

**ABS-CBN BROADCASTING CORPORATION, petitioner, vs. COMMISSION ON ELECTIONS, respondent.***G.R. No. 133486. January 28, 2000*

Ponente: PANGANIBAN, J.

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The holding of exit polls and the dissemination of their results through mass media constitute an essential part of the freedoms of speech and of the press. Hence, the Comelec cannot ban them totally in the guise of promoting clean, honest, orderly and credible elections. Quite the contrary, exit polls -- properly conducted and publicized -- can be vital tools in eliminating the evils of election-fixing and fraud. Narrowly tailored countermeasures may be prescribed by the Comelec so as to minimize or suppress the incidental problems in the conduct of exit polls, without transgressing in any manner the fundamental rights of our people.

**The Case and the Facts**

Before us is a Petition for Certiorari under Rule 65 of the Rules of Court assailing Commission on Elections (Comelec) en banc Resolution No. 98-1419[1] dated April 21, 1998. In the said Resolution, the poll body

"RESOLVED to approve the issuance of a restraining order to stop ABS-CBN or any other groups, its agents or representatives from conducting such exit survey and to authorize the Honorable Chairman to issue the same."

The Resolution was issued by the Comelec allegedly upon "information from [a] reliable source that ABS-CBN (Lopez Group) has prepared a project, with PR groups, to conduct radio-TV coverage of the elections x x x and to make [an] exit survey of the x x x vote during the elections for national officials particularly for President and Vice President, results of which shall be [broadcast] immediately." [2] The electoral body believed that such project might conflict with the official Comelec count, as well as the unofficial quick count of the National Movement for Free Elections (Namfrel). It also noted that it had not authorized or deputized Petitioner ABS-CBN to undertake the exit survey.

On May 9, 1998, this Court issued the Temporary Restraining Order prayed for by petitioner. We directed the Comelec to cease and desist, until further orders, from implementing the assailed Resolution or the restraining order issued pursuant thereto, if any. In fact, the exit polls were actually conducted and reported by media without any difficulty or problem.

**The Issues**

Petitioner raises this lone issue: "Whether or not the Respondent Commission acted with grave abuse of discretion amounting to a lack or excess of jurisdiction when it approved the issuance of a restraining order enjoining the petitioner or any [other group], its agents or representatives from conducting exit polls during the x x x May 11 elections." [3]

In his Memorandum, [4] the solicitor general, in seeking to dismiss the Petition, brings up additional issues: (1)

mootness and (2) prematurity, because of petitioner's failure to seek a reconsideration of the assailed Comelec Resolution.

#### The Court's Ruling

The Petition[5] is meritorious.

#### Procedural Issues:

##### Mootness and Prematurity

The solicitor general contends that the petition is moot and academic, because the May 11, 1998 election has already been held and done with. Allegedly, there is no longer any actual controversy before us.

The issue is not totally moot. While the assailed Resolution referred specifically to the May 11, 1998 election, its implications on the people's fundamental freedom of expression transcend the past election. The holding of periodic elections is a basic feature of our democratic government. By its very nature, exit polling is tied up with elections. To set aside the resolution of the issue now will only postpone a task that could well crop up again in future elections.[6]

In any event, in *Salonga v. Cruz Pano*, the Court had occasion to reiterate that it "also has the duty to formulate guiding and controlling constitutional principles, precepts, doctrines, or rules. It has the symbolic function of educating bench and bar on the extent of protection given by constitutional guarantees." [7] Since the fundamental freedoms of speech and of the press are being invoked here, we have resolved to settle, for the guidance of posterity, whether they likewise protect the holding of exit polls and the dissemination of data derived therefrom.

The solicitor general further contends that the Petition should be dismissed for petitioner's failure to exhaust available remedies before the issuing forum, specifically the filing of a motion for reconsideration.

This Court, however, has ruled in the past that this procedural requirement may be glossed over to prevent a miscarriage of justice,[8] when the issue involves the principle of social justice or the protection of labor,[9] when the decision or resolution sought to be set aside is a nullity,[10] or when the need for relief is extremely urgent and certiorari is the only adequate and speedy remedy available.[11]

The instant Petition assails a Resolution issued by the Comelec en banc on April 21, 1998, only twenty (20) days before the election itself. Besides, the petitioner got hold of a copy thereof only on May 4, 1998. Under the circumstances, there was hardly enough opportunity to move for a reconsideration and to obtain a swift resolution in time for the May 11, 1998 elections. Moreover, not only is time of the essence; the Petition involves transcendental constitutional issues. Direct resort to this Court through a special civil action for certiorari is therefore justified.

