

Freedom of Expression, Fake News, and the Elections: How Expression Is Limited or Amplified in the Democratic Elections in the Philippines

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I. INTRODUCTION

Tap, click, swipe, scroll.

These gestures are the new means of communicating today. A single tap on one’s mobile phone, or a click on one’s laptop, grants a user access to endless information on the internet. The same motions likewise permit one to voice out his or her opinions through different social media platforms. In a digital age, everything comes immediately, and anything can be shared instantaneously.¹

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1. *Guy v. Tulfo*, G.R. No. 213023, 901 SCRA 159, 185 (2019).

In this online era, netizens sometimes go “viral” for the information they share,² the subjects of which can range from comedic to contentious issues.³ A “meme,”⁴ for instance, has come a long way, going from an interesting idea shared on the internet to an expression of a political opinion.⁵ This drastic development has been demonstrated by fairly recent events. In one case, a joke posted on Twitter about killing the President resulted in an arrest for inciting to sedition (the suit was eventually dismissed by the courts).⁶ In other cases, the power of the internet has shown that cultivating an online persona can pave the way for an individual’s election into public office.⁷

The internet has indeed created an outlet of public discourse and given the public the freedom to express their opinions through the avenue of social media.⁸ While some may take this freedom for granted, others may not have the same luxury in countries where the use of these platforms remains regulated or restricted.⁹ Facebook, Twitter, and even Instagram facilitate a

2. KARINE NAHON & JEFF HEMSLEY, *GOING VIRAL* 1-2 (2013).

3. See AN XIAO MINA, *MEMES TO MOVEMENTS: HOW THE WORLD’S MOST VIRAL MEDIA IS CHANGING SOCIAL PROTEST AND POWER* 43 (2019).

4. LIMOR SHIFMAN, *MEMES IN DIGITAL CULTURE* 2 (2014). “The term ‘meme’ was coined by Richard Dawkins in 1976 to describe small units of culture that spread from person to person by copying or imitation.” *Id.*

Richard Dawkins himself came up with the term in describing the need for “a noun that conveys the idea of a unit of cultural transmission, or a unit of *imitation*.” RICHARD DAWKINS, *THE SELFISH GENE* 192 (2d ed. 1989).

5. MINA, *supra* note 3, at 43.

6. Lian Buan, ‘Move On’: NBI Loses Case a 3rd Time vs Teacher Over ‘Kill Duterte’ Tweet, *RAPPLER*, June 29, 2021, available at <https://www.rappler.com/nation/nbi-loses-case-teacher-ronnel-mas-kill-duterte-tweet-june-2021> (last accessed Nov. 30, 2021) [<https://perma.cc/26WB-PPRQ>].

7. See generally Joel Mark Baysa Barredo & Jose Santos P. Ardivilla, *The Curious Case of Vox Populi 2.0: ASEAN’s Complicated Romance with Social Media*, available at <https://www.boell.de/en/2018/02/08/curious-case-vox-populi-20-aseans-complicated-romance-social-media> (last accessed Nov. 30, 2021) [<https://perma.cc/T9XS-8ZNV>].

8. Jomari James T. De Leon, et al., *Rise of the Troll: Exploring the Constitutional Challenges to Social Media and Fake News Regulation in the Philippines*, 64 *ATENEO L.J.* 150, 161 (2019).

9. See generally Pamela C. O’Brien, *Countries Banning Social Media for Political Reasons*, in *ENCYCLOPEDIA OF SOCIAL MEDIA AND POLITICS* 325-29 (Kerric Harvey ed., 2014).

great deal of discourse on topics ranging from celebrity gossip to political issues, to, most importantly, elections.¹⁰ Considering the advent of these new “virtual” means of communication, it is critical to examine their impact on the foundations of free expression.

Freedom of expression is a fundamental¹¹ and universal human right.¹² Unanimously recognized in the Universal Declaration of Human Rights (UDHR),¹³ and ratified by States Parties to the International Covenant on Civil and Political Rights (ICCPR),¹⁴ freedom of expression remains to be “a fundamental principle of every democratic government,”¹⁵ and, adversely, a right which governments can restrict within the realm of reasonableness.¹⁶

10. See Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 30 (2011). “[S]ocial media have become coordinating tools for nearly all of the world’s political movements, just as most of the world’s authoritarian governments (and, alarmingly, an increasing number of democratic ones) are trying to limit access to it.” Shirky, *supra* note 10, at 30.

11. Ban Ki-moon, Freedom of Expression, a Fundamental Human Right, *available at* <https://www.un.org/en/chronicle/article/freedom-expression-fundamental-human-right> (last accessed Nov. 30, 2021) [<https://perma.cc/ZT5A-VKFZ>].

12. *Contra* Larry Alexander, *Is Freedom of Expression a Universal Right?*, 50 SAN DIEGO L. REV. 707, 715 (2013).

Freedom of expression — a content-neutral, hands-off governmental approach to expression — has much to commend it[,] even if it is not a universal human right. Democratic government requires that citizens be decently informed about government’s actions, and governments are not particularly trustworthy when it comes to refraining from suppressing valid criticisms of it.

Alexander, *supra* note 12, at 715.

13. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) [hereinafter UDHR].

14. International Covenant on Civil and Political Rights art. 19, ¶ 2, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

15. *Chavez v. Gonzales*, G.R. No. 168338, 545 SCRA 441, 481 (2008).

16. ICCPR, *supra* note 14, art. 19, ¶ 3. Freedom of expression may “be subject to certain restrictions, but these shall only be such as are provided by law and are necessary[,]” *first*, “[f]or respect of the rights or reputations of others;” and *second*, “[f]or the protection of national security or of public order ... or of public health or morals.” *Id.* art. 19, ¶ 3 (a)-(b).

See also Chavez, 545 SCRA at 584 (J. Nachura, dissenting opinion).

Freedom of expression embraces not only the expression of an opinion, but also the right not to speak.¹⁷

United States Supreme Court Justice Oliver Wendell Holmes proposed that when there is free trade of ideas, where healthy competition of thought is accepted, the truth will eventually arise.¹⁸ The expansion of this marketplace of ideas is evidenced by the rise of social media platforms in the present.¹⁹ However, this expansion necessarily widens the avenue for perspectives to vie for supremacy, with some opinions thriving at the expense of others. Consequently, voices are either amplified or silenced.²⁰

Today, it is not only governments that restrict or regulate the use of social media, with these online entities themselves imposing rules to govern content

17. Anna M. Taruschio, *The First Amendment, the Right Not to Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1001 (2000) (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 645 (1943) (J. Murphy, concurring opinion) & *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

18. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (J. Holmes, dissenting opinion). Justice Oliver Wendell Holmes opined that

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that *the ultimate good desired is better reached by free trade in ideas* — that *the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out.

Id. (emphases supplied).

19. See generally Peter Maggiore, *Viewer Discretion Is Advised: Disconnects Between the Marketplace of Ideas and Social Media Used to Communicate Information During Emergencies and Public Health Crises*, 18 MICH. TELECOMM. & TECH. L. REV. 627, 642 (2012).

20. See ELISABETH NOELLE-NEUMANN, *THE SPIRAL OF SILENCE: PUBLIC OPINION — OUR SOCIAL SKIN* 5 (2d ed. 1993). According to Elisabeth Noelle-Neumann's "spiral of silence" theory,

a spiral of silence occurs when individuals hold an opinion but fail to express it because they perceive themselves to embrace a minority viewpoint and fear the social isolation that their expression of an unpopular opinion would bring. As the individuals on one side of an issue choose silence, they actually do isolate themselves.

Barbara Allen, *The Spiral of Silence & Institutional Design: Tocqueville's Analysis of Public Opinion & Democracy*, 24 POLITY 243, 245 (1991).

moderation of speech on their respective platforms.²¹ For example, Twitter's usage prohibits terrorism, child sexual exploitation, and illegal services, among others.²² Facebook regulates content that may induce potential offline harm, violence, or hate speech.²³ Recently, these social media companies banned former President Donald Trump's accounts because his posts incited violence in Washington, D.C.²⁴

Nowadays, mass calls to action can grow out of mere social media posts. For instance, fans of the K-Pop band BTS rapidly organized a collective online stance against racial discrimination, as well as falsely registered tickets for a Trump Rally, mobilizing both efforts through social media.²⁵ Conversely, Facebook's role in the political situation in Myanmar has alternated between its use for a military agenda to sow disinformation and hate speech against the Rohingyas and civilian use to coordinate protests against the military coup of February 2021.²⁶ Some governments, including those of Russia and the

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21. Sarah Frier, et al., *How and Why Internet Companies Moderate Speech Online*, BLOOMBERG, Oct. 22, 2021, available at <https://www.bloomberg.com/news/articles/2021-10-18/how-and-why-internet-companies-moderate-speech-online-quicktake> (last accessed Nov. 30, 2021) [<https://perma.cc/KP7E-GK5R>].
 22. Twitter, *The Twitter Rules*, available at <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last accessed Nov. 30, 2021) [<https://perma.cc/5M28-LECP>].
 23. Meta, *Facebook Community Standards*, available at <https://transparency.fb.com/policies/community-standards/?source=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards> (last accessed Nov. 30, 2021) [<https://perma.cc/R77Q-T7CU>].
 24. Twitter, *Permanent Suspension of @realDonaldTrump*, available at https://blog.twitter.com/en_us/topics/company/2020/suspension (last accessed Nov. 30, 2021) [<https://perma.cc/MA9H-FYC6>] & Nick Klegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated If Conditions Permit*, available at <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump> (last accessed Nov. 30, 2021) [<https://perma.cc/LV7U-D6ER>].
 25. Grady McGregor, *How K-Pop Fans Are Wielding Their Organizing Power Against Donald Trump*, available at <https://fortune.com/2020/06/22/kpop-fans-trump-rally-crowd-size> (last accessed Nov. 30, 2021) [<https://perma.cc/GLN2-79MX>].
 26. Billy Perrigo, *Facebook's Ban of Myanmar's Military Will Be a Test of the True Power of Social Media Platforms*, TIME, Mar. 1, 2021, available at <https://time.com/5943151/facebook-myanmar-military-ban> (last accessed Nov. 30, 2021) [<https://perma.cc/Y3E7-XSRD>].

Philippines, have also been accused of employing troll farms to harvest fake social media posts and influence the outcome of elections.²⁷ Today, news indeed spreads like wildfire, and it becomes difficult for an ordinary person to verify information that he or she sees online.²⁸

Regulations by social media companies, as well as government scrutiny of online posts and fake news on the internet, raise the question of the true extent of free speech. There have been various American court decisions regarding limitations on the government's power to restrict freedom of expression.²⁹ However, whether private social media companies can restrict freedom of expression without any limitations is another matter that has not been thoroughly explored by laws and court decisions. Given widespread use of and reliance on social media, the democratic platform must be utilized in the exercise of the right to express oneself (or not).

II. FREEDOM OF EXPRESSION

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race[.]

