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EN BANC

[G.R. No. 133486, January 28, 2000]

ABS-CBN BROADCASTING CORPORATION, petitioner, vs. COMMISSION ON ELECTIONS, respondent.

D E C I S I O N

PANGANIBAN, J.:

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;[12] and relevant provisions of the Omnibus Election Code.[13] 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."[14]

Our Constitution clearly mandates that no law shall be passed abridging the freedom of speech or of the press.[15] In the landmark case *Gonzales v. Comelec*,[16] 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.[17] It represents a profound commitment to the principle that debates on public issues should be uninhibited, robust, and wide open.[18] 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, [19] 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*;[26] as well as in later ones, *Vera v. Arca*,[27] *Navarro v. Villegas*,[28] *Imbong v. Ferrer*,[29] *Blo Umpar Adiong v. Comelec*[30] and, more recently, in *Iglesia ni Cristo v. MTRCB*.[31] 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."[32]

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.[33] 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.[34]

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.[35] And it is respondent's burden to overthrow such presumption. Any act that restrains speech should be greeted with furrowed brows,[36] so it has been said.

To justify a restriction, the promotion of a substantial government interest must be clearly shown.[37] 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."[38]