

## AN EMERGING PARADIGM OF FREE EXPRESSION\*

*Artemio V. Panganiban\*\**

Let me start by recalling a famous adage that is generally attributed to the French philosopher Voltaire: "I may not agree with what you say, but I will defend to the death your right to say it."<sup>1</sup> These simple words capture the very essence of the right to free expression. This right dwells in the heart of every democratic society; it keeps the government in check and prevents it from becoming tyrannical.

### TWO ASPECTS OF FREE EXPRESSION

The right to free expression has two aspects: (1) freedom from previous restraint or censorship and (2) freedom from subsequent punishment. The first is in Section 4, Article III of the Philippine Constitution, which states: "No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people to peaceably assemble and petition the Government for redress of grievances."

The second is in Section 18 of the same Article, which reads as follows: "No person shall be detained solely by reason of his political beliefs and aspirations."

Freedom of expression, traditionally understood, includes several other rights involved in effective communications like the freedoms of speech, of the press, of assembly, of petition, of religion, of association and of access to public information. It even encompasses the right to be silent, the right to listen and the right not to listen.<sup>2</sup>

Language, whether verbal or written, was the primary mode of expression in the distant past. Thus, whenever people delivered speeches, preached sermons,

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\*\* Associate Justice, Supreme Court of the Philippines.

<sup>1</sup> JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 344 (1980).

<sup>2</sup> ISAGANI A. CRUZ, *CONSTITUTIONAL LAW* 188 (1995).

shouted slogans, scribbled graffiti, wrote poems, sung songs, and staged plays to express their views and their sentiments, they were really exercising their right to free expression. Then came the less obvious but equally effective modes of expressing this freedom, such as flags, caricatures, cartoons, floats, logos, yellow ribbons, clenched fists, and even the picket line of silent protestors. These later forms may be wordless, but sometimes they communicate more tellingly than spoken or written speech.

The advances of science and technology provided more options for the exercise of the right to free expression. Movies, interactive television, and radio extended the range and the audience of advocacy. Moreover, cell phones, teleconferencing, discs, and satellites brought new commercial methods of communications.

Indeed, discoveries in modern technology have provided easier ways of retrieving and disseminating information.<sup>3</sup> Through the Internet, huge volumes of information are transmitted all over the world with the speed of thought.<sup>4</sup> Anyone can now open a personal website and tell the world about one's life, beliefs and aspirations. I am eagerly waiting for the day when the issues on the internet's constitutional protection will come before the judiciary for resolution.

In this article, however, I am focusing on the public opinion poll which, I believe, is an emerging paradigm of free expression. It is a unique mode of free expression with a growing role in nurturing and strengthening Philippine democracy.

#### OPINION POLLS – IMPERATIVES IN DEMOCRACIES

A public opinion poll may be defined as a survey conducted by qualified individuals or groups of individuals for the purpose of determining the opinion of the public or of a specific segment thereof on certain issues of concern. Polling is often used to measure public support and sentiment for or against the government. Just as often, however, it is commercially used in marketing research and public relations campaigns.

Opinion polls play a great role in every democratic society. Their results not only reflect but also shape the people's views. They sometimes influence voters in making their eventual election choices. Public opinion polls likewise enable

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<sup>3</sup> ARTEMIO V. PANGANIBAN, *TRANSPARENCY, UNANIMITY & DIVERSITY* 376-7 (2000).

<sup>4</sup> BILL GATES, *BUSINESS AT THE SPEED OF THOUGHT* 3 (1999).

voters to express their views and, in the process, to acquire power with the information these polls bring.

