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[G.R. No. 147571, May 05, 2001]

SOCIAL WEATHER STATIONS, INCORPORATED AND KAMAHALAN PUBLISHING CORPORATION, DOING BUSINESS AS MANILA STANDARD, PETITIONERS, VS. COMMISSION ON ELECTIONS, RESPONDENT.

D E C I S I O N

MENDOZA, J.:

Petitioner, Social Weather Stations, Inc. (SWS), is a private non-stock, non-profit social research institution conducting surveys in various fields, including economics, politics, demography, and social development, and thereafter processing, analyzing, and publicly reporting the results thereof. On the other hand, petitioner Kamahalan Publishing Corporation publishes the Manila Standard, a newspaper of general circulation, which features newsworthy items of information including election surveys.

Petitioners brought this action for prohibition to enjoin the Commission on Elections from enforcing §5.4 of R.A. No. 9006 (Fair Election Act), which provides:

> Surveys affecting national candidates shall not be published fifteen (15) days before an election and surveys affecting local candidates shall not be published seven (7) days before an election.

The term "election surveys" is defined in §5.1 of the law as follows:

> Election surveys 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 (hereafter referred to as "Survey").

To implement §5.4, Resolution 3636, §24(h), dated March 1, 2001, of the COMELEC enjoins ¾

Surveys affecting national candidates shall not be published fifteen (15) days before an election and surveys affecting local candidates shall not be published seven (7) days before an election.

Petitioner SWS states that it wishes to conduct an election survey throughout the period of the elections both at the national and local levels and release to the media

the results of such survey as well as publish them directly. Petitioner Kamahalan Publishing Corporation, on the other hand, states that it intends to publish election survey results up to the last day of the elections on May 14, 2001.

Petitioners argue that the restriction on the publication of election survey results constitutes a prior restraint on the exercise of freedom of speech without any clear and present danger to justify such restraint. They claim that SWS and other pollsters conducted and published the results of surveys prior to the 1992, 1995, and 1998 elections up to as close as two days before the election day without causing confusion among the voters and that there is neither empirical nor historical evidence to support the conclusion that there is an immediate and inevitable danger to the voting process posed by election surveys. They point out that no similar restriction is imposed on politicians from explaining their opinion or on newspapers or broadcast media from writing and publishing articles concerning political issues up to the day of the election. Consequently, they contend that there is no reason for ordinary voters to be denied access to the results of election surveys which are relatively objective.

Respondent Commission on Elections justifies the restrictions in §5.4 of R.A. No. 9006 as necessary to prevent the manipulation and corruption of the electoral process by unscrupulous and erroneous surveys just before the election. It contends that (1) the prohibition on the publication of election survey results during the period proscribed by law bears a rational connection to the objective of the law, i.e., the prevention of the debasement of the electoral process resulting from manipulated surveys, bandwagon effect, and absence of reply; (2) it is narrowly tailored to meet the "evils" sought to be prevented; and (3) the impairment of freedom of expression is minimal, the restriction being limited both in duration, i.e., the last 15 days before the national election and the last 7 days before a local election, and in scope as it does not prohibit election survey results but only require timeliness. Respondent claims that in National Press Club v. COMELEC,[1] a total ban on political advertisements, with candidates being merely allocated broadcast time during the so-called COMELEC space or COMELEC hour, was upheld by this Court. In contrast, according to respondent, it states that the prohibition in §5.4 of R.A. No. 9006 is much more limited.

For reasons hereunder given, we hold that §5.4 of R.A. No. 9006 constitutes an unconstitutional abridgment of freedom of speech, expression, and the press.

To be sure, §5.4 lays a prior restraint on freedom of speech, expression, and the press by prohibiting the publication of election survey results affecting candidates within the prescribed periods of fifteen (15) days immediately preceding a national election and seven (7) days before a local election. Because of the preferred status of the constitutional rights of speech, expression, and the press, such a measure is vitiated by a weighty presumption of invalidity.[2] Indeed, "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. . . . The Government `thus carries a heavy burden of showing justification for the enforcement of such restraint.'"[3] There is thus a reversal of the normal presumption of validity that inheres in every legislation.

Nor may it be argued that because of Art. IX-C, §4 of the Constitution, which gives the COMELEC supervisory power to regulate the enjoyment or utilization of franchise

for the operation of media of communication, no presumption of invalidity attaches to a measure like §5.4. For as we have pointed out in sustaining the ban on media political advertisements, the grant of power to the COMELEC under Art. IX-C, §4 is limited to ensuring "equal opportunity, time, space, and the right to reply" as well as uniform and reasonable rates of charges for the use of such media facilities for "public information campaigns and forums among candidates."[4] This Court stated:

> 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 exercises 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 rights of free speech and free press.[5]

MR. JUSTICE KAPUNAN dissents. He rejects as inappropriate the test of clear and present danger for determining the validity of §5.4. Indeed, as has been pointed out in Osmeña v. COMELEC,[6] this test was originally formulated for the criminal law and only later appropriated for free speech cases. Hence, while it may be useful for determining the validity of laws dealing with inciting to sedition or incendiary speech, it may not be adequate for such regulations as the one in question. For such a test is concerned with questions of the gravity and imminence of the danger as basis for curtailing free speech, which is not the case of §5.4 and similar regulations.

