

# Validity of State Prohibitions on Political Campaigning through Text Messaging

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I. INTRODUCTION.....	1142
<i>A. Background</i>	
<i>B. Problem</i>	
<i>C. Organization of the Note</i>	
II. DISCUSSION.....	1145
<i>A. The Freedom of Expression and Police Power of the State</i>	
<i>B. The Commission on Elections</i>	
<i>C. The National Telecommunications Commission</i>	
<i>D. Text Messaging in the Philippines</i>	
III. ANALYSIS.....	1152
<i>A. Power of the State to Prohibit Text Messaging</i>	
<i>B. Broadcast Messaging Service</i>	
<i>C. Private Text Messages</i>	
IV. CONCLUSION.....	1161

## I. INTRODUCTION

### *A. Background*

Every three years, the coming of the month of May heralds the time of the Elections for both national and local positions. 90 days before the day of the election until 30 days after is known as the election period.<sup>1</sup> Within this interval, campaign periods are set for every candidate, depending on the position they are running for.<sup>2</sup> The start of the election campaign period signals the arrival of election propaganda by the different candidates trying to entice their constituents into voting for them. Different candidates and political parties have different strategies. Every election, advertisements flood

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1. Omnibus Election Code of the Philippines [OMNIBUS ELECTION CODE], Batas Pambansa Blg. 881, § 3 (1985).  
2. *Id.*

the walls and newspaper spaces, as well as radio and television air time. In the coming May 2010 elections, a new medium for campaigning is being anticipated.

The Filipino, being part of a culture that needs perpetual and constant contact, has made the mobile phone an indispensable gadget.<sup>3</sup> Filipinos have adapted to the use of text messaging as a normal means of communication. Election opportunists now seek to take advantage of this social phenomenon.

As early as January of 2007, expectation for massive campaign texting has begun to tickle the minds of the citizens, as well as heads of government offices.<sup>4</sup> A consumer advocacy group, TXTPower, already asked the National Telecommunications Commission (NTC) and the Commission on Elections (COMELEC) to prevent text spamming by the different political parties and candidates who will use text brigades.<sup>5</sup>

The candidates themselves admit that text messaging may be one of the modes that will be used in their campaigns. “[P]olitical candidates are eyeing text messaging next to reach out to more potential voters, now that the Commission on Elections has allowed the use of either the short message service or the multi-media message service of telecommunication companies for the May 14 polls.”<sup>6</sup> Eduardo Angara, then running under the Administration, says: “Before, it was just newspapers, radio and television. Now we cannot discount the reach of the Internet and text messaging.”<sup>7</sup>

However, these text messages may be unwanted by some mobile phone users. A sudden influx of political advertisements through text may annoy or irritate some Filipinos. Some may not want to receive any kind of campaign advertisements in their mobile phones. Furthermore, the ceiling set by the Omnibus Election Code<sup>8</sup> on the amount that can be spent on candidacy provided may be violated by the expenses incurred by using text

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3. RAUL PERTIERRA, *TRANSFORMING TECHNOLOGIES: ALTERED SELVES, MOBILE PHONES AND INTERNET USE IN THE PHILIPPINES 1* (2006) [hereinafter PERTIERRA, *TRANSFORMING TECHNOLOGIES*].

4. Darwin G. Amojelar, *Texting Campaign will be Regulated*, THE MANILA TIMES, Jan. 28, 2007, available at [http://www.manilatimes.net/national/2007/jan/28/yehey/top\\_stories/20070128top4.html](http://www.manilatimes.net/national/2007/jan/28/yehey/top_stories/20070128top4.html) (last accessed Apr. 5, 2007).

5. *Id.*

6. Philippine News Service, *Candidates to Use Text Messaging*, PHILIPPINES TODAY, Mar. 8, 2007, available at <http://www.philippinestoday.net/index.php?module=article&view=259> (last accessed Apr. 17, 2010).

7. *Id.*

8. OMNIBUS ELECTION CODE, art. 11, § 100.

advertisements.<sup>9</sup> Since the Fair Election Act<sup>10</sup> do not have any provisions regarding the regulation of campaign text messaging, the COMELEC has approached the NTC in order to resolve any issue regarding its regulation.<sup>11</sup> However, the COMELEC has also recognized the difficulty in regulating this new mode of campaigning. Benjamin Abalos, former chairman of the COMELEC, admitted that it would be almost impossible to enforce the rules because there is no way to determine who the source of information is.<sup>12</sup>

### B. Problem

In light of the situation, this Note seeks to address the problem on the power of the State, through its agencies, to prohibit political campaign advertisements through text messaging.

In other words, the question sought to be answered is: May the State, through the COMELEC and the NTC, prohibit political campaign advertisements through text messaging under existing laws and jurisprudence on the freedom of expression and police power?

The author will only discuss the issue of the power of the State to prohibit the political campaign advertisements through text messaging. The ability of government bodies to enforce rules and regulations regarding political campaign text messaging will not be tackled in this Note.

Also, this Note does not deal with regulations imposed on citizens, but only with prohibitions of actions.

### C. Organization of the Note

First, the freedom of expression and the police power of the State will be discussed as vital in evaluating the power of the State.

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9. William B. Depasupil, *COMELEC in Dilemma over Proper Handling of New Media*, THE MANILA TIMES, Jan. 26, 2007, available at <http://www.manilatimes.net/national/2007/jan/26/yehey/metro/20070126met4.html> (last accessed Apr. 6, 2007).

10. An Act To Enhance The Holding Of Free, Orderly, Honest, Peaceful and Credible Elections through Fair Election Practices [Fair Election Act], Republic Act No. 9006 (2001).

11. Erwin Oliva, *SMS Campaign Rules Out Next Week – COMELEC Spokesman*, PHILIPPINE DAILY INQUIRER, Feb. 9, 2007, available at [http://newsinfo.inquirer.net/breakingnews/infotech/view\\_article.php?article\\_id=48537](http://newsinfo.inquirer.net/breakingnews/infotech/view_article.php?article_id=48537) (last accessed Apr. 17, 2010).