— John Stuart Mill³⁰

Self-expression is vital in a constitutional democracy.³¹ Be it through words or actions, expression serves a way of knowing and communicating interests,

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27. JENS DAVID OHLIN, ELECTION INTERFERENCE: INTERNATIONAL LAW AND THE FUTURE OF DEMOCRACY 19 (2020) & Resolution to Direct the Appropriate Senate Committee to Conduct an Inquiry in Aid of Legislation Into Reports of Public Funds Being Spent on Troll Farms That Spread Misinformation and Fake News in Social Media Sites, P.S. Res. No. 768, 118th Cong., 3d Reg. Sess. (2021).
28. See Kai Shu, et al., *Mining Disinformation and Fake News: Concepts, Methods, and Recent Advancements*, in DISINFORMATION, MISINFORMATION, AND FAKE NEWS IN SOCIAL MEDIA: EMERGING RESEARCH CHALLENGES AND OPPORTUNITIES 2 (Kai Shu, et al. eds., 2020).
29. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006); *Roth v. United States*, 354 U.S. 476, 481 (1957); & *Connick v. Myers*, 461 U.S. 138, 140 (1983).
30. JOHN STUART MILL, ON LIBERTY 33 (1859).
31. *Gonzales v. Commission on Elections*, G.R. No. L-27833, 27 SCRA 835, 857 (1969) (citing THOMAS IRWIN EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (1966)). “The vital need in a constitutional democracy for freedom of expression is undeniable whether as a means of assuring individual self-fulfillment, of attaining the truth, of securing participation by the people in social including

preferences, and thoughts.³² To appreciate and understand the legal factors underlying freedom of expression, review and analysis of the history and recognition thereof is crucial.³³

Recognition by States of this right is manifested by inclusion of the same in their respective constitutions.³⁴ *Manila Prince Hotel v. Government Service Insurance System*³⁵ described a constitution as a “permanent framework of a system of government, [which] assigns to the different departments their respective powers and duties, and establishes certain fixed principles on which government is founded.”³⁶ The case further stated —

Admittedly, some constitutions are merely declarations of policies and principles. Their provisions command the legislature to enact laws and carry out the purposes of the framers who merely establish an outline of government providing for the different departments of the governmental machinery and *securing certain fundamental and inalienable rights of citizens*.³⁷

This fundamental framework of rules embodies certain rights over which restrictions have developed and been interpreted,³⁸ one example of which being the right to freedom of expression.³⁹

political decision-making, and of maintaining the balance between stability and change.” *Id.*

32. *The Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 747 SCRA 1, 80 (2015). “Free speech must be protected as the vehicle to find those who have similar and shared values and ideals, to join together and forward common goals.” *Id.*
33. Anna Lea A. Barron, *Freedom of Expression in ASEAN: Contextualizing Freedom of Expression in Terms of ASEAN Values*, at 15 (May 27, 2021) (unpublished LL.M. thesis, Central European University) (on file with Author).
34. *See generally* ROBERT TRAGER & DONNA L. DICKERSON, *FREEDOM OF EXPRESSION IN THE 21ST CENTURY* 92-96 (1999).
35. *Manila Prince Hotel v. Government Service Insurance System*, G.R. No. 122156, 267 SCRA 408 (1997).
36. *Id.* at 430.
37. *Id.* at 431 (citing 16 AM. JUR. 2d *Constitutional Law* § 96 (1964)) (emphasis supplied).
38. *Carpio-Morales v. Court of Appeals (Sixth Division)*, G.R. Nos. 217126-27, 774 SCRA 431, 551 (2015). “Unto this Court devolves the sole authority to interpret what the Constitution means, and all persons are bound to follow its interpretation.” *Id.*
39. PHIL. CONST. art. III, § 4.

In the Philippines, the right to free expression traces its early roots to the 1899 Constitution, more commonly known as the Malolos Convention.⁴⁰ Under Title IV (“The Filipinos and [T]heir National and Individual Rights”), Article 20 provided that no Filipino shall be deprived “[o]f the right to freely express his ideas or opinions, orally or in writing, through the use of the press or other similar means.”⁴¹ Today, the right to free speech is embedded in the Bill of Rights of the 1987 Constitution, specifically under Article III, Section 4 thereof, which provides that “[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.”⁴²

This provision bears striking resemblance to the United States’ own First Amendment.⁴³ The Philippines’ constitutional provision on freedom of expression similarly imposes a limitation on the powers of the State to restrict the exercise thereof.⁴⁴ However, recent domestic legislation and political events seem to unduly restrict the right of free expression in the country.⁴⁵

The present Constitution integrated a more rights-centered framework by incorporating international human rights law.⁴⁶ The Bill of Rights was oriented towards a “strong entrenchment of a rights-culture that appears more universalist in character[.]”⁴⁷ This approach was ascribed to Philippine

40. 1899 MALOLOS CONSTITUTION, tit. IV, art. 20 (superseded in 1935).

41. 1899 MALOLOS CONSTITUTION, tit. IV, art. 20 (superseded in 1935).

42. PHIL. CONST. art. III, § 4.

43. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

44. PHIL. CONST. art. III, § 4. *See also* ABS-CBN Broadcasting Corp. v. Commission on Elections, G.R. No. 133486, 323 SCRA 811, 825 (2000).

45. *See, e.g.*, Jeremiah Joven B. Joaquin & Hazel T. Biana, *Philippine Crimes of Dissent: Free Speech in the Time of COVID-19*, 17 CRIME MEDIA CULTURE 37, 38 (2021) (citing PHIL. CONST. art. III, § 4 & Llanesca T. Panti, *CHR Decries Warrantless Arrest of Cebu-Based Writer Over Satirical COVID-19 Post*, GMA NEWS, Apr. 22, 2020, available at <https://www.gmanetwork.com/news/topstories/nation/735177/decries-warrantless-arrest-of-cebu-based-writer-over-satirical-covid-19-post/story> (last accessed Nov. 30, 2021) [<https://perma.cc/AV99-C5TA>]).

46. *See* PHIL. CONST. art. II, § 2.

47. Diane A. Desierto, *A Universalist History of the 1987 Philippine Constitution (II)*, 11 HISTORIA CONSTITUCIONAL 427, 428 (2010).

involvement and integration of international human rights law into the domestic constitutional dialogue.⁴⁸ As such, several individual rights were textualized by the 1987 Constitutional framers, in addition to the adoption of the doctrine of incorporation, for a dynamic approach to the protection and interpretation of individual rights.⁴⁹

The right to freedom of expression has a preferred status as a constitutional right.⁵⁰ Thus, any such “measure is vitiated by a weighty presumption of invalidity.”⁵¹ As held in Philippine case law, “any system of prior restraints of expression comes ... bearing a heavy presumption against its constitutional validity[.]”⁵² The State “carries a heavy burden of showing justification for the enforcement of such restraint.”⁵³ Therefore, there is “a reversal of the normal presumption of validity that inheres in every legislation.”⁵⁴

Accordingly, the rule laid down by jurisprudence states that “expression is not subject to any *prior restraint or censorship* because the Constitution commands that freedom of expression shall not be abridged.”⁵⁵ However, there exist four exceptions when prior restraint may be imposed, namely: “pornography, false or misleading advertisement, advocacy of imminent lawless action, and danger to national security.”⁵⁶ According to Justice Carpio’s concurring opinion in *Chavez v. Gonzales*,⁵⁷ all other expressions are

48. *See id.* at 467–68.

49. *Id.* at 468–69.

50. *Chavez*, 545 SCRA at 481 & *Lopez v. People*, G.R. No. 172203, 642 SCRA 668, 671 (2011).

51. *Social Weather Stations, Inc. v. Commission on Elections*, G.R. No. 147571, 357 SCRA 496, 501 (2001).

52. *Id.* (citing *New York Times Company v. United States*, 403 U.S. 713, 714 (1971)).

53. *Id.*

54. *Social Weather Stations, Inc.*, 357 SCRA at 501.

55. *Chavez*, 545 SCRA at 529 (J. Carpio, concurring opinion).

56. *Id.* at 529–30 (J. Carpio, concurring opinion) (citing *Gonzales v. Kalaw-Katigbak*, G.R. No. L-69500, 137 SCRA 717, 723 (1985); *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, G.R. No. 173034, 535 SCRA 265, 345 (2007) (C.J. Puno, concurring opinion); PHIL. CONST. art. XVI, § 11 (2); & *Eastern Broadcasting Corporation (DYRE) v. Dans, Jr.*, G.R. No. L-59329, 137 SCRA 628, 635 & 636 (1985)).

57. *Chavez v. Gonzales*, G.R. No. 168338, 545 SCRA 441 (2008).

“not subject to prior restraint[,]”⁵⁸ and those not subject to prior restraint are considered “protected expression or high-value expression.”⁵⁹ Moreover,

[a]ny content-based prior restraint on protected expression is unconstitutional without exception. A protected expression means what it says — it is absolutely protected from censorship. Thus, there can be no prior restraint on public debates on the amendment or repeal of existing laws, on the ratification of treaties, on the imposition of new tax measures, or on proposed amendments to the Constitution.

Prior restraint on expression is content-based if the restraint is aimed at the message or idea of the expression. Courts will subject to strict scrutiny content-based restraint. If the content-based prior restraint is directed at protected expression, courts will strike down the restraint as unconstitutional because there can be no content-based prior restraint on protected expression. The analysis thus turns on whether the prior restraint is content-based, and if so, whether such restraint is directed at protected expression, that is, those not falling under any of the recognized categories of unprotected expression.⁶⁰

International law has provided a stage for civil liberties to develop and to manifest in a global community. Emory University Professor Abdullahi A. An-Na'im notes that the right to freedom of expression, which is considered as one of the most important civil liberties, “emerged through a long process of [] philosophical, political, and constitutional developments, especially over the last two centuries[.]”⁶¹ However, the Western origins of free expression by no means suggest that this concept is exclusive thereto.⁶² The characterization of free expression as a right within universal reach⁶³ thus warrants understanding of the theoretical foundations that have resulted in its inclusion in various constitutions and international instruments.⁶⁴ Justice

58. *Id.* at 530 (J. Carpio, concurring opinion) (emphasis omitted).

59. *Id.* (emphasis omitted).

60. *Id.*

61. Abdullahi A. An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29, 32 (1997).

62. *Id.*

63. Nathan Berg & Jeong-Yoo Kim, *Free Expression and Defamation*, 17 L., PROBABILITY & RISK 201, 201 (2018) (citing UDHR, *supra* note 13, art. 19). *Contra* Alexander, *supra* note 12, at 715.

64. Barron, *supra* note 33, at 16 & TRAGER & DICKERSON, *supra* note 34, at 92-97.

Oliver Wendell Holmes' dissent in *Abrams v. United States*,⁶⁵ one of the early American decisions dealing with free expression, pronounced the significance of maintaining a "marketplace of ideas,"⁶⁶ where there exists "healthy competition of thoughts among the [people] as a matter of the right to free speech."⁶⁷

Encompassing other means of communication including "spoken language, musical performances, plays,"⁶⁸ and writing, free expression has become "synonymous with freedom of speech or freedom of communication."⁶⁹ Moreover, free expression should not be construed as a right exclusively belonging to the speaker, but rather as one pertaining also to the recipient's right to receive information.⁷⁰

65. *Abrams v. United States*, 250 U.S. 616 (1919).

66. *But see* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 824 n. 3 (2008) (citing *Lamont v. Postmaster General of the United States*, 381 U.S. 301, 308 (1965) (J. Brennan, concurring opinion) & *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 199 (1973) (J. Brennan, dissenting opinion)).

67. Barron, *supra* note 33, at 16 (citing *Abrams*, 250 U.S. at 630 (J. Holmes, dissenting opinion)).

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power[,] and want a certain result with all your heart[,] you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams, 250 U.S. at 630 (J. Holmes, dissenting opinion).

68. Barron, *supra* note 33, at 16 (citing LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 7-8 (2005)).

69. Barron, *supra* note 33, at 16 (citing ALEXANDER, *supra* note 68, at 7-8).

70. Barron, *supra* note 33, at 16 (citing *Lamont*, 381 U.S. at 308 (J. Brennan, concurring opinion)).

Further, by virtue of the public character of this freedom, any speech or communication made in the exercise thereof should be publicly available.⁷¹ Alternatively, it refers to the “right to actively participate in and contribute to public culture,”⁷² which echoes the analogy of Justice Holmes that free-flowing speech creates a competitive marketplace of ideas,⁷³ where “good ideas flourish and bad ideas fail.”⁷⁴

According to one of the works of the Author,

[t]he universal character of human rights refers to two aspects [—] validity and application. With regard to universal validity, freedom of expression is [a] legitimate national concern in all [Nation S]tates as embodied in their cultural, constitutional, and philosophical traditions. On the other hand, universal application means that the freedom of expression can be applied to everyone at every place. Universal validity and application are ‘mutually inclusive and supportive’ terms, but its aspect of universality [neither implies nor assumes] the absoluteness of the freedom of expression. Some degree of internal enforcement of human rights will always be necessary [as] it is unrealistic to expect voluntary compliance with the law of the land by the whole population. However, massive, coerced enforcement by a government is neither consistent with the nature and justification of human rights in general, nor is likely to succeed in practice. Further, other governments exerting external pressures for offending governments are not willing to maintain the economic, political, and security costs of such pressure.⁷⁵

In the international sphere, freedom of expression is a universally recognized right under the UDHR.⁷⁶ Article 19 thereof states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive[,] and impart information and ideas through any media and regardless of frontiers.”⁷⁷ Since the UDHR is a declaration, States have codified several

71. Barron, *supra* note 33, at 16 (citing Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 303 (1991)).

72. Barron, *supra* note 33, at 16–17 (citing Raz, *supra* note 71, at 304).

73. Barron, *supra* note 33, at 17 & Blocher, *supra* note 66, at 824 (citing Ronald H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 27 (1977)).