As Dr. Mahar Mangahas said in his keynote address a couple of years ago during the Conference of the World Association for Public Opinion Research (WAPOR), these polls assist electorates acquire and maintain genuine political power in a democratic society.<sup>5</sup> A government that does not have the means of acquiring and measuring popular information is ineffective. Its authority to govern will eventually lead to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power that knowledge gives.<sup>6</sup>

#### PUBLIC OPINION POLLS AROUND THE WORLD

The publication of the results of an opinion poll is a subject that has caused much debate and emotion in various countries. For instance, in Singapore, the dissemination of information through the Internet is restricted, and election surveys and exit polls are banned.<sup>7</sup> In contrast, the Supreme Court of India in 1999 dismissed the Election Commission's Petition seeking a "ban" on the Indian news media's publication of the results of pre-election and exit polls during the month-long voting for the 13<sup>th</sup> Lok Sabha elections.<sup>8</sup> India's Election Commission claimed that there were still unresolved substantive issues on the impact of opinion and exit polls on a poor and half-literate society in a multi-party democracy.<sup>9</sup>

In Mexico, it is a criminal offense to release a poll predicting an election winner within eight days before an election.<sup>10</sup> France continues to prohibit the publication of poll surveys immediately before an election. In the United Kingdom, there is a voluntary practice of not reporting opinion polls on the day of the elections.<sup>11</sup>

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<sup>5</sup> MAHAR MANGAHAS, *Opinion Polling and Young Democracies* (last modified 4 March 2003) [http://www.unl.edu/WAPOR/keynote\\_address.html](http://www.unl.edu/WAPOR/keynote_address.html).

<sup>6</sup> Board of Education Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982).

<sup>7</sup> (last modified 4 March 2003) <http://www.freemedia.at/wpfr/singapor.htm>

<sup>8</sup> Editorial, *Polls, the media and elections* (last modified 4 March 2003) <http://www.flonnet.com/fl1620/16200340.htm>.

<sup>9</sup> National News, *Exit polls a debatable issue: M S Gill* (last modified 2 May 2001) <http://news.sawaal.com/02-May-2001/National/10.htm>.

<sup>10</sup> SUE NELSON, *Election Integrity: Electoral Campaign* (last modified 18 November 2000) <http://www.accessproject.org/main/english/ci/cic09.htm>.

<sup>11</sup> *Id.*

The publication of poll results on the day of the elections also presented some problems in countries spanning multiple time zones. In the United States, for example, media had announced the winner in the State of Florida before the polls were closed in the Midwest and the West. Because of the close electoral vote, a win in Florida was critical to winning the entire elections. The premature and inaccurate call for Gore in Florida added confusion to the already hair-raising race.<sup>12</sup>

#### **ABS-CBN v. COMELEC**

In the Philippines, the Supreme Court had the first occasion to discuss public opinion polls, particularly exit polls, as a new species of free expression in *ABS-CBN Broadcasting Corp. v. COMELEC*<sup>13</sup> three years ago. The term “exit polls” was defined in the decision that I had the honor of writing as “a species of electoral survey conducted by qualified individuals or groups of individuals for the purpose of determining the probable result of an election by confidentially asking randomly selected voters whom they have voted for, immediately after they have officially cast their ballots.”<sup>14</sup>

In this case, ABS-CBN assailed directly before the Supreme Court a Resolution issued by the Comelec restraining the SWS from conducting an exit poll during the 1998 presidential elections; and the TV network, from broadcasting the results. The Comelec believed that this poll might conflict with its official ballot count, as well as with the unofficial quick count of the National Movement for Free Elections (Namfrel).

Specifically, the Court was faced with the question of whether the Comelec, in the guise of protecting the sanctity of elections and the secrecy of the ballot, might totally prohibit the holding of exit polls and the dissemination of their results through the mass media. The decision answered this question with a firm “no”. Exit polls form part of free expression and are entitled to constitutional protection.

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<sup>12</sup> *Supra* note 5.

<sup>13</sup> G.R. No. 133486, 323 SCRA 811 (2000).