12. Depasupil, *supra* note 9.

Second, the powers of the COMELEC will be discussed. The COMELEC is primarily in charge of election matters and plays a significant role in ensuring that the elections are as orderly as possible.

Third, the powers of the NTC will be discussed. The NTC is given the power to regulate the telecommunications industry and is instrumental in any regulation regarding text messaging.

Fourth, text messaging, including its recent developments and effects in the country will be discussed. The nature of text messaging is significant in determining whether it may be subject to regulation or not.

Fifth, the power of the State to regulate text messaging will be discussed. Pertinent jurisprudence as well as the opinions of the different Justices will be cited.

## II. DISCUSSION

### *A. The Freedom of Expression and Police Power of the State*

The Philippine Constitution provides for the protection of the freedom of speech and of expression.<sup>13</sup> The Supreme Court has constantly held that the freedom of expression is a preferred freedom and calls for the utmost respect.<sup>14</sup> The Constitution protects every kind of expression, whether oral, written, or disc recorded. It also guards cinematic expressions, as well as symbolic speech.<sup>15</sup>

Fr. Joaquin Bernas, S.J. gives several reasons why the freedom of expression is guaranteed by the supreme law. He says,

[f]or some, the freedom of expression is essential for the search of truth. This is the marketplace idea which posits that the power of thought can be tested by its acceptability of the market. Another reason offered is that free expression is needed for democracy to work properly. The citizen-critic has to be given the information required for him to be able to perform his civic duty. Still another reason is a personal one. Freedom of expression promotes self-realization and self-determination.<sup>16</sup>

However, the broad protection that the Constitution gives has its limitations. The Supreme Court recognizes that “the freedom of speech and

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13. PHIL. CONST. art. III, § 4.

14. *Mutuc v. Commission on Elections*, 36 SCRA 229, 233 (1970).

15. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION: A COMPREHENSIVE REVIEWER* 58 (2006) [hereinafter BERNAS REVIEWER].

16. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 223 (2003) [hereinafter BERNAS COMMENTARY].

of the press or of expression, which the Bill of Rights guarantees, is not an absolute right.”<sup>17</sup> In fact, even in American jurisprudence,

the right or privilege of free speech or publication, guaranteed by the Constitutions of the United States and of several States, has its limitations; the right is not absolute at all time and under all circumstances, although limitations are recognized only in exceptional cases. Freedom of speech does not comprehend the right to speak whenever, however, and wherever one pleases, and the manner, place, or time of public discussion can be constitutionally controlled.<sup>18</sup>

This rule implies that a responsibility to give due regard to the rights and freedoms of others comes with the constitutionally protected right of the freedom of expression.<sup>19</sup> Persons are still required to give ample respect to others in exercising their freedom of expression.

The State provides limits to certain freedoms by exercising its police power. It has been described as “the most essential, insistent and the least limitable of powers, extending as it does to all the great public needs.”<sup>20</sup> Police power, however, is not a stagnant exercise of sovereignty. “[I]ts scope expands and contracts with the changing needs.”<sup>21</sup> Police power dynamically copes with the changing of the times and the needs of the present. It has been used to

justify such public health measures as requirements to make house repairs, compulsory connection to a city sewerage system, [and] the licensing of the practice of medicine . . . .

[It] has likewise been used to justify public safety measures such as . . . the regulation of the carrying of the carrying of deadly weapons, the requirement of rotational participation in patrol duty, [and the] regulation of gasoline stations and movie theaters . . . .

In the field of public morals, police power has been used as the basis for judicial approval of legislation punishing vagrancy and classifying a pimp as a vagrant, . . . [and] regulating the operation of motels and hotels . . . .

Under the general rubric of promoting general welfare, enactments have been upheld regulating the slaughter of carabaos, prescribing provisions for the suppression of agricultural pests, . . . prescribing the

17. *National Press Club v. Commission on Elections*, 207 SCRA 1, 17 (1992) (Davide, Jr., J., concurring).

18. *Id.* (citing 16A Am. Jur. 2d, 341-42).

19. *See National Press Club*, 207 SCRA 1.

20. *Ermita-Malate Hotel and Motel Operators Association Inc. v. Mayor of Manila*, 20 SCRA 849, 857-58 (1967) (citing *Ichong v. Hernandez*, 101 Phil. 1155, 1163 (1957)).

21. BERNAS COMMENTARY, *supra* note 16, at 102.

registration of land under the Torrens System, zoning regulations [and] moratorium laws.<sup>22</sup>

Police power may also be used to limit the exercise of the freedom of expression. To ensure, however, that the rights of the people are still protected, jurisprudence gives two prohibited types of limitations on the freedom of expression: prior restraint and subsequent punishment. Prior restraint is the “official governmental restriction[] on the press or other forms of expression in advance of actual publication or dissemination.”<sup>23</sup> Some examples of prior restraint are licensing and movie censorship. Subsequent punishment is a means to penalize actions after they have been consummated. The curtailment of speech has standards in order to determine its validity.

The first standard is the “dangerous tendency” rule where speech is curbed or punished when it “creates a dangerous tendency which the State has the right to prevent.”<sup>24</sup> It requires that there be a “rational connection between the speech and the evil to be avoided.”<sup>25</sup>

The second standard is the “clear-and-present-danger” test. This standard asks “whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that the Congress has a right to prevent.”<sup>26</sup> The “clear-and-present-danger” test is now more widely applied than the “dangerous tendency rule.”