Instead, MR. JUSTICE KAPUNAN purports to engage in a form of balancing by "weighing and balancing the circumstances to determine whether public interest [in free, orderly, honest, peaceful and credible elections] is served by the regulation of the free enjoyment of the rights" (page 7). After canvassing the reasons for the prohibition, *i.e.,* to prevent last-minute pressure on voters, the creation of bandwagon effect to favor candidates, misinformation, the "junking" of weak and "losing" candidates by their parties, and the form of election cheating called "dagdag-bawas" and invoking the State's power to supervise media of information during the election period (pages 11-16), the dissenting opinion simply concludes:

> Viewed in the light of the legitimate and significant objectives of Section 5.4, it may be seen that its limiting impact on the rights of free speech and of the press is not unduly repressive or unreasonable. Indeed, it is a mere restriction, not an absolute prohibition, on the publication of election surveys. It is limited in duration; it applies only during the period when the voters are presumably contemplating whom they should elect and when they are most susceptible to such unwarranted persuasion. These surveys may be published thereafter. (Pages 17-18)

The dissent does not, however, show why, on balance, these considerations should outweigh the value of freedom of expression. Instead, reliance is placed on Art. IX-C, §4. As already stated, the purpose of Art. IX-C, §4 is to "ensure equal opportunity, time, and space and the right of reply, including reasonable, equal rates therefor for public information campaigns and forums among candidates." Hence

the validity of the ban on media advertising. It is noteworthy that R.A. No. 9006, §14 has lifted the ban and now allows candidates to advertise their candidacies in print and broadcast media. Indeed, to sustain the ban on the publication of survey results would sanction the censorship of all speaking by candidates in an election on the ground that the usual bombasts and hyperbolic claims made during the campaigns can confuse voters and thus debase the electoral process.

In sum, the dissent has engaged only in a balancing at the margin. This form of ad hoc balancing predictably results in sustaining the challenged legislation and leaves freedom of speech, expression, and the press with little protection. For anyone who can bring a plausible justification forward can easily show a rational connection between the statute and a legitimate governmental purpose. In contrast, the balancing of interest undertaken by then Justice Castro in *Gonzales* v. *COMELEC,*[7] from which the dissent in this case takes its cue, was a strong one resulting in his conclusion that §50-B of R.A. No. 4880, which limited the period of election campaign and partisan political activity, was an unconstitutional abridgment of freedom of expression.

Nor can the ban on election surveys be justified on the ground that there are other countries ¾ 78, according to the Solicitor General, while the dissent cites 28 ¾ which similarly impose restrictions on the publication of election surveys. At best this survey is inconclusive. It is noteworthy that in the United States no restriction on the publication of election survey results exists. It cannot be argued that this is because the United States is a mature democracy. Neither are there laws imposing an embargo on survey results, even for a limited period, in other countries. As pointed out by petitioners, the United Kingdom, Austria, Belgium, Denmark, Estonia, Finland, Iceland, Ireland, Latvia, Malta, Macedonia, the Netherlands, Norway, Sweden, and Ukraine, some of which are no older nor more mature than the Philippines in political development, do not restrict the publication of election survey results.

What test should then be employed to determine the constitutional validity of §5.4? The United States Supreme Court, through Chief Justice Warren, held in *United States* v. *O'Brien*:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms [of speech, expression and press] is no greater than is essential to the furtherance of that interest.[8]

This is so far the most influential test for distinguishing content-based from content-neutral regulations and is said to have "become canonical in the review of such laws."[9] It is noteworthy that the *O'Brien* test has been applied by this Court in at least two cases.[10]

Under this test, even if a law furthers an important or substantial governmental

interest, it should be invalidated if such governmental interest is "not unrelated to the suppression of free expression." Moreover, even if the purpose is unrelated to the suppression of free speech, the law should nevertheless be invalidated if the restriction on freedom of expression is greater than is necessary to achieve the governmental purpose in question.

Our inquiry should accordingly focus on these two considerations as applied to §5.4.

First. Sec. 5.4 fails to meet criterion [3] of the *O'Brien* test because the causal connection of expression to the asserted governmental interest makes such interest "not unrelated to the suppression of free expression." By prohibiting the publication of election survey results because of the possibility that such publication might undermine the integrity of the election, §5.4 actually suppresses a whole class of expression, while allowing the expression of opinion concerning the same subject matter by newspaper columnists, radio and TV commentators, armchair theorists, and other opinion makers. In effect, §5.4 shows a bias for a particular subject matter, if not viewpoint, by preferring personal opinion to statistical results. The constitutional guarantee of freedom of expression means that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[11] The inhibition of speech should be upheld only if the expression falls within one of the few unprotected categories dealt with in *Chaplinsky* v. *New Hampshire*,[12] thus:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or `fighting' words ¾ those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Nor is there justification for the prior restraint which §5.4 lays on protected speech. In *Near* v. *Minnesota*,[13] it was held:

> [The] protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government . . . .

Thus, contrary to the claim of the Solicitor General, the prohibition imposed by §5.4 cannot be justified on the ground that it is only for a limited period and is only