# *P. D.* 1986 AND THE *MOVIE* AND *TELEVISION REVIEW* AND *CLASSIFICATION BOARD*: *A CHALLENGE TO FREEDOM OF SPEECH AND EXPRESSION*

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*Freedom of expression has always been a most cherished right. Such a right is essential to a democratic society, for it is through this right that the citizenry is able to air its grievances and curb the excesses of government. It is no surprise, therefore, that the said freedom has been given constitutional protection in most, if not all, democracies. Time and again, the courts have upheld this right in the face of repeated attempts to suppress it.*

*In the Philippines, freedom of expression reached its nadir during the days of the Marcos dictatorship. Under the said regime, the voice of the people was effectively suppressed by the draconian policy of censorship adopted by the government. And it was not until the ascension of the Aquino administration in 1986 that the right of free expression could once again be exercised. Unfortunately, as subsequent events were to show, this right would continue to be suppressed even under the new administration.*

*One such instance of suppression occurred when Mr. Manuel Morato, the Chairman of the Movie and Television Review and Classification Board (MTRCB), imposed disciplinary measures on the producers of the television show "Oh No, It's Johnny!", after the latter aired an episode which Mr. Morato found to be offensive to public morals. Despite the withering criticism he received for his action, Mr. Morato proceeded to ban the succeeding telecast of the said program, which penalty forms the main topic of this thesis. In the following pages, the writer of this thesis will proceed to show that 1) the action taken by Mr. Morato is beyond the authority granted to the chairman of the MTRCB; 2) the producers of "Oh No, It's Johnny!" were not given a chance to be heard; and 3) the controversial episode of "Oh No, It's Johnny!" was not obscene, and thus did not merit disciplinary action from Mr. Morato.*

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## I. INTRODUCTION

"I disapprove of what you say, but I will defend to the death your right to say it. "

*Francois M. A. Voltaire*

One of the proudest achievements of the Aquino Administration was the restoration of our basic freedoms. During the months that followed the People Power Revolution at EDSA in 1986, we, after twenty years of darkness under Marcos, were able to bask in the sunshine of our newfound "democratic space".

For the first time in the same number of years we were free. Free to speak. Free to read. Free to move. Free to associate. Free to strike and air our grievances without fear of truncheons, tear gas and water cannons.

Our experience with Marcos was much like that of the Philippines during the Spanish era wherein, "[T]he... rule was one of a political and social system where power outweighed freedom."[1]

And similarly the aims of the 1986 revolution were very much the same as the objectives of 1898. According to Bernas[2], "[T]he aim of the Philippine revolution was to achieve a just restraint of governmental power and a corresponding expansion of individual freedoms." In the same vein, the success of EDSA has brought on us the gift of freedom as was, "[T]he gift of the American conqueror, after having suppressed the Filipino republic established by the revolution, was the implantation of a system that promised the achievement of balance between power and freedom. The balancing of these two social values, first under the 1935 Constitution and later under the 1973 Constitution and the accompanying martial law interlude and now under the 1987 Constitution, is the story of governmental power and the constitutional limits on it found in the Bill of Rights."[3]

This paper shall continue the same story and through its sequel, show how, after only six years from EDSA, one governmental agency

1 J. BERNAS, S.J., THE CONSTITUTION OF THE PHILIPPINES, A COMMENTARY 2 (1988)
2 *Id.*
3 *Id* at 32-33

has turned back the hands of time to an era "where power outweighed freedom."

### *A. Background of the Study*

Mr. Manuel Morato, the Chairman of the Movie and Television Review and Classification Board (MTRCB for brevity) is again in the spotlight of controversy. The MTRCB, through its Chairman, decided to suspend for ten days the weekly show "Oh No, It's Johnny !". According to Morato, the suspension, which would, in effect, disallow the airing of one episode plus a couple of days allotted for pre-production preparation for the following week's other episode, was due to the show's past episode wherein they had as guest Dr. Margarita Go-Singco Holmes,[4] a psychologist with an M.A. and a Ph.D. in Clinical Psychology, discussing phoned-in questions concerning sex and sexuality along with population and birth control.

The decision of Morato, faxed to the show's producers[5], stated that "Margarita, who is not even a medical doctor really went to town and propounded on sexual perversions on television in full view of the public." He added that Johnny Litton, the show's host, "should have consulted about sexual aberrations in the privacy of Mrs. Holmes psychological clinic". (Underscoring mine). He then continued,

> We want to call the attention of all live television shows to exercise extreme caution in what they say and do on television for the MTRCB will not hesitate to impose all penalties and legal sanctions to whoever violates the provisions of Article 201 of the Revised Penal Code, PD 1986 and its Implementing Rules and Regulations.[6]

In an incident earlier in his term, during the campaign period for the 1987 congressional elections, Morato wielded his mighty sword

Morato though insists that Margarita Holmes is not a medical doctor and should stop parading as one. This was not denied by Mrs. Holmes however reiterating that it was not improper for her to assume such title for in fact she had completed her doctorate degree.

[5] This is vehemently denied by Johnny Litton and Rocelle Rebano of Silverstar Communications, the show's producers. They maintain that there was no written decision received by their group nor by ABS-CBN. According to him, they only came to know of the decision was when Morato verbally conveyed to them over the telephone that they were to be suspended for ten days due to the airing of last week's episode. Interview with Johnny Litton, the Litton residence, December 22, 1991. Telephone interview, Rocelle Rebano, Producer, Oh No, It's Johnny!, January 6, 1992.

[6] *Why Morato Gave Litton A Vacation*, Manila Chronicle, August 26, 1991. *See* also Celebrity World, Manila Bulletin, August 26, 1991.



of censorship by disallowing the showing of an episode of the television show "Isip Pinoy" which featured the life and plight of urban slumdwellers so as not to undermine the chances of administration candidates in the said elections[7]. Subsequently however, "[T]he MTRCB allowed that episode to be shown only after the congressional elections where the administration bets were running."[8] According to Morato, the episode was not given a permit to air because "It was brought to his residence at 6 p.m., after the MTRCB offices had closed, and two-and-a-half hours before its scheduled showing on television."[9]

He disclaims any banning of the episode and insists that it was "a case of late submission."

The same incident would later be repeated. This time the object was the award winning television show "Inside Story" which sought to air its interview with Gregorio "Gringo" Honasan.

The episode which would have been aired on September 21, 1990 was disapproved by the first committee since, according to Morato, "[I]t's a profile of Gringo, extolling his virtues from birth to present".[10] He then proceeded to convey to the show's producer that the episode was "a sensitive film that requires us to consult a higher authority owing to the fact that we are presently in crisis..."[11] The issue was then "tossed over to National Security Adviser Rafael Ileto for approval or formal disapproval. Ileto has so far prolonged the *de facto* censorship by not deciding on the matter."[12]

The most recent and most widely publicized case prior to the "Oh No! It's Johnny" incident was the "disallowance"[13] by the MTRCB of the airing of "Dear Sam... Sumasaiyo, Juan."

The TV documentary, a production of the Ateneo de Manila University's Center for Social Policy, was scheduled to be aired on September 21, 1990 — a time when the negotiations for the RP-US Military Bases Agreement were being undertaken. However, the MTRCB, again, disapproved its showing claiming that documentary films must

[7] *Voice of the People*, Manila Chronicle, October 29, 1991 at 5.

[8] *Id.*

[9] *The 'Debasing' of the MTRCB chairman*, The Philippine Star, October 4, 1990 at 7.

[10] *Id.*

[11] *Id.*

[12] *Supra* note 7.

[13] *Morato Explains*, Manila Standard, October 12, 1990 at 20.

[14] *Morato Bans Docu on Bases*, Malaya, September 28, 1990 at 13.

equally present both sides of the question.[14] Morato goes on to explain that aside from this lack of objectivity, the documentary is full of "historical inaccuracies... and suffers from a manipulation of sequences."[15] He further said that:

> [B]ecause of the on-going Base negotiation (sic), prudence dictates that no film/commentary/activity must be aired through media that tends to influence the people who are not knowledgeable or privy to the negotiation and is potently designed to foment an anti-base feeling among people, if not violence (sic). The film encourages hatred and diplomatic row (sic).[16]

Morato became the subject of vehement attacks denouncing his Marcosian ways and accusing him of bringing us back to the dark days when the freedom of speech and of the press were disregarded and curtailed. In fact, "Some 200 members of the Concerned Artists of the Philippines staged a rally... to protest the alleged censorship of an antibases documentary film and demanded the abolition of the government's censors body... They were joined by Senator Joseph Estrada,... Armida Syguion-Reyna,... Ishmael Bernal,... Lucrecia Kasilag,... Pete Lacaba,... and other notable public figures."[17] Three major media organizations, the National Press Club, the Philippine Movement for Press Freedom and the National Union of Journalists of the Philippines issued a statement in support of CAP's action saying:

> The MTRCB, whose authority is only to classify, has dangerously arrogated unto itself the function to censor, which is totally repugnant to the Philippine media community.
>
> We uphold press freedom and freedom of expression as inviolable rights of the people guaranteed under the Constitution and we cannot accept any arbitrary act by the government or any of its agencies to curtail these rights.[18]

Sen. Agapito Aquino went on record to say that "(i)n as much as we are trying to build the foundations of a strong democracy, censorship of any form is reprehensible and has no place in a true

[15] *Supra* note 13.