In sum, the freedom of expression allows individuals to promulgate ideas through various forms of communication. This is why the Constitution puts it under a broad security blanket. It is, however, not absolute. The State may impose such limitations as it may deem appropriate, subject, of course, to standards that have been put in place by law and jurisprudence. In the

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22. *Id.* at 103-04 (citing *U.S. v. Abendan*, 24 Phil. 165 (1913); *Case v. Board of Health*, 24 Phil. 250 (1913); *U.S. v. Gomez Jesus*, 31 Phil. 218 (1915); *People v. Ventura*, 4 SCRA 208, January 31 1962; *U.S. v. Villareal*, 28 Phil. 390 (1914); *U.S. v. Pompeya*, 31 Phil. 245 (1915); *Javier v. Earnshaw*, 64 Phil. 626 (1937); *People v. Chan*, 65 Phil. 611 (1938); *U.S. v. Giner Cruz*, 38 Phil. 677 (1918); *Ermita-Malate Hotel and Motel Operators Association Inc. v. Mayor of Manila*, 20 SCRA 849 (1967); *U.S. v. Toribio*, 15 Phil. 85 (1910); *Punzalan v. Ferriols*, 19 Phil 214 (1911); *Director of Lands v. Aballa*, 54 Phil. 455 (1930); *Seng Kee and Co. v. Earnshaw*, 56 Phil. 204 (1931); *People v. Fajardo*, 104 Phil. 443 (1958); *Rutter v. Esteban*, 93 Phil. 68 (1953)).

23. *Id.* at 225.

24. *Id.* at 241 (citing *People v. Perez*, 45 Phil. 599 (1923)).

25. *Id.*

26. *Id.* at 241 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

Philippines, the COMELEC and the NTC are two government offices that have the power to limit the freedom of expression.

*B. The Commission on Elections*

The COMELEC is a constitutional commission given the power to “enforce and administer all laws and regulations relative to the conduct of an election.”<sup>27</sup> It possesses executive, quasi-judicial, and quasi-legislative powers. In a way it has also been given judicial power through the exercise of “exclusive jurisdiction over all contests relating to the elections, returns, and qualifications of all elective” local officials.<sup>28</sup>

The COMELEC may also “issue rules and regulations to implement election laws”<sup>29</sup> as an exercise of their quasi-legislative powers. It is also good to note that the COMELEC may “deputize, with the concurrence of the President, law enforcement agencies and instrumentalities of the Government ... for the exclusive purpose of ensuring free, orderly, honest, peaceful, and credible elections.”<sup>30</sup>

During the election period, the COMELEC may

supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges or concessions granted by the Government or any subdivision, agency or instrumentality thereof, including any government-owned or controlled corporation or subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefore, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.<sup>31</sup>

The COMELEC is entrusted to ensure that the elections — both national and local — are done in the proper manner. With such a daunting task, it has been given a number of powers that it may use to accomplish its main goal, including the power to ask for the cooperation of the National Telecommunications Commission.<sup>32</sup>

*C. The National Telecommunications Commission*

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27. PHIL. CONST. art. IX-C, § 2, ¶ 1.

28. PHIL. CONST. art. IX-C, § 2, ¶ 2.

29. BERNAS COMMENTARY, *supra* note 16, at 1043.

30. PHIL. CONST. art. IX-C, § 2, ¶ 4.

31. PHIL. CONST. art. IX-C, § 4.

32. PHIL. CONST. art. IX-C, § 2, ¶ 4.

Recognizing that telecommunications “is essential to the economic development, integrity and security of the Philippines,”<sup>33</sup> Congress passed Republic Act No. 7925 in order “to safeguard, enrich and strengthen the economic, cultural, social and political fabric of the Philippines.”<sup>34</sup> This law proposes “to dismantle gradually the barriers to entry, replace government control on price and income with market instruments, and shift the focus of government’s intervention towards ensuring service standards and protection of customers.”<sup>35</sup>

R.A. No. 7925 created the National Telecommunications Commission.<sup>36</sup> The NTC is the “principal administrator of [the guidelines in the law] and as such shall take the necessary measures to implement [its] policies and objectives.”<sup>37</sup> One of its functions is to “[p]rotect consumers against misuse of a telecommunications entity’s monopoly or quasi-monopolistic powers by, but not limited to, the investigation of complaints and exacting compliance with service standards from such entity.”<sup>38</sup> Through it, the government responded “to the avalanche of inventions and innovations in the dynamic telecommunications field.”<sup>39</sup> Of course, it is not intended to restrict the industry within a cumbersome regulatory regime.<sup>40</sup>

To be able to address consumer complaints, welfare, and protection connected with text messaging, the NTC recently passed Rules and Regulations on Broadcast Messaging Service.<sup>41</sup> As general measures, the circular requires that broadcast messages shall be sent only to subscribers who have prior consent.<sup>42</sup> Also, broadcast messaging expenses shall not be charged to the recipient.<sup>43</sup> The circular also requires that broadcast messaging may

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33. An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunications Services [Public Telecommunications Policy Act], Republic Act. No. 7925, § 4 (1995).

34. *Id.*

35. *Globe Telecom, Inc. v. National Telecommunications Commission*, 435 SCRA 110, 122 (2004) (citing III Records of the Senate No. 50, p. 810).

36. Public Telecommunications Policy Act, § 5.

37. *Id.*

38. *Id.*, § 5 (f).

39. *Globe Telecom, Inc.*, 435 SCRA at 123.

40. *Id.* at 151 (citing IV Record of the Senate No. 73, p. 870).

41. National Telecommunications Commission Memorandum Circular No. 03-03-05, Rules and Regulations on Broadcast Messaging Service (2005) [hereinafter NTC MC No. 03-03-05].

42. *Id.* § 3.1.

43. *Id.* § 3.3.



not be sent between nine in the evening and seven in the morning.<sup>44</sup> To help consumers, it provides guidelines in submitting complaints against unwanted spam messages received.<sup>45</sup>

The State gives significance to the means used to regulate new media as it recognizes them to be vital in the growth of the country as whole. It is therefore correct in trying to come up with fresh and innovative regulations to be able to keep up with the advent of the phenomenon of text messaging as the new popular and practical means of communication.

