

**DECISION T-391 OF 2007**  
**Manuel José Cepeda Espinosa**  
**May 22, 2007**

*Radio Cadena Nacional* (hereinafter *RCN*), a media network, broadcasted the daily radio show “EL MAÑANERO DE LA MEGA” to a young demographic. In many of its broadcasts, the anchors would cover news and entertainment topics using sexually explicit and abusive language. Consequently, the NGO *Fundación Sueño por Colombia* filed a class action lawsuit against *RCN* and the *Ministry of Communications*, claiming that such radio show was highly destructive and vitriolic to the values and morals of the Colombian youth. Additionally, the plaintiff submitted that the *Ministry of Communications*’ passive stance regarding the show greatly encouraged behavior of that nature. Thus, the plaintiff claimed that *RCN*’s “EL MAÑANERO DE LA MEGA” was contrary to Colombia’s public morals, good customs and values.

The *State Council* ruled in favor of the plaintiff, ordering the *Ministry of Communications* to launch a probe in order to impose the sanctions that it could deem applicable with regard to the content of the radio show.

As a result, *RCN* filed a writ of tutela (writ of protection of fundamental rights) in order to challenge the constitutionality of the decision issued by the *State Council*, alleging that it violated the due process clause and its rights to freedom of expression and information. The Court granted certiorari to the case.

The Court began by acknowledging that the matter before it raised questions regarding the scope and limits to the rights of freedom of expression and information. In that regard, the Court stated that:

*“The right to freedom of expression entails a social risk that is implicit in any democratic system. However, forbidding such right on that account would also result in the loss of one of the core principles of a democracy, that is, that in any democratic society, it is preferable to face the consequences resulting from exercising the right to hold opinions without interference, rather than imposing a general restriction on it.”*

Hence, the Court explained that any given authority that intends to establish a limitation on the right of freedom of expression must comply with the following three requirements:

- The concerned authority imposing a restriction on the right to freedom bears the burden of establishing the end pursued by such measure. Thus, it must prove (i) the intent behind the restriction; (ii) the legal, statutory grounds supporting such measure and (iii) the effects that the exercise of the right to freedom of expression might entail with regards to the objective that is being protected.
- The concerned authority is required to declare, in the regulation imposing the restriction to the right to freedom of expression itself, the grounds for establishing such measure and how it successfully complies with the aforementioned elements.

- The authority imposing the restriction must prove that the factual, scientific or technical evidence supporting the need for a limitation on the exercise of the right to freedom of expression is objective, verifiable and sound.

Additionally, the Court explained that:

*“Freedom of expression, much like any other right, is not absolute in any of its forms (freedom of expression stricto sensu, freedom of information, freedom of press). On the contrary, it may be subject to restrictions, in order to protect other constitutionally protected rights, values and interests that it may eventually clash with.”*

However, the Court pointed out that:

*“The right to freedom of expression, as a founding principle of a democratic society, results in several presumptions concerning the constitutionality of opinions, and conversely, in the unconstitutionality of measures restricting its exercise. In that regard, any opinion or expression is prima facie constitutional in the language of article 20 of the Charter. In addition, any measure restricting the exercise of the right to freedom of expression must be subject to strict scrutiny. Similarly, the right to freedom of expression, prima facie, prevails over other interests, values and rights of constitutional nature. Lastly, it is understood that any kind of measure controlling the content of opinions or expressions is a form of unconstitutional censorship, until proven otherwise.”*

The Court stressed that it is the duty of the constitutional judge to determine whether the limitation at issue meets the following requirements: (i) It is enshrined in precise and strict terms in a law; (ii) It pursues a specific legitimate objective (e.g. the protection of the rights of others, national security, public order, public morals); (iii) It is necessary to meet the objective pursued and (iv) It does not constitute a form of censorship.

Turning to the case at hand, the Court found that RCN’s “EL MAÑANERO DE LA MEGA” was not broadcasting obscene nor pornographic content, even though some of it could admittedly be regarded as tasteless, offensive and abusive to some people. Likewise, the Court noted that none of its contents fell within the scope of the four categories not covered by the presumption of protection under the freedom of expression clause (v.gr. expressions that may incite violence, war or genocide; hate speech and child pornography), nor could it be construed as inciting of sexual criminal behavior.

The Chamber concluded that the contents of “EL MAÑANERO DE LA MEGA” were a form of expression protected under article 20 of the Constitution. Consequently, the Court found that the challenged radio show was covered by the three constitutional presumptions derived from the freedom of expression clause: (i) the presumption of constitutionality of any expression or opinion; (ii) the presumption of unconstitutionality of any limitation to the right to freedom of expression, and (iii) the presumption that the right to freedom of expression prevails over other interests, values and rights of constitutional nature.

As a result, the Court held that the decision of the State Council and the fines issued by the Ministry of Communications with respect to the contents of “EL MAÑANERO DE LA MEGA” violated the due process clause and were contrary to the plaintiff’s rights to freedom of expression and information.