#### Main Issue:

##### Validity of Conducting Exit Polls

An exit poll is 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. The results of the survey are announced to the public, usually through the mass media, to give an advance overview of how, in the opinion of the polling individuals or organizations, the electorate voted. In our electoral history, exit polls had not been resorted to until the recent May 11, 1998 elections.

In its Petition, ABS-CBN Broadcasting Corporation maintains that it is a responsible member of the mass media, committed to report balanced election-related data, including "the exclusive results of Social Weather Station

(SWS) surveys conducted in fifteen administrative regions."

It argues that the holding of exit polls and the nationwide reporting of their results are valid exercises of the freedoms of speech and of the press. It submits that, in precipitately and unqualifiedly restraining the holding and the reporting of exit polls, the Comelec gravely abused its discretion and grossly violated the petitioner's constitutional rights.

Public respondent, on the other hand, vehemently denies that, in issuing the assailed Resolution, it gravely abused its discretion. It insists that the issuance thereof was "pursuant to its constitutional and statutory powers to promote a clean, honest, orderly and credible May 11, 1998 elections"; and "to protect, preserve and maintain the secrecy and sanctity of the ballot." It contends that "the conduct of exit surveys might unduly confuse and influence the voters," and that the surveys were designed "to condition the minds of people and cause confusion as to who are the winners and the [losers] in the election," which in turn may result in "violence and anarchy."

Public respondent further argues that "exit surveys indirectly violate the constitutional principle to preserve the sanctity of the ballots," as the "voters are lured to reveal the contents of ballots," in violation of Section 2, Article V of the Constitution;<sup>[12]</sup> and relevant provisions of the Omnibus Election Code.<sup>[13]</sup> It submits that the constitutionally protected freedoms invoked by petitioner "are not immune to regulation by the State in the legitimate exercise of its police power," such as in the present case.

The solicitor general, in support of the public respondent, adds that the exit polls pose a "clear and present danger of destroying the credibility and integrity of the electoral process," considering that they are not supervised by any government agency and can in general be manipulated easily. He insists that these polls would sow confusion among the voters and would undermine the official tabulation of votes conducted by the Commission, as well as the quick count undertaken by the Namfrel.

Admittedly, no law prohibits the holding and the reporting of exit polls. The question can thus be more narrowly defined: May the Comelec, in the exercise of its powers, totally ban exit polls? In answering this question, we need to review quickly our jurisprudence on the freedoms of speech and of the press.

#### Nature and Scope of Freedoms of Speech and of the Press

The freedom of expression is a fundamental principle of our democratic government. It "is a 'preferred' right and, therefore, stands on a higher level than substantive economic or other liberties. x x x [T]his must be so because the lessons of history, both political and legal, illustrate that freedom of thought and speech is the indispensable condition of nearly every other form of freedom."<sup>[14]</sup>

Our Constitution clearly mandates that no law shall be passed abridging the freedom of speech or of the press.<sup>[15]</sup> In the landmark case *Gonzales v. Comelec*,<sup>[16]</sup> this Court enunciated that at the very least, free speech and a free press consist of the liberty to discuss publicly and truthfully any matter of public interest without prior restraint.

The freedom of expression is a means of assuring individual self-fulfillment, of attaining the truth, of securing participation by the people in social and political decision-making, and of maintaining the balance between stability and change.<sup>[17]</sup> It represents a profound commitment to the principle that debates on public issues should be uninhibited, robust, and wide open.<sup>[18]</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. And paraphrasing the eminent justice Oliver Wendell Holmes,<sup>[19]</sup> we stress that the freedom encompasses the thought we hate, no less than the thought we agree with.

## Limitations

The realities of life in a complex society, however, preclude an absolute exercise of the freedoms of speech and of the press. Such freedoms could not remain unfettered and unrestrained at all times and under all circumstances.[20] They are not immune to regulation by the State in the exercise of its police power.[21] While the liberty to think is absolute, the power to express such thought in words and deeds has limitations.