*D. Text Messaging in the Philippines*

Raul Pertierra observes that mobile phones have become a major icon in Philippine life.<sup>46</sup> Mobile phones provide for privacy and mobility for the user.<sup>47</sup> It is simple and efficient to use. One of its key features is Short Messaging Service or SMS.

Text messaging or SMS has fast become a more popular mode of communicating with others. Be it teens, yuppies, the middle-aged, or the elderly, SMS is the most convenient way of reaching someone. People routinely text in public, while walking in a mall, or waiting for public transportation.<sup>48</sup> For drivers, “being stuck in traffic provides for opportunities for texting.”<sup>49</sup> With its citizens openly adapting to the use of mobile phone technology in their daily lives, the Philippines is now “known as the texting capital of the world. Filipinos send over 300 million texts daily, ten times the per capita world average.”<sup>50</sup>

Texting is easy and “is performed by pressing letters on a cell phone’s alphanumeric keypad to create a message that is sent by typing the recipient’s phone number and hitting the ‘send’ key.”<sup>51</sup> It “is a cheap and effective way to relay basic information. Its informal nature also lends itself to novel uses, from sending greetings, initiating friendships to mending misunderstandings.”<sup>52</sup> Besides being cheap, text messaging also has some

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44. *Id.* § 3.2.

45. *Id.* § 4.

46. PERTIERRA, TRANSFORMING TECHNOLOGIES, *supra* note 3, at 9.

47. RAUL PERTIERRA, TXT-ING SELVES: CELLS AND PHILIPPINE MODERNITY 87 (2002) [hereinafter PERTIERRA, TXT-ING SELVES].

48. *Id.*

49. *Id.*

50. PERTIERRA, TRANSFORMING TECHNOLOGIES, *supra* note 3, at 41.

51. PERTIERRA, TXT-ING SELVES, *supra* note 47, at 87.

52. PERTIERRA, TRANSFORMING TECHNOLOGIES, *supra* note 3, at 58.

factors like relative anonymity, impersonality, control which make it ideal for secure communication with others.<sup>53</sup>

It does not come as a surprise that Filipinos have adopted it so quickly. The Filipino needs to be in contact with his or her loved ones constantly.<sup>54</sup> It is even said that Filipinos readily agree to exchange text messages with strangers.<sup>55</sup> Presently, “traditional media such as television, radio and newspapers have become more interactive, [by] requesting their audience to text in their opinions and interests.”<sup>56</sup> It is normal now to see television noon time shows or music video channels asking for text messages from their watchers. Popular contests such as Pinoy Big Brother or Starstruck garner votes for their participants through text messages sent by fans.

Text messaging has also affected Philippine politics. Some have argued that “EDSA 2 marked the political power of mobile phones.”<sup>57</sup> The “replacement of President Estrada in 2001 has been described as a coup d’text.”<sup>58</sup> Although EDSA 2 may or may not have happened with or without mobile phones, it signaled the assimilation of text messaging with politics. “Mobile phones may well have encouraged a sense of participation leading to notions of active agency and political empowerment.”<sup>59</sup>

Text messaging, however, has its downsides. SMS may be used to defraud. Sometimes, unidentified individuals try to “lure [the victims] to purchase phone cards or deposit their money in a certain bank account as taxes and other expenses. [They] reportedly go as far as using the names of other institutions like the Philippine Amusement and Gaming Corporation or the Philippine Charity Sweepstakes Office.”<sup>60</sup>

In the coming elections, candidates are sure to use text messaging as a mode of campaigning like what happened in 2007.<sup>61</sup> By using text messaging

53. PERTIERRA, *TXT-ING SELVES*, *supra* note 47, at 88.

54. See PERTIERRA, *TRANSFORMING TECHNOLOGIES*, *supra* note 3, at 1.

55. *Id.* at 6.

56. *Id.* at 9-10.

57. *Id.* at 9.

58. *Id.* at 42.

59. PERTIERRA, *TXT-ING SELVES*, *supra* note 47, at 9.

60. Jamie Pilapil, *DoLE Warns OFW's vs Text Scam*, MANILA STANDARD TODAY, Aug. 3, 2005, available at [http://www.manilastandardtoday.com/?page=politics\\_06\\_aug03\\_2005](http://www.manilastandardtoday.com/?page=politics_06_aug03_2005) (last accessed Apr. 6, 2007).

See also Cynthia Balana, *OFWs warned on text scams*, PHILIPPINE DAILY INQUIRER, Sep. 23, 2009, available at <http://globalnation.inquirer.net/news/breakingnews/view/20090923-226559/OFWs-warned-on-text-scams> (last accessed Apr. 17, 2010).

61. See Philippine News Service, *supra* note 6.

to send campaign messages, either through SMS or Multimedia Messaging Service (MMS), candidates may reach about forty million cell phone users in the country.<sup>62</sup>

### III. ANALYSIS

#### A. *Power of the State to Prohibit Text Messaging*

Jurisprudence attests that political candidates have used different campaign materials through the years. Some have played campaign jingles using speakers mounted on vehicles;<sup>63</sup> some have used decals and stickers to be put on cars.<sup>64</sup> But the COMELEC prohibited some of the campaign materials violating election laws. Although the Supreme Court has held before that the “prohibition[s] are] a valid exercise of police power of the [S]tate ‘to prevent the perversion and prostitution of the electoral apparatus,’”<sup>65</sup> Some prohibitions still infringe on the freedom of expression and were struck down for being invalid.

The question is whether text messaging falls under the category of campaign materials that violate elections laws, or whether it is one protected by the freedom of expression. This conflict shows the clash between the police power of the State and the freedom of expression of the people.