74. Blocher, *supra* note 66, at 824 (citing Coase, *supra* note 73, at 27).

75. Barron, *supra* note 33, at 17 (citing An-Na'im, *supra* note 61, at 33 & 35–36 (citing HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (TEXT AND MATERIALS) 811–83 (1996))).

76. UDHR, *supra* note 13, art. 19.

77. *Id.*

rights,⁷⁸ including the freedom of expression,⁷⁹ into a covenant known as the ICCPR.⁸⁰ Under the ICCPR, freedom of expression is protected pursuant to Article 19, which provides —

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; [and]
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.⁸¹

Although the ICCPR expressly enumerates several human rights entitled to universal respect,⁸² freedom of expression itself is not absolute.⁸³ The same Article 19 explicitly states that it may be restricted to a certain degree, but only as may be “provided by law[,]”⁸⁴ “necessary[,]”⁸⁵ and/or pertaining to the “protection of national security[.]”⁸⁶

78. See ARYEH NEIER, *THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY* 64 (2020).

79. *Id.* at 104-05.

80. *Id.* at 64.

81. ICCPR, *supra* note 14, art. 19.

82. Barron, *supra* note 33, at 18 (citing ICCPR, *supra* note 14, pmbl.).

83. See ICCPR, *supra* note 14, art. 19, ¶ 3 (a)-(b) & U.N. Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

84. ICCPR, *supra* note 14, art. 19, ¶ 3.

85. *Id.*

86. *Id.* art. 19, ¶ 3 (b).

Freedom of expression has been liberally construed by the Supreme Court of the United States (SCOTUS).⁸⁷ *New York Times Company v. Sullivan*⁸⁸ is a leading case on freedom of the press in the United States, having been referenced in several subsequent decisions involving freedom of expression.⁸⁹ In that case, the SCOTUS reproduced the concurring opinion of Justice Louis Brandeis in *Whitney v. People of the State of California*⁹⁰ —

Those who won [U.S.] independence believed ... that public discussion is a political duty[,] and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.⁹¹

The SCOTUS ruled that there should be significant “national commitment” to the standard that debate regarding public issues “should be uninhibited, robust, and wide-open,” and that such necessarily includes occasionally unpleasant attacks or harsh criticism of the government and its officials.⁹²

87. See Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, 84 IND. L.J. 885, 888 (2009). “Stone after stone, case after case, the Court *demolished the old common law institutions that bound freedom of expression* in order to *reconstruct the law on new and more liberal foundations.*” *Id.* (emphases supplied).

88. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

89. See, e.g., *Raffy Tulfo v. People of the Philippines and Atty. Carlos T. So*, G.R. No. 187113, Jan. 11, 2021, at 35, available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67112> (last accessed Nov. 30, 2021); *Borjal v. Court of Appeals*, G.R. No. 126466, 301 SCRA 1, 25-26 (1999); & *The Diocese of Bacolod*, 747 SCRA at 112.

90. *Whitney v. People of the State of California*, 274 U.S. 357 (1927).

91. *New York Times Company*, 376 U.S. at 270 (citing *Whitney*, 274 U.S. at 375-76).

92. *New York Times Company*, 376 U.S. at 270 (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

It was also underscored that before the press may be held liable for publishing any statement involving public issues against the government or a public official, actual malice should first be established,⁹³ and the government or public official concerned has the burden of proof.⁹⁴ Evidently, in the United States, when the press is subjected to limitations on their freedom of expression, it is the State that has the duty to establish that such statement involving public interest must be regulated or restrained.⁹⁵

In the regional setting, the Association of Southeast Asian Nations (ASEAN) affirmed its own commitment to human rights, including the right to freedom of expression, through the ASEAN Human Rights Declaration (AHRD).⁹⁶ The Declaration states that “[e]very person has the right to freedom of ... expression, including freedom to hold opinions without interference[,] and to seek, receive[,] and impart information, whether orally, in writing[,] or through any other medium of that person’s choice.”⁹⁷ Textual analysis of Article 23 of the AHRD demonstrates similarity with Article 19 of the UDHR, which provides, in turn, that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference[,] and to seek, receive[,] and impart information and ideas through any media and regardless of frontiers.”⁹⁸

Articles 7 and 8 of the AHRD, however, provide for limitations on the protection of rights, including that of free expression.⁹⁹ Although the AHRD

93. *New York Times Company*, 376 U.S. at 279–80.

94. *See id.* at 279 (citing JOHN STUART MILL, ON LIBERTY 15 (1947)).

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable ‘self-censorship.’ Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.

New York Times Company, 376 U.S. at 279 (citing MILL, *supra* note 94, at 15).

95. *See, e.g., New York Times Company*, 376 U.S. at 280–81 (citing *Coleman v. MacLennan*, 78 Kan. 711, 712–13 (1908) (U.S.)).

96. Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, available at <https://asean.org/asean-human-rights-declaration> (last accessed Nov. 30, 2021) [<https://perma.cc/PN3Q-6DSX>] [hereinafter AHRD].

97. *Id.* ¶ 23.

98. UDHR, *supra* note 13, art. 19.

99. *See* Nicholas Doyle, *The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard Setting*, 63 INT’L & COMP. L.Q. 67, 84–85 (2014).

states that “[a]ll human rights are universal, indivisible, interdependent[,] and interrelated[,]” the rest of Article 7 nevertheless pronounces that “[a]t the same time, the reali[z]ation of human rights must be considered in the regional and national context[,] bearing in mind different political, economic, legal, social, cultural, historical[,] and religious backgrounds.”¹⁰⁰ The foregoing provision suggests the “ASEAN Way mentality” and proves unresolved the difficult tension between the objective to promote universal human rights and the unwillingness of the Member States to cede any of their sovereignty.¹⁰¹

Similarly, Article 8¹⁰² does not identify a significant and essential “principle in international human rights law: that [particular] human rights, such as the right to freedom [of expression], are inviolable[, sacrosanct,] and non-derogable” under any condition.¹⁰³ Rather, the provision would tolerate State violations of human rights, including freedom of expression, so long as such violations serve “national security, public order, public health, public safety, public morality, [and] the general welfare of the peoples[.]”¹⁰⁴

The AHRD’s limiting provisions on freedom of expression can be attributed to the ASEAN values, particularly the value of non-interference.¹⁰⁵ This value represents the “ASEAN Way,” which prevents ASEAN States

100. AHRD, *supra* note 96, ¶ 7. See also Doyle, *supra* note 99, at 85. “Article 7 is worded for both inter- and intra-ASEAN application (it conditions the realization of the rights described according to regional or national context with their own historical and cultural implications)[.]” Doyle, *supra* note 99, at 85.

101. See Mariam Sarwar, *Human Rights the “ASEAN Way”: Exploring the Possibilities for a Regional ADR and Adjudicative Body in Southeast Asia*, 52 LOY L.A. L. REV. 27, 40 (2018) (citing Yvonne Xin Wang, *Contextualizing Universal Human Rights: An Integrated Human Rights Framework for ASEAN*, 25 DUKE J. COMP. & INT’L L. 385, 396-97 (2015) (citing Catherine Shanahan Renshaw, *The ASEAN Human Rights Declaration 2012*, 13 HUM. RTS. L. REV. 557, 578 (2013))).

102. AHRD, *supra* note 96, art. 8.

103. Sarwar, *supra* note 101, at 41 (citing AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE, *THE ASEAN HUMAN RIGHTS DECLARATION: A LEGAL ANALYSIS* 7 (2014)).

104. Sarwar, *supra* note 101, at 41 (citing AHRD, *supra* note 96, art. 8).

105. See generally Sarwar, *supra* note 101, at 28 (citing HAO DUY PHAN, *A SELECTIVE APPROACH TO ESTABLISHING A HUMAN RIGHTS MECHANISM IN SOUTHEAST ASIA: THE CASE FOR A SOUTHEAST ASIAN COURT OF HUMAN RIGHTS* 113 (2012)).

from intruding into the affairs of fellow Members to foster regional peace without any form of accountability for rights violations.¹⁰⁶

III. DEMOCRATIC ELECTIONS IN THE PHILIPPINES

Elections play a vital role in a democratic government,¹⁰⁷ operating as a means to keep politicians in check and compelled to answer for public needs and interests through legislation and enforcement of the policies they commit to.¹⁰⁸ Elections should ideally function as a “major source of political recruitment, a means of making government, and of transferring government power, a guarantee of representation, and a major determinant of government policy[.]”¹⁰⁹ Nevertheless, these do not preclude possible deterrence of the “will of the electorate in a ‘flawed democracy[.]’”¹¹⁰

The plurality system in the Philippines is codified and manifested in the 1935, 1973, and 1987 Constitutions.¹¹¹ The fundamental law states that all elective officials (i.e., president, vice-president, senators, members of the House of Representatives, local chief executives, and local legislators) are elected by “direct vote of the people” via a “first-past-the-post system.”¹¹²

106. Sarwar, *supra* note 101, at 28 (citing PHAN, *supra* note 105, at 113).

107. Guingona, Jr. v. Commission on Elections, G.R. No. 191846, 620 SCRA 448, 462 (2010).

On election day, the country’s registered voters will come out to exercise the sacred right of suffrage. Not only is it an *exercise that ensures the preservation of our democracy*, the coming elections also embodies our people’s last ounce of hope for a better future. It is the final opportunity, patiently awaited by our people, for the peaceful transition of power to the next chosen leaders of our country.

Id. (emphasis supplied).

108. See Jacques Thomassen, *Representation and Accountability, in ELECTIONS AND DEMOCRACY: REPRESENTATION AND ACCOUNTABILITY* 3 (Jacques Thomassen ed., 2014).

109. Julio Teehankee, *Electoral Politics in the Philippines, in ELECTORAL POLITICS IN SOUTHEAST AND EAST ASIA* 149 (Gabriele Bruns, et. al. eds., 2002) (citing ANDREW HEYWOOD, *KEY CONCEPTS IN POLITICS* 200 (2000)).

110. Teehankee, *supra* note 109, at 149.

111. *Id.*

112. *Id.* (citing ALBERTO C. AGRA, *A Q&A PRIMER ON THE PHILIPPINE PARTY-LIST SYSTEM: A LIST PROPORTIONAL REPRESENTATION SCHEME OF ELECTING ONE-FIFTH OF THE MEMBERS OF THE HOUSE OF REPRESENTATIVES* 1 (1997)).

“The Philippine electoral system has generally been consistent throughout history.”¹¹³

The 1987 Constitution mandates a separate election through direct votes for President and Vice-President, with the winners declared from a simple plurality.¹¹⁴ The President and the Vice-President each serve a six-year term, but the former is not eligible for re-election, while the latter shall not serve for more than two consecutive terms.¹¹⁵ Conversely, the Legislature — composed of the Senate and the House of Representatives¹¹⁶ — follows a different system for either body.¹¹⁷ Half of the Senate is elected every six years through a plurality vote.¹¹⁸ Alternatively, members of Congress are “elected from single-member districts” for a term of three years.¹¹⁹

In the local government setting, Republic Act No. 7160 (R.A. No. 7160),¹²⁰ more commonly known as the 1991 Local Government Code, repealed several Batas Pambansa and Presidential Decrees on elections of local government officials.¹²¹ R.A. No. 7160 is the current law on local government elections, which facilitates the people’s determination, through a plurality vote, of the “governor, vice-governor, city mayor, city vice-mayor, municipal mayor, municipal vice-mayor and *punong barangay*” (village head) in their localities of residence.¹²² Like the members of the House of Representatives, local elective officials serve a three-year term.¹²³ Additionally, local legislative assemblies, termed *sanggunian*, are elected through a district vote by the people.¹²⁴

113. Teehankee, *supra* note 109, at 149.

114. *Id.* at 162 & PHIL. CONST. art. VII, § 4, paras. 1 & 5.

115. Teehankee, *supra* note 109, at 162 & PHIL. CONST. art. VII, § 4, paras. 1-2.

116. PHIL. CONST. art. VI, § 1.

117. *See* PHIL. CONST. art. VI, §§ 2 & 5.

118. Teehankee, *supra* note 109, at 162 & PHIL. CONST. art. VI, §§ 2 & 4.

119. Teehankee, *supra* note 109, at 162 & PHIL. CONST. art. VI, §§ 5 (1) & 7.

120. An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160 (1991).

121. *Id.* § 534.

122. *Id.* § 41 (a) (emphasis supplied) & Teehankee, *supra* note 109, at 163.