<sup>14</sup> *Id.*

## NATURE AND SCOPE OF THE FREEDOM OF EXPRESSION

According to the decision, freedom of expression is a fundamental principle of every democratic government, a preferred right standing on a higher level than substantive economic freedom or other liberties. This is so because the lessons of history, both political and legal, teach us that freedom of speech is an indispensable condition for nearly every other form of freedom.<sup>15</sup>

Freedom of expression is a means of assuring individual self-fulfillment, of attaining the truth, of securing the people's participation in social and political decision-making, and of maintaining the balance between stability and change.<sup>16</sup> It represents a profound commitment to the principle that debates on public issues should be uninhibited, robust and wide open.<sup>17</sup> It means more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, or to take refuge in the existing climate of opinion on any matter of public consequence. Paraphrasing the eminent Justice Oliver Wendell Holmes Jr., the Court stressed that this freedom encompasses the thought we hate, no less than the thought we agree with.<sup>18</sup>

## LIMITATIONS OF FREEDOM

The complexities of modern life, however, cannot allow the unfettered and unrestrained exercise of freedom of expression at all times and under all circumstances. To determine the validity of restrictions on the right, two alternative tests have been devised by jurisprudence: (1) the clear and present danger rule and (2) the dangerous tendency rule.<sup>19</sup>

Justice Holmes explains the clear and present danger rule by saying that the issue to be resolved is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the state has a right to prevent." If they do, then the

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<sup>15</sup> *Salonga v. Cruz Paño*, G.R. No. 59524, 134 SCRA 458-9 (1985); *Gonzales v. COMELEC*, 137 Phil. 489, 485, 492-3 (1969); *Philippine Blooming Mills Employees Org'n. v. Philippine Blooming Mills Co., Inc.*, 151-A Phil. 676-677 (1973); *Philippine National Press Club v. COMELEC*, G.R. No. 102653, 207 SCRA 1, 9 (1992); *Blo Umpar Adiong v. COMELEC*, G.R. 103956, 207 SCRA 712, 715 (1992).

<sup>16</sup> *Id.*, at 857 *citing* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966).

<sup>17</sup> *Id. citing* *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>18</sup> *U.S. v. Schwimmer*, 279 U.S. 644 (1929).

<sup>19</sup> There is actually a third -- the *balancing of interest* test-- in which the courts are given leeway to weigh the conflict between authority and freedom in the light of the peculiar circumstances of each case.

speaker shall be punished, but not otherwise. The character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man who falsely shouts "Fire, fire" in a crowded theater and thereby causes panic. In contrast, if the same words are uttered in a less flammable setting like an open field, they would create no clear and present danger and therefore no liability.<sup>20</sup>

Under this test, any act that restrains speech or other forms of expression should be greeted with furrowed brows.<sup>21</sup> The Supreme Court has invariably ruled in favor of freedom of expression, and any restriction is treated as an exception. The power to exercise prior restraint is not to be presumed; rather, the presumption is against the validity of prior censorship.<sup>22</sup>

On the other hand, the dangerous tendency rule was explained by Justice Felix Bautista Angelo in *Cabansag v. Fernandez*.<sup>23</sup>

If the words uttered create a dangerous tendency which the State has a right to prevent, then such words are punishable. It is not necessary that some definite or immediate acts of force, violence, or unlawfulness be advocated. It is sufficient that such acts be advocated in general terms. Nor is it necessary that the language used be reasonably calculated to incite persons to acts of force, violence or unlawfulness. It is sufficient if the natural tendency and probable effect of the utterance be to bring about the substantive evil, which the legislative body seeks to prevent.

An example of the application of the dangerous tendency doctrine is *People v. Perez*.<sup>24</sup> In that case, a municipal secretary in the course of a casual conversation said to his companion, "Filipinos like myself must use bolos for cutting off [Governor-General] Wood's head for having recommended a bad thing for the Filipinos, for he has killed our independence." He was convicted for having uttered seditious words. The Supreme Court held that Perez had made a statement and performed an act that tended to instigate others to cabal or meet together for unlawful purposes. His statement tended to stir up the people against lawful authorities and disturb the peace of the community and the safety or order of the

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<sup>20</sup> *Supra* note 2 at 198.

<sup>21</sup> *Iglesia ni Cristo (Inc.) v. C.A.*, G.R. No. 119673, 259 SCRA 529 (1996) *citing* *Near v. Minnesota*, 283 U.S. 697 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); and *New York Times v. Sullivan*, *supra* at 17.

<sup>22</sup> *Id.*

<sup>23</sup> 102 Phil. 163 (1957).