Under Election law, the following are lawful election propaganda:

1. Pamphlets, leaflets, cards, decals, stickers or other written or printed materials the size of which does not exceed eight and one-half inches in width and fourteen inches in length;
2. Handwritten or printed letters urging voters to vote for or against any particular political party or candidate for public office;
3. Cloth, paper or cardboard posters whether framed, or posted, with an area not exceeding two (2) feet by three (3) feet, except that, at the site and on the occasion of a public meeting or rally, or in announcing the holding of said meeting or rally, streamers not exceeding three (3) feet by eight (8) feet in size, shall be allowed: Provided, That said streamers may be displayed five (5) days before the date of the meeting or rally and shall be removed within twenty-four (24) hours after said meeting or rally;

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62. Riza T. Olchondra, *Candidate Can Use Cell Phones to Campaign*, PHILIPPINE DAILY INQUIRER, Mar. 6, 2007, available at [http://newsinfo.inquirer.net/inquirerheadlines/nation/view\\_article.php?article\\_id=53102](http://newsinfo.inquirer.net/inquirerheadlines/nation/view_article.php?article_id=53102) (last accessed Apr. 17, 2010).

63. *Mutu*, 36 SCRA at 230.

64. *Blo Umpar Adiong v. Commission on Elections*, 207 SCRA 712 (1992).

65. *Sanidad v. Commission on Elections*, 181 SCRA 529, 534 (1990) (citing *Badoy, Jr. v. Commission on Elections*, 35 SCRA 285 (1970)).

4. Paid advertisements in print or broadcast media: Provided, that the advertisements shall follow the requirements set forth in Section 4 of this Act; and
5. All other forms of election propaganda not prohibited by the Omnibus Election Code or this Act.<sup>66</sup>

Clearly, text messaging does not fall under any of the enumerated propaganda. As the COMELEC said, it “remains a grey area since the law neither prohibits nor allows it.”<sup>67</sup> The law, however, clearly states that “[a]ll other forms of election propaganda not prohibited by the Omnibus Election Code or [the Fair Election] Act,”<sup>68</sup> fall under legal propaganda. Text messaging may then be allowed as lawful election propaganda that can be used by the candidates and the political parties.

The unregulated use of text messaging, however, may lead to unwanted consequences. Wealthy candidates and political parties may take advantage of their almost unlimited funds, leaving small candidates in the dust in terms of campaign materials.

Knowing this, the COMELEC has approached the NTC regarding possible regulations of text messaging.<sup>69</sup> By doing so, the COMELEC exercises the power given to it in Section 4 of Article IX of the Constitution. Under that provision, the COMELEC may supervise or regulate the utilization of franchises granted by any agency of the Government.<sup>70</sup> Since the NTC grants franchises for the enjoyment of Public Telecommunications Entities (PTEs),<sup>71</sup> the COMELEC may then supervise the enjoyment of PTEs of their franchise under the NTC.

Text messaging, however, may be said to be protected by the freedom of expression. The freedom of expression, being broad and protective of almost every kind of expression,<sup>72</sup> certainly includes text messaging under its umbrella. SMS and MMS involve the sending of messages conveying an individual’s ideas to another person. The freedom of expression protects this interchange of ideas; thus, it should be protected from unwarranted intervention of the State.

So may the COMELEC and the NTC, hand in hand, regulate political campaign text messaging?

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66. Fair Election Act, § 3.

67. Oliva, *supra* note 11.

68. Fair Election Act, § 3.

69. See Amojelar, *supra* note 4.

70. PHIL. CONST. art. IX-C, § 4.

71. Public Telecommunications Policy Act, § 16.

72. See BERNAS REVIEWER, *supra* note 15, at 58.

The author answers yes and no.

It is necessary to divide text messaging, which includes both SMS and MMS, into two categories. The first category would be Broadcast Messaging Service, which allows one to send the same SMS or MMS to a large number of mobile phones<sup>73</sup> by contracting with PTEs. The second category would be private text messages, sent by one individual to another. Collectively, the second category may evolve into a “text brigade” where there is a possibility of perpetual flow of the message depending on the diligence of the recipients. This allows an individual to reach as many people as long as his friends continue to pass the message to other people.

### *B. Broadcast Messaging Service*

Broadcast Messaging Service allows a client to come to an agreement with a PTE in order to send a message to a large number of people. This kind of service is usually used by businesses to promote their products through text messages, but it may also be used by a candidate or a political party to promote themselves. Currently, the NTC has rules and regulations regarding Broadcast Messaging Service.<sup>74</sup>

If a candidate or political party would avail of a Broadcast Messaging Service now, it would be subject to the general measures regulating its use. It should be sent only to those who have consented or have opted-in to broadcast messaging.<sup>75</sup> It should be free, unless the user has opted-in,<sup>76</sup> and should be sent only between seven am and nine pm.<sup>77</sup>

Since it comes under the Broadcast Messaging Service, the political campaign is already subject to some limitations. In addition to this, the State may still regulate it not only as under Broadcast Messaging Service, but also as lawful election propaganda.

The COMELEC regulates election campaign material because of its Constitutional mandate to ensure the “holding [of] free, orderly, honest, peaceful, and credible elections.”<sup>78</sup> The COMELEC, however, is not perfect in its regulation of election law. The Supreme Court has continually been asked to clarify if certain prohibitions or regulations of the COMELEC were valid or not.

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73. NTC MC No. 03-03-05, § 2.1.

74. *Id.*

75. *Id.* § 3.1.

76. *Id.* § 3.3.

77. *Id.* § 3.2.

