Content-Neutral Regulation

Several mechanisms involved in the application of the heckler's veto prohibition are present in the Philippine jurisprudential catalogue. The root of jurisprudential censure of a heckler's veto is grounded on the impermissibility of invalid content-based regulation of speech.[259] A heckler's veto on expression is prohibited because it is motivated by a riotous response of an audience because of offensive message or content. If it is to become a

254. *Id.* ¶ 39.

255. *Id.* ¶ 54.

256. *General Comment No. 21*, *supra* note 116, at ¶ 48.

257. *Id.* ¶ 55 (d).

258. *Id.* ¶16.

259. *See* Texas v. Johnson, 491 U.S. 397, 412 (1989).

legitimate ground for curtailment, it must pass the muster of the clear and present danger standard.[260]

The distinction between content-based and content-neutral regulation on expression, along with the standards they entail, had long been adopted by the courts in *Primicias v. Fugoso*,[261] *Ignacio and dela Cruz v. Ela, etc.*,[262] *Navarro v. Villegas*,[263] *Reyes*, *Iglesia*, and more recently in *Chavez*. In distinguishing the two forms of regulation from each other, *Osmeña* and *Blo Umpar Adiong v. Commission on Elections*[264] adopted the "deferential standard of review" established by *O'Brien*, to wit —

> A government regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest[,] if the governmental interest is unrelated to the suppression of free expression[,] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[265]

Several American cases which refused suppression of speech based on content-based hostile audience response have also grafted themselves onto a number of Philippine cases. *Reyes* and *Primicias* found "full support" in the case of *Cox v. State of New Hampshire*[266] where prerequisite licensing for the exercise of public assembly was validated for as long as it limited itself to time, place, and manner considerations.[267] Furthermore, *Reyes* permitted a public assembly based on the reasoning of *Hague* — that although citizen privilege to use streets and parks to communicate their view may be regulated, it cannot be abridged or denied in the guise of regulation.[268]

In *Gonzales v. Commission on Elections*[269] and *Chavez*, the Court adopted the reasoning of *Terminiello v. City of Chicago*,[270] which even included offensive messages in free speech protection, declaring that speech "may indeed best serve its high purpose when it induces a condition of unrest,

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260. *Id.* at 419.

261. *See* Primicias v. Fugoso, 80 Phil. 71 (1948).

262. *See* Ignacio and dela Cruz v. Ela etc., 99 Phil. 346 (1956).

263. *See* Navarro v. Villegas, 31 SCRA 730 (1970).

264. Blo Umpar Adiong v. Commission on Elections, 207 SCRA 712 (1992).

265. *Id.* at 718.

266. Cox v. New Hampshire, 312 U.S. 569 (1941).

267. *Id.* at 576.

268. *Reyes*, 125 SCRA at 563-64.

269. Gonzales v. Commission on Elections, 27 SCRA 835 (1969).

270. *Terminiello*, 337 U.S. at 1.

creates dissatisfaction with conditions as they are, or even stirs people to anger."[271]

*Social Weather Station* adopted *Police Department v. Moshley*[272] in invalidating a statute which contained an absolute prohibition of printing election survey results, quoting its justification that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[273] It also used the categories of unprotected speech established in *Chaplinsky v. New Hampshire*[274] which included obscenity, libel, and fighting words.[275]

2. Adopted Parameter: Clear and Present Danger

The clear and present danger doctrine had obtained the approval of Philippine courts since it had been first introduced in the case of *Cabansag v. Fernandez, et al.*[276] It was implicitly accepted in *Primicias*. *Eastern Broadcasting Corporation* explained that limitations on all forms of media are tested against the clear and present danger rule, but it provided for an exception in the case of television and radio.[277] Likewise, *Iglesia* references to forms of speeches to which the clear and present danger test is inapplicable to "*low value speeches* such as obscene speech, commercial speech, and defamation."[278] *Iglesia* points to four types of speech to which, in American jurisprudence, the standard applies — "speech that advocates dangerous ideas, speech that provokes a hostile audience reaction, out of court contempt[,] and release of information that endangers a fair trial."[279] *ABS-CBN Broadcasting v. COMELEC*[280] determined that in cases of speech restriction, it is the clear and present danger test which should be utilized as opposed to the earlier dangerous tendency test.[281] Thereafter, considering both American and Philippine jurisprudence, *Chavez* pointed to the different tests developed with respect to content-neutral and content-based restriction, clarifying that

271. *Id.* at 4. *See Chavez*, 545 SCRA at 529 & *Gonzales*, 27 SCRA at 857.

272. Police Department of the City of Chicago v. Moshley, 408 U.S. 92 (1972).

273. *Social Weather Station*, 357 SCRA at 505 (citing *Police Department*, 408 U.S. at 95).

274. *Chaplinsky*, 315 U.S. at 568 (1942).