In *Cabansag v. Fernandez*[22] this Court had occasion to discuss two theoretical tests in determining the validity of restrictions to such freedoms, as follows:

"These are the 'clear and present danger' rule and the 'dangerous tendency' rule. The first, as interpreted in a number of cases, means that the evil consequence of the comment or utterance must be 'extremely serious and the degree of imminence extremely high' before the utterance can be punished. The danger to be guarded against is the 'substantive evil' sought to be prevented. x x x"[23]

"The 'dangerous tendency' rule, on the other hand, x x x may be epitomized as follows: 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."[24]

Unquestionably, this Court adheres to the "clear and present danger" test. It implicitly did in its earlier decisions in *Primicias v. Fugoso*[25] and *American Bible Society v. City of Manila*;<sup>[26]</sup> as well as in later ones, *Vera v. Arca*,<sup>[27]</sup> *Navarro v. Villegas*,<sup>[28]</sup> *Imbong v. Ferrer*,<sup>[29]</sup> *Blo Umpar Adiong v. Comelec*<sup>[30]</sup> and, more recently, in *Iglesia ni Cristo v. MTRCB*.<sup>[31]</sup> In setting the standard or test for the "clear and present danger" doctrine, the Court echoed the words of justice Holmes: "The question in every case 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 Congress has a right to prevent. It is a question of proximity and degree."<sup>[32]</sup>

A limitation on the freedom of expression may be justified only by a danger of such substantive character that the state has a right to prevent. Unlike in the "dangerous tendency" doctrine, the danger must not only be clear but also present. "Present" refers to the time element; the danger must not only be probable but very likely to be inevitable.<sup>[33]</sup> The evil sought to be avoided must be so substantive as to justify a clamp over one's mouth or a restraint of a writing instrument.<sup>[34]</sup>

## Justification for a Restriction

Doctrinally, the Court has always ruled in favor of the freedom of expression, and any restriction is treated an exemption. The power to exercise prior restraint is not to be presumed; rather the presumption is against its validity.<sup>[35]</sup> And it is respondent's burden to overthrow such presumption. Any act that restrains speech should be greeted with furrowed brows,<sup>[36]</sup> so it has been said.

To justify a restriction, the promotion of a substantial government interest must be clearly shown.<sup>[37]</sup> Thus:

"A government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>[38]</sup>

Hence, even though the government's purposes are legitimate and substantial, they cannot be pursued by means that broadly, stifle fundamental personal liberties, when the end can be more narrowly achieved.[39]

The freedoms of speech and of the press should all the more be upheld when what is sought to be curtailed is the dissemination of information meant to add meaning to the equally vital right of suffrage.[40] We cannot support any ruling or order "the effect of which would be to nullify so vital a constitutional right as free speech." [41] When faced with borderline situations in which the freedom of a candidate or a party to speak or the freedom of the electorate to know is invoked against actions allegedly made to assure clean and free elections, this Court shall lean in favor of freedom. For in the ultimate analysis, the freedom of the citizen and the State's power to regulate should not be antagonistic. There can be no free and honest elections if, in the efforts to maintain them, the freedom to speak and the right to know are unduly curtailed.[42]

True, the government has a stake in protecting the fundamental right to vote by providing voting places that are safe and accessible. It has the duty to secure the secrecy of the ballot and to preserve the sanctity and the integrity of the electoral process. However, in order to justify a restriction of the people's freedoms of speech and of the press, the state's responsibility of ensuring orderly voting must far outweigh them.

These freedoms have additional importance, because exit polls generate important research data which may be used to study influencing factors and trends in voting behavior. An absolute prohibition would thus be unreasonably restrictive, because it effectively prevents the use of exit poll data not only for election-day projections, but also for long-term research.[43]

#### Comelec Ban on Exit Polling

In the case at bar, the Comelec justifies its assailed Resolution as having been issued pursuant to its constitutional mandate to ensure a free, orderly, honest, credible and peaceful election. While admitting that "the conduct of an exit poll and the broadcast of the results thereof [are] x x x an exercise of press freedom," it argues that "[p]ress freedom may be curtailed if the exercise thereof creates a clear and present danger to the community or it has a dangerous tendency." It then contends 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."