78. PHIL. CONST. art. IX-C, § 4.

For example, in *National Press Club v. Commission on Elections*,<sup>79</sup> the Supreme Court was asked to rule on a law which allegedly “invades and violates the constitutional guarantees comprising the freedom of expression.”<sup>80</sup> The “[p]etitioners [in that case] maintain that the prohibition imposed ... amounts to censorship, because it selects and singles out for suppression and repression with criminal sanctions, only publications of a particular content, namely, media-based election or political propaganda during the election period of 1992.”<sup>81</sup> They also said that the provision “abridges the freedom of speech of candidates.”<sup>82</sup>

The Electoral Reforms Law of 1987<sup>83</sup> states that:

Sec. 11: Prohibited Forms of Election Propaganda. — In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:

...

b) for a newspaper, radio broadcasting, or television, other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission [on Elections].<sup>84</sup>

The Supreme Court upheld the validity of the provision. First, they acknowledged that the objective of the provision “is the equalizing, as far as practicable, [of] the situations of rich and poor candidates by preventing the former from enjoying the undue advantage offered by huge campaign ‘war chests.’”<sup>85</sup> They recognized that the “objective [was] of special importance and urgency in a country, which like ours is characterized by extreme disparity in income distribution between the economic elite and the rest of society, and the prevalence of poverty with the bulk of our population falling below the ‘poverty line.’”<sup>86</sup>

Second, they found this objective to be well-founded. They admitted that the authority of the COMELEC to regulate franchises of the media of communication under Article IX, Section 4 of the Constitution was born

79. *National Press Club*, 207 SCRA 1 (1992).

80. *Id.* at 6.

81. *Id.*

82. *Id.*

83. An Act Introducing Additional Reforms In The Electoral System And For Other Purposes [Electoral Reforms Law of 1987], Republic Act No. 6646, (1987).

84. *Id.* at § 11 (b).

85. *National Press Club*, 207 SCRA at 7.

86. *Id.* at 8.

from the mandate to ensure “‘equal opportunity, time, and space, and the right to reply,’ as well as the uniform and reasonable rates of charges for the use of such media facilities, in connection with ‘public information campaigns.’”<sup>87</sup> The Supreme Court also added that one of the basic state policies is to “‘guarantee equal access to opportunities for public service.’”<sup>88</sup> Justice Davide, in his concurring opinion, foresaw that it is in the area of various forms of media, which gives the most effective means of reaching the electorate, that a poor candidate will not be able to compete with his more fortunate rivals in the political arena.<sup>89</sup>

Third, they regarded these Constitutional provisions as having

[t]he technical effect ... that no presumption of invalidity arises in respect of exercises of supervisory or regulatory authority on the part of the COMELEC for the purposes of securing equal opportunity among candidates for political office, although such supervision or regulation may result in *some* limitation of free speech and free press.<sup>90</sup>

The Supreme Court concluded by saying that the “nature and characteristics of modern mass media, especially electronic media, cannot be totally disregarded.”<sup>91</sup>

Analogously, the same arguments may be used in deciding if a prohibition on Broadcast Messaging Service is valid. Broadcast Messaging Service may be compared to broadcast media, television and radio broadcasting. First, both are relatively new ways of communicating, which were brought about by the fast pace at which technology is moving at the moment. Second, both have the purpose of conveying ideas to others. Third, they also have the capacity to reach millions of people almost instantaneously. Fourth, Broadcast Messaging Service and broadcast media both need money to be exploited. Air time in television and radio both cost money. Needless to say, Broadcast Messaging Service also costs money. Fifth, both modes of communication may be employed for campaigning purposes. And last, both may be used by wealthy candidates and political parties to their advantage.

There are several arguments against the restriction of broadcast media. First, it is contended that by upholding the validity of the prohibition, the Supreme Court was “willing to sacrifice not only the most precious clause of the Bill of Rights — freedom of speech and of the press — but also the right

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87. *Id.* at 8–9 (citing 1 Records of the Constitutional Commission 624, 631–32, 662–63).

88. PHIL. CONST. art. II, § 26.

89. *See National Press Club*, 207 SCRA at 19 (Davide Jr., J., concurring opinion).

90. *Id.* at 9.

91. *Id.* at 15.

of every citizen to be informed in every way possible about the qualifications and programs of those running for public office.”<sup>92</sup> Also, “[t]he freedom to advertise one’s political candidacy in the various forms of media is clearly a significant part of [the] freedom of expression and of [the] right to access to information.”<sup>93</sup>

Nevertheless, it has been said that the freedoms of the press, speech, and of expression “are not immune to regulation by the State in the legitimate exercise of its police power.”<sup>94</sup> The freedom of speech does not mean “more speech for the rich for the freedom of speech is not guaranteed only to those who can afford its exercise.”<sup>95</sup> Because “[p]olitical equality is the touchstone of democracy[,] [t]he guarantee of freedom of speech should not be used to frustrate legislative attempts to level the playing field in politics.”<sup>96</sup> Regarding the right to be informed of the pertinent characteristics of the candidates as well as their platforms, different venues are still available to the electorate such as holding assemblies in municipalities and cities where candidates and voters may exchange ideas, or publishing campaign literature containing information about the candidate.<sup>97</sup>

Second, doubters may say that

any attempt to restrict the exercise of a right must be tested by the strict requisites of the valid exercise of the police power established by [the] Court in a long line of decisions. These requisites are: 1) the interests of public generally distinguished from those of a particular class require the exercise of the police power; and 2) the means employed are reasonably necessary to the accomplishment of the purpose sought to be achieved and not unduly oppressive upon individuals.<sup>98</sup>

Although the restriction complies with having a lawful subject which is “to prevent disparity between the rich and the poor candidates by denying

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92. *Id.* at 28 (Gutierrez, Jr., J., dissenting opinion).

93. *Id.* at 43 (Paras, J., dissenting opinion).

94. *Id.* at 25 (Padilla, J., concurring opinion).

95. *Osmeña v. Commission on Elections*, 288 SCRA 447, 485 (1998) (Puno, J. separate concurring opinion).

96. *Id.*

97. *See National Press Club*, 207 SCRA at 27-28 (Padilla, J., concurring opinion).