123. LOCAL GOV'T CODE, § 43.

124. *Id.* § 41 (b) & Teehankee, *supra* note 109, at 163.

The 1987 Constitution envisions the advancement of a multi-party system for more democratic choices for the populace.¹²⁵ However, the rise of political parties in the post-Marcos era remains unsuccessful in providing solutions to prevailing socio-economic problems in the country.¹²⁶

Under the constitutional framework, all election exercises in the Philippines have been implemented by the Commission on Elections (COMELEC) since 1935.¹²⁷ As a constitutional body, it serves the purpose of regulating the conduct of elections with the objective of ensuring that “[a] free and open party system shall be allowed to evolve according to the free choice of the people[.]”¹²⁸ Additionally, the COMELEC has other powers and functions such as ruling on questions affecting elections (but not the right to suffrage)¹²⁹ and on contests regarding the qualifications of elective officials.¹³⁰ It may also deputize, with Presidential concurrence, law enforcement agencies for the “exclusive purpose of ensuring free, orderly, honest, peaceful, and credible elections.”¹³¹

Philippine jurisprudence highlights the democratic value of elections.¹³² Julio Teehankee called the exercise a “technique of rendering authority and/or creating representative bodies[.]” which is “often linked [with] democratic representation.”¹³³ It is an event through which an office or post is filled through a democratic choice made by the people who constitute the electorate.¹³⁴ Although elections in the Philippines are geared towards

125. *Osmeña v. Commission on Elections*, G.R. No. 132231, 288 SCRA 447, 506 (1998) (J. Romero, dissenting opinion).

126. Teehankee, *supra* note 109, at 163.

127. Teehankee, *supra* note 109, at 162 & PHIL. CONST. art. IX-C, § 2 (1).

128. PHIL. CONST. art. IX-C, § 6.

129. PHIL. CONST. art. IX-C, § 2 (3).

130. PHIL. CONST. art. IX-C, § 2 (2).

131. PHIL. CONST. art. IX-C, § 2 (4).

132. *See, e.g., Roque, Jr. v. Commission on Elections*, G.R. No. 188456, 599 SCRA 69, 101 (2009). “In a democratic system of government, the people’s voice is sovereign. Corollarily, choosing through the ballots the men and women who are to govern the country is perhaps the highest exercise of democracy.” *Roque, Jr.*, 599 SCRA at 101 (emphasis supplied).

133. Teehankee, *supra* note 109, at 178.

134. *Id.* (citing HEYWOOD, *supra* note 109, at 199).

government legitimation, they ultimately tend to preserve the existing status quo of dominant political parties and clans.¹³⁵

As stated by Teehankee —

Essentially, ‘an election is a procedure by which members of communities and/or organizations choose persons to hold an office[.]’ ... Elections are often linked to the idea of democratic representation. Therefore, ‘an election is a device for filling an office or posts through choices made by a designated body of people, the electorate[.]’ ... This does not, however, discount the holding of semi-competitive or non-competitive elections.

In the Philippines, elections have historically served to legitimize the government and perpetuate elite rule. As de Quiros [] notes, ‘elections were the ‘equilibrating’ mechanism, although their ability to equilibrate society under the combined weight of mass restiveness and competing claims to power by various power blocs would diminish in time[.]’ Consequently, the quality of democratic representation has suffered from this anomaly.¹³⁶

In the Philippines, elections often consist largely of personality-driven popularity contests.¹³⁷ A candidate builds on the character he or she depicts to the voting public to secure national or local office.¹³⁸ The Filipino’s penchant for a compelling narrative has turned election campaigns into spectacles¹³⁹ starring “simple” candidates, “earnest” candidates, and even

135. Teehankee, *supra* note 109, at 178. See also Alfred W. McCoy, “An Anarchy of Families”: *The Historiography of State and Family in the Philippines*, in AN ANARCHY OF FAMILIES: STATE AND FAMILY IN THE PHILIPPINES 24-25 (Alfred W. McCoy ed., 2009).

136. Teehankee, *supra* note 109, at 178 (citing DIETER NOHLEN, ELECTIONS AND ELECTORAL SYSTEMS (1984); HEYWOOD, *supra* note 109, at 199; & Conrado de Quiros, *Guns, Goons, and Government: Pre-Martial Law Politics and Elections*, in 1992 & BEYOND: FORCES AND ISSUES IN PHILIPPINE ELECTIONS 12 (Lorna Kalaw-Tirol & Sheila S. Coronel eds., 1992)).

137. ROMMEL C. BANLAOI, PHILIPPINE SECURITY IN THE AGE OF TERROR: NATIONAL, REGIONAL, AND GLOBAL CHALLENGES IN THE POST-9/11 WORLD 149 (2010).

138. See, e.g., Mark R. Thompson, *Class, Charisma, and Clientelism in Thai and Philippine Populist Parties*, in PARTY POLITICS IN SOUTHEAST ASIA: CLIENTELISM AND ELECTORAL COMPETITION IN INDONESIA, THAILAND AND THE PHILIPPINES 70 (Dirk Tomsa & Andreas Ufen eds., 2013).

139. See BANLAOI, *supra* note 137, at 146. “Election season is [] like a big sports or concert season — highly entertaining. ... Indeed, electoral politics in the Philippines is like show business — it is a big ‘show’ and a big ‘business.’” BANLAOI, *supra* note 137, at 146.

candidates who dance their way into the hearts of the electorate.¹⁴⁰ Many candidates also come from families with political backgrounds and with more than enough capital and mileage to joust for political power.¹⁴¹

Central to elections is the role of each member of the electorate as a voter.¹⁴² The participation of the voter, as long as he or she is qualified to cast his or her vote, is essential to the democratic process of elections.¹⁴³ Without participation, there can be no measure to verify the accomplishment of any government program.¹⁴⁴ However, in the Philippines, the extent of voter participation has been affected by celebrity gimmicks, and even by giving away free food, campaign paraphernalia, and, most significantly, money.¹⁴⁵

A study conducted on voter practices during elections in Cebu showed that the “voters’ [perception] on the electoral process belonged to an acceptable level.”¹⁴⁶ The results of the study indicated that voters perceive that there is awareness, and that election day procedures were implemented in the five subject municipalities in Cebu.¹⁴⁷ The same study further demonstrated the likelihood of voter participation in election-related programs and activities.¹⁴⁸ Nevertheless, the problems of “vote buying, partisanship, political dynasty, and crowded precinct areas” remain.¹⁴⁹ In

140. Nile Villa, *WATCH: Bop to the Top: Politicians Boogie for Votes*, RAPPLER, Apr. 20, 2016, available at <https://www.rappler.com/nation/elections/130193-dancing-politicians-campaign> (last accessed Nov. 30, 2021) [<https://perma.cc/FQ58-38MT>].

141. McCoy, *supra* note 135, at 24–25.

142. Lino Luna v. Rodriguez, 39 Phil. 208, 215 (1918).

143. People v. San Juan, G.R. No. L-22944, 22 SCRA 498, 504 (1968).

144. See BANLAOI, *supra* note 137, at 146.

145. Reuters Staff, *Philippine Police Chief Warns Vote Buying in 2022 Polls May Go Digital*, REUTERS, June 14, 2021, available at <https://www.reuters.com/article/philippines-election-idUSL3N2NW0R7> (last accessed Nov. 30, 2021) [<https://perma.cc/2X79-AY8A>]. See also Regina Ann L. Nonato, *Reforming the Limitations on Election Campaign Expenditures and Contributions*, 54 ATENEO L.J. 1163, 1185 (2010).

146. Glenn L. Velmonte, *Voters Practices in the Philippine Election*, J. CRITICAL REVIEWS, Volume No. 7, Issue No. 8, at 954.

147. *Id.*

148. *Id.*

149. *Id.*

conclusion, the study recommended that the COMELEC “conduct extensive voter education in the barangays[,] especially [at] the grassroots.”¹⁵⁰

IV. FREEDOM OF EXPRESSION AND ELECTIONS

The right to vote is the free expression of the will of the people in a democratic society.¹⁵¹ “[F]or this formal process to take place,” the following conditions should be met: (1) that elections are free, meaning that they are conducted “under secret ballot[;]” and (2) that they are held at “reasonable intervals.”¹⁵² These elements have been concretized in international case law and contained “in a single proposition[.]”¹⁵³ For instance, as Alain Zysset notes,¹⁵⁴ the European Court of Human Rights reiterated in *Labita v. Italy*¹⁵⁵ the mandate of “‘free’ elections at ‘reasonable intervals’ ‘by secret ballot’ and ‘under conditions which will ensure the free expression of the opinion of the people,’”¹⁵⁶ the same being “the subjective rights to vote and to stand for election.”¹⁵⁷

In addition, there is the “interdependence between freedom of expression and the right to free elections in forming the foundations of a democratic society, thereby pointing to a consonance of purpose[.]”¹⁵⁸ Zysset further points to the reference made by the European Court of Human Rights to “free elections and freedom of expression, particularly freedom of political debate,” which “together form the bedrock of any democratic system[.]”¹⁵⁹ As cited by Zysset, these “two rights are inter-related and operate to reinforce

150. *Id.* at 955. See also Omnibus Election Code of the Philippines [OMN. ELECTION CODE], Batas Pambansa Blg. 881, art. VII, § 52 (j) (1985).

151. See *Loong v. Commission on Elections*, G.R. No. 133676, 305 SCRA 832, 871 (1999).

152. Alain Zysset, *Freedom of Expression, the Right to Vote, and Proportionality at the European Court of Human Rights: An Internal Critique*, 17 INT’L J. CONST. L. 230, 240 (2019) (citing Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *opened for signature* Mar. 20, 1952, E.T.S. No. 9).

153. Zysset, *supra* note 152, at 240.

154. *Id.*

155. *Labita v. Italy*, 2000-IV Eur. Ct. H.R. 99.

156. Zysset, *supra* note 152, at 240 (citing *Labita*, 2000-IV Eur. Ct. H.R. ¶ 201).

157. *Id.*

158. Zysset, *supra* note 152, at 240.

159. *Id.* (citing *Bowman v. United Kingdom*, App. No. 24839/94, E.C.H.R. 4, ¶ 42 (1998)).

each other[.]”¹⁶⁰ Moreover, as observed by the European Court of Human Rights, “freedom of expression is one of the ‘conditions’ necessary to ensure the free expression of the opinion of the people in the choice of the legislature.”¹⁶¹

Philippine jurisprudence has identified a “vital need in a constitutional democracy” for free expression, which serves “as a means of assuring individual self-fulfillment, of attaining the truth, of securing participation by the people in social including political decision-making, and of maintaining the balance between stability and change.”¹⁶²

As held in *Chavez*,

[f]reedom of speech and of the press means something more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, and to take refuge in the existing climate of opinion on any matter of public consequence. When atrophied, the right becomes meaningless. The right belongs as well — if not more — to those who question, who do not conform, [and] who differ. The ideas that may be expressed under this freedom are [not only] confined ... to those that are conventional or acceptable to the majority. To be truly meaningful, freedom of speech and of the press should allow and even encourage the articulation of the unorthodox view, though it be hostile to or derided by others; or though such view ‘induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.’¹⁶³

In other words, freedom of expression is the gateway to guaranteeing the people’s democratic participation in political decision-making, particularly through the exercise of their right to suffrage.

In evaluating the extent of the guarantee of free expression during elections in the Philippines, both sides of the spectrum must be analyzed (i.e., the electoral candidates and the electorate itself).

160. *Id.*

161. *Id.*

162. *Gonzales*, 27 SCRA at 857 (citing EMERSON, *supra* note 31, at 3).

163. *Chavez*, 545 SCRA at 484 (citing *Gonzales*, 27 SCRA at 857 & *Terminiello*, 337 U.S. at 4).

The free expression of the electoral candidates is generally regulated by the Omnibus Election Code,¹⁶⁴ the Fair Elections Act,¹⁶⁵ and by the different regulations issued by the COMELEC.¹⁶⁶ Indeed, a candidate's freedom of expression should be freely exercised, but should not be given completely free reign.¹⁶⁷ Absent such laws and regulations, election campaigns may lead to unfair election practices where candidates with greater financial resources and influence will have an undue advantage against the other *bona fide* candidates who are not as wealthy or influential, thus undermining the latter's freedom of expression, and ultimately prejudicing the electorate.¹⁶⁸

The Omnibus Election Code contains several provisions geared towards a similar objective, providing for acceptable election propaganda or materials that may be used by a candidate,¹⁶⁹ and establishing the prohibited forms

164. Omnibus Election Code of the Philippines [OMN. ELECTION CODE], Batas Pambansa Blg. 881 (1985).

165. 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).