[16] *On Banning Dear Sam*, People's Journal, October 3, 1990 at 16.

[17] *Artists Assail Morato in Rally Near Malacanang*, Daily Globe, October 11, 1990 at 6.

[18] *Id.*

[19] *Senate to Quiz Morato on Film Ban*, Daily Globe, October 14, 1990 at 6.



democracy."[19] He thereafter filed a resolution seeking Senate authority to conduct an inquiry into the banning of the film, realizing the uproar that it had caused.

After being attacked by journalists, National Artists, film producers, directors, writers, actors, actresses, politicians and ordinary citizens, the MTRCB, with the blessing of Malacañang, allowed the showing of the controversial documentary on October of 1990 with "portions of the documentary showing an American soldier mashing the breasts of a Filipina prostitute and the words `puta' and `kaputahan' be deleted, threatening to take the producers to court if these are shown"[20]

There are numerous cases of a similar nature, however, this writer shall not elucidate further on other cases of the MTRCB's acts of censorship since most of these are concerned with motion pictures like *Naked Gun, Mahirap ang Magmahal,* and *The Last Temptation of Christ.* These cases and the jurisdiction of the MTRCB over motion pictures have already been adequately dealt with by a thesis submitted last year by the Juris Doctor candidates.[21]

### *B. Objective and Limitations of the Study*

> "No law shall be passed abridging the freedom of speech, of expression, or of the press..."
>
> *Art. III, Sec. 4, 1987 Constitution*

Aside from informing the reader of the various laws and concepts of free speech, this work shall be limited to the decision of the MTRCB concerning its finding that the August 21, 1991 episode of "Oh No, It's Johnny !" deserved to be penalized by a suspension of ten days and its effect of restraining the producers from airing the subsequent episode scheduled for August 28, 1991. The study shall deal with the circumstances of the controversial episode and shall make a conclusion as to whether or not such episode contained material which was obscene, indecent or lewd thus deserving the punishment meted out. It shall likewise investigate and resolve whether or not the basic requirements of due process were observed by the MTRCB in its consideration of the case and finally, discuss whether or not "prior restraint" was

[20] *Ban on Bases Docu Lifted* , Malaya, October 20, 1991 at 1.

[21] *Freedom of Expression, Obscenity and Movie Censorship*, A thesis presented to the Ateneo de Manila School of Law by Jose Ma. Emmanuel Caral and Ferdinand Tolentino, April 1, 1991.

committed by the government agency with respect to the suspended episode. To close, the writer shall make his recommendations to improve the system of review and classification of television programming.

The sources for the analysis and arguments shall unfortunately be based on American jurisprudence. Since our Bill of Rights was substantially taken verbatim from the American Constitution, it would not be improper to apply the rules of statutory construction that when a law is taken verbatim from the laws of another state, then the construction placed by the original state may be applied to the copying state in the absence of jurisprudence in the latter[22]. Since the Philippines has very few in-depth analyses of cases concerning free speech, this writer is constrained to refer to cases decided by the United States Supreme Court and articles in American publications for the discussion on obscenity and prior restraint. However, on the point of due process, Philippine and foreign cases were considered.

The thrust therefore of this paper is to establish that:

1) The August 21, 1991 episode of "Oh No, It's Johnny!" was not obscene, indecent, immoral nor lewd and as such did not deserve the penalty dealt to it.

2) Assuming, for the sake of argument that the said episode was obscene, indecent, immoral, and lewd, the MTRCB did not observe the basic requirements of procedural due process, thus denying its producers of their constitutional right.

3) The subsequent punishment — suspension for ten days constitutes prior restraint of the August 28, 1991 episode and thus an abridgement by a governmental agency of the freedom of speech and expression.

4) In summary, that the acts of the MTRCB and its Chairman are in flagrant violation of a person's basic right to free speech and expression.

[22] "In interpreting a statute adopted from another jurisprudence, it is proper to consider the interpretation of the act by the courts of the state or country from which it was adopted. The fact that a statute is almost a literal copy of an earlier statute of another state is persuasive evidence of a practical re-enactment of the earlier statute giving rise to new rights and obligations and requiring the court of the adopting state to construe the statute as disclosed in the province thereof and in the light of the history and purpose of the act." 82 C.J.S. at 859 (1955). *See Reyes v. Wells*, 54 Phil. 102; *PECO v. Soriano*, 39 SCRA 587; *Ang Giok Chio v. Springfield Insurance Co.*, 56 Phil. 375; *Osorio v. Posadas*, 56 Phil. 748; *Tamayo v. Gsell*, 35 Phil. 953; *Campos Rueda v. Sta. Cruz*, 98 Phil. 627.



### C. *Definition of Terms*

For the guidance of the reader, the following terms[23] need to be explained more specifically:

TELEVISION BROADCAST: Public showing by transmitting sound or images by television or similar equipment, including cable television and other limited audience distribution.

TELEVISION PROGRAM: Any matter aired or broadcast on television including live and pre-taped programs, product and service advertisements, teleplays, and motion pictures originally shown in movie houses or elsewhere.

REVIEW: The Process of examining motion pictures, television programs and related publicity materials and determining whether, using the standards set by law, they are fit for importation, exportation, production, copying, distribution, sale, lease, exhibition, or broadcast by television. The process includes determination as to what audience classification the film may be exhibited.

REVIEW SESSION: Shall mean the review and examination of motion pictures, television programs and similar shows, or publicity materials by the BOARD.

GENERAL PATRONAGE or G: A classification of motion pictures admission to which is open to persons of all ages.

PARENTAL GUIDANCE or PG: A classification of motion pictures cautioning parents on delicate content of the film and the need for parental guidance for its appreciation.

RESTRICTED or R: A classification of motion pictures admission to which is limited to adults. Adults, for the purpose of these Rules, are persons eighteen (18) years or over.

PORNOGRAPHY: As here used is synonymous to obscenity the test of which is whether to the average person, applying contemporary community standard, the dominant theme of the material taken as a whole appeals to prurient interest. This includes (a) patently offensive or demeaning representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,

[23] Rules and Regulations of the Movie and Television Review and Classification Board Chapter I.

including but not limited to zoorastia and anal or oral sexual intercourse; (b) patently offensive representations or scatological descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals; and (c) explicit sexual exploitation of children.

## II. BRIEF HISTORY AND THE PARAMETERS OF FREE SPEECH

### *A. Freedom of Speech*

Freedom of speech was, as a concept and guaranteed right quite unknown to the Filipinos prior to 1900.[24] Basing this freedom on the First amendment of the United States Constitution"[25], McKinley reproduced this amendment in his *Instructions* to the Second Philippine Commission. However, prior to this, the Malolos Constitution enshrined this sacred freedom as did the Philippine Bill of 1902 and the Jones Law of 1906.[26] The guarantee them became an integral part of the 1935, 1973 and 1987 Constitutions.

Freedom of the press has been intimately related and co-extensive with freedom of speech. When the Court examined tests such as the "clear and present danger" or the "dangerous tendency rule", it applied to all First Amendment freedoms.[27] It is insisted that these freedoms as exercises on television are likewise covered by the protective mantle of free speech. Constitutional Commissioner Foz has stated that:

> [T]he age of romanticism in the press is long past. The press no longer refers to newspapers alone but also to other forms of media such as television, radio and others... Competing novel and unpopular ideas should be assured of a forum. Unorthodox views, which have no claim on broadcast time or newspaper space as a matter of right, are in a poor position to compete with those aired or printed as a matter of grace.[28]

[24] L. TAÑADA & E. FERNANDO, CONSTITUTION OF THE PHILIPPINES 200 (1947).

[25] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

[26] *Supra* note 24.

[27] E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 317 (1978).

[28] Debates of the 1987 Constitutional Commission (June 18, 1986).



There is no need to debate that the freedoms of speech and of expression are not absolute rights. These are freedoms coupled with a responsibility. It is without doubt that in the exercise of these freedoms, they will come into conflict with other societal interests. It is these societal interests that place a limitation as to its exercise.

Based on the development of jurisprudence through the years, there have been three areas wherein speech may be limited. The first area is in the realm of defamation as when speech inflicts injury and damages to persons. This topic is dealt with in detail under our laws of libel and slander. Second, under the police power of the State, speech may be limited if it is of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[29] Lastly, when speech falls into the category of the obscene.

### *B. Obscenity As A Concept in Free Speech*

Obscenity as a concept has escaped an exact definition. In 1868, an attempt to define it was undertaken by Lord Chief Justice Cockburn. The case, which arose out of a prosecution for obscene libel under Lord Campbell's Act for the publication of "The Confessional Unmasked" enunciated the Hicklin Rule:

> ... the test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.[30]

It is the same Hicklin's test that introduced the "isolated passages test" wherein the work as a whole was to be determined based on isolated passages. It further used as a gauge for determination "minds of susceptible persons."[31]

These tests were reconsidered in the cases of *Butler v. Michigan*[32] and *Roth v. United States*[33], wherein it was suggested that rather than an isolated passage test, the dominant theme of the work as a whole

[29] *Schenk v. United States*, 249 U.S. 47, 52 (1919).

[30] *Supra* note 1 (citing *Regina v. Hicklin*, L.R. 3 Q.B. 360, 368).

[31] *Supra* note 1.

[32] 352 U.S. 380, 383 (1957).