Such arguments are purely speculative and clearly 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 or reflective of the general sentiment or view of the community or group polled. Second, the survey result is not meant to replace or be at 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, not at stake here are the credibility and the integrity of the elections, which are exercises that are separate and independent from the exit polls. The holding and the reporting of the results of exit polls cannot undermine those of the elections, since the former is only part of the latter. If at all, the outcome of one can only be indicative of the other.

The Comelec's concern with the possible noncommunicative effect of exit polls -- disorder and confusion in the voting centers -- does not justify a total ban on them. Undoubtedly, the assailed Comelec Resolution is too broad, since its application is without qualification as to whether the polling is disruptive or not.[44] Concededly, the Omnibus Election Code prohibits disruptive behavior around the voting centers.[45] There is no showing,

however, that exit polls or the means to interview voters cause chaos in voting centers. Neither has any evidence been presented proving that the presence of exit poll reporters near an election precinct tends to create disorder or confuse the voters.

Moreover, the prohibition incidentally prevents the collection of exit poll data and their use for any purpose. The valuable information and ideas that could be derived from them, based on the voters' answers to the survey questions will forever remain unknown and unexplored. Unless the ban is restrained, candidates, researchers, social scientists and the electorate in general would be deprived of studies on the impact of current events and of election-day and other factors on voters' choices.

In *Daily Herald Co. v. Munro*,<sup>[46]</sup> the US Supreme Court held that a statute, one of the purposes of which was to prevent the broadcasting of early returns, was unconstitutional because such purpose was impermissible, and the statute was neither narrowly tailored to advance a state interest nor the least restrictive alternative. Furthermore, the general interest of the State in insulating voters from outside influences is insufficient to justify speech regulation. Just as curtailing election-day broadcasts and newspaper editorials for the reason that they might indirectly affect the voters' choices is impermissible, so is regulating speech via an exit poll restriction.<sup>[47]</sup>

The absolute ban imposed by the Comelec cannot, therefore, be justified. It does not leave open any alternative channel of communication to gather the type of information obtained through exit polling. On the other hand, there are other valid and reasonable ways and means to achieve the Comelec end of avoiding or minimizing disorder and confusion that may be brought about by exit surveys.

For instance, a specific limited area for conducting exit polls may be designated. Only professional survey groups may be allowed to conduct the same. Pollsters may be kept at a reasonable distance from the voting center. They may be required to explain to voters that the latter may refuse to be interviewed, and that the interview is not part of the official balloting process. The pollsters may further be required to wear distinctive clothing that would show they are not election officials.<sup>[48]</sup> Additionally, they may be required to undertake an information campaign on the nature of the exercise and the results to be obtained therefrom. These measures, together with a general prohibition of disruptive behavior, could ensure a clean, safe and orderly election.

For its part, Petitioner ABS-CBN explains its survey methodology as follows: (1) communities are randomly selected in each province; (2) residences to be polled in such communities are also chosen at random; (3) only individuals who have already voted, as shown by the indelible ink on their fingers, are interviewed; (4) the interviewers use no cameras of any sort; (5) the poll results are released to the public only on the day after the elections.<sup>[49]</sup> These precautions, together with the possible measures earlier stated, may be undertaken to abate the Comelec's fear, without consequently and unjustifiably stilling the people's voice.

With the foregoing premises, we conclude that the interest of the state in reducing disruption is outweighed by the drastic abridgment of the constitutionally guaranteed rights of the media and the electorate. Quite the contrary, instead of disrupting elections, exit polls -- properly conducted and publicized -- can be vital tools for the holding of honest, orderly, peaceful and credible elections; and for the elimination of election-fixing, fraud and other electoral ills.

#### Violation of Ballot Secrecy

The contention of public respondent that exit polls indirectly transgress the sanctity and the secrecy of the ballot is off-tangent to the real issue. Petitioner does not seek access to the ballots cast by the voters. The ballot system of voting is not at issue here.

The reason behind the principle of ballot secrecy is to avoid vote buying through voter identification. Thus, voters

are prohibited from exhibiting the contents of their official ballots to other persons, from making copies thereof, or from putting distinguishing marks thereon so as to be identified. Also proscribed is finding out the contents of the ballots cast by particular voters or disclosing those of disabled or illiterate voters who have been assisted. Clearly, what is forbidden is the association of voters with their respective votes, for the purpose of assuring that the votes have been cast in accordance with the instructions of a third party. This result cannot, however, be achieved merely through the voters' verbal and confidential disclosure to a pollster of whom they have voted for.