98. *Id.* at 35 (Cruz, J., dissenting opinion (citing *U.S. v. Toribio*, 15 Phil 85; *Fabie v. City of Manila*, 21 Phil.486; *Case v. Board of Health*, 24 Phil. 250; *Taxicab Operators of Metro Manila v. Board of Transportation*, 119 SCRA 596; *Bautista v. Juinio*, 127 SCRA 329; *Lozano v. Martinez*, 146 SCRA 323; *Lorenzo v. Director of Health*, 50 Phil. 595; *People v. Chan*, 65 Phil. 611; *Department of Education v. San Diego*, 180 SCRA 533; *Ynot v. IAC*, 148 SCRA 659)).



both of them access to the mass media and thus preventing the former from enjoying an undue advantage over the latter,”<sup>99</sup> it is believed

that the necessary and reasonable link between the means employed and the purpose sought to be achieved has not been proved and that the method employed is unduly oppressive ...

The financial disparity among the candidates is a fact of life that cannot be corrected by legislation except only by the limitation of their respective expenses to a common maximum.<sup>100</sup>

However,

a regulatory measure that ... does not completely obliterate the evil sought to be remedied, is not for that reason alone constitutionally infirm. The Constitution does not, as it cannot, exact perfection in governmental regulation. All it requires, in accepted doctrine, is that the regulatory measure ... challenge[d] bear[s] a reasonable nexus with the constitutionally sanctioned objective.<sup>101</sup>

Also, Article IX-C, Section 4 of the Constitution makes it clear that the supervision or regulation of communication and information is not a forbidden modality.<sup>102</sup>

Third, it is claimed that a restriction on media based on promoting equality of opportunities to campaign between candidates does not comply with the clear and present danger test.<sup>103</sup> The clear-and-present-danger test requires that “the danger must be patently clear and pressingly present and the evil sought to be avoided must be so substantive as to justify a clamp on one’s mouth or a writing instrument to be stilled.”<sup>104</sup>

But,

[t]he clear-and-present-danger test is not, however, a sovereign remedy for all free speech problems ... [I]t was originally formulated for the criminal law and only later appropriated for free speech cases ... [I]t is inappropriate as a test for determining the constitutional validity of laws which ... are not concerned with the content of political ads but only with their incidents.<sup>105</sup>

Applying these lines of reasoning to a prohibition regarding Broadcast Messaging Service, it may be said that the regulation is valid, but subject to the same requisites provided by law and jurisprudence. Since the

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99. *Id.*

100. *Id.* at 36.

101. *Id.* at 14.

102. *Id.*

103. *Osmeña*, 288 SCRA at 504 (Romero, J., dissenting opinion).

104. *Id.* (citing *Blo Umpan Adiong*, 207 SCRA 712).

105. *Id.* at 478.

Constitution already permits the COMELEC to regulate franchises, and that the mandate has been held to negate the presumption of invalidity provided by the freedom of expression, the only requisite to be complied with is the requirement to have a purpose of putting all candidates — wealthy or otherwise — in the same footing. Following that requisite, a regulation of Broadcast Messaging Service neither violates the freedom of expression nor the right to information. It also complies with substantial due process, even if imperfect, by being reasonably connected with the purpose sought. Being inappropriate, the clear-and-present-danger test may not be used to evaluate the validity of the regulation.

### *C. Private Text Messages*

“Short message service (SMS) is a globally accepted wireless service that enables the transmission of alphanumeric messages between mobile subscribers and external systems such as electronic mail, paging, and voice-mail systems.”<sup>106</sup> It allows individuals to send messages to each other. These messages sent may be called private messages. Using a mobile phone, one may store private messages in the inbox, for later viewing or for forwarding to other people.

By sending private messages, an individual is able to convey his thoughts and ideas to another. A candidate or a political party may then send their own private messages containing their information to the electorate, and try to convince the latter into voting for them. Even a private individual may send a message containing his or her own views regarding candidates to the electorate. Regardless of where the message came from, a mobile phone user is faced with a choice. He or she may resend the message to other people and allow it to perpetuate. He or she may also delete the message and prevent its dissemination.

Comparing it to Broadcast Messaging Service, private messaging involves a single individual sending a message to a single individual. Broadcast Messaging Service, however, involves a single individual sending a message to a collective.

May the State, through the COMELEC, regulate the sending of private messages endorsing a candidate or a political party?

No. The sending of private text messages containing election propaganda is protected by the freedom of expression.

It is said that if

[the] freedom to speak by a candidate or party ... [is] invoked against actions intended for maintaining clean and free elections, the police, local

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106. Wireless Short Message Service (SMS), available at [http://www.iec.org/online/tutorials/wire\\_sms/](http://www.iec.org/online/tutorials/wire_sms/) (last accessed Feb. 22, 2010).

officials and [the] COMELEC should lean in favor of freedom. For in the ultimate analysis, the freedom of the citizen and the State's power to regulate are not antagonistic. There can be no free and honest elections if in the efforts to maintain them, the freedom to speak ... [is] unduly curtailed.<sup>107</sup>

“[T]he preferred freedom of expression calls all the more for the utmost respect when what may be curtailed is to make more meaningful the equally vital right [to] suffrage.”<sup>108</sup> “Too many restrictions will deny to people the robust, uninhibited, and wide open debate, the generating of interest essential if our elections will truly be free, clean and honest.”<sup>109</sup>

Thus, the “regulation of election campaign activity may not pass the test of validity ... if it restricts one's expression of belief in a candidate or one's opinion of his or her qualifications ... and if the regulatory measure bears no clear and reasonable nexus with the constitutionally sanctioned objective.”<sup>110</sup>

A prohibition on sending private messages regarding political campaigns has no substantial public interest. It threatens no public interest sufficient enough to defend its validity. Any purpose, not already covered by laws on unprotected speech, escapes the author. But “[s]ignificantly, the freedom of expression curtailed by the questioned prohibition is not so much that of the candidate or the political party. The regulation strikes at the freedom of an individual to express his preference and ... to convince others to agree with him.”<sup>111</sup>

In *Blo Umpar Adiong v. Commission on Elections*,<sup>112</sup> even if the sticker is furnished by the candidate, “once the owner of the car agrees to have it placed on his private vehicle, the expression becomes primarily his own and not of anybody else.”<sup>113</sup> In the realm of text messaging, the message may initially be sent by the candidate, but once the cell phone user forwards the message to another individual, the private text message becomes an expression of belief by the cell phone user, and no one else's. Necessarily, the forwarding of the message entails consent of the cell phone user; otherwise, he would not resend the message.