<sup>24</sup> 45 Phil. 599 (1923).

government. The dangerous tendency doctrine was used to discourage attacks against the American administration at that time.

The present Supreme Court adheres to the more liberal clear and present danger rule. In passing upon the legality of exit polls, the Court said that they created no obvious or imminent risk to society that could not be prevented by assiduous and circumspect governance.

Indeed, our Constitution guarantees every individual the right to speak out his mind. If this right is available to journalists and broadcasters to enable them to disseminate their individual opinion, why should the publication of opinion polls that reflect the views of the general population be banned? I believe that, properly understood, polling goes into the very essence of free expression.

The COMELEC tried to justify its resolution banning exit polls by contending that:

An exit poll has the tendency to sow confusion considering the randomness of selecting interviewees, which further make[s] the exit poll highly unreliable. The probability that the results of such exit poll may not be in harmony with the official count made by the COMELEC x x x is ever present. In other words, the exit poll has a clear and present danger of destroying the credibility and integrity of the electoral process.”

The High Court, however, held that such arguments were purely speculative and untenable. *First*, by the very nature of a survey, the interviewees or participants are selected at random, so that the results will as much as possible be representative and thus be reflective of the general sentiment of the community or group polled. *Second*, the survey result is not meant to replace or be on a par with the official COMELEC count. It consists merely of the opinion of the polling group as to who the electorate in general has probably voted for, based on the limited data gathered from polled individuals. *Finally*, the credibility and integrity of the elections is not at stake here. An election is an exercise separate and independent from the exit polls. Hence, the holding and the reporting of exit polls cannot undermine those of an election, since the former is only part of the latter. At most, the outcome of the exit polls can only be indicative of the outcome of the election.

May I add that while all polling organizations equally have this right to publicize their surveys, they do not enjoy equal public credibility. Just as all newspapers, and radio and TV stations have an equal right to express their opinions, they do not enjoy the same amount of public acceptability.

**SWS v. COMELEC**

So much for this first decision on the exit polls. Imagine my elation last year when the Supreme Court decided another case, *Social Weather Stations (SWS) v. COMELEC*,<sup>25</sup> which further strengthened my view that public opinion polls constitute a new mode of free speech.<sup>26</sup> I was specially pleased that the writer of this later Decision was Mr. Justice Vicente V. Mendoza, who had dissented in *ABS v. COMELEC*, the case I discussed earlier.

In this later case, SWS sought to prohibit the Commission on Elections from enforcing Section 5.4 of Republic Act 9006, otherwise known as the Fair Elections Act. This provision banned the publication of election surveys<sup>27</sup> affecting national candidates within fifteen days, and those relating to local candidates within seven days before an election.

The Court held that this ban constituted an unconstitutional abridgment of the freedom of expression for reasons set forth below.

*First*, it laid a prior restraint by prohibiting the publication of election survey results. *Second*, under Section 4, Article IX-C of the Constitution, the COMELEC's power was limited to ensuring "equal opportunity, time, space, and the right to reply"; as well as to prescribing uniform and reasonable rates of charge for the use of such media facilities for public information campaigns and forums among candidates. Hence, it could not enforce the ban contemplated in the Fair Elections Act. *Third*, the provision did not pass the test enunciated in *United States v. O'Brien*,<sup>28</sup> which distinguished content-based from content-neutral regulations. In *O'Brien*, the US Supreme Court ruled that a government regulation was sufficiently justified under the following conditions:

- (1) it is within the constitutional power of the government;
- (2) it furthers an important or a substantial governmental interest;
- (3) the governmental interest is unrelated to the suppression of free expression; and

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<sup>25</sup> G.R. No. 147571, 5 May 2001.

<sup>26</sup> ARTEMIO V. PANGANIBAN, A CENTENARY OF JUSTICE 359 (2001).

<sup>27</sup> Election surveys, according to Sec. 5.1, "refer to the measurement of opinions and perceptions of the voters as regards a candidate's popularity, qualifications, platforms or a matter of public discussion in relation to the election, including voters' preference for candidates or publicly discussed issues during the campaign period."