[33] 354 U.S. 476 at 489 (1957).

should be considered and a person with "average sex instincts" rather than a susceptible person should be the gauge. Thus the Hicklin test was rejected as it would reduce adult literature to that of a child susceptible persons the gauge for censorability or non-censorability of materials."[34]

It was the landmark case of *Roth*[35] wherein the United States Supreme Court, through Justice William Brennan, enunciated various doctrines on obscenity vis-a-vis free speech. The case arose when a Manhattan bookseller was convicted for having used the mails to transport obscene material. The Court held that obscenity can be regulate without applying the traditional First Amendments standards such as clear and present danger since obscenity is outside the protection of the First Amendment being "utterly without redeeming importance" historically and functionally.[36] Obscenity was, and still is, unprotected speech. But what is obscenity? The court defined it as follows:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to the prurient interest.[37]

The case likewise made a very important distinction for the purpose of this paper, i.e. "sex and obscenity are not synonymous."

Less than a decade later, the Court decided *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.[38] This case modified the ***Roth*** doctrine with a three-fold test for obscenity. "It must be established that:

a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;

b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

c) the material is utterly without redeeming social value."[39]

[34] *Supra* note 1 at 193.

[35] 354 U.S. 476 (1957).

[36] *Id.* at 485.

[37] *Id.* at 489.

[38] 383 U.S. 413 (1966)

[39] *Id.* at 418.



According to some writers,[40] an analysis of the terms "Patently offensive" and "utterly without redeeming social value" would seem indicate that obscenity is being limited to "hard core" pornography. Such phrase was a way of describing these matters as so objectionable that their lack or complete absence of social importance is quite evident and clear. "It implied that pornographic photographs or publications whose obscenity is self-demonstrating are what is meant by the term 'hard core' pornography."[41] Since the phrase 'hard core' was just as imprecise a concept as obscenity, Justice Potter Stewart, in *Jacobellis v. Ohio*[42] offered some guidance:

> "I shall not today attempt further to define the kinds of material I understand to be embraced in that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

However, that 3-fold test did not gain a plurality among the justices and it was only in 1973 that the *Roth* ruling was reaffirmed and the tests of *Memoirs* abandoned by a 5-4 vote in the case of *Miller v. California*.[43]

The case involved a conviction due to a mass mailing campaign to advertise the sale of sexually explicit materials to unwilling recipients who had in no way invited such solicitation. The defendant had caused some unsolicited envelopes to be sent to a restaurant in Newport Beach. The Supreme Court of the United States was tasked with affirming the conviction of criminal obscenity based on laws aimed at prohibiting invasion of privacy of an unwilling audience.

The Court failed to affirm and protected to formulate a new definition of obscenity. It was stated that for obscenity to result, "[T]he basic guidelines for the trier of facts must be:

a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest...

[40] J. A. BARRON AND C. T. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979).

[41] *Id.*

[42] 378 U.S. 184 (1963)

[43] 413 U.S. 15 (1973)

b) whether the work depicts or describes, in a patently defined by the applicable state law;[44]

c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value."[45]

The decision seems to indicate that to determine obscenity a mere application of the three requisites would be sufficient. However, this writer would agree more with the dissent by Justice William Brennan, wherein various volatile factors have been put at issue such as the contemporary community standards test in determining prurient interests. The standards for obscenity, as with other contemporary concepts, are constantly changing and continuously evolving. The difficulty of fixing an unwavering standard for obscenity was succinctly stated by Lawrence Tribe:

> There is little likelihood that this development has reached a state of rest — or that it will ever do so until the Court recognizes that obscene speech *is* speech nonetheless, although it is subject — as is all speech — to regulation in the interest of unwilling viewers, captive audiences, young children, and beleaguered neighborhoods — but *not* in the interest of a uniform vision of how human sexuality should be regarded or portrayed."[46]

## III. OBSCENITY AND "OH NO, IT'S JOHNNY!": WAS IT OBSCENE?

### *A. The MTRCB and Johnny Litton's Show: Obscenity ad Indecency Under P.O. 1986*

The show "Oh No, It's Johnny' is aired on ABS-CBN Channel 2 every Wednesday at 10:30 p.m. Its format is informative entertainment. The producers wanted to present to the viewers a different perspective of Filipino life, mores and interests by presenting it in an informal manner so as to offer an alternative source of entertainment; one wherein, after a hard day's work, the viewer can sit back and relax or even attend to some other activity and watch a television show which does not need undivided attention or a careful analysis of its dialogue.[47]

[44] *Id.* at 25.

[45] *Id.* at 24.

[46] L. H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988).

[47] Interview with Johnny Litton, the Litton residence, December 22, 1991.



The guest for the August 21 episode was Dr. Margarita Holmes. At the beginning of the show when Mr. Litton was informing the viewers of his guests, he immediately advised the viewers, especially the parents, that the discussion would be of an adult nature and that it was up to them (parents) whether they would allow their children to listen to not. This notice was announced every fifteen minutes throughout the show. As Dr. Holmes was presenting her credentials, phoned-in questions began pouring in through their pager's printer.

The following are some questions and replies which, in this writer's opinion, were controversial:

1. What to do with her 5-year old son who gets an erection every time he sees people on TV or the movies kissing? Holmes replied that such was normal.

2. Whether there was anything wrong with having sex four times daily? Ans: As long as there is no coercion and it does not interfere with work, then such was alright.

3. What is the best way for a menopausal lady to have sex? Ans: Lubrication of the vaginal walls is not as quick and there may be some pain, so she suggested KY Jelly or saliva to lubricate and thereby accommodate the sexual act.

4. Whether frequent masturbation is harmful and could cause sterility? Ans. No to both. Provided such does not interfere with work in the sense that, provided one is not prevented from working due to this preoccupation, one can masturbate as much as she/he wants.

5. Whether it was wrong to practice oral sex and whether it was harmful to swallow semen? Ans: No to both provided none of the partners have any sexually transmittable diseases. She even cited sexologists encouraging the act.

6. Whether it was bad to take a bath after sex? Ans: No.

7. Whether a 7-month pregnant wife can have sex? Ans: According to a study in Boston, sex is available even up to the time of giving birth but only in certain position such as rear entry.

8. A woman called to say that she couldn't have an orgasm without using a vibrator and asked what she could do. Ans: Holmes asked her to write in order to know more about her. She gave some preliminary answers like there was no life in the relationship or with the partner.

9. Whether the size of a man's penis mattered? Ans: No, and emphasized that it was the person that mattered, not the dimension of his organ.

Throughout the episode Dr. Holmes was using terms such as penis, vagina, condom, pill, contraception, sperm, egg, fertilization, lovemaking, foreplay, anal and oral sex, masturbation, saliva, vibrator, etc. These terms, she explains at the start of the interview, are the most appropriate words for her to use as they are the most exact scientific and clinical terms used, and that she knows of no other more appropriate ones. She and Mr. Litton then agreed that the Filipino child and adult are intelligent and mature enough to appreciate the use of these terms in the replies to their questions rather than insist in using euphemisms and metaphors which have no real basis in reality.

Apparently, Chairman Morato found these words and the replies to be sexual perversions and aberrations in violation of Article 201 of the Revised Penal Code and PD 1986 which state the following respectively:

> Art. 201. Immoral doctrines, obscene publications and exhibitions, and indecent shows. — The penalty of prison mayor or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon;...
>
> (2) (a)...
>
> (b) Those who, in theatres, fairs, cinematographs or any other place, exhibit indecent or immoral plays, scenes, acts, or shows, whether live or film, which are prescribed by virtue hereof, shall include those which ...
>
> (2) serve no other purpose but to satisfy the market for... lust or pornography... and (5) are contrary to law, public order, morals, good customs, established policies, lawful orders, decrees and edicts;
>
> (3) Those who shall... exhibit films... which are offensive to morals."
>
> "PD 1986 Section 3 (c) To approve or disapprove, delete objectionable portions from and/or prohibit the... production, copying, distribution, sale, lease, exhibition and/or television broadcast of the motion picture, television programs... which in the judgment of the BOARD applying contemporary Filipino cultural values as standard, are objectionable for being immoral, indecent, contrary to law and/or good custom...
>
> (f) To close moviehouses and other similar establishments engaged in the public exhibition of motion pictures and television programs which violate the provisions of this Act and the rules and regulations promulgated by the BOARD pursuant hereto...



Thereupon he imposed upon the producers a ten day suspension.

In the absence of a written decision from the MTRCB, it is very difficult to analyze the tests and standards applied to the speech involved. One can only surmise on the findings of fact and law on which Chairman Morato's action was based.

The following arguments summarize the writer's submissions on the matter

## 1. THE EPISODE WAS NOT OBSCENE; THUS ANY FORM OF RESTRAINT ON THE PRODUCERS IS A VIOLATION OF THE CONSTITUTION.

The tests in *Miller v. California* provide standards for obscenity. Applying them to this case, did "the average person, applying contemporary community standards (contemporary Filipino cultural values under PD 1986) find that the work, taken as a whole, appeals to the prurient interest"?

An "average person" as used in law and jurisprudence is one with average sex instincts, who stands in the same category as the hypothetical standard of the "reasonable man" in the law on Torts and the "learned man in the arts" under Patent law.[48] It does not refer to a person with extremely liberal views on obscenity nor to another whose views are strictly conservative. It is an ordinary person applying his ordinary views on sexuality based on his ordinary knowledge and experiences. In this task, his totality of experiences, values and morals should come into play.