275. *Social Weather Station*, 357 SCRA at 505 (citing *Chaplinksy*, 315 U.S. at 571–72).

276. Cabansag v. Fernandez, et al., 102 Phil. 152, 161 (1957).

277. *Eastern Broadcasting Corporation*, 137 SCRA at 635.

278. *Iglesia ni Cristo*, 259 SCRA at 551.

279. *Id.*

280. ABS-CBN Broadcasting v. COMELEC, 323 SCRA 811 (2000).

281. *Id.* at 825.

when regulation is content-neutral, the strictest form of judicial scrutiny is merely the intermediate approach of the O'Brien test, while content-based regulation must be measured against the clear and present danger standard.[282]

3. Limitative Devices: The Captive Audience, the Public Forum, and Government Speech

In terms of exceptions, the captive audience doctrine had not been extensively applied by the courts, but it was the main thrust of the argument in creating different standards in the realm of broadcast media. In *Eastern Broadcasting Corporation*, the Court determined that television and radio broadcasting enjoy a lesser scope of protection compared to print media.[283] The justification was grounded on *Federal Communications Commission v. Pacifica Foundation*,[284] perhaps the most well-known captive audience case.[285] *Federal Communications Commission* found that broadcast media had the most limited protection because: (1) it "established a uniquely pervasive presence"[286] which reaches the audience even up to the privacy of their homes; and (2) it "is uniquely accessible to children."[287] Therefore, the dilemma in the instance of broadcast media is that the "reactions to inflammatory or offensive speech would be difficult to monitor or predict. The impact of the vibrant speech is forceful and immediate. Unlike readers of the printed work, the radio audience has lesser opportunity to cogitate, analyze, and reject the utterance."[288]

At present, there is no equivalent to the public forum doctrine in Philippine jurisdiction. Nevertheless, jurisprudence and law indicate recognition of the existence of a public forum. Public fora were recognized by *Reyes* when it quoted *Hague*'s declaration —

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[289]

282. *Chavez*, 545 SCRA at 493-94.

283. *Eastern Broadcasting Corporation*, 137 SCRA at 635.

284. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

285. Corbin, *supra* note 226, at 945.

286. *Eastern Broadcasting Corporation*, 137 SCRA at 635.

287. *Id.*

288. *Id.* at 636.

289. *Reyes*, 125 SCRA at 573-74 (citing *Hague*, 307 U.S. at 515).

It also recognized the distinction between public and private property, specifically in terms of permit requirement.[290] In the use of public places, the applicant is required to procure a permit from a licensing authority, while in private property only the consent of the private owner is needed.[291] The codification of *Reyes*, Batas Pambansa Blg. 880 (B.P. 880) or The Public Assembly Act, defines a "public place" as something which "include[s] any highway, boulevard, avenue, road, street, bridge[,] or other thoroughfare, park, plaza, square, and/or any open space of public ownership where the people are allowed access."[292]

In addition, it obliged cities and municipalities to "establish or designate at least one suitable 'freedom park' which ... [should] be centrally located"[293] as much as possible where no prior permit will be required.[294] This type of forum is equivalent to the quintessential or traditional public forum in American jurisprudence. B.P. 880, consistent with *Reyes*, indicates that the clear and present danger will be the parameter to be satisfied for a valid refusal of a permit.[295] Further, in situations where police assistance is requested, it is mandated that the law enforcement "observe the policy of maximum tolerance[,]"[296] which is defined as "the highest degree of restraint that the military, police[,] and other peace keeping authorities shall observe during a public assembly or in the dispersal of the same."[297] In effect, the requirement of strict scrutiny required for the American traditional public forum had been espoused.

290. *Hague*, 307 U.S. at 514-18.

291. An Act Ensuring the Free Exercise by the People of their Right Peaceably to Assemble and Petition the Government for Other Purposes [The Public Assembly Act of 1985], Batas Pambansa Blg. 880, § 4 (1985).

292. *Id.* § 3 (b).

293. *Id.* § 15.

294. *Id.*

295. Section 6 (a) of B.P. 880 provides that —

> It shall be the duty of the mayor or any official acting in his behalf to issue or grant a permit unless there is clear and convincing evidence that the public assembly will create a clear and present danger to public order, public safety, public convenience, public morals[,] or public health.

*Id.* § 6.

296. Section 10 (a) of B.P. 880 states that "[m]embers of the law enforcement contingent who deal with the demonstrators shall be in complete uniform with their nameplates and units to which they belong displayed prominently on the front and dorsal parts of their uniform and must observe the policy of 'maximum tolerance' as herein defined." *Id.* § 10 (a).

297. *Id.* § 3 (c).

No express acceptance had been made of the notion of a designated or of a non-public forum. But it is to be noted at the same time that there is no express rejection of these other variations of public fora. The Author submits that these are nevertheless incorporated in our legislative practices. For instance, the CCP was directed to "maintain ... a national theater, a national music hall, an art gallery ... and the like."[298] The CCP is effectively a designated public forum by express provision of the law. Another example is the National Museum which received the mandate to "collect, preserve, restore[,] and exhibit to the public objects of arts[,]"[299] ethnographic "cultures, practices[,] and artistic forms,"[300] as well as "artifacts."[301] Verily, the National Museum is a form of limited public forum, which is a legislated exhibition space for the "nation's rich artistic[ ] and cultural heritage."[302]

There is likewise no express rejection of the government speech doctrine as formulated by American jurisprudence. *Rust* upheld the government's ability to legally advance a viewpoint because it does not necessarily amount to suppression of private speech, but is merely promoting an activity or idea which it deems within "public interest."[303] Practically all legislation is predicated on a determination of which measures are within the public interest. In connection, the Author further posits that the doctrine is compatible with the present Philippine legal concepts.

All considered, the Philippine jurisprudential guidelines have been set for the adoption of the doctrine on heckler's veto. The heart of the doctrine, which is the condemnation of content-based suppression of speech, had been assented to by the courts, and the standard of clear and present danger, by which to gauge the validity of speech restrictions, had been well in place. Further, there exist legislative definitions and penalties for unprotected speech.

## VII. *POLETEISMO* IN A DIFFERENT FRAME: AN ANALYSIS BASED ON AMERICAN HOSTILE AUDIENCE RESPONSE JURISPRUDENCE

The controversial closure of *Kulô* provides an opportune ground for the theoretical application of the foregoing doctrines. To objectively assess the censure of *Poleteismo* within the framework of the heckler's veto doctrine, several content-neutral elements must be taken into consideration: (1) the nature of the forum, whether public or private; (2) the character of the

298. P.D. No. 15, § 2 (a).

299. National Museum Act of 1998, § 7.10.

300. *Id.* § 7.12.

301. *Id.* § 20.

302. *Id.* § 6.3.

303. *Rust*, 500 U.S. at 193.

restriction, content-based or content-neutral; (3) the standard applicable; and (4) the amount of disorder fomented as measured against the standard.

*Poleteismo* was exhibited in the main gallery of the CCP, a non-municipal public corporation established by P.D. No. 15 with this purpose in mind — "[t]o construct, establish[,] and maintain in a single site a national theater, a national music hall, an art gallery[,] and such other buildings and facilities as are necessary or desirable for the holding of conferences, seminars, concerts[,] and the like[.]"[304]

From this, it is reasonable to deduce that the main gallery of the CCP is a designated public forum, which may unqualifiedly exhibit works so long as they fit the curator's determination of "art," and subject to the approval of the CCP Board of Trustees.

*Poleteismo* provoked many responses and these included complaints, threats of criminal charges against the officials of the CCP, demands for resignation, as well as actual vandalism of the artwork.[305] Public officials threatened to deprive the CCP of funding.[306] Eventually the CCP closed the exhibit because of "increasing number of threats to persons and property."[307] To designate the parameter by which the validity of this action may be measured, the character of the closure must be considered. Immediately, *Cantwell*'s pronouncement comes to mind — speech cannot be suppressed in the guise of preserving ideal conditions.[308] Nevertheless, as explained in *Chavez*, determining whether a limitation is content-based or content-neutral is difficult.[309] In fact, avoiding threats to persons and property appears to be a legitimate reason to close the exhibit at first glance. The restriction seemed unrelated to the suppression of speech, which allows it to be classified as content-neutral under the *O'Brien* test.[310] Yet the distinction between content-based and content-neutral restriction is not as obvious; apparent content-neutral limitations may reveal themselves as content-based once their application is scrutinized.[311] The Court, in *Newsounds Broadcasting*

304. P.D. No. 15, § 2 (a).

305. *See* Carmela Lapeña & Jesse Edep, CCP closes down gallery with controversial 'Kulo' exhibit, *available at* http://www.gmanetwork.com/news/story/228841/news/nation/ccp-closes-down-gallery-with-controversial-kulo-exhibit (last accessed Mar. 31, 2014).

306. *Id.*

307. Delon Porcalla, *'Blasphemous' art exhibit shut down*, PHIL. STAR., Aug. 10, 2011, *available at* http://www.philstar.com/headlines/714803/blasphemous-art-exhibit-shut-down (last accessed Mar. 31, 2014).

308. *Cantwell*, 310 U.S. at 308.

309. *Chavez*, 545 SCRA at 493.

310. *See Blo Umpar Adiong*, 207 SCRA at 718.

311. *Chavez*, 545 SCRA at 493.

*Network, Inc. v. Dy*,[312] considered an ordinance, which is seemingly content-neutral, as content-based regulation based on the surrounding circumstances.[313] The radio station that was ordered closed made scathing commentaries against the Mayor in relation to election irregularities in Isabela.[314] The Court also considered the time of closure, which was rendered on the date the population of Isabela was about to exercise their right of suffrage.[315]

If the surrounding circumstances of the *Poleteismo* controversy are investigated, facts suggest that the closure is something other than a neutral action. The artwork had invited the possibility of reduced funding.[316] It received the moral reproach of national authorities such as the President Noynoy Aquino, the former Senate President Juan Ponce Enrile, Senator Jinggoy Ejercito Estrada, Senator Joker P. Arroyo, and Congresswoman Imelda Marcos.[317] During the Senate hearing, it was practically admitted that most of the members of the CCP aired their protests against *Poleteismo* and wanted to pull it out.[318] The CCP President himself felt offended by the artwork.[319] This offense became the motivation for him to convene the Management Committee to get their opinions on the exhibit.[320] A memorandum had already been made by majority of the members to put into effect the closure of the exhibit as early as 14 July 2011, even before the threats heightened on 4 August 2011, when the vandalisms were perpetrated on the artwork.[321] On 3 August 2011, Board member Anthony Yap e-mailed his opposition to the exhibit.[322] Ms. Zenaida Tantoco also sent a

312. Newsounds Broadcasting Network, Inc. v. Dy, 583 SCRA 333 (2009).

313. *Id.* at 352.

314. *Id.* at 348.

315. *Id.* at 368.

316. Porcalla, *supra* note 307.

317. *Id.*

318. *See* Kimberly Jane Tan, Controversial 'Poleteismo' not art, says national artist, *available at* http://www.gmanetwork.com/news/story/229551/news/nation/controversial-poleteismo-not-art-says-national-artist (last accessed Mar. 31, 2014).

319. *See* de Santos & Alvarez, *supra* note 21 & Kimberly Jane Tan, CCP president on 'Kulo' exhibit: As a Catholic, I was shocked, *available at* http://www.gmanetwork.com/news/story/229543/news/nation/ccp-president-on-kulo-exhibit-as-a-catholic-i-was-shocked (last accessed Mar. 31, 2014) [hereinafter Tan, CCP president on 'Kulo' exhibit].

320. *Id.*

321. *Id.*

322. Sam L. Marcelo, Penises, TV shows, bishops, and memos: How art landed on the front page, *available at* http://culturalcenterphils.tumblr.com/post/9122789920 (last accessed Mar. 31, 2014).

letter expressing her opposition to the exhibit.[323] There is sufficient evidence, therefore, that the closure was not entirely based on public order, but was a measure that the CCP board members felt appropriate to take given the content of the artwork.

Nevertheless, even assuming the closure was based on threats of public order, the action is specifically within the definition of the heckler's veto. In the words of Leslie Jacobs, "[t]hat the government acts in response to the complaints of offended constituents — even a large number of them — does not justify restricting the unpopular speech. Rather, such a response constitutes an unconstitutional 'heckler's veto' of protected expression."[324] Evidently, the public remonstrations against the content of the speech were made the basis for taking the whole exhibit down. Being content-based, it is to be measured against the standard of clear and present danger. "Clear" means there must be a causal connection between the substantive evil and the speech, while "present" means imminent and immediate danger.[325] It must be remembered that police had been deployed to the CCP already to anticipate any possible disturbance.[326] Security is present at the site, and no actual disorder occurred at the time of the closure. B.P. 880 will only allow the dispersal of a public assembly in the event of actual violence, and even then it mandates a requisite audible warning.[327] Only when the disturbance fails to abate despite the lapse of a reasonable time from the warning are the law enforcement officers allowed to disperse the crowd.[328] These guidelines may be applicable to the case of visual art. Notably, the requirements of B.P. 880 apply to actual demonstrations, which are more difficult to regulate than the immobile visual art.[329] If these standards were to apply, therefore, it will be seen that the CCP's closure was premature and without legal basis. The closure was not predicated on "clear and convincing evidence" of a clear and present danger as required by law.

There is opinion to the effect that the closure was an exercise of the government's right "not to speak."[330] However, the government speech

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323. Tan, CCP president on 'Kulo' exhibit, *supra* note 319.

324. Jacobs, *supra* note 188, at 1358.

325. *Gonzales*, 27 SCRA at 860-61.

326. Delon Porcalla and Rhodina Villanueva, *CCP exec quits amid furor*, PHIL. STAR., Aug. 11, 2011, *available at* http://www.philstar.com/headlines /715139/ccp-exec-quits-amid-furor (last accessed Mar. 31, 2014).

327. The Public Assembly Act of 1985, §§ 10 (c) & 11 (c).

328. *Id.* § 11 (c).

329. The Public Assembly Act of 1985, § 3.

330. *See* Fr. Joaquin G. Bernas, S.J., *Art and the right not to speak*, PHIL. DAILY INQ., Aug. 22, 2011, *available at* http://opinion.inquirer.net/10425/art-and-the-right-not-to-speak (last accessed Mar. 31, 2014).

doctrine comes into operation when the government decides to regulate content when it is the speaker, or when it selects private entities to convey its message.[331] It applies only when the speech proceeded from the government, not to private speech. Thus, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."[332] The issue at hand no longer concerns *access* to the forum, because that phase had long been foregone. There is no question that the government may refuse viewpoints that are non-compliant with the message it designates a forum to propagate. But once it has opened a limited forum "the State must respect the lawful boundaries it has itself set."[333] As discussed previously, the CCP is a designated public forum by virtue of P.D. No. 15, whose options to exhibit are not inhibited by any specified subject matter in the law. To reiterate, therefore, in discontinuing the exhibit prior to its predetermined closure date, its action must properly be scrutinized through the clear and present danger test.

It may then be inquired whether the artwork constituted the viewers as a captive audience. To answer this, the placement and location of the artwork must be discussed. The artwork was placed in the Main Gallery of the Cultural Center which is on the second floor of the building.[334] *Poleteismo* was placed almost at the far end of the gallery.[335]

The installation art was not immediately accessible to the audience as it was neither seen outside, as in the stained-glass in *Piarowski*, nor was it in the line of sight of the spectators entering the gallery, as in *Claudio*. The captive audience doctrine is inapplicable as an exception to the heckler's veto doctrine in the instant case. The presence of notice outside the exhibit is important to note as the spectators were cautioned in advance of the substance of the artworks in it.

331. *See* Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1261-63 (2010).

332. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828 (1995).

333. *Id.* at 829.

334. *See* Silverio, *supra* note 5.

335. *See* Figure 1.

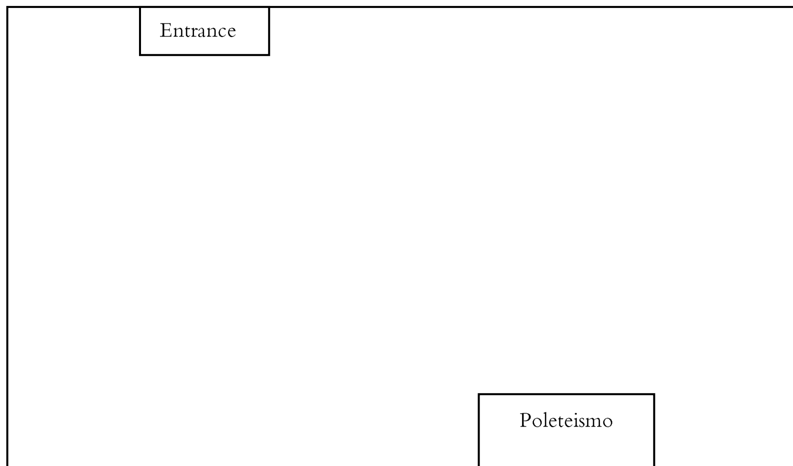


Figure 1. Approximate position of *Poleteismo* in the CCP Main Gallery

An argument may be made that there is no statute to strike down in the case of *Poleteismo*'s censure. However, Philippine courts have invalidated lesser actions by the government, as in *Chavez*, where a mere press statement or warning which did not carry a directive at all, was decided as unconstitutional.[336] The Court said that "[a]ny act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint. The concept of an 'act' does not limit itself to acts already converted to a formal order or official circular."[337]

In summary, the CCP main gallery is a designated public forum as provided by law, and the closure of the exhibit was content-based, which puts into operation the parameter of clear and present danger rule. The CCP had failed to satisfy altogether this standard for restriction. The captive audience doctrine is not applicable. Therefore, the closure of the exhibit is unconstitutional.

## VIII. CONCLUSION AND RECOMMENDATION: THE NECESSITY FOR A DEFENSIVE FRAMEWORK IN THE VISUAL ARTS

### *A. The Importance of Exhibition to the Visual Arts*

For a legitimate restriction of expression, the form and means of dissemination of speech must be taken into account.[338] In *Freedom of Expression and the Visual Arts*,[339] Grete Marstein differentiates visual art from

336. *Chavez*, 545 SCRA at 510-11.

337. *Id.* at 510.

338. *See General Comment No. 34*, *supra* note 129, at par. 34.

339. Grete Marstein, *Freedom of Expression and the Visual Arts*, *in* World Congress on the Implementation of the Recommendation Concerning the Status of the

other art forms in that there are only two main possibilities for their communication — through exhibition or display and reproduction.[340] She criticizes reproduction as method of dissemination because important qualities of the artwork will be lost, altered, or diminished.[341] Surface textures, colors, and material qualities will change, become distorted, or disappear completely.[342] Because of this, she argues that reproduction must be considered merely as a secondary way of expression.[343] The true realization of an artwork is its display — which includes exhibition and installation mounting.[344] However, it was found that visual artists frequently have a problem with respect to access to exposure space and general censorship.[345]

Installation art is site-specific and is made contingent to the configurations of a specific location, which means it can no longer be experienced after it is dismantled.[346] To permit a heckler's veto on visual art and installation art, even as a provisional remedy, will therefore destroy the right altogether, which is a violation of Article 5 of the ICCPR.

*B. Insufficient Safeguard Against Heckler's Veto of Art*

B.P. 880 is equipped with measures to safeguard a lawful public assembly from a heckler's veto, at the same time adopting the clear and present danger test to justify the dispersal of an assembly.[347] The Law provides prohibited

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Artist, Paris, June 16-20, 1997, *The Survival of the Artist: How Visual Artists Live and Work*, U.N. Doc. CLT/CONF/206/INF.4 (June 12, 1997) [hereinafter *Freedom of Expression and the Visual Arts*].

340. *Id.* at 57.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Freedom of Expression and the Visual Arts*, *supra* note 339, at 59.

346. *See* JULIE H. REISS, FROM MARGIN TO CENTER: THE SPACES OF INSTALLATION ART xiii-xix (2001 ed.).

347. Section 11 of B.P. 880 provides that —

> No public assembly with a permit shall be dispersed. However, when an assembly becomes violent, the police may disperse such public assembly as follows:
>
> (a) At first sign of impending violence, the ranking officer of the law enforcement contingent shall call the attention of the leaders of the public assembly and ask the latter to prevent any possible disturbance;
>
> (b) If actual violence starts to a point where rocks or other harmful objects from the participants are thrown at the police or at the

acts which are specific to public demonstrations,[348] and contains a list of penalties for violations of its mandates.[349] These measures, however, remain applicable to public assemblies as defined by the act.[350] B.P. 880 operates only in instances of concerted actions or actual speech in public, which involve expressions of a political, economic, or social character. It does not find application to religious demonstrations nor to artistic expression.

*C. The Need for Guidelines*

Under the ICESCR, the obligation to protect and to fulfill entails the adoption of policies to facilitate the taking part in cultural life, which includes access to exhibition space.[351] The ICCPR requires for restrictions

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> non-participants, or at any property causing damage to such property, the ranking officer of the law enforcement contingent shall audibly warn the participants that if the disturbance persists, the public assembly will be dispersed;
>
> (c) If the violence or disturbances prevailing as stated in the preceding subparagraph should not stop or abate, the ranking officer of the law enforcement contingent shall audibly issue a warning to the participants of the public assembly, and after allowing a reasonable period of time to lapse, shall immediately order it to forthwith disperse;
>
> (d) No arrest of any leader, organizer[,] or participant shall also be made during the public assembly unless he violates during the assembly a law, statute, ordinance[,] or any provision of this Act, [s]uch arrest shall be governed by Article 1255 of the [RPC], as amended;
>
> (e) Isolated acts or incidents of disorder or breach of the peace during the public assembly shall not constitute a group for dispersal.

The Public Assembly Act of 1985, § 11.

348. These prohibited acts are "[o]bstructing, impeding, disrupting[,] or otherwise denying the exercise of the right to peaceful assembly[.]" *Id.* § 13 (d).

349. *Id.* § 14.

350. Public Assembly is defined as —

> Any rally, demonstration, march, parade, procession[,] or any other form of mass or concerted action held in a public place for the purpose of presenting a lawful cause; or expressing an opinion to the general public on any particular issue; or protesting or influencing any state of affairs whether political, economic[,] or social; or petitioning the government for redress of grievances.
>
> The processions, rallies, parades demonstrations, public meetings[,] and assemblages for religious purposes shall be governed by local ordinances[.]

*Id.* § 3 (a).

351. *General Comment No. 21*, *supra* note 116, at ¶ 54.

to be provided by law. The restrictions should not go beyond the grounds provided by the ICCPR — the rights and reputation of others and public order, health, or morals.[352] But a restriction based on morals must not derive from a singular tradition, and must therefore remain viewpoint neutral.[353]

In the manner of B.P. 880, it will be beneficial to enact a statute that will cover exigent situations in public fora which houses art that provokes a hostile audience response. Guidelines must ensure that any decision of the exhibitor is content-neutral.

1. Preventing Censorial Community Values

The Author is inclined to accept the three-step test propounded by Amy Ruth for the determination of whether a government entity or agent has closed access to art based on censorial community values, and has therefore acted unconstitutionally.[354] The *first* test is a temporal inquiry — whether the censorial act came after access has been granted.[355] If it did, the second test will apply since this may indicate viewpoint discrimination. Otherwise the inquiry ends. *Second*, it must be determined whether the entity effected the closure to avoid offense against the community.[356] If the statement is forthcoming, as in *Brooklyn Museum*, where Mayor Guiliani admonished "[y]ou don't have a right to government subsidy to desecrate someone else's religion,"[357] then the censorship is unconstitutional.[358] If the statement is not based on claims of offense, the next test must be considered. The *third* and final inquiry requires a determination of whether the stated reason for withdrawal of access is mere subterfuge or pretext.[359] For example, a museum may issue a statement of closure based on public disorder, but the facts reveal a censorship based on censorial community values.

To effect the above test, a statute must define particularly the difference between the public fora and private galleries. To cut through pretext, the burden of proof must be placed on the government entity. This is in accordance with the ICCPR requirement to demonstrate the necessity of censorship.

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352. ICCPR, *supra* note 127, at art. 19 (3).

353. *General Comment No. 34*, *supra* note 129, at ¶ 32.

354. *See* Amy Ruth Ita, *Censorial Community Values: An Unconstitutional Trend in Arts Funding and Access*, 61 OHIO STATE L.J. 1725, 1750 (2000).

355. *Id.* at 1751.

356. *Id.*

357. *Brooklyn*, 64 F.Supp.2d at 191.

358. Ita, *supra* note 354, at 1751.

359. *Id.* at 1752-53.

The Author also envisions guidelines that prohibit curators or museum directors from capitulating to threats alone, and will compel them to seek content-neutral alternatives, and request the assistance of local authorities, to avoid the summary closure of exhibits. For instance, the relocation of a piece of art, if it can be moved without being destroyed, must be effected first. In the end, the statute must incorporate the clear and present danger test to validate the closure of an exhibit. The directors must be required to substantiate this claim, in accordance with the requirement of necessity and proportionality in the ICCPR, and the need to demonstrate an individualized justification for the restraint. The guidelines will ensure that no other alternative exists except for the suppression of speech.

The statute must also consider a broad definition of art to be inclusive of all forms of artistic expression. An example of a broad definition of "art" is made by Amy Adler.[360] This will ensure a restriction not unmindful of the form of expression and the means of its dissemination.

2. Prohibition Against Injunction

The proportionality requirement of the ICCPR obliges the law to consider the form and means of dissemination of the expression. This applies not only to the legislature, but also to administrative and judicial authorities. Once a criminal or civil complaint is instituted against the offending artist, a final conviction or judicial determination of obscenity, libel, or defamation, is required to be made before the artwork is to be seized and the artist penalized. However, Rule 58 of the Revised Rules of Court provides for the provisional remedy of preliminary injunction which may be applied for in closing down the exhibit.[361]

To avoid the devolution of a court case into a hollow remedy, the limited operation of art exhibits must be considered. Installation artworks are commonly made to harmonize with the exhibition space, such that if they are dismantled, they can no longer be exhibited in the same form, but will have lost their original structure. If the judicial process is invoked and an injunction is issued against the exhibit, the issue of offensiveness or violation of any penal or civil statute will have become moot and academic by the time the decision is submitted, since the period for exhibition will have already lapsed. A preventive measure will ensure that any censorship of the

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360. The Author recognizes the inherent difficulty of ascribing a definition to art, a problem which has predominantly become the source of failures of interpretation. For the sake of uniformity, however, art will be considered artwork which "critics, scholars, galleries, museums, and 'artists' generally discuss as 'art[.]'" Amy Adler, *What's Left: Hate Speech, Pornography, and the Problem of Artistic Expression*, 84 CAL. L. REV. 1499, 1507 (1996).

361. *See* 1997 RULES OF CIVIL PROCEDURE, rule 58.

artwork will not be based on invalid content-based orders. A relative prohibition against injunction may be incorporated in the law.

3. Independent Civil Action

Finally, the New Civil Code provides a remedy for persons sustaining damages for a violation of their constitutional right — "Article 32. Any *public officer or employee*, or any *private individual*, who *directly or indirectly* obstructs, defeats, violates[,] or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages: ... (2) Freedom of speech[.]"[362]

This tort may be committed whether intentionally or not. Good faith will not automatically excuse the wrongdoer from liability.[363] Liability may be exacted from public officers and private individuals for direct or indirect violations of constitutional rights.[364] An indirect violation may be the instigation by a person to infringe civil and political rights.[365] Permitting a heckler's veto is an invalid curtailment of the freedom of expression, therefore every person instigating and enforcing this measure are liable under Article 32.

*D. Proposed Model*

The following model incorporates the foregoing recommendations, and provides for a more concrete illustration of the suggested legislation.

Republic Act No._

An Act Protecting the Exhibition of Visual Art in Public Fora

Section 1. *Title* — This Act shall hereafter be known as the "Visual Art Exhibition Act of 2014."

Section 2. *Declaration of Policy* — The constitutional right to freedom of artistic expression must be respected, protected, and fulfilled. In compliance with the mandates of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and in accession to the recommendations of the United Nations Economic, Social, and Cultural Organization, the State endeavors to restrain all invalid threats of censorship against artistic expression.

Section 3. *Definition of Terms* —

362. CIVIL CODE, art. 32 (emphasis supplied).

363. TIMOTEO B. AQUINO, TORTS AND DAMAGES 583 (2013).

364. *Id.* at 584.

365. *See* MHP Garments, Inc. v. Court of Appeals, 236 SCRA 227, 235 (1994).

(1) *Visual Art* — This includes paintings, mixed media, and installation artwork which critics, scholars, galleries, museums, and artists generally discuss as art.

(2) *Public Forum* — For purposes of this Act, a public forum is public property devoted to artistic exhibition by government order or legislation. They are divided into three types:

(a) *Traditional public forum* — It is a forum quintessentially devoted to free expression, either by tradition or government fiat, such as, but not limited to, highway, boulevard, streets, bridges, thoroughfares, parks, plazas, squares, and other open spaces of public ownership where people are allowed access;

(b) *Designated public forum* — It is a forum made available to the public as place of expressive activity through government fiat, like statutes or ordinances, such as but not limited to university facilities, municipal or national theaters, galleries, or concert halls;

(c) *Non-public forum* — It is public property which is not, by tradition or designation, a forum for public expression.

(3) *Hostile Audience Response* — These are responses of the audience directed against the artwork which may manifest as claims of offense, threats of public disorder, threats of criminal or civil charges, public demonstrations, threats of vandalism, and other similar actions by an individual or collective.

Section 4. *Prohibition Against a Heckler's Veto* — No traditional or designated public forum is allowed to order the closure of an artistic exhibit on the basis of a hostile audience response, except upon clear and convincing proof of a clear and present danger. A non-public forum cannot effect the closure of an exhibit based on hostile audience response except when there is a reasonable ground to do so.

Section 5. *Guidelines for Closure* — In the event of hostile audience response, the board or officers must take caution not to censor the exhibit based on reasons of offensiveness or indecency, and must follow these guidelines:

(1) In the event of hostile audience response, the board or officers of the public forum are required to make time, place, and manner constraints on the exhibition, which may take the form of rescheduling of the exhibit, relocation, or placing cautionary notices near the gallery or building entrance, but which must not constitute complete deprivation of access to the exhibit.

(2) If hostility is aggravated, it shall be imperative for law enforcement agencies, when their assistance is requested, to

perform their duties of providing protection to the public forum exercising its right to freedom of expression. Failure of law enforcement officers to fulfill their duty, and for the board or officers of the public forum to request assistance, will be subject to liability as provided in Section 8 of this Act.

(3) If there is a public demonstration, the provisions of B.P. 880 are applicable, particularly Sections 9, 10, 11, and 12, and in pursuant to the policy of "maximum tolerance" defined therein.

(4) If the very building which houses the exhibit becomes endangered, as well as the persons operating the exhibit, the assistance of law enforcement officials must be sought. If after assistance is provided, there remains an imminent or grave danger of harm on the part of the officers and the actual exhibit, the exhibit may be taken down, but only after proof that these guidelines have been complied with.

(5) Isolated acts or incidents of disorder or breach of peace during the exhibition proper shall not constitute as ground for its closure.

(6) Extreme threats to public morals shall not be a valid ground to close an exhibit.

Section 6. *Reportorial Requirements* — Except only on the basis of national security or public health, in every case of closure of an exhibit based on clear and present danger, the board or officers responsible must prepare a report making individualized justifications, and clarifying the nature of the threat to be avoided.

Section 7. *Prohibition Against Preliminary Injunctions* — No injunction or temporary restraining order may issue against the gallery or the exhibitors in the exhibition of an artwork, unless there be clear and convincing evidence that a clear and present danger of a substantive evil will arise if the artwork is permitted to be displayed.

Section 8. *Liability* — Any public officer or employee who fails to follow the guidelines enumerated in Section 5 will be liable under Article 32 of the New Civil Code for damages against the offended parties. Any public or private officer who refuses to comply with Section 5, or who, through negligence, failed to take the precautions mandated by the said Section will be liable under Article 32. Private individuals who have instigated the infringement of the constitutional freedom of expression through threats or actual performance of unlawful acts shall be liable under the said provision as well.

Section 9. *Separability Clause* — If, for any reason, any section or provision of this Act shall be declared unconstitutional or invalid, such parts of provisions not affected thereby shall remain in full force and effect.

Section 10. *Repealing Clause* — All laws, executive orders, rules, and regulations, or parts thereof, inconsistent with the provisions of this Act are hereby repealed or amended accordingly.

Section 11. *Effectivity* — This Act shall take effect 15 days from the date of its complete publication in at least two newspapers of general circulation.