166. *See, e.g.*, Commission on Elections, Rules and Regulations Implementing Republic Act No. 9006, Otherwise Known as the "Fair Election Act", in Connection With the May 9, 2022 National and Local Elections, Resolution No. 10730 [COMELEC Res. No. 10730] (Nov. 17, 2021) & Commission on Elections, Rules and Regulations Implementing Republic Act No. 9006, Otherwise Known as the "Fair Election Act", in Connection With the May 13, 2019 National and Local Elections, Resolution No. 10488 [COMELEC Res. No. 10488] (Jan. 30, 2019).

167. *See* National Press Club v. Commission on Elections, G.R. No. 102653, 207 SCRA 1, 9 (1992) (citing PHIL. CONST. art. III, § 4; PHIL. CONST. art. IX-C, § 4; PHIL. CONST. art. II, § 26; & 4 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 90, at 945 & 955-56 (1986)).

168. *See, e.g.*, *National Press Club*, 207 SCRA at 7-9 (citing An Act Introducing Additional Reforms in the Electoral System and for Other Purposes [The Electoral Reforms Law of 1987], Republic Act No. 6646, § 11 (b) (1988); OMN. ELECTION CODE, §§ 90 & 92; PHIL. CONST. art. IX-C, § 4; & 1 RECORD, PHIL. CONST., NO. 31, at 624, 631-32, & 662-63).

169. OMN. ELECTION CODE, § 82.

SECTION 82. *Lawful election propaganda*. — Lawful election propaganda shall include:

- (a) Pamphlets, leaflets, cards, decals, stickers[,] or other written or printed materials of a size not more than eight and one-half inches in width and fourteen inches in length;

thereof.¹⁷⁰ On the other hand, the Fair Election Act regulates election propaganda to the end that every *bona fide* candidate may be given sufficient

-
- (b) Handwritten or printed letters urging voters to vote for or against any particular candidate;
 - (c) Cloth, paper[,] or cardboard posters, whether framed or posted, with an area exceeding two feet by three 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 feet by eight feet in size, shall be allowed: *Provided*, That said streamers may not be displayed except one week before the date of the meeting or rally and that it shall be removed within seventy-two hours after said meeting or rally; or
 - (d) All other forms of election propaganda not prohibited by this Code as the Commission may authorize after due notice to all interested parties and hearing where all the interested parties were given an equal opportunity to be heard: *Provided*, That the Commission's authorization shall be published in two newspapers of general circulation throughout the nation for at least twice within one week after the authorization has been granted.

Id.

170. *Id.* § 85.

SECTION 85. *Prohibited forms of election propaganda.* — It shall be unlawful:

- (a) To print, publish, post[,] or distribute any poster, pamphlet, circular, handbill, or printed matter urging voters to vote for or against any candidate unless they bear the names and addresses of the printer and payor as required in Section 84 hereof;
- (b) To erect, put up, make use of, attach, float[,] or display any billboard, tinplate-poster, balloons[,] and the like, of whatever size, shape, form[,] or kind, advertising for or against any candidate or political party;
- (c) To purchase, manufacture, request, distribute[,] or accept electoral propaganda gadgets, such as pens, lighters, fans of whatever nature, flashlights, athletic goods or materials, wallets, shirts, hats, bandanas, matches, cigarettes[,] and the like, except that campaign supporters accompanying a candidate shall be allowed to wear hats and/or shirts or T-shirts advertising a candidate;
- (d) To show or display publicly any advertisement or propaganda for or against any candidate by means of cinematography, audio-visual units[,] or other screen projections except telecasts which may be allowed as hereinafter provided; and

time and venue to campaign to the public.¹⁷¹ It provides that “[a]ll registered parties and *bona fide* candidates shall have equal access to media time and space.”¹⁷²

Without these legal restrictions, candidates with limitless capital can undermine candidates without unlimited capital and potentially manipulate or change the tone of the campaign.¹⁷³ This is precisely why under the law, candidates and their parties may only erect campaign materials in common poster areas with specified sizes and dimensions.¹⁷⁴ However, during the campaign season, it is not an uncommon sight to see campaign posters displayed everywhere, even outside the designated common areas.¹⁷⁵

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- (e) For any radio broadcasting or television station to sell or give free of charge air time for campaign and other political purposes except as authorized in this Code under the rules and regulations promulgated by the Commission pursuant thereto.

Any prohibited election propaganda gadget or advertisement shall be stopped, confiscated[,] or torn down by the representative of the Commission upon specific authority of the Commission.

Id.

171. See Fair Election Act, § 2.

172. Fair Election Act, § 6.

173. See Nonato, *supra* note 145, at 1164.

174. Fair Election Act, § 9.

SECTION 9. *Posting of Campaign Materials.* — The COMELEC may authorize political parties and party-list groups to erect common poster areas for their candidates in not more than ten (10) public places such as plazas, markets, barangay centers[,] and the like, wherein candidates can post, display[,] or exhibit election propaganda: *Provided*, That the size of the poster areas shall not exceed twelve (12) by sixteen (16) feet or its equivalent.

Independent candidates with no political parties, may likewise be authorized to erect common poster areas in no more than ten (10) public places, the size of which shall not exceed four (4) by six (6) feet or its equivalent.

Candidates may post any lawful propaganda material in private places with the consent of the owner thereof, and in public places or property which shall be allocated equitably and impartially among the candidates.

Id.

175. See, e.g., Xave Gregorio, *Comelec Wants Candidates to Pay for Takedown of Illegal Posters*, CNN PHIL., Mar. 4, 2019, available at

Further, the recent COMELEC Resolution No. 10488 provides for reporting requirements to be submitted by mass media entities to ensure that candidates comply with the limitations on election spending for campaign materials or propaganda.¹⁷⁶ In the 2013 midterm elections, the COMELEC displayed strict implementation of the limitations on campaign spending by candidates when it disqualified Emilio Ramon “E.R.” Ejercito as governor of Laguna due to election overspending.¹⁷⁷ It remains to be seen whether COMELEC shall also diligently enforce these campaign limitations, especially during the upcoming 2022 elections.

On the other side of the spectrum, there is the freedom of expression of the electorate during the election season.¹⁷⁸ There is no specific law which limits the freedom of expression of the electorate as a whole.¹⁷⁹ The most prominent legal prohibition restricting freedom of expression of the electorate would be that concerning public officers and employees, as provided under the Omnibus Election Code.¹⁸⁰ Accordingly, those guilty of an election offense include

[a]ny officer or employee in the civil service, except those holding political offices; any officer, employee, or member of the Armed Forces of the

<https://www.cnnphilippines.com/news/2019/3/4/Comelec-candidates-pay-takedown-illegal-posters.html> (last accessed Nov. 30, 2021) [<https://perma.cc/B8HY-CZUM>].

176. Commission on Elections, Rules and Regulations Implementing Republic Act No. 9006, Otherwise Known as the “Fair Election Act”, in Connection With the May 13, 2019 National and Local Elections, Resolution No. 10488 [COMELEC Res. No. 10488], §§ 11-12 (Jan. 30, 2019).

177. *Ejercito v. Commission on Elections*, G.R. No. 212398, 742 SCRA 210, 218 & 221-22 (2014).

178. *The Diocese of Bacolod*, 747 SCRA at 46-47. “The right to suffrage not only includes the right to vote for one’s chosen candidate, but also the right to vocalize that choice to the public in general, in the hope of influencing their votes. It may be said that in an election year, the right to vote necessarily includes the right to free speech and expression.” *Id.*

179. See PHIL. CONST. art. III, § 4. The fundamental law itself provides that “[n]o law shall be passed abridging the freedom of speech, of expression, or of the press[.]” PHIL. CONST. art. III, § 4.

The Supreme Court has also stated that protection is afforded to “both speech and medium because the quality of this freedom in practice will define the quality of deliberation in our democratic society.” *The Diocese of Bacolod*, 747 SCRA at 39.

180. OMN. ELECTION CODE, § 261 (i).

Philippines, or any police force, special forces, home defense forces, *barangay* self-defense units[,] and all other para-military units ... who, directly or indirectly, intervenes in any election campaign or engages in any partisan political activity, except to vote or to preserve public order[.]¹⁸¹

Accordingly, in theory, if the member of the electorate is a civilian, then he or she is free to exercise his or her expression in connection with the election.¹⁸² A civilian may praise, scrutinize, and even criticize a candidate seeking public office.¹⁸³ It is through the exercise of the freedom of expression that the electorate can determine who are worthy to hold public office and govern the State.¹⁸⁴

Even though there is no specific law regulating or limiting the exercise of freedom of expression of the electorate, there are laws of general application that can be weaponized to limit such right.¹⁸⁵ The most prominent and widely utilized law to restrict freedom of expression would be libel.¹⁸⁶

181. *Id.*

182. *See* Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc., G.R. No. L-31195, 51 SCRA 189, 201-02 (1973). *But see* *The Diocese of Bacolod*, 747 SCRA at 91. “The right to freedom of expression is indeed not absolute. Even some forms of protected speech are still subject to some restrictions.” *The Diocese of Bacolod*, 747 SCRA at 91.

183. *The Diocese of Bacolod*, 747 SCRA at 84-85 (citing *Gonzales*, 27 SCRA at 926-27 (J. Barredo, concurring and dissenting opinion) (citing PHIL. CONST. art. II, § 1)).

184. *See id.*

[W]hen the freedoms of speech, press and peaceful assembly and redress of grievances are being exercised in relation to suffrage or as a means to enjoy the inalienable right of the qualified citizen to vote, they are absolute and timeless. If our democracy and republicanism are to be worthwhile, the conduct of public affairs by our officials must be allowed to suffer incessant and unabating scrutiny, favorable or unfavorable, every[]day and at all times. Every holder of power in our government must be ready to undergo exposure any moment of the day or night, from January to December every year, as *it is only in this way that he can rightfully gain the confidence of the people.*

Gonzales, 27 SCRA at 927 (J. Barredo, concurring and dissenting opinion) (emphasis supplied).

185. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815, art. 353 (1930).

186. *Id.*

A libel is a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.¹⁸⁷

Several democratic countries have decriminalized defamation and libel.¹⁸⁸ Criminal sanctions associated with insult and defamation laws create a chilling effect on the freedom of the press,¹⁸⁹ and, in turn, threaten the existence of freedom and democracy.¹⁹⁰

Elena Yanchukova observed that freedom of expression and “of the press cannot be achieved while journalists are imprisoned for telling the truth, or even threatened with criminal sanctions[,]”¹⁹¹ and that “[w]hile governments claim that criminal sanctions are necessary to protect [public] order and to protect the rights of individuals, honor and reputation are personal interests that can be fully protected by private law, without the imposition of criminal sanctions.”¹⁹²

In addition, Richard Winfield opined that “[t]he libel suit should become exclusively a civil remedy to reconcile two competing values: an individual

187. *Id.*

188. See generally Philippine Daily Inquirer, *EDITORIAL: Decriminalize Libel*, PHIL. DAILY INQ., Feb. 6, 2012, available at <https://opinion.inquirer.net/22599/decriminalize-libel> (last accessed Nov. 30, 2021) [<https://perma.cc/PT2K-SKGH>].

189. *Belen v. People*, G.R. No. 211120, 817 SCRA 370, 421 (2017) (J. Leonen, dissenting opinion).

190. See *Bayan, Karapatan, Kilusang Magbubukid ng Pilipinas (KMP) v. Ermita*, G.R. No. 169838, 488 SCRA 226, 249 (2006).

[T]he right to peaceably assemble and petition for redress of grievances is, together with *freedom of speech, of expression, and of the press, a right that enjoys primacy in the realm of constitutional protection. For these rights constitute the very basis of a functional democratic polity, without which all the other rights would be meaningless and unprotected.*

Bayan, Karapatan, Kilusang Magbubukid ng Pilipinas (KMP), 488 SCRA at 249 (emphases supplied).

191. Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861, 893 (2003).