In exit polls, the contents of the official ballot are not actually exposed. Furthermore, the revelation of whom an elector has voted for is not compulsory, but voluntary. Voters may also choose not to reveal their identities. Indeed, narrowly tailored countermeasures may be prescribed by the Comelec, so as to minimize or suppress incidental problems in the conduct of exit polls, without transgressing the fundamental rights of our people.

WHEREFORE, the Petition is GRANTED, and the Temporary Restraining Order issued by the Court on May 9, 1998 is made PERMANENT. Assailed Minute Resolution No. 98-1419 issued by the Comelec en banc on April 21, 1998 is hereby NULLIFIED and SET ASIDE. No costs.

**SO ORDERED.**

Davide, Jr., CJ., Bellosillo, Puno, Quisumbing, Purisima, Buena, Gonzaga-Reyes, Ynares-Santiago, and De Leon Jr., JJ., concur.

Melo, J., joins separate opinion of J. Vitug.

Vitug, J., see separate opinion.

Kapunan, J., see dissenting opinion.

Mendoza, J., joins separate opinion of J. Vitug.

Pardo, J., no part.

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[1] Rollo, p. 14.

[2] Ibid. Words in parentheses in the original; those in brackets supplied.

[3] Petition, p. 4.

[4] Rollo, p. 78 et seq.

[5] This case was deemed submitted for resolution on January 19, 1999, upon receipt by the Court of the Memorandum for the Respondent

[6] See *Gamboa Jr. v. Aguirre Jr.*, GR No. 134213, July 20, 1999.

[7] 134 SCRA 438, 463, February 18, 1985; per Gutierrez Jr., J.

[8] *Solis v. NLRC*, 263 SCRA 629, October 28, 1996.

[9] *Zurbano Sr. v. NLRC*, 228 SCRA 556, December 17, 1993.

[10] *Alfante v. NLRC*, 283 SCRA 340, December 15, 1997; *Saldana v. Court of Appeals*, 190 SCRA 386, October 11, 1990.

[11] *Republic v. Sandiganbayan*, 269 SCRA 316, March 7, 1997; *Gelmart Industries Phils., Inc. v. NLRC*, 176

SCRA 295, August 10, 1989; Philippine Air Lines Employees Association v. Philippine Air Lines, Inc., 111 SCRA 215, January 30, 1982.

[12] "Sec. 2. The congress shall provide a system for securing the secrecy and sanctity of the ballot x x x."

[13] Citing §§ 195, 196, 207 and 261 (z-5, 7 & 16)

[14] Salonga v. Cruz Paño, supra, pp. 458-459. See also Gonzales v. Comelec, 27 SCRA 835, 849, 856-857, April 18, 1969; Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc., 51 SCRA 191, June 5, 1973; National Press Club v. Comelec, 207 SCRA 1, 9, March 5, 1992; Blo Umpar Adiong v. Comelec, 207 SCRA 712, 715, March 31, 1992.

[15] § 4, Art. III of the Constitution.

[16] Supra, p. 856, per Fernando, J. (later CJ)

[17] Ibid., p. 857; citing Emerson, Toward a General Theory of the First Amendment (1966)

[18] Ibid., citing New York Times Co. v. Sullivan, 376 US 254, 270 (1964)

[19] US v. Schwimmer, 279 US 644 (1929)

[20] Ibid., p. 858.

[21] Badoy Jr. v. Comelec, 35 SCRA 285, 289, October 17, 1970.

[22] 102 Phil 152, October 18, 1957, per Bautista-Angelo, J.

[23] Ibid., p. 161.

[24] Ibid., citing Gitlow v. New York, 268 US 652, 69 L ed. 1138 (1925)

[25] 80 Phil 71 (1948)

[26] 101 Phil 386 (1957)

[27] 28 SCRA 351, May 26, 1969.

[28] 31 SCRA 731, February 26, 1970.

[29] 35 SCRA 28, September 11, 1970.

[30] Supra.

[31] 259 SCRA 529, July 26, 1996.