The power to determine the fate of one person's exercise of speech and expression is much too great to be bestowed on one person. Notwithstanding his "average" qualities, there stands the risk of putting such a great freedom in the whims and caprices of one person. This may be the reason why under PD 1986, the awesome powers of censorship were bestowed on a Board rather than an individual. It ensured that in the determination of a case under its jurisdiction, various views, ideas, morals and values interplayed with each other to achieve a reasonable concensus of allowing or disallowing a film. It likewise ensured that the body deciding as such would preserve the characteristics of an "average man" since the ultra-conservatives would balance out the ultra-liberals.

[48] 5 F. Supp. at 184.

Secondly, the speech must be measured against the standards of the contemporary community. It is submitted that this task is aptly accomplished by the multi-sectoral representation which composes the MTRCB. Aside from having persons engaged in or connected with the movie and television industry in the Board, the religious, the academe, the lawyers' and the womens' sector are likewise represented.[49] However, this community representation is set into motion only when the Board acts as a whole. In fact, the Board , under Sec. 4 of PD 1986 may only review and classify a film and determine cases presented to it as a collegial body and not through its individual members even if acting under the guise of his/her official function.

These safeguards were incorporated into the law to ensure that the "contemporary community standards" were validly applied. Unfortunately, the MTRCB issued Resolution No. 88-1-25 which allows the Chairman to *unilaterally* downgrade a film already reviewed (Italics mine). In annulling the resolution, the Supreme Court in *Aquino-Sarmiento v. Morato*[50] said:

> As Chief Executive Officer, respondent Morato's function as Chairman of the Board calls for the implementation and execution not modification or reversal, of the decisions of the latter (Sec. 5 [a], ibid.). The power of classification having been reposed by law exclusively with the respondent Board, it has no choice but to exercise the same as mandated by law, i.e., as a collegial body, and not to transfer it elsewhere or discharge said power through the intervening mind of another. *Delegata potestas non delegari* a delegated power cannot be delegated. And since the act of classification involves an act of the Board's discretionary power, with more reason the Board cannot, by way of the assailed resolution, delegate said power for it is an established rule in administrative law that discretionary power cannot be the subject of delegation. (Italics original).

By issuing such resolution furthermore, the Board vested in an individual the power to determine the fate of free speech and expression; a power granted to it as a body with a special distinction and function to not only review but also protect free speech and develop it further.

The MTRCB also failed in the next test of *Miller* — that the work is taken as a whole in arriving at whether it appeals to the prurient

[49] PRESIDENTIAL DECREE NO. 1986, Whereas clause (1985).

[50] G.R. No. 92541, November 13, 1991.



interest and depicts or describes in a "patently offensive way sexual conduct specifically defined by the applicable... law."

By his own statements,[51] the Chairman has admitted viewing *only portions* of the episode. According to him he had no time to view the whole episode as he was busy monitoring other shows during the same time slot.

In *Illinois Citizens Committee for Broadcast v. F.C.C.*[52], the FCC made a finding that a radio phoned-in program on sex-related topics which aired daily from Monday to Friday , from 10 am to 3 pm was obscene. The topic for discussion on that particular day when listeners complained was techniques of oral sex in which some callers were very descriptive of their techniques. One even went as far as saying that she used to spread peanut butter on her partner's penis so as to enjoy it. The announcer then teased her about using marshmallows and whipped cream. The United States Court of Appeals (District of Columbia Circuit) noted, in upholding the decision, that *the show was broadcast at a time when children were reasonably expected to be listening* and that the topics were not for any educational or scientific purposes but "in a context that was fairly described by the FCC as titillating and pandering".[53] (Underscoring mine) The Court continued, "[G]iven this combination of factors, we do not think that the FCC's evaluation of this material infringes upon the rights protected by the First Amendment."[54]

It is however Chief Judge Bazelon's dissent[55] in the motion for rehearing which merits our concern. He stated that:

> Here the Commission made its judgment on a 22 minute tape which eliminated the bulk of the... 2-hour... talk show programming not involving sexual discussion. By the admitted facts the FCC did not take the material as a whole but rather viewed the material piecemeal.

This writer thoroughly agrees with the dissenting opinion. As stated in *Miller*, it must be the work taken as a whole which appeals to the prurient interest. The determination of pruriency cannot be arrived at on a piecemeal basis, otherwise we would be resurrecting the "isolated passages test" abandoned in *Roth*.[56] The MTRCB is mandated

[51] *Supra* note 6.

[52] 515 F. 2d. 397 (1975).

[53] *Id.* at 404.

[54] *Id.*

[55] *Id.* at 407.

by its enabling law that "No film or motion picture intended for exhibition at moviehouses or theatres or television shall be disapproved by reason of its topic, theme or subject matter, but upon the merits of each picture or program *considered in its entirety.*"[57] (Underscoring mine.)

> Pruriency must be found in the work as a whole and not in isolated parts... If the pruriency predominates or if the nonprurient material is included only as a ruse to avoid an obscenity prosecution, the work taken as a whole is prurient.[58]

The action of the Chairman, acting alone, in determining the indecent character of the episode of "Oh No, It's Johnny!" and basing the opinion on merely parts of the episode and not its entirety, is contrary to PD 1986 and its Implementing Rules and Regulations.

It is likewise submitted that the dominant theme of the episode was not prurient nor patently offensive in its descriptions of sexual conduct. Most of the material on sexual conduct came from the callers themselves and Dr. Holmes conducted herself in a very dignified manner in replying to the questions scientifically and professionally. She further paraphrases well-known psychologists such as Sigmund Freud and studies conducted here and abroad as sources of her analyses. This writer must emphasize that not all portrayals, scenes, discussions, and exchanges on sex are prurient. And this episode is definitely not prurient nor patently offensive. "Sex and obscenity are not synonymous."

The *Miller* doctrine expanded unprotected speech to cover those "lacking serious literary, artistic, political or scientific value"[59]. So even if it has some literary, educational, artistic, or political value but in the eyes of the court such is not serious, then the speech may still be classified as obscene. But such is not the case here. There is an essential social, educational and scientific value in Dr. Margarita Holmes' discussion. It offers valuable educational information. It offers the viewers a chance to engage in healthy discussion on sexuality while at the same time maintaining his/her anonymity. The Chairman suggested that such form of discussion was not proper for broadcast and stated that the callers could just visit Dr. Holmes at her office. The United States Supreme Court had this to say:

[56] *Roth*, 354 U.S. 476 (1957).

[57] PRESIDENTIAL DECREE NO. 1986, Sec. 4.

[58] *Supra* note 40 at 660.

[59] 413 U.S. at 24.



> ... The opinions... display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases, the medium may well be the message.[60]

I submit that educating the youth and the adults on sex and their sexuality have very positive effects. On one level, they may impart the proper facts and knowledge to their children and friends. Rather than rely on rumors (such as getting AIDS from kissing and that any and all condoms protect one from the AIDS virus or that it is harmful to bathe after sex), people will be better informed on how to lead their lives vis-a-vis their sexuality. This drive for sex education among the youth and even among adults is a program suggested[61] by the American government.

In *Illinois*,[62] it was stated,

> The potential redeeming social interest in these materials lies in their discussion of adjustment to changing social mores on sexual relations and in the discussion of sexual problems as a means of solving 'hang-ups'. This is, after all, a method of psycho-therapy.

In another case[63] the U.S. Supreme Court said:

> The State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us... in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

It is therefore submitted that the episode in question is not obscene in the light of the tests enunciated in *Miller v. California* and therefore falls under protected speech. Thus, any restraint upon its broadcast is a curtailment of the exercise of the right to free speech guaranteed under the Constitution.

[60] F.C.C. *v. Pacifica Foundation*, 57 L. Ed. 2d. 1073, 1109 (1978).

[61] *Report of the U.S. Commission on Obscenity and Pornography* (1970).

[62] 515 F. 2d. 397 at 419.

[63] *Cohen v. California*, 29 L. Ed. 2d. 284 (1971).

## 2. INDECENCY, BY ITSELF, IS NOT A SUFFICIENT BASIS TO CURTAIL FREE SPEECH.

The Chairman hinges his authority to penalize "Oh No, It's Johnny!" on Sec. 3 (c) of PD 1986 and its Implementing Rules and Regulations specifically emphasizing the phrase "... which in the decision of the Board... are objectionable for being immoral, indecent... " This writer submits that such standards (immoral and indecent) standing alone are not sufficient to penalize the producers of the show.

The word "indecent" has a very vague meaning and probably shall meet the same fate as the word "obscenity". However, there are relevant cases in the United States which attempt to define the word "indecent". This is essential to the study because the MTRCB refuses to use the word "obscene" but uses "indecent".

In *Pacifica Foundation*[64], "indecent" was described as that which is correlated with the

> ... exposure of children to language that describes, in terms offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities and organs, *at times of the day when there is a reasonable risk that children may be in the audience...* (i.e. in the early afternoon)[65]

In this case, as in the *Illinois* case, at around 2 o'clock in the afternoon, there was aired over a radio station a 12-minute monologue entitled "Filthy Words" wherein a comedian gave his thoughts about words you couldn't say on the public airwaves. He went on by making jokes about the following words: shit, piss, fuck, cunt, cocksucker, motherfucker and tits, constantly using these terms in various instances and repeating them throughout the broadcast. *The FCC admitted that the words were not obscene but indecent and that it never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.*[66]

> It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults..."[67] because "the government's interest in the well being of its youth and in supporting parents claim to authority in their own household justified the regulation of otherwise protected expression.[68]

[64] 57 L. Ed. 2d. 1073 (1978).