192. *Id.*

person's right to reputation and the right of a free press to publish. The criminal justice system has no place in resolving these personal disputes."¹⁹³

In the Philippines, defamation, including libel, is still considered as a criminal offense, "punished by *prisión correccional* in its minimum and medium periods or a fine ranging from [P]200 to [P]6,000 [], or both[.]"¹⁹⁴ The penalty was amended by the passage of Republic Act (R.A.) No. 10951 in 2017, which increased the fine to P40,000 to P1,200,000.¹⁹⁵ When libel is "committed through a computer system[.]"¹⁹⁶ then it is considered as cyber libel, which is punished by a penalty one degree higher.¹⁹⁷

Contemporary history has shown that libel charges are filed during the election season. In Dapa, Surigao del Norte, a candidate for municipal mayor filed criminal libel charges against several journalists who published an article regarding the candidate's alleged illegal mining activities.¹⁹⁸ The complainant alleged that the journalists portrayed her "as a villain, a swindler[,] and a

193. Richard N. Winfield, *The Wasting Disease and a Cure: Freedom of the Press in Emerging Democracies*, 20 COMM. LAW. 22, 24 (2002).

194. REV. PENAL CODE, art. 355.

195. An Act Adjusting the Amount or the Value of Property and Damage on Which a Penalty is Based, and the Fines Imposed Under the Revised Penal Code, Amending for the Purpose Act No. 3815, Otherwise Known as "The Revised Penal Code," As Amended, Republic Act No. 10951, § 91 (2017).

Article 355 of the same Act is hereby amended to read as follows:

'ART. 355. *Libel by means of writings or similar means.* — A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by *prisión correccional* in its minimum and medium periods or a fine ranging from Forty thousand pesos (P40,000) to One million two hundred thousand pesos (P1,200,000), or both, in addition to the civil action which may be brought by the offended party.

Id.

196. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor, and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175, § 4 (c) (4) (2012).

197. *Id.* § 6.

198. Roel Catoto, 3 Editors of Weekly Paper in Surigao Sued for Libel, *available at* <https://www.mindanews.com/top-stories/2016/12/3-editors-of-weekly-paper-in-surigao-sued-for-libel> (last accessed Nov. 30, 2021) [<https://perma.cc/7CTS-P8EV>].

cheat.”¹⁹⁹ A warrant of arrest was issued by Branch 29 of the Regional Trial Court in Surigao del Norte.²⁰⁰

In another instance, a candidate for municipal mayor in Aurora, Zamboanga del Sur filed a criminal complaint against a town councilor for cyber libel in relation to an alleged defamatory post by the latter on social media which affected the election campaign of the complainant.²⁰¹ In that case, Branch 12 of the Regional Trial Court in Zamboanga del Sur found the accused guilty of committing cyber libel and sentenced him to a penalty of eight years imprisonment.²⁰² These cases demonstrate that the crime of libel may be actively used during the election season to criminalize expressions made by the electorate towards the election candidates.

Aside from libel, there are other recent laws of general application that can be utilized to limit the free expression of civilians during elections. For instance, Section 6 (f) of the *Bayanihan* to Heal as One Act provided that “creating, perpetrating, or spreading false information regarding the COVID-19 crisis on social media and other platforms,” the same having “no valid or beneficial effect on the population, and [being] clearly geared to promote chaos, panic, anarchy, fear, or confusion[,]” is a criminal offense.²⁰³ The process to determine the foregoing false information regarding the COVID-19 crisis, however, has not been sufficiently laid down.²⁰⁴

199. *Id.*

200. *Id.*

201. Salvador Santiago, *Court Finds Zambo Sur Town Dad Guilty of Cyber Libel*, PHIL. NEWS AGENCY, Mar. 2, 2020, available at <https://www.pna.gov.ph/articles/1095302> (last accessed Nov. 30, 2021) [<https://perma.cc/W5ZJ-9TA2>].

202. *Id.*

203. An Act Declaring the Existence of a National Emergency Arising from the Corona Virus Disease 2019 (COVID-2019) Situation and a National Policy in Connection Therewith, and Authorizing the President of the Republic of the Philippines for a Limited Period and Subject to Restrictions, to Exercise Powers Necessary and Proper to Carry Out the Declared National Policy and For Other Purposes [*Bayanihan* to Heal as One Act], Republic Act No. 11469, § 6 (f) (2020).

204. See generally Joaquin & Biana, *supra* note 45, at 38. “This provision of the *Bayanihan* Act seems to present tension between preserving free speech, on the one hand[,] and ensuring public safety, on the other hand.” Joaquin & Biana, *supra* note 45, at 38.

Further, the passage of the Philippine Anti-Terror Act of 2020²⁰⁵ sparked local and international criticism of the curtailment of free expression through the law's vague definition of "terrorism" and "detention and arrest based on mere suspicion."²⁰⁶

These are some general laws that may be utilized to limit and restrict free expression during the election period. Like libel, such laws may be exploited to constrain public discussion by the electorate of campaign promises and performances by candidates on issues of national and local concern.

In contrast, several Supreme Court decisions have actually lifted the restrictions on freedom of expression relevant during elections. In *Penera v. Commission on Elections*,²⁰⁷ the Court held that premature campaigning is not an election offense because the law only covers a candidate during the campaign period.²⁰⁸ Prior to the campaign period, no person is held liable for such an offense.²⁰⁹ It was explained therein that

[i]t is a basic principle of law that any act is lawful unless expressly declared unlawful by law. This is [e]specially true to expression or speech, which Congress cannot outlaw except on very narrow grounds involving clear, present[,] and imminent danger to the State. The mere fact that the law does not declare an act unlawful *ipso facto* means that the act is lawful. Thus, there is no need for Congress to declare in Section 15 of RA 8436, as amended by RA 9369, that political partisan activities before the start of the campaign period are lawful. It is sufficient for Congress to state that 'any unlawful act

205. An Act to Prevent, Prohibit and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the "Human Security Act of 2007" [The Anti-Terrorism Act of 2020], Republic Act No. 11479 (2020).

206. Barron, *supra* note 33, at 3 (citing Business & Human Rights Resource Centre, Philippines: Business Associations, Trade Unions, Human Rights Organizations & Financial Executives Strongly Push Back Against Anti-Terrorism Act, *available at* <https://www.business-humanrights.org/en/latest-news/philippines-business-associations-trade-unions-human-rights-organizations-financial-executives-strongly-push-back-against-anti-terrorism-act> (last accessed Nov. 30, 2021) [<https://perma.cc/GJ6Q-D74L>]) & The Anti-Terrorism Act of 2020, § 29. *See also* Eimor Santos, *Here Are the Major Issues Raised Against the Anti-Terrorism Act*, CNN PHIL., Jan. 30, 2021, *available at* <https://www.cnnphilippines.com/news/2021/1/30/Anti-Terrorism-Act-oral-arguments-Supreme-Court.html> (last accessed Nov. 30, 2021) [<https://perma.cc/9K6A-4CP6>].

207. *Penera v. Commission on Elections*, G.R. No. 181613, 605 SCRA 574 (2009).

208. *Id.* at 590.

209. *Id.* at 590-91.

or omission applicable to a candidate shall take effect only upon the start of the campaign period.’ The only inescapable and logical result is that the same acts, if done before the start of the campaign period, are lawful.

In layman’s language, this means that a candidate is liable for an election offense only for acts done during the campaign period, not before. The law is clear as daylight — any election offense that may be committed by a candidate under any election law cannot be committed before the start of the campaign period. In ruling that *Penera* is liable for premature campaigning for partisan political acts before the start of the campaigning, the assailed Decision ignores the clear and express provision of the law.²¹⁰

While *Penera* might have a negative impact on leveling the playing field during the elections, supposing that more financially powerful and influential candidates can begin campaigning prior to the campaign period, this decision is inescapably in favor of freedom of expression because it removes the restriction on a candidate’s freedom to campaign before the election period itself.

Another Supreme Court decision in favor of freedom of expression during the elections is *The Diocese of Bacolod v. Commission on Elections*.²¹¹ In 2013, the Diocese posted two tarpaulins on the front walls of the San Sebastian Cathedral of Bacolod.²¹² Placed “within public view[,]” one of the tarpaulins displayed the words “Conscience Vote” and listed “candidates as either ‘(Anti-RH) Team Buhay’ with a check mark, or ‘(Pro-RH) Team Patay’ with an ‘X’ mark.”²¹³

The tarpaulins classified the candidates according to their respective stances on the adoption of Republic Act (R.A.) No. 10354,²¹⁴ or the Responsible Parenthood and Reproductive Health Act of 2012. Candidates who voted for the law’s passage were listed under “Team Patay,” while candidates who voted against its passage were listed under “Team Buhay.”²¹⁵ The COMELEC sought to have the tarpaulin taken down for violating the

210. *Id.* at 590 (emphases omitted).

211. *The Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 747 SCRA 1 (2015).

212. *Id.* at 27.

213. *Id.*

214. *Id.*

215. *Id.*

size requirement for election propaganda, which led the petitioners to file the instant case.²¹⁶

The Court granted the petition and held that the tarpaulin was not election propaganda.²¹⁷ It ruled that “[w]hile the tarpaulin may influence the success or failure of the named candidates and political parties, this does not necessarily mean it is election propaganda. The tarpaulin was not paid for or posted ‘in return for consideration’ by any candidate, political party, or party list group.”²¹⁸ It was emphasized therein that “[e]very citizen’s expression with political consequences enjoys a high degree of protection[,]”²¹⁹ and that the COMELEC cannot engage in content-based regulation of the public’s expression.²²⁰

The Court also discussed the possibility of abusing the definition of “election propaganda.”²²¹ It discussed that

candidates and political parties do solicit the help of private individuals for the endorsement of their electoral campaigns.

On the one extreme, this can take illicit forms such as when endorsement materials in the form of tarpaulins, posters, or media advertisements are made ostensibly by ‘friends[,]’ but ... are really paid for by the candidate or political party. This skirts the constitutional value that provides for equal opportunities for all candidates.²²²

Nevertheless, the Court emphasized that

[t]he guarantee of freedom of expression to individuals without any relationship to any political candidate should not be held hostage by the possibility of abuse by those seeking to be elected. It is true that there can be underhanded, covert, or illicit dealings so as to hide the candidate’s real levels of expenditures. However, labelling all expressions of private parties that tend to [influence] the debate in the elections as election paraphernalia would

216. *Id.* at 28–30.

217. *The Diocese of Bacolod*, 747 SCRA at 87 & 124–25.

218. *Id.* at 87.

219. *Id.* at 82.

220. *See id.* at 92, 96, & 123. The “COMELEC’s general role includes a mandate to ensure equal opportunities and reduce spending among candidates and their registered political parties. *It is not to regulate or limit the speech of the electorate as it strives to participate in the electoral exercise.*” *The Diocese of Bacolod*, 747 SCRA at 123 (emphasis omitted and supplied).

221. *The Diocese of Bacolod*, 747 SCRA at 101–02.

222. *Id.*

be too broad a remedy that can stifle genuine speech like in this case. Instead, to address this evil, better and more effective enforcement will be the least restrictive means to the fundamental freedom.²²³

This ruling of the Court advanced the electorate's freedom of expression because it clarified the limitation thereon with respect to discourse and dialogue on issues that may affect the elections.²²⁴

Evidently, whether in law or in court decisions, freedom of expression and the elections are intertwined in the Philippines.²²⁵ Thus, the regulations on free expression during the elections must be scrutinized to ensure that this inviolable right is not unduly restricted.²²⁶ Worth noting is that an opinion, despite it being "valuable or worthless, correct or false," or stated during an "emotional or rational[]" outburst, is protected under the right to freedom of expression.²²⁷ This is because statements that "contribute[] to the intellectual struggle of opinions on an issue of public concern[]" are protected as expressions.²²⁸

V. FAKE NEWS DURING THE ELECTIONS

Another rising challenge that the Philippines faces with respect to freedom of expression and elections is the proliferation of fake news.²²⁹ The propagation of fake news is a problem haunting "journalists, news media, citizens[,] and

223. *Id.* at 102.

224. *Id.* at 124.

225. *See id.* at 46-47 & 124.

What is involved in this case is the most sacred of speech forms: expression by the electorate that tends to rouse the public to debate contemporary issues. This is not speech by candidates or political parties to entice votes. It is a portion of the electorate telling candidates the conditions for their election. It is the substantive content of the right to suffrage.

The Diocese of Bacolod, 747 SCRA at 124.