[32] Cabansag v. Fernandez, supra; citing Schenck v. US, 249 US 47 (1919)

[33] Gonzales v. Comelec, supra, pp. 860-861.

[34] Adiong v. Comelec, supra.

[35] Iglesia ni Cristo v. Court of Appeals, supra; Gonzales v. Katigbak, 137 SCRA 717, July 22, 1985.

[36] Iglesia ni Cristo v. Court of Appeals, supra, pp. 545-546; citing Near v. Minnesota, 283 US 697 (1931); Bantam books, Inc. v. Sullivan, 372 US 58 (1963); and New York Times Co. v. Sullivan, supra.

[37] Blo Umpar Adiong v. Comelec, supra. See also National Press Club v. Comelec, supra.

[38] *Adiong v. Comelec*, *supra*.

[39] *Gonzales v. Comelec*, *supra*, p. 871, citing *Shelton v. Tucker*, 364 US 479, 488.

[40] *Mutuc v. Comelec*, 36 SCRA 228, 233-34, November 26, 1970; per Fernando, J. (later CJ)

[41] *Ibid.*, p. 236.

[42] *Adiong v. Comelec*, *supra*.

[43] *Exit Polls and the First Amendment*, 98 Harvard Law Review 1927 (1985)

[44] See *CBS v. Smith*, 681 F. Supp. 794 (SD Fla. 1988)

[45] See § 261 (d, e, f, k & z-11). See also Arts. 148, 149 & 153 of the Revised Penal Code.

[46] 838 F 2d 380 (9th Cir. 1988)

[47] *Ibid.*, citing *Mills v. Alabama*, 384 US 214, 218-20, 86 S Ct. 1434, 1436-37, 16 L Ed. 2d 484 (1966); *Vanasco v. Schwartz*, 401 F Supp. 87, 100 (SDNY 1975), *aff'd mem.*, 423 Us 1041, 96 S Ct. 763, 46 L Ed. 2d 630 (1976)

[48] *Exit Polls and the First Amendment*, *supra*, p. 1935.

[49] Petitioner's Memorandum, p. 15.

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### SEPARATE OPINION

#### VITUG, J.:

The instant petition, now technically moot, presents issues so significant that a slight change of circumstances can have a decisive effect on, and possibly spell a difference in, the final outcome of the case. I am not inclined to take the case in an academic fashion and pass upon the views expressed by either party in preemptive judgment.

While I understand what the ponencia is saying quite laudably, I also appreciate, upon the other hand, the concern of the Commission on Elections, i.e., that the conduct of exit polls can have some adverse effects on the need to preserve the sanctity of the ballot. The Commission performs an indispensable task of ensuring free, honest, and orderly elections and of guarding against any frustration of the true will of the people. Expectedly, it utilizes all means available within its power and authority to prevent the electoral process from being manipulated and rendered an absurdity. Like my colleagues, I greatly prize the freedom of expression but, so also, I cherish no less the right of the people to express their will by means of the ballot. In any case, I must accept the reality that the right to information and free speech is not illimitable and immune from the valid exercise of an ever demanding and pervasive police power. Whether any kind of restraint should be upheld or declared invalid in the proper balancing of interest is one that must be resolved at any given moment, not on perceived circumstances, but on prevailing facts.

Neither of the advocations proffered by the parties in this instance, I believe, should be foreclosed by the Court at this time.

I vote, therefore, to dismiss the petition on the foregoing thesis.

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## DISSENTING OPINION

### KAPUNAN, J.:

I share the view of Justice Jose C. Vitug in his Separate Opinion that the case is technically moot. Since the Comelec has not declared exit polls to be illegal and neither did the petitioner present its methodology or system of conducting the exit polls to the poll body, the nullification of the Comelec's questioned resolution is bereft of empirical basis. The decision of this Court constitutes a mere academic exercise in view of the premature nature of the issues and the lack of "concreteness" of the controversy. I wish, however, to express my thoughts on a few material points.