<sup>28</sup> 391 U.S. 367, 377, 20 L. Ed. 2d 672, 680 (1968).



- (4) the incidental restriction on alleged First Amendment freedoms (of speech, expression, and the press) is greater than is essential to the furtherance of that interest.

Section 5.4 failed to meet the third criterion, because the causal connection of freedom of expression to the asserted governmental interest made such interest “not unrelated to the suppression of free expression.” True, it prohibited the publication of election survey results, because of the possibility that it might undermine the integrity of the election. However, in so doing, it actually suppressed a whole class of expressions, while at the same time allowing opinion on the same subject matter to be expressed by members of the media, such as newspaper and television commentators and other opinion makers. In effect, it showed a bias for the viewpoints of certain sectors of society by preferring personal opinion to statistical results.

Section 5.4 likewise failed to meet the fourth criterion, because it could have promoted governmental interest by means other than the suppression of freedom of expression. The provision aimed to prevent last-minute pressure on voters, the creation of a bandwagon effect, the junking of weak candidates, and the resort to a form of election cheating called *dagdag-bawas*. This may be a praiseworthy cause, but it can be attained through ways other than the sacrifice of the fundamental right to free expression.

I wrote a concurring opinion on this case, in which I reiterated that freedom of expression was a preferred right, standing on a level higher than other substantive liberties. Although this liberty is never absolute, any limitation should be justified by a clear and present danger of such substantive character that the state has a right to prevent.<sup>29</sup> In other words, the evil sought to be avoided must be so important as to justify a restraint.<sup>30</sup> The COMELEC in this case failed to convince me that a substantive danger, which the state had a right to prevent, was lurking and threatening to explode if ignited by the conduct and the dissemination of the prohibited surveys. No lover of freedom, no guardian of the Constitution, and no advocate of democracy can agree to this unreasonable restraint.

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<sup>29</sup> *Primicias v. Fugoso*, 80 Phil. 71 (1948); *American Bible Society v. City of Manila*, 101 Phil. 386 (1957); *Iglesia ni Cristo (Inc.) v. CA*, *supra* at 21.

<sup>30</sup> *Blo Umpar Adiong v. COMELEC*, *supra* at 15.

**FREEDOM AND RESPONSIBILITY**

Before I end, may I stress that, like any other right, the freedom to conduct public opinion polls and to disseminate the information gathered from these polls may be subjected to reasonable regulation, not to stifle or diminish it, but in fact to safeguard it and at the same time to ensure that it does not collide with or overrun the rights of others. There must therefore be a continuing effort to ensure that public opinion polls, particularly exit polls, remain true instruments of the freedom of expression as declared by the Supreme Court.

Toward this end, *ABS-CBN v. COMELEC* made some recommendations, such as designating a specific limited area for conducting exit polls, allowing only professional survey groups to conduct the polls, and requiring pollsters to keep a reasonable distance from the voting center as well as to wear distinctive clothing to set them apart from elections officials. Of course, interviewees must be informed that they may refuse to be interviewed and that their identities will not be divulged. It should likewise be explained to them that the interview is not part of the official balloting process.

We must also keep in mind that public opinion polls are open to abuse for partisan political ends. Hence, I believe there must be a conscious effort to educate the public on the factors surrounding the conduct of public opinion polls. Results of the polls should be published with explanations of such terms as "margin of error," "sample size," and "demographics of respondents." There must also be transparency in the methodology used by the groups conducting the polls, so that the public can judge the accuracy of the polling.<sup>31</sup>

For every freedom, there is a corresponding responsibility. As a democratic nation, it is our responsibility to have a balanced and progressive attitude towards public opinion polls as an instrument of free expression in our country. Most especially, it is the continuing responsibility of all groups engaged in conducting public opinion polls to help educate the public. They should enlighten the people not only on the advantages that polls offer in providing relevant public information and raising public awareness in a democracy, but also on the limitations of polls and their potential for abuse. It is this interplay of freedom and responsibility that will ensure the place of public opinion polling as an enduring instrument of freedom in our country.

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<sup>31</sup> *Supra* note 10.