226. *The Diocese of Bacolod*, 747 SCRA at 57. "In this case, the Bill of Rights gives the utmost deference to the right to free speech. Any instance that this right may be abridged demands judicial scrutiny." *Id.*

227. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 379 (2d ed. 1997) (citing Campaign Slur Case, 61 BVERFGE I (1982) (Ger.)).

228. *Id.*

229. *See De Leon, et al., supra* note 8, at 162.

open societies.”²³⁰ “Fake news” refers to “the broad spread of stories treated by those who [propagate] them as having been produced by standard journalistic practices, but [which] have not in fact been produced by such practices.”²³¹

Fake news during the elections, or “electoral disinformation[,]” is one of the more recent challenges faced by the electorate, courts of law, legal scholars, and policy-makers.²³² False information is becoming increasingly manipulated and disseminated to influence elections,²³³ leading some states to implement new policies to regulate the negative effects of fake news on democratic processes and government institutions.²³⁴

Disinformation is intended to produce public harm through the inaccurate or misleading information it provides the receiver.²³⁵ Not only does it affect

230. Cherilyn Ireton, *Truth, Trust and Journalism: Why It Matters*, in JOURNALISM, ‘FAKE NEWS’ & DISINFORMATION 33 (Cherilyn Ireton & Julie Posetti eds., 2018) (citing Katharine Viner, *A Mission for Journalism in a Time of Crisis*, GUARDIAN, Nov. 16, 2017, available at <https://www.theguardian.com/news/2017/nov/16/a-mission-for-journalism-in-a-time-of-crisis> (last accessed Nov. 30, 2021) [<https://perma.cc/3ZT7-JHN9>]).

231. Jessica Pepp, et al., *What’s New About Fake News?*, 16 J. ETHICS & SOC. PHIL. 67, 69 (2019).

232. Adam Krzywoń, *Summary Judicial Proceedings as a Measure for Electoral Disinformation: Defining the European Standard*, 22 GERMAN L.J. 673, 673 (2021).

233. *Id.* (citing Sanja Kelly, et al., *Freedom on the Net 2017: Manipulating Social Media to Undermine Democracy*, available at <https://freedomhouse.org/report/freedom-net/2017/manipulating-social-media-undermine-democracy> (last accessed Nov. 30, 2021) [<https://perma.cc/629C-DA8A>]; Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211, 212 (2017); KATHLEEN HALL JAMIESON, *CYBER-WAR: HOW RUSSIAN HACKERS AND TROLLS HELPED ELECT A PRESIDENT — WHAT WE DON’T, CAN’T, AND DO KNOW* 7 (2018); & EUROPEAN PARLIAMENT POLICY DEPARTMENT FOR CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS, *DISINFORMATION AND PROPAGANDA — IMPACT ON THE FUNCTIONING OF THE RULE OF LAW IN THE EU AND ITS MEMBER STATES* 39-50 (2019)).

234. Krzywoń, *supra* note 232, at 674.

235. *Id.* at 675 (citing Claire Wardle & Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policymaking*, at 5 & 20, available at <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c> (last accessed Nov. 30, 2021) [<https://perma.cc/6QFB-HZGJ>] & EUROPEAN PARLIAMENT POLICY

the perception of the receiver, but disinformation also undermines the democratic processes and institutions that enable protection of the “rights of others[.]”²³⁶ Additionally, disinformation is directed towards the furtherance of a political or economic goal, or both.²³⁷

The advent of false information has been observed before and during the election process,²³⁸ when candidates present themselves to the public, until the time the electorate decide their choices for public office.²³⁹ Admittedly, the spread of “intentionally false information[]” harms “collective [and] individual interests.”²⁴⁰ Moreover, it impacts the sovereignty of a state and may lead to the tarnishing of the integrity of its elections.²⁴¹ Further, disinformation is borderless, such that actors perpetrating this phenomenon may operate both domestically and in jurisdictions where they cannot be reached by local penal laws.²⁴² Thus, actors operating externally can influence voter preferences and the national electoral process itself.²⁴³

Another interesting factor in the interplay of freedom of expression and elections is how information through social media is filtered. Through “information operations[.]” or influence operations, voters are influenced into developing certain voting preferences through a study of their attitudes and

DEPARTMENT FOR CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS, *supra* note 233, at 131).

236. Krzywoń, *supra* note 232, at 675.

237. *Id.*

238. *Id.* (citing JEAN-BAPTISTE JEANGÈNE VILMER, ET AL., INFORMATION MANIPULATION: A CHALLENGE FOR OUR DEMOCRACIES 39 (2018)).

239. See Guy Berger, *Foreword* to JOURNALISM, ‘FAKE NEWS’ & DISINFORMATION 10 (2018) (citing David Lipson, Indonesia’s ‘Buzzers’ Paid to Spread Propaganda as Political Elite Wage War Ahead of Election, *available at* <https://www.abc.net.au/news/2018-08-13/indonesian-buzzers-paid-to-spread-propaganda-ahead-of-election/9928870> (last accessed Nov. 30, 2021) [<https://perma.cc/V5BS-GCMG>]).

240. Krzywoń, *supra* note 232, at 676.

241. *Id.*

242. *Id.*

243. *Id.* (citing Ashley C. Nicolas, *Taming the Trolls: The Need for an International Legal Framework to Regulate State Use of Disinformation on Social Media*, 107 GEO. L.J. ONLINE 36, 36–37 (2018) & Manuel Rodriguez, *Disinformation Operations Aimed at (Democratic) Elections in the Context of Public International Law: The Conduct of the Internet Research Agency During the 2016 US Presidential Election*, 47 INT’L J. LEGAL INFO. 149, 150 (2019)).

behaviors.²⁴⁴ This is an underhanded way of meddling with democratic elections, as opposed to direct manipulation of the results thereof.²⁴⁵ However, while information operations are intensifying, international law has yet to regulate such a scheme.²⁴⁶

In the United States (U.S.), where freedom of expression is liberally interpreted, fake news, or electoral disinformation, has grown in significance,²⁴⁷ with the Presidential race in 2016 being one of the more recent and prolific cases involving an “influence campaign (including disinformation operations) aimed at democratic elections[.]”²⁴⁸

According to Manuel Rodriguez, Russian interference with the elections employed a “multifaceted[.]” four-way approach: (1) “cyber intrusion into State and local electoral boards;” (2) “theft of information;” (3) “selective

244. Rodriguez, *supra* note 243, at 152 (citing TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 564 (Michael N. Schmitt ed., 2017); United States Joint Chiefs of Staff, Joint Publication 3-13: Information Operations, at ix, available at <https://www.hsdl.org/?abstract&did=759867> (last accessed Nov. 30, 2021) [<https://perma.cc/X37A-TPQ3>]; Lawrence T. Greenberg, et al., Information Warfare and International Law, at 20, available at http://www.dodccrp.org/files/Greenberg_Law.pdf (last accessed Nov. 30, 2021) [<https://perma.cc/K5R6-G2S2>]; Ido Kilovaty, *Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT'L SEC. J. 146, 152-55 (2018); Jacqueline Van De Velde, The Law of Cyber Interference in Elections, at 8 & 17-21, available at https://web.archive.org/web/20171120142229/https://law.yale.edu/system/files/area/center/global/document/van_de_velde_cyber_interference_in_elections_06.14.2017.pdf (last accessed Nov. 30, 2021); Barrie Sander, *Democracy Under the Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections*, 18 CHINESE J. INT'L L. 1, ¶¶ 8-26 (2019); Duncan Hollis, *The Influence of War; The War for Influence*, 32 TEMPLE INT'L & COMP. L.J. 31, 36 (2018); & Isabella Hansen & Darren J. Lim, *Doxing Democracy: Influencing Elections Via Cyber Voter Interference*, 25 CONTEMP. POL. 150, 152 (2019)).

245. Rodriguez, *supra* note 243, at 152 (citing Hansen & Lim, *supra* note 244, at 152).

246. Rodriguez, *supra* note 243, at 152 (citing Van De Velde, *supra* note 244, at 28).

247. See generally Rodriguez, *supra* note 243, at 150. See also OHLIN, *supra* note 27, at 2-3.

248. Rodriguez, *supra* note 243, at 157 (citing Cambridge Dictionary, Campaign, available at <https://dictionary.cambridge.org/de/worterbuch/englisch/campaign> (last accessed Nov. 30, 2021) [<https://perma.cc/F7JG-P62G>]).

dissemination of information;” and (4) “disinformation and propaganda.”²⁴⁹ Rodriguez further noted that “[w]hile the impacts and effects of disinformation are still hard to measure, it is[,] however, clear that Russia launched a broad influence campaign through the cyber and/or information space to affect the 2016 [P]residential election.”²⁵⁰ He observed that “Facebook[,] for instance, has estimated that approximately 126 million Americans were exposed to Russian backed content on the platform over a period of two years up to Election Day. This was content served from pages associated with the Internet Research Agency[.]”²⁵¹

The subsequent investigation of Russia’s interference in the 2016 elections, called the Mueller Investigation,²⁵² led to the indictment, conviction, or guilty pleas of 34 individuals and three companies, “including top advisers to President Trump, Russian spies[,] and hackers with ties to the Kremlin.”²⁵³ The charges ranged “from interfering with the 2016 election and

249. Rodriguez, *supra* note 243, at 157-58 (citing Van De Velde, *supra* note 244, at 10 & Office of the Director of National Intelligence, Assessing Russian Activities and Intentions in Recent US Elections, at 2-4, available at https://web.archive.org/web/20180215235000/https://www.dni.gov/files/documents/ICA_2017_01.pdf (last accessed Nov. 30, 2021)).

250. Rodriguez, *supra* note 243, at 160 (citing Jarred Prier, *Commanding the Trend: Social Media as Information Warfare*, 11 STRATEGIC STUD. Q. 50, 74 (2017)).

251. Rodriguez, *supra* note 243, at 160 (citing Robert S. Mueller, Report on the Investigation Into Russian Interference in the 2016 Presidential Election, at 15 (March 2019) & Olivia Solon & Sabrina Siddiqui, *Russia-Backed Facebook Posts ‘Reached 126m Americans’ During US Election*, GUARDIAN, Oct. 31, 2017, available at <https://www.theguardian.com/technology/2017/oct/30/facebook-russia-fake-accounts-126-million> (last accessed Nov. 30, 2021) [<https://perma.cc/CM8H-5EP5>]).

See also Carol E. Lee & Jo Ling Kent, *Facebook Says Russian-Backed Election Content Reached 126 Million Americans*, NBC NEWS, Oct. 31, 2017, available at <https://www.nbcnews.com/news/us-news/russian-backed-election-content-reached-126-million-americans-facebook-says-n815791> (last accessed Nov. 30, 2021) [<https://perma.cc/XHB2-5SFD>].

252. Mueller, *supra* note 251, at 1-3. See also ANDREW WEISSMANN, *WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION* xi-xii (2020).

253. Ryan Teague Beckwith, *Here Are All of the Indictments, Guilty Pleas and Convictions From Robert Mueller’s Investigation*, TIME, Nov. 15, 2019, available at <https://time.com/5556331/mueller-investigation-indictments-guilty-pleas> (last accessed Nov. 30, 2021) [<https://perma.cc/6W8Q-ZMEK>].

hacking emails[,] to lying to investigators and tampering with witnesses.”²⁵⁴ Mueller, however, notably “did not charge or suggest charges for anyone on one of the biggest [issues raised]: whether the Trump campaign worked with the Russians to influence the election.”²⁵⁵

In Europe, fake news during elections is also being tackled through new legislation. In France, new legislation was adopted to require a higher degree of transparency in “political advertising on social media[,]” with the purpose of preventing the manipulation of information.²⁵⁶ Obligations were thus set for “online platform operators[]” to provide an avenue for users to report false information “likely to disturb” the electoral process and public order.²⁵⁷

Another notable provision of this law “calls for special judicial proceedings” to stop the propagation of false information “within three months prior to elections.”²⁵⁸ Here, the court must act expeditiously upon petitions of persons with legal interest when there are allegations of “inaccurate or misleading” information, which can “affect forthcoming elections,” being spread through an “online public communication service[.]”²⁵⁹ The court must also determine that the transmission of information was with the intent of influencing voters with respect to the reliability of the elections.²⁶⁰

Lastly, the French law stipulates policies against foreign state intrusions “which could affect the electoral process[.]”²⁶¹

254. *Id.*

255. *Id.*

256. Krzywoń, *supra* note 232, at 674 & 683–84 (citing Loi 2018–1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information [Law 2018–1202 of December 22, 2018 on the fight against the manipulation of information], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 23, 2018; Conseil constitutionnel [CC] [Constitutional Court] decision no. 2018–773 DC, Dec. 20, 2018 (Fr.); Rachael Craufurd Smith, *Fake News, French Law and Democratic Legitimacy: Lessons for the United Kingdom?*, 11 J. MEDIA L. 52, 63–76 (2019); & Amélie Heldt, *Let’s Meet Halfway: Sharing New Responsibilities in a Digital Age*, 9 J. INFO. POL’Y 336, 346 (2019)).