The majority opinion cites the general rule that any restrictions to freedom of expression would be burdened with a presumption of invalidity and should be greeted with "furrowed brows."<sup>[1]</sup> While this has been the traditional approach, this rule does not apply where, as in this case, the Comelec exercised its Constitutional functions of securing the secrecy and sanctity of the ballots and ensuring the integrity of the elections.. Thus, Mr. Justice Feliciano in *National Press (NPC) v. Comelec*<sup>[2]</sup> wrote:

The technical effect of Article IX (C) (4) of the Constitution may be seen to be that no presumption of invalidity arises in respect of supervisory or regulatory authority on the part of the COMELEC for the purpose of securing equal opportunity among candidates for political office, although such supervision or regulation may result in some limitation of the right of free speech and free press. For supervision or regulation of the operations of media enterprises is scarcely conceivable without such accompanying limitation. Thus, the applicable rule is the general, time honored one - that a statute is presumed to be constitutional and that the party asserting its unconstitutionality must discharge the burden of clearly and convincingly proving that assertion.<sup>[3]</sup>

The NPC decision holds that if the right to free speech collides with a norm of constitutional stature,<sup>[4]</sup> the rule on heavy presumption of invalidity does not apply.

Our Constitution mandates the Comelec to enforce and administer laws and regulations relative to the conduct of elections and to secure the secrecy and sanctity of the ballots to ensure orderly, honest, credible and peaceful elections.<sup>[5]</sup> This Constitutional provision effectively displaces the general presumption of invalidity in favor of the presumption that Comelec acted in the exercise of its constitutionally mandated powers. If no presumption of invalidity arises, I see no occasion for the application of the "clear and present danger test." As this Court, through Mr. Justice Mendoza, succinctly observed:

x x x the clear-and-present danger test is not, however, a sovereign remedy for all free speech problems. As has been pointed out by a thoughtful student of constitutional law, it was originally formulated for the criminal law and only later appropriated for free speech cases. For the criminal law is necessarily concerned with the line at which innocent preparation ends and guilty conspiracy or attempt begins. Clearly, it is inappropriate as a test for determining the constitutional validity of law which, like §11(b) of R.A. No. 6646, are not concerned with the content of political ads but only with their incidents. To apply the clear-and-present danger test to such regulatory measures would be like using a sledgehammer to drive a nail when a regular hammer is all that is needed.<sup>[6]</sup>

On the matter of methodology in conducting polls, petitioner gave assurance that the exit poll results will only be made public a day after the elections, in order to allay fears of "trending," "bandwagon-effect" or disruption. This offers little comfort considering the state of our country's electoral system. Unlike in other countries where voting and counting are computerized, our elections are characterized by snail-paced counting. It is not infrequent that postponement, failure or annulment of elections occur in some areas designated as election hot spots.<sup>[7]</sup> Such

being the case, exit poll results made public after the day of voting in the regular elections but before the conduct of special elections in these areas may potentially pose the danger of "trending," "bandwagon- effect" and disruption of elections.

In view of the foregoing discussion, I believe the Comelec committed no abuse of discretion in issuing the assailed temporary restraining order stopping petitioner from conducting exit polls. I, therefore, vote to DENY the petition.

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[1] *Iglesia ni Cristo vs. MTRCB*, 259 SCRA 529 (1996)

**[2] 207 SCRA 1 (1992)**

[3] *Ibid.*, citing as examples: *Abbas vs. Commission on Elections*, 179 SCRA 287 (1989); *People vs. Dacuycuy*, 173 SCRA 90 (1989); *Heirs of Ordera vs. Reyes*, 125 SCRA 380 (1983) (sic); *Peralta vs. Commission on Elections*, 82 SCRA 30 (1978); *Salas vs. Jarencio*, 46 SCRA 734 (1972)

[4] The norm embodied in article IX (C) (4) of the Constitution in the NPC case aims to equalize opportunity, time and space, and the right to reply in the use of media for campaign purposes.

[5] CONST. art V, sec. 2; art IX (C), sec. 2 (1)

[6] *Osmeña vs. Comelec*, 288 SCRA 447 (1998)

[7] BATAS PAMBANSA BLG. 881 (as amended), secs. 5 & 6 and R.A. No. 7166, sec. 4. These situations are replete with cases; see for e.g. *Hassan vs. Comelec*, 264 SCRA 125 (1996); *Sanchez vs. Comelec*, 145 SCRA 454 (1982); *Mangudadatu vs. Comelec*, G.R. No. 86053, May 4, 1989; *Barabu vs. Comelec*, G.R. No. 78820, May 17, 1988.

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