Several questions may be used to try and refute the invalidity of a prohibition on the sending of private messages regarding political campaigns. First, since a prohibition on sending private text message does not

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107. *Blo Umpar Adiong*, 207 SCRA at 717.

108. *Id.* at 716 (citing *Mutu*, 36 SCRA 228).

109. *Id.*

110. *Id.* at 718 (citing *National Press Club*, 207 SCRA 1).

111. *Id.* at 719.

112. *Id.*

113. *Blo Umpar Adiong*, 207 SCRA at 719.

completely hinder an individual from exercising the freedom of expression, can it be deemed valid? Second, can a prohibition based on giving the rich and poor candidates equal opportunity be entertained?

*Sanidad v. Commission on Elections*<sup>114</sup> has held that “while [a] limitation does not absolutely bar [one]’s freedom of expression, it is still a *restriction on [the] choice* of forum where [one] may express his view. No reason was advanced ... to justify such abridgement. [The Court] hold[s] that this form of regulation is tantamount to a restriction of [one]’s freedom of expression for no justifiable reason.”<sup>115</sup>

Next, a reason suggested for a prohibition would be to put rich and poor candidates on similar footing in terms of opportunity to inform the electorate. The forwarding of politically energized private text messages, however, requires the consent of the cell phone user. Like in *Adiong*, “the preference of the citizen becomes crucial in this kind of election propaganda[,] not the financial resources of the candidate.”<sup>116</sup>

Private text messages promulgating political ad campaigns by candidates or political parties may not be prohibited by the State because of the protection the freedom of expression affords those messages. The freedom of expression, being of utmost importance, gives private text messaging security against State prohibition. Being a mode of communication through which to speak one’s mind about the elections, private text messages may not be curtailed without substantial public interest. Even if given the purpose of putting all candidates on an equal footing in their ability to inform their constituents of their qualifications, a prohibition will still be struck down if it tramples on the preference of a person who wants to convey his ideas regarding the elections.

#### IV. CONCLUSION

Text messaging has become part and parcel of how a Filipino communicates his ideas to his fellow citizens. It has already transformed the way Filipinos move about in their daily lives. Unsurprisingly, politicians are trying to exploit this efficient way of personal advertising. Their unregulated use of text messaging may lead to unwanted consequences. Rich candidates may enjoy an advantage over the poor candidates. Rich candidates may spend a lot of money to use text messaging as a means to reach the electorate. Poor candidates may not have the same opportunity.

However, as mandated by the Constitution, the COMELEC has the capacity to regulate the elections, especially to afford equal opportunities for

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114. *Sanidad*, 181 SCRA 529.

115. *Id.* at 534-35.

116. *Blo Umpar Adiong*, 207 SCRA at 722.

both the rich and the poor candidates in their use of different media to advertise themselves as the persons to be voted for. By itself though, the COMELEC may be powerless to do anything about text messaging. It is the NTC that is given statutory authority to handle the franchises and permits of public telecommunications agencies.

But the COMELEC may supervise government bodies, like the NTC, in order to fulfill its mandate. Together, they have the ability to restrict text messaging with the purpose of providing a healthy electoral process in the Philippines.

There are some limits, however, on how the government, through its agencies, may restrict the actions of the people. These limits are enshrined in the Bill of Rights. Under the Bill of Rights, the freedom of expression and of speech protects the citizens from laws that may unduly hamper a person's ability to convey himself to other people.

Knowing these, is a prohibition on text messaging valid?

Text messaging may be divided into two categories: 1) Broadcast Messaging Service; and 2) private text messages. Broadcast Messaging Service, allows an individual to send a message to a large number of people by contracting with PTEs like Globe Telecom or Smart Communications, Inc. Private text messaging allows an individual to send a message to another individual. Cumulatively, these text messages may be called a text brigade, where each person passes the messages to a predetermined set of people. Text brigades may also be used to reach a significant amount of people.

The author answers the problem differently for the two types of text messaging. A prohibition on Broadcast Messaging Service based on the virtue of equal opportunity of candidates, both rich and poor, to inform the electorate of their candidacy is valid. The characteristics of this type of text messaging fall under broadcast media. Decisions on broadcast media like *Blo Umpar Adiong v. Commission on Elections*<sup>117</sup> and *Osmeña v. Commission on Elections*<sup>118</sup> upheld the validity of a provision restricting the use of television and radio advertisements. Although both decisions contained strong dissents from several members of the Court, the validity of the prohibition still stood. Following along the same line, a prohibition on Broadcast Messaging Service to promote equal opportunities for candidates has more force than the freedom of expression.

Private text messaging, however, is different from Broadcast Messaging Service. While a candidate may provide for the message, a private individual is free to choose whether to keep the message to himself or to let other people read it. By resending the message, the individual makes it his or her

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117. *Id.*

118. *Osmeña*, 288 SCRA 447.

own and consents to it. This act is protected by the freedom of expression. Arguably though, this situation may still be exploited by politicians by paying a group of individuals to constantly send the message. Still, consent of the individual is present; thus, it would not warrant a prohibition on private text messages containing political agenda.

Keeping up with the fast pace of technological advancement, difficult as it may be, should never be forsaken. However, laws designed to keep up with technology should never disregard the rights ingrained in the supreme law. New as it may seem, text messaging is still subject to proper restrictions, especially if it involves the elections.