257. Krzywoń, *supra* note 232, at 684.

258. *Id.*

259. *Id.* (citing Code Électoral, Article L163–2 (Fr.)).

260. Krzywoń, *supra* note 232, at 684.

261. *Id.*

Meanwhile, Germany has also enacted a “complex regulation against illegal online content[.]”²⁶² Some have called this regulation “an anti-fake news law” that “penalizes social media networks for harboring false and hateful content in their platforms[.]”²⁶³ while others deem the regulation as one strengthening “existing criminal sanctions” through “heavy fines on social media platforms that fail to [promptly] delete ‘fake reports and hate speech.’”²⁶⁴

Evidently, the complex laws enacted in the European countries to combat fake news, especially during the elections, are more substantial compared to the United States. Notably, these laws require the participation of the court for the summary proceeding to determine whether the information is indeed false in order to curtail such information.²⁶⁵

On the other end of the spectrum are the laws enacted by Singapore to combat fake news. In October 2019, Singapore enacted a law banning “fake news,” or the Protection from Online Falsehoods & Manipulation Act (POFMA).²⁶⁶ The Singaporean government enacted the law and justified its

262. *Id.* (citing Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Netzwerkdurchsetzungsgesetz – NetzDG], BGBl. I S. 3352 (2017) (Ger.) (as amended)).

263. Krzywoń, *supra* note 232, at 684 (citing Juan Carlos Escudero de Jesús, *Fake News and the Systemic Lie in the Marketplace of Ideas: A Judicial Problem?*, 87 REV. JUR. UPR 1394, 1395 & 1413 (2018) (citing Germany Starts Enforcing Hate Speech Law, BBC NEWS, available at <https://www.bbc.com/news/technology-42510868> (last accessed Nov. 30, 2021) [<https://perma.cc/BPX2-T2XZ>])).

264. Krzywoń, *supra* note 232, at 684 (citing Irini Katsirea, “Fake News”: Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty, 10 J. MEDIA L. 159, 159 (2018)).

265. *Id.* at 686.

266. Evelyn Mary Aswad, *In a World of “Fake News,” What’s a Social Media Platform to Do?*, 2020 UTAH L. REV. 1009, 1018 (2020) (citing James Griffiths, *Singapore ‘Fake News’ Law Comes Into Force, Offenders Face Fines and Prison Time*, CNN, available at <https://edition.cnn.com/2019/10/02/asia/singapore-fake-news-internet-censorship-intl-hnk/index.html> (last accessed Nov. 30, 2021) [<https://perma.cc/WUH6-KR4N>])).

See also An Act to Prevent the Electronic Communication in Singapore of False Statements of Fact, to Suppress Support for and Counteract the Effects of Such Communication, to Safeguard Against the

passage on grounds of public order and protection of society against “hostile parties” who could “turn different groups against one another and cause disorder.”²⁶⁷

The Singaporean government has invoked the law against its critics or political opponents.²⁶⁸ Brad Bowyer, a personality opposite the government on the political spectrum, posted his criticism of “investments of two state-owned companies.”²⁶⁹ Bowyer implied that the Singaporean government influenced the investment decision.²⁷⁰ The Minister of Finance then contacted Bowyer and, invoking authority under the POFMA, directed Bowyer to amend his Facebook post.²⁷¹

Clearly, the law was wielded to lessen expression in the sense of “silencing a regime critic[.]”²⁷² This practice is in stark contrast with the intent of the

Use of Online Accounts for Such Communication and for Information Manipulation, to Enable Measures to Be Taken to Enhance Transparency of Online Political Advertisements, and for Related Matters [Protection From Online Falsehoods and Manipulation Act], Act No. 18 of 2019 (2019) (Sing.).

267. Aswad, *supra* note 266, at 1018 (citing Griffiths, *supra* note 266).

268. See, e.g., Human Rights Watch, Singapore: ‘Fake News’ Law Curtails Speech — Migrant Workers’ Rights Ignored During Covid-19 Pandemic, available at <https://www.hrw.org/news/2021/01/13/singapore-fake-news-law-curtails-speech> (last accessed Nov. 30, 2021) [<https://perma.cc/9RAR-4SGV>].

269. Aswad, *supra* note 266, at 1019 (citing Adam Taylor, *First Target of Singapore’s ‘Fake News’ Law Is Facebook Post That Alleged Failed State Investment in Restaurant*, WASH. POST, Nov. 27, 2019, available at <https://www.washingtonpost.com/world/2019/11/25/first-target-singapore-fake-news-law-is-facebook-post-that-alleged-failed-state-investment-salt-bae/> (last accessed Nov. 30, 2021) [<https://perma.cc/UPC4-6QGS>]).

270. *Id.*

271. *Id.*

272. Aswad, *supra* note 266, at 1019-20 (citing Taylor, *supra* note 269 & Tim Cushing, Singapore Government Tests Out Its Fake News Law Against an Opposition Party Leader, available at <https://www.techdirt.com/2019/11/27/singapore-government-tests-out-fake-news-law-against-opposition-party-leader> (last accessed Nov. 30, 2021) [<https://perma.cc/U7XG-5TSY>]).

law, which is the protection of society “from online foreign interference” and the promotion of “sectarian harmony.”²⁷³

A similar instance was when the Singaporean government ordered the correction of a Facebook post by the editor of an Australian website.²⁷⁴ The editor rejected the order, reasoning that he was outside of Singapore’s jurisdiction.²⁷⁵ However, Facebook itself complied with the Singaporean government’s order by adding to the original post the statement, “Facebook is legally required to tell you that the Singapore government says this post has false information[.]”²⁷⁶

VI. ELECTORAL DISINFORMATION IN THE PHILIPPINES

In the Philippines, there is no specific law that addresses fake news during the election period.²⁷⁷ A perusal of the Omnibus Election Code and the Fair Election Act would show that election disinformation was not envisioned at the time these laws were enacted. Notably, not even COMELEC Resolution No. 10488 addressed the creation and spread of fake news during the election period.²⁷⁸ The closest law addressing fake news would be Section 6 (f) of the

273. Aswad, *supra* note 266, at 1020 (citing Taylor, *supra* note 269 & Cushing, *supra* note 272).

274. Aswad, *supra* note 266, at 1020 (citing Niharika Mandhana & Phred Dvorak, Ordered by Singapore, Facebook Posts a Correction, *available at* <https://www.marketwatch.com/story/ordered-by-singapore-facebook-posts-a-correction-2019-11-30> (last accessed Nov. 30, 2021) [<https://perma.cc/F77L-9Y4Y>] & Cameron Wilson, This Man’s Post Was the First to Be “Corrected” by Facebook Under Singapore’s Fake News Law, *available at* <https://www.buzzfeed.com/cameronwilson/singapore-fake-news-law-facebook-correction> (last accessed Nov. 30, 2021) [<https://perma.cc/RUK5-KQXQ>]).

The Australian website editor explained that “he was contacted by a friend who saw the correction order” from the Singaporean government. The editor then “posted that he would not comply with foreign governmental orders.” Aswad, *supra* note 266, at 1020 n. 61 (citing Wilson, *supra* note 274).

275. Aswad, *supra* note 266, at 1020 (citing Mandhana & Dvorak, *supra* note 274 & Wilson, *supra* note 274).

276. Aswad, *supra* note 266, at 1020 (citing Mandhana & Dvorak, *supra* note 274).

277. Lian Buan, *Duterte’s Special Powers Bill Punishes Fake News by Jail Time, Up to P1-M Fine*, RAPPLER, Mar. 24, 2020, *available at* <https://www.rappler.com/nation/255753-duterte-special-powers-bill-coronavirus-fines-fake-news> (last accessed Nov. 30, 2021) [<https://perma.cc/4EBX-L4VR>].

278. COMELEC Res. No. 10488.

Bayanihan to Heal as One Act, but it is not specifically applicable to the elections.²⁷⁹

Philippine jurisprudence likewise lacks any significant discussion on fake news, or on electoral disinformation.²⁸⁰ The only instance that “fake news” was mentioned by the Supreme Court was in the dissenting opinion of Associate Justice Marvic M.V.F. Leonen in *Lagman v. Medialdea*,²⁸¹ which raised the possibility of fake news affecting the factual determination of rebellion to justify Martial Law if not thoroughly scrutinized by the Court —

Ignoring the cultural context will render this Court vulnerable to accepting any narrative, no matter how farfetched. A set of facts which should be easily recognized as unrelated to rebellion may be linked together to craft a tale of rebellion which is convincing only to those unfamiliar with the factual background in which the story is set. Blindly accepting a possibly farfetched narrative of what transpired in Marawi leading up to and including the events of [23 May 2017] and ignoring the cultural context will have its own consequences. The public will accept this farfetched narrative as reasonable or the truth, when it could be nothing but ‘fake news.’ In turn, the government may be inadvertently doing a service for [the] Maute Group and ISIS[,] projecting them as bigger than what they really are.²⁸²

The concern of Associate Justice Leonen should not be taken with a grain of salt. Indeed, fake news can affect the decision-making authorities of the State.²⁸³ It is an inescapable fact that the Philippines is not immune to this phenomenon.²⁸⁴ In fact, in 2020, an artist and activist was charged with a violation of the cybercrime law, as well as with spreading fake news, without the government verifying whether she was indeed connected thereto.²⁸⁵

279. See *Bayanihan to Heal as One Act*, § 6 (f).

280. Worth noting is *Guy v. Tulfo*, which highlighted the nature of journalism as a profession and its value to a democratic society. *Guy*, 901 SCRA at 164.

281. *Lagman v. Medialdea*, G.R. No. 231658, 829 SCRA 1 (2017).

282. *Id.* at 580 (J. Leonen, dissenting opinion).

283. See Benjamin C. M. Fung, *Foreword* to NAVIGATING FAKE NEWS, ALTERNATIVE FACTS, AND MISINFORMATION IN A POST-TRUTH WORLD xv (2020).

284. See De Leon, et al., *supra* note 8, at 162.

285. Carlos H. Conde, Philippine Activists Charged with Seditious, ‘Fake News’, available at <https://www.hrw.org/news/2020/04/22/philippine-activists-charged-sedition-fake-news> (last accessed Nov. 30, 2021) [<https://perma.cc/U9W2-NM9D>] & Ana P. Santos, Filipino Artist Confronts Duterte on COVID-19 Response, available at <https://www.dw.com/en/maria-victoria-beltran-filipinoartist-confronts-duterte-on-covid-19-response/a-53524106> (last accessed Nov. 30, 2021) [<https://perma.cc/UH38-XYW5>].

Reliance on characterizing speech as fake news, without checking the verified facts of the speech itself, has been directly used to stifle the freedom of expression of some citizens in the Philippines.²⁸⁶

According to Professor Clarissa David of the College of Mass Communication of the University of the Philippines, fake news attempts to “agitate readers or consumers[,]” with the objective of convincing them that the information, though fake, should be taken seriously.²⁸⁷ This is in contrast with “legitimate news organizations,” which, as a rule, comply with the rules of journalism that require them to present balanced views and, as much as possible, avoid sensationalism.²⁸⁸ Further, purveyors of fake news “mimic[] the reportage of more established news media organizations, especially the ones that are identified with the dominant media[.]”²⁸⁹ Thus, it is arduous for an ordinary citizen to set aside fake news, especially electoral disinformation.²⁹⁰

Despite attracting negative publicity during the 2016 national elections, President Rodrigo R. Duterte still emerged as a frontrunner and the eventual victor.²⁹¹ His success, however, garnered criticism due to allegations of

286. Graham Vyse, Disinformation on Social Media is Threat to Democracy, Rappler CEO Says, *available at* https://www.voanews.com/a/press-freedom_disinformation-social-media-threat-democracy-rappler-ceo-says/6198583.html (last accessed Nov. 30, 2021) [<https://perma.cc/2HVT-FHPE>].

287. Kim G. Quilanguing, The Problem With Fake News: UP Experts Speak on