[65] *Id.* at 1082.

[66] *Id.* at 1083.

[67] *Erzonzik v. City of Jacksonville*, 45 L. Ed. 2d 125, 133 (1975).



This writer agrees with the reasoning of the court in *Pacifica* and *Illinois* but it must be emphasized that both the FCC and the Supreme Court in those cases recognized and acknowledged that their orders were to be strictly applied to the circumstances prevailing therein.

In *Illinois*, such circumstances were (1) that the Sonderling broadcast was not for educational or scientific but for titillating and pandering purposes and (2) that it was broadcast during daytime when children may be listening. In *Pacifica*, aside from being indecent, the broadcast was aired at a time when children were undoubtedly listening. The FCC even suggested that:

> ... if an offensive broadcast had literary, artistic, or scientific value, and were preceded by warnings, it might not be indecent in the late evening but would be so during the day, when children are in the audience.[69]

This writer, as earlier stated has no quarrel with the holdings in the abovementioned cases; however such cases may not be the basis for analogy to be applied to the Johnny Litton case. Assuming without admitting that the Johnny Litton episode was allegedly indecent, the circumstances around its broadcast do not merit any penalty as there was no contravention of any law. Furthermore the cases decided by the U.S. Supreme Court and Circuit Court of Appeals have substantial factual differences from that of "Oh No, It's Johnny!."

In the first place, the US cases dealt with airing of programs during the daytime between 10 o'clock in the morning and 3 in the afternoon while "Oh No, It's Johnny!" airs late in the evening (10:30) when children are presumably asleep. Moreover, the interview portions of this show proceed at an even later hour 11:05 pm. At this time the State has all the right to assume that parents are fulfilling their duties and obligations towards their children; and if at such a late hour, their young ones are still up, then it is the parents who should be on the look out as to what their children are doing and to discipline them accordingly because although

[68] *Ginsberg v. New York*, 20 L. Ed. 2d. 195 (1968).

[69] 57 L. Ed. 1082 n. 5.

> ... children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, *leaving to parents the decision as to what speech of this kind their children shall hear and repeat...*[70]

As enunciated in *Ginsberg*, children are, without doubt, within the interest of the State to protect from sexually explicit materials and broadcast. However, the "parents' claim to authority in their own households"[71] gives them the right to prescribe which materials their children may read and view because the latter, it should be realized, are also "entitled to a significant measure of First Amendment protection."[72] This is precisely the reason for informing the parents of the mature nature of the show and leaving to their discretion whether they should allow their children to listen or not as suggested in the *Pacifica* ruling. It is the viewers' choice. This is the essence of a democracy, the freedom to choose according to one's morals, values and standards. If a government agency is allowed to take away this right to choose, by tailoring the choices of viewers to what the censor feels, according to his own standards of morality, are proper to be viewed, then later on this same censor may rule that only comedy programs may be broadcast, then further limit it to comedy programs without any sexual overtones. He may even go as far as stating that only comedy programs with Filipino actors in it but without Rene Requiestas and Joey de Leon or that only comedy sequences with Dolphy in it may be seen. One may even push the argument to the extreme to the effect that no Dolphy shows may be seen by the viewers because he portrays a man with a hundred illegitimate children and twenty-five common-law partners. Sooner or later, the only thing allowed to be viewed on television is Magtanong sa Pangulo and all press releases from Malacanang. And this is evidently a grave abuse of discretion going beyond the powers granted to the MTRCB. As the jury stated in the 2 Live Crew case in the United States: "You take away one freedom, and pretty soon they're all gone."[73]

[70] 57 L. Ed. at 1099.

[71] *Pacifica*, 57 L. Ed. 2d. at 1093 *citing* Ginsberg v. New York, 20 L. Ed. 125. (1968).

[72] *Erzonzik*, 45 L. Ed. 2d. at 133.

[73] Ehrenfeld and Brewster, *The Bill of Rights*, Life Magazine (Fall 1991).



In the interview of the Chairman of the MTRCB, he stated that one of the reasons for the penalty meted out to Johnny Litton was the *possibility* of children being in the audience despite the late showing. This argument has been passed upon in *Cohen:*

> ... the mere *presumed* presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.[74]

In any case, if the viewers found the topic and the episode of Margarita Holmes offensive, it was within their power to call the station and object to the format of the show or to its discussion. No one did. If these viewers felt offended by the show, they were at liberty not to watch it. They could have changed channels or shut the TV set off completely. The fundamental issue is the right of choice. No one forced them to watch the show; they chose to watch it when there was no compulsion to do so. On the other hand, there were individuals who chose to watch and enjoy the show. The latter exercised their liberty to choose which show to watch on that Wednesday night and they freely selected "Oh No, It's Johnny !" Those offended should have chosen to "avoid further bombardment of their sensibilities simply by averting their eyes"[75] and to further "take steps to ignore (these) offensive materials."[76]

Secondly, the Johnny Litton show was definitely mild as compared with the language used and abused in the above cases. At no time during the episode was any slang or street term used to denote the act or body part referred to. Although it must be said that consistent with the informal atmosphere evoked by the show, there were one-liners and bursts of laughter which could be heard on the air. However, this fact alone is not enough to characterize the show as indecent because

> Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explicitation, but otherwise in expressible emotions as well. In fact, words are often chosen as such for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little

[74] *Cohen*, 29 L. Ed. 2d. at 291. *See* also ORGANIZATION FOR A BETTER AUSTIN v. KEEFE, 29 L. Ed. 2d 1 (1971).

[75] *Id.* at 292.

[76] *Erzonzik*, 45 L. Ed. 2d. at 137.

or no regard for their emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated...`[o]ne of the prerogatives of... citizenship is the... freedomto speak foolishly and without moderation'.[77]

The U.S. Supreme Court had this to add:

... a speaker's choice of words cannot surgically be separated from the ideas he desires to express when he warned that `we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process... Moreover, even if an alternative phrase may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications.[78]

Furthermore, the fact that the resource person in the TV show was an expert in her field and resulted in dissemination of information not commonly inquired into nor known to the public at large adds credibility to the fact that the objective of the show is not to pander "sexual aberrations or perversions", but to make available, in a most informal and casual manner, to the viewers such inaccessible information.

Thus, the cases of speech illustrated above which have been characterized by the court as unprotected do not apply since there are differences in factual circumstances which are essential and relevant in the determination of whether or not the form of speech in "Oh No, It's Johnny !" is protected. The cases enunciated that indecency alone is not enough to curtail the right of free speech, that it must be coupled with the circumstance that such speech would be easily accessible to children. I therefor submit that the episode of "Oh No, It's Johnny!" should be characterized as protected speech since it is neither indecent nor was broadcast at a time when exposure to children is likely.

### 3. THE ACTION TAKEN BY MORATO HAS NO BASIS IN LAW.

According to the Chairman, no adult shows are allowed on television and proceeded to characterize the episode in question as an adult rated show. However, the episode itself belies such conclusion. Prior and

[77] 29 L. Ed. 2d. at 294 *citing* also *Baumgartner v. United States*, 88 L. Ed. 1525 (1944).

[78] *Pacifica*, 57 L. Ed. 2d. at 1109 *citing Cohen v. California* 29 L. Ed. 2d. 284 (1978).



during the whole broadcast, Johnny Litton, as host, repeated over and over again that the subject matter of the episode was of an adult nature and that it was up to the parents whether they would allow their children to listen or not. He never characterized the show as an adult only show. Thus he could not have violated Sec. 5 (b) of the MTRCB's implementing Rules and regulations which states that:

The Board shall not, as a general rule, order deletions or cuts in films... Films that are approved for exhibitions for moviehouses shall, unless re-edited, be given the same classification by the Board if shown on television provided that only films with G classification shall be authorized by the Board for showing on Television at any time of day and those with P classification only from 9:00 o'clock in the evening up to late in the night. Films carrying the R or X classification shall not be allowed for television broadcast.

As may be seen the prohibition on adult material on TV refers to movies previously shown in theatres under the R classification and thereafter proposed to be shown on television. It therefore is stressed that this provision of law does not apply to live television which is not capable of review and classification.

Furthermore, under Sec. 17 which enumerates the duties of exhibitors, it is provided that

They shall exhibit only motion pictures, television programs, and related publicity materials covered by an appropriate Board permit. In case of television broadcast, whose kind of audience cannot be controlled, only television programs and publicity materials classified by the Board as suitable for general patronage or with parental guidance may be broadcast as provided in Section 5 (b) above.

The section above quoted has no application to live television and there exists no section either in PD 1986 or its Implementing Rules and Regulations which prohibit mature or even adult subject matter on live television. This does not mean that in the absence of a prohibition, such materials may be aired on television as in such media "a less liberal approach calls for observance... because unlike motion pictures where the patrons have to pay their way, television reaches every home where there is a set".[79] But under the Definition of Terms (supra), only motion pictures are required to be classified. The law is silent as to who shall classify the live television shows.

[79] *Gonzales v. Kalaw-Katigbak*, 137 SCRA 717 at 729 (1985).

In fact, the MTRCB has very limited jurisdiction over live television. It is only Sec. 5 (c) of the Rules which sets out their actions:

> Live programs on television shall not require prior review and approval by the Board but television studios shall give the Board at least 48 hours advance notice regarding the title and contents of such programs before they are aired or broadcasted. In any event, television studios, their officers and managers, shall be responsible for any breach or violation of pertinent laws arising from such live presentations. Moreover, should there be evidence that a live television program contains or contemplates matters that are prohibited for exhibition, under PD 1986 and these Rules, the Board shall require pretaping of the program or its sequel for prior review and approval as with other motion pictures.

There are two acts which may lead to a penalty imposable by the Board. These are 1) if it fails to inform the Board of the topic for such an episode and 2) if prohibited material is shown. In these two transgressions of the law, the Board is empowered to, after adhering to the requirements of administrative due process, impose a penalty outlined by the Presidential Decree and the Rules, on the officers and managers of the television studios.

By the express provision of law, it is not the producers or the hosts of the show who are liable for violations of PD 1986 but the officers and managers of the television stations. Thus no cause of action exists against Johnny Litton.

The above quoted section also has no basis in logic. Live television is not defined in law but they are, in this writer's opinion, programs shown by direct transmission of sound and images via television waves without any pre-recording of any sort. In common parlance, these are shows which are not taped but are taken by the camera and transmitted directly through the air waves to the television sets. These are therefore not capable and not subject to prior review[80] as defined under the law because as the nature of the broadcast indicates, the determination to allow the showing of a live show is a hollow undertaking since the episodes are directly beamed and received by the televiewer without any appreciable lapse of time. By the time the Board determines that the live work, taken in its entirety, is contrary to the provisions of PD 1986, the material would have cast its effect on the viewer, thus nullifying any determination arrived at. On another note, the requirement of a pre-taping is contrary to the nature of a live show. Essentially, a live show is not taped and this requirement would go against its very nature.

80 See *supra* note 23.



The section quoted likewise grants to the board wide discretion on which type of live television would require taping. No standards to guide the discretion of the Board were stated in the law making it incomplete. The discretion on which live formats will be taken out of its nature and subjected to review lies within the complete and untrammeled whim of the Board. Such a wide latitude of discretion goes against the Constitutional mandate that legislative power may not be further legislated, unless the enabling law is complete and sets the standards to be applied by the administrative agency.[81]

Secondarily, he likewise states that the show was suspended due to a violation of Art. 201 of the Revised Penal Code. However, none of the provisions in PD 1986 or in its Rules grants a power to the Board to hear, judge and determine the culpability of any person or establishment with respect to felonies and offenses penalized under the RPC. This power is vested by the Rules of Court to the public prosecutors who shall prosecute all criminal actions whether commenced by information or complaint.[82]

Furthermore, the power to hear, try and determine actual controversies including criminal actions is vested in the Judicial Department and not with a government agency tasked with censorship. Finally, even if the Board was granted such sweeping powers, nowhere does suspension exist as a penalty under Art. 201 of the RPC.

One of the powers granted to the Board under Sec. 33 (i) of PD 1986 is to "cause the prosecution, on behalf of the People of the Philippines, of violators of this Act, of anti-trust, obscenity, censorship and other laws pertinent to the movie and television industry." Neither he, nor the Board acting collectively, has the power to assume the role of accuser, judge and executor of a cause of action — this results in the unjust usurpation of powers granted to the Judiciary and the emasculation of the due process clause of the Constitution.

Finally the acts taken by the Board are repugnant to the precepts of Administrative law.

The enabling laws grant to the Board under Sec. 11 of PD 1986 the power to impose a mandatory penalty of three months and one day to one year imprisonment plus a fine of not less than fifty thousand

81 N. GONZALES, ADMINISTRATIVE LAW: A TEXT (1979).

82 REVISED RULES ON CRIMINAL PROCEDURE, Rule 110, Sec. 5.

pesos but not more than one hundred thousand pesos. Sec. 28 (a) of the implementing rules and regulations enacted by the Board pursuant to Sec. 3 (a) of PD 1986 however state that exhibitions and television broadcast of programs not covered by appropriate Board permits shall result in confiscation of such films and the closure of the establishment exhibiting or broadcasting them for a period not exceeding ninety days. It is further stated under Sec.28(c) that failure of film exhibitors to comply with their duties under Sec. 17 will result in the suspension for a period not exceeding ninety days their right to operate or exhibit television programs.

This writer reiterates the earlier statements that these provisions do not apply to live television programs but cover instead taped ones which are capable of review by the Board.

Under Constitutional Law vis-a-vis Administrative Law, there exists a legal maxim that no department of the government, except when allowed by the Constitution, may escape its duties and responsibilities by delegating any of its powers to another body. Such act of delegation is void under the maxim *delegata potestas non delegari*.[83]

This principle admits though of exceptions and one of these is when the enabling laws allow the administrative body to promulgate rules and regulations for the implementation of the law, provided "ascertainable standards" are set.[84] This exception is further qualified by the fact that

> The rule making power cannot be extended to amending or expanding the statutory requirements or to embrace matters not covered by the statute or beyond its terms and provisions[85]

The MTRCB, it is submitted violated these precepts when, in promulgating its rules, it expanded and amended the penalties granted by its enabling law. By imposing suspensions as additional penalties other than the imprisonment and fine mandated by PD 1986, the Board overstepped its powers; and such unauthorized acts of an administrative body not exercising original but only delegated legislative powers are void ab initio. The Board has no power to promulgate such expanded rules. As stated in *Young v. Rafferty*:[86]

> A rule which is broader than the statute empowering the making of rules cannot be sustained. Administrative authorities must strictly adhere to the standards, policies and limitations provided in the statutes vesting power to them. Regulations are valid only as subordinate rules and when found to be within the framework of the policy which the legislative has sufficiently defined.

This grave usurpation of legislative powers is further compounded by the fact that the expansion of penalties under PD 1986 amount to deprivation of life, liberty and property and thus should be construed strictly against the state and in favor of the individual.[87] The power to declare what acts shall constitute a criminal offense and what penalties apply to such violations are purely legislative and may not be promulgated by the administrative agency without a standard and complete law allowing for such.[88] Even if they are characterized as administrative sanctions, these are the

> ... vindicatory parts of a law or those parts which ordain or denounce a penalty for the violation. Administrative sanctions, *when granted by law*, may include... suspension or expulsion, restraint of persons, imposition of administrative fines and forfeitures. These sanctions are regarded as remedial and civil, not criminal and thus may be imposed by administrative agencies.[89] (Underscoring mine.)

Whether the sanctions partake of civil or criminal penalties, all acts in derogation of rights of individuals are strictly construed against the state. The absence of a power granted to the MTRCB to promulgate additional penalties deny it the authority to pass on such matters. Furthermore the penalties provided for under PD 1986 are fine and imprisonment and no other. Suspension, not being a penalty provided under the law may not be imposed by the MTRCB.

### *B. The MTRCB's suspension order and due process*

#### 1. THE REQUISITES OF PROCEDURAL DUE PROCESS WERE NOT OBSERVED BY THE MTRCB IN CONSIDERING THE CASE OF "OH NO, ITS' JOHNNY!"

Enshrined in the 1987 Constitution is the very first section of the Bill of Rights:

[83] *Supra* note 78 at 17, 18.

[84] *Id.* at 20.

[85] *Shell Oil v. Central Bank*, 162 SCRA 628 (1988).

[86] 33 Phil. 276 (1916).

[87] *U.S. v. Abad Santos* 30 Phil. 243 (1915). *See* also *People v. Yu Hai*, 99 Phil. 728 (1956).

[88] *People v. Maceren*, 79 SCRA 450 (1977).

[89] RIVERA, PUBLIC ADMINISTRATION at 871.

No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the law.

Pursuant to this, the court has invariably held that:

> By `due process of law,' as Mr. Daniel Webster said in his arguments before the Supreme Court of the United States in the famous Dartmouth College case, `is more clearly intended the general law, *a law which hears before it condemns;* which proceeds upon enquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society.... *`Due process of law' contemplates notice and opportunity to be heard before judgment is rendered,* affecting one's person or property. `Due process of law' is not every act, legislative in form... Arbitrary power, enforcing its edicts to the injury of the person and property of citizens, is not law."[90] (Underscoring mine.)

The case of *Banco Espanol Filipino v. Palanca*[91] sets forth the most essential or the minimum standards of procedural due process as applied to judicial proceedings:

(1) There must be a court or tribunal clothed with judicial power to hear and determine the matter before it;

(2) Jurisdiction must be lawfully acquired over the person of the defendant or over the property which is the subject of the proceedings;

(3) The defendant must be given an opportunity to be heard; and

(4) The judgment must be rendered upon lawful hearing.

As stated above these are the minimum requirements of procedural due process under a judicial determination of rights and interests. However, for purposes of this paper, what is relevant are the requirements of procedural due process in an administrative adjudication, the MTRCB being an administrative agency of the Executive. Thus, the case of *Ang Tibay v. Court of Industrial Relations*[92] is most applicable as it sets out the requirements of administrative due process:

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[90] *Supra* note 1 at 45 *citing Lopez v. Director of Lands* 47 Phil. 23 at 32 (1924).

[91] 37 Phil. 921 at 934 (1918).

[92] 69 Phil. 635 (1940).



(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 own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate; and

(7) The Board or body should, in all controversial questions, render its decision in such manner that the parties to the proceeding can know the issues involved, and the reason for the decision rendered.

Under Sec. 4 of PD 1986 and Sec. 29 of its Rules, any violation thereof shall be heard and decided, with notice to the alleged offenders, by the Board. Technical rules of evidence shall not be observed except for fairness in its proceedings. It is required that after determination, all decisions of the Board must be in writing stating the grounds therefor. It likewise states the procedure and venue for appeal.

The question posed is whether the MTRCB observed the Constitutionally mandated requirements of administrative due process? This writer submits that the producers of "Oh No, Its' Johnny !" were denied their Constitutional right to due process. Applying the procedure laid down in Ang Tibay, it is indubitable that the Constitution and the enabling law and rules of the Board had been violated.

First, the producers of the show, Silverstar Communications, through Roselle Rebano, were not informed or notified of the charge that they had violated PD 1986. Neither were they afforded the right to a hearing nor an opportunity to present their case and submit evidence in their defense.

Second, there being no notice and hearing, no evidence was presented for or against the show. They were not able to confront witnesses, cross-examine them, nor adduce evidence in their own behalf to defend themselves and the exercise of their rights.

Third, there was no written decision received by Johnny Litton, Silverstar Communications, or ABS-CBN. To project a semblance of legality in his actions, Morato issued press statements saying that he had faxed the decision to the producers. Apparently, none was received.[93]

Fourth, the rule on substantial evidence finds no application since none was ever adduced.

Fifth, the decision has no basis as it was arrived at without any hearing ever being conducted. The only basis for the decision was the finding of the Chairman, acting individually and upon an observation of only a portion of the episode which is hardly enough to impose a restriction upon a freedom guaranteed by the Constitution. Moreover, no evidence was presented for or against the episode; not even a notice that the episode was under investigation for violations of the law was sent.

Sixth, there is no evidence that there was a board resolution or determination of this case. However, at the time of the suspension, MTRCB Resolution No.88-1-25 was still in effect which granted the Chairman the power to overturn the determination of the whole committee or Board as to the classification of films.[94] In any case, The Chairman admitted that he alone was monitoring the show at his private residence and there is no showing that there was a conference by the Board, as a collegial body, in the determination of the liability of the officers and managers of the TV station broadcasting the episode.

Seventh, the decision of the Board was verbally conveyed by the Board through its Chairman to Roselle Rebano stating that due to the August 21 episode, they were to be suspended for ten days. No issues nor reasons were set forth by the Board. It was only in later press interviews that the reasons for the decision were stated.

Clearly and without doubt, the requirements of due process were not followed resulting in a dual violation of the Constitution — the failure to afford due process and the curtailment of free speech.

[93] *Supra* note 5.

[94] *Aquino-Sarmiento*, G.R. No. 92541, November 13, 1991.



## 2. THE MTRCB'S ENABLING LAW FAILS TO INTEGRATE JUDICIAL PREROGATIVE IN DETERMINING CLAIMS UNDER FREE SPEECH, RESULTING IN A VIOLATION OF THE RIGHT TO BE AFFORDED DUE PROCESS IN DEPRIVATIONS OF LIFE, LIBERTY AND PROPERTY.

Nowhere in PD 1986 or its rules is there embodied the role of the judiciary in classifying speech as protected or otherwise. And this absence is fatal to the protection granted to speech. The citizens are left to the whims and caprices of a censor, be it a body or an individual rather than to an independent and objective judge who may have greater respect for the Constitution and the freedoms it protects.

> [T]hus, sensitive issues of free expression are decided largely by a minor bureaucrat rather than through an institution designed to secure a somewhat more independent, objective liberal judgment... No adequate study seems to have been made of the psychology of licensers, censors, security officials, and their kind, but common experience is sufficient to show that their attitudes, drives, emotions, and impulses all tend to carry them to excesses. This is particularly true in the realm of obscenity, but it occurs in all areas where officials are driven by fear or other emotion to suppress free communication.
>
> Further, it is necessary to keep in mind not only the character structure of the licenser, but the institutional framework in which he operates. The function of the censor is to censor. He has a professional interest in finding things to suppress. His career depends upon the record he makes. He is often acutely responsive to interests which demand suppression — interests which he himself represents — and not so well attuned to the more scattered and less aggressive forces which support free expression.[95]

On the other hand, the courts are not folly to this "myopia" and "singlemindedness". Due to the daily rigors of their jurisdiction, the judiciary is more exposed to various views, opinions and situations calling for different mindsets.[96]

It is therefore asserted, in order that respect may be given the requisite of due process set forth in *Castillo v. Juan*[97], that the proceedings be attended by the "cold neutrality of an impartial judge".

[95] Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 649 at 657-658 (1955).

[96] Monaghan, *First Amendment Due Process*, 83 HARV L. REV. 518 (1970).

[97] 62 SCRA 124 at 128 (1975).

The final determination of the classification of the speech should be left to the courts and not to the agency or to the power of the Chairman under Resolution 88-1-25. This is not to take away the administrative powers of the MTRCB. The initial classification of the uttered speech falls within the power of the agency and concomitantly, the power to impose the penalties granted to it under the law after notice and hearing. However, it is suggested that the law mandate the Board to seek judicial intervention if it seeks to enjoin the further broadcast of the film.

In the case of live television, an injunction on any of its episode would fail since live broadcast is not capable of review. This topic shall be dealt with in more detail in the following section.

The freedom is too precious to be left to the whims of one body or one man for that matter. And it is only in a judicial determination in an adversarial proceeding where the necessary sensitivities to the freedom are insured; "only a procedure requiring a judicial determination suffices to impose a valid final restraint."[98] This determination shall be ascertained during the prosecution under Art 201 of the RPC, which is within the power of the Board to initiate, or upon an appeal to the courts to question the act of the agency in imposing penalties. During this period the burden of proving that the restraint to be imposed is warranted must be borne by the government. The presumption should be in favor of the exhibitor because "[a]ny system of prior restraints of expression comes... bearing a heavy presumption against its Constitutional validity"[99] During the pendency of the proceedings, any injunction against the broadcast of the live television show should be disallowed because the episode would lose its effectivity and appeal as a live broadcast scheduled for that week. Time is of the essence especially in live informative shows since issues are merely passing and a "hot" issue now may not be as interesting in a few days. Furthermore, this would result in an act of prior restraint which the Constitution and the Courts have frowned upon as violative of free speech. If, due to the live broadcast, the Board deems the law to have been violated, then the appropriate criminal charges should be filed. The Board should initiate prosecutions, through the public prosecutors, under the said law, in order to ensure notice and proper hearing, by an impartial judge and to safeguard the dual rights under the Constitution — Freedom of Speech and Due Process.[100]

[98] *Freedman v. Maryland*, 13 L. Ed. 2d. 649, 654 (1965).

[99] *Id.*

[100]



In no way should an administrative agency be given a power so broad as to be the accuser that speech is unprotected; the judge who determines if such is true and passes judgment and imposes the penalty; and the executor who actually carries out the penalty. The rules of justice, equity, and fair play cannot countenance such arrogation of power unto one administrative agency/person. The rules of the agency should include the automatic duty upon the agency to cause the prosecution in court of cases which, in its opinion, are violative of the obscenity laws of the land. "It is *essential* for the validity of... previous restraint or censorship that the... authority *does not rely solely on his own appraisal of what the public welfare, peace or safety may require.*"[101] (Italics original.)

> The Court... has no quarrel that... freedom of the press is not without restraint, as the state has the right to protect society from pornographic literature that is offensive to public morals... But it brings us back to square one: were the "literature" so confiscated "pornographic"? That "we have laws punishing the author, publisher, and sellers of obscene publications (Sec. 1, Art. 201, Revised Penal Code, as amended by P.D. No. 960 and P.D. No. 969), is also fine, but the question again, is: Has the petitioner been found guilty under the statute?
>
> ... Presidential Decrees Nos. 960 and 969 are, arguably police power measures, but they are not, by themselves, authorities for high-handed acts. They do not exempt our law enforcers, in carrying out the decree of the twin presidential issuances (Mr. Marcos'), from the commandments of the Constitution, the right to due process of law and unreasonable searches and seizures...[102]

### C. *The Suspension and Prior Restraint*

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." [103]

The doctrine of prior restraint concerns itself with governmental intervention through regulations and restrictions imposed upon speech and other forms of expression before its actual publication, broadcast

[101] *Reyes v. Bagatsing*, 125 SCRA 553, 572 (1983).

[102] Pita, 178 SCRA 363, 374-375 (1989).

[103] *Freedman*, 13 L. Ed. 2d at 654.

or dissemination.[104] It is by this practice that the freedoms of speech and expression are most endangered. The aim therefore is to prevent prior restraint without precluding subsequent restraint when such action is deemed proper.

In the landmark case of *Near v. Minnesota*[105], in question was a statute which provided for an abatement as a nuisance any malicious, scandalous, defamatory, lewd, obscene, and lascivious newspaper, magazine or periodical. A suit could then be brought for the State to enjoin perpetually the continued publication of such material. The law thrust the burden of proving the truth and good motive of the articles upon the publisher, and if the judge is not satisfied, then an injunction would issue and a continued publication would be punishable as contempt. The trial court, finding that the defendant's newspaper had violated the statute, perpetually enjoined future publication of such.

The United States Supreme Court here held that "[T]his is the essence of censorship."[106] In a 5-4 decision, it was ruled that the remedy constituted prior restraint and hence was violative of free speech since "... [T]he statute in question does not deal with punishments..., but for suppression and injunction, that is, for restraint upon publication."[107]

That Court, in striking down the law in question, upheld the liberty of free press and speech which consists of the right to print and publish any statement whatever without subjection to previous censorship by the government. However, it was pointed out that the prohibition did not apply in exceptional cases such as obstruction to the conduct of war, obscenity, and incitements to violence.[108]

As earlier pointed out, under the provisions of P.D. 1986, a penalty of 3 months and 1 day to one year imprisonment plus a fine of not less than fifty pesos but not exceeding one hundred pesos for its violation may be imposed. Furthermore, there are provisions for the banning of motion pictures and television programs, closure of movie and television stations and of course deletions from films. However, its implementing rules have added suspension not exceeding 90 days as another penalty. It is under this last provision that the Chairman of the MTRCB claims to act.

[104] *Supra* note 95 at 649.

[105] 283 U.S. 697 (1931).

[106] *Id.* at 713.

[107] *Id.* at 712, 715.

[108] *United States v. Sotto*, 38 Phil. 666 (1918).



This writer submits that the penalty of suspension, despite the presence of this authority (albeit as earlier asserted beyond the power of the MTRCB to promulgate and impose), without any prior judicial determination that the August 28 episode, which was yet to be shown, was in fact and law not protected speech, constituted prior restraint.

The case of *Near* falls clearly into place as the applicable case rule. "Oh no, It's Johnny!", like *Near*, was determined to be indecent, offensive, lewd. However, unlike the former, the latter was granted the privilege of a judicial determination with rights to notice, examination, presentation of evidence, etc. Due to such determination, in both cases, future publication and broadcast were prohibited, albeit temporarily and perpetually, respectively. Furthermore, *Near* stated that the doctrine of prior restraint protected the publication of materials which could be the subject of subsequent punishment under criminal libel and other laws.[109] Since the U.S. Supreme Court struck down such act of the trial court as unconstitutional for imposing a prior restraint on free speech, so should the decision of the MTRCB.

There is no doubt that under the Rules of the MTRCB, the studios of a live television program had to inform the former, 48 hours in advance, of the theme and topic of the impending broadcast. If there is evidence that such shall contain matters prohibited by the PD, then a pre-taping for prior review was necessary. This requirement, as earlier stated is contradictory to the nature of a live television show since it imposes an impossible condition. This requirement would be similar to requiring stage plays, concerts, and operas, which are deemed to have violated the law, to be taped. Assuming arguendo that such requirement is valid and feasible, what is assailed is the fact that even prior to the submission of the topic and theme, or of an order requiring a pre-taping, the August 28 episode was enjoined from its broadcast. Without any evidence at hand, without any judicial intervention, speech and expression were curtailed *prior* to its utterance.

Silverstar Communications had been prevented from exercising its right to speak through the airwaves without any finding that the August 28 episode was indecent, immoral, obscene, or in any way posed a clear and present danger of an evil that the State has a right to be protected from. According to Johnny Litton, that episode would have had as guests Alejandro Roces, who was to speak on town fiestas in the Visayas, and Philip Salvador, to share his experiences as a

[109] *Near*, 283 U.S. at 718-719.

Filipino actor living in the U.S. and why, despite his success here, he had chosen the harder life abroad. The suspension took away the opportunity of the viewers to hear this information. It took away the opportunity of the producers to impart this knowledge.

Assuming that an earlier episode had indeed been determined to be obscene and had violated the law, then the appropriate remedy should have been imposed on that episode alone but not on a later episode which has no connection or relation at all to the first one. Furthermore, the penalty should not, in any way, be violative of the fundamental law of the land. There exists, as earlier stated, enough laws to deal with obscenity violations. If the Penal Laws have been violated, then the MTRCB may file a complaint with the Public Prosecutor's Office, the accomplishment of which is their right and duty. If in their discretion, acts have been committed in violation of PD 1986, then such fact should be let known and a hearing allowed to be conducted. The latter however must be subject to immediate judicial determination; otherwise such act may be struck down as unconstitutional.

It is submitted that when an act or omission which may constitute a violation of indecency and obscenity laws is capable of subsequent prosecution or restraint, any restraint or penalty imposed by the government at any time through any of its instrumentalities prior to its utterance constitutes prior restraint. The fear expressed by many is allayed in *U.S. v. Sotto*[110]

> The freedom of the press consists in the right to print and publish any statement whatever without subjection to the previous censorship of government. It does not mean immunity from willful abuses of that freedom, which, if permitted to go unrebuked, would soon make a license of an unrestricted press even more odious to the people than would be the interference of government with the expression of opinion...[111]

In any limitation then on the freedom, the burden falls on the shoulders of the government to prove that such a restraint is constitutionally valid.

This writer further submits that a second violation of the producers' right to procedural due process had been committed by the MTRCB due to its failure to formally determine whether or not the

[110] *Sotto*, 38 Phil. 666.

[111] 378 U.S. 184.



August 28 episode would indubitably be obscene. It likewise failed to grant a prompt measure of judicial superintendence of the board's actions. But rather than repeat what has already been said about the first violation, which if done would be applicable in this case, another aspect of due process shall be tackled.

Under *Freedman*, three requirements were necessary under a system of administrative restraint:[112]

1. The censor has the burden of proving that the film is unprotected expression;
2. The censor must, within a specified brief period, remove the restraint or go to court to continue the restraint;
3. There must be a prompt final judicial decision.

Since this case is considered the authority for procedural due process under a scheme of administrative restraint for films, failure to comply with these requirements disposes of the case without need of determining the classification of the speech.[113] However, these requirements apply only to films which are capable of prior review, since by the Rules of the MTRCB, live television need not undergo prior review but should merely send a notification of the contents of the episode, it may be argued that *Freedman* should not apply to this study.

It is suggested that the rules under *Freedman* be the basis for the integration of judicial intervention in cases of live television. The MTRCB should invoke the jurisdiction of the courts in order to prohibit temporarily or perpetually any live television broadcast. Without such determination, any injunction by the Board of live broadcast would constitute prior restraint. Live programs, it must be stressed, are not capable of review. Without such safeguards, it becomes easier for administrative agencies to nullify the effects of the speech sought to be restrained, thus amounting to an indirect implementation of prior restraint. With these safeguards, the true burden of proving that such speech is unprotected and therefore merits the restraint forced upon it shall fall on the agency exercising restraint. The absence of these rules would bestow the burden of proving that the speech is a protected form of expression on the utterer, when it should be the reverse.

[112] *Supra* note 40 at 58.

[113] *Id.*

Prior restraint is abhorred since

> Under a system of prior restraint, the communication, if banned, never reaches the marketplace at all. Or the communication may be witheld until the issue of its release is finally settled, at which time, it may have become obsolete or unprofitable. Such a delay is particularly serious in certain areas — such as in motion pictures — where large investments may be involved.[114]

Having knowledge of this power, Morato readily and unashamedly admits using it to coerce producers to tone down their films, threatening them with a disapproval of the film in its entirety. In the decision concerning Johnny Litton, he again threatens the TV producers with any and all forms of restraint in order to force them to conform to his standards of propriety.[115] This continuous infringement on the freedoms of speech and of expression must stop. There is no reason for it to continue. In this modern day of democracy, such tyrannical ways of restraint and suppression must be vigilantly guarded against by the citizens; and the courts should not hesitate to strike down a law or enjoin a mere bureaucrat espousing and perpetuating these practices.

## IV. CONCLUSION

In *Times Films v. City of Chicago* [116], Chief Justice Earl Warren stated:

> The contention may be advanced that the impact of motion pictures is such that a licensing system of prior censorship is permissible. There are several answers to this, the first of which I think is the Constitution itself. Although it is an open question whether the impact of motion pictures is greater or less than that of other media, there is not much doubt that the exposure of television far exceeds that of motionpictures...
>
> But even if the impact of the motion picture is greater than that of other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression. This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has been consistently held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.

In this light, despite the wider viewership and impact of television, it is submitted that neither should such fact alone be the basis for greater suppression.

It is thus suggested that when a penalty under subsequent action suffices, it must be mandated that such course of action be taken. This is not to say that any form of subsequent restraint on free speech is constitutionally valid since there may be some subsequent penalties which work to hinder the speaker from uttering anything at all. However, it is submitted that subsequent restraint is the lesser of the two evils, since in this case, the speech has already been uttered and is free to join the marketplace of ideas rather than merely lurk in the darkness of one's mind, longing to be set free and make its impact on the listener.

It is further recommended that judicial determination be infused into the workings of the MTRCB since the judiciary is in a better position to protect the rights of the individuals and correlate these rights with that of the State to prevent the wanton proliferation of materials harmful to public morals and welfare. This does not do away with the fact that any and all restraint imposed by the judicial branch is again constitutionally valid. However, the cold neutrality of an impartial judge may weigh down the partiality of a censor whose prime duty, responsibility, and success is based purely on limiting speech as it reaches the citizenry, especially when what is at stake is the freedom of speech and expression — a right which occupies a preferred position in the hierarchy of freedoms.[117]

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[114] *Supra* note 95 at 657.

[115] *Entertainment*, Manila Chronicle, July 5, 1988; Dumanal, Newsday, September 15, 1986; Defensor, Manila Chronicle, August 27, 1991.

[116] 365 U.S. 43, 77 (1961).

[117] *Gonzales v. Commission on Elections*, 29 SCRA 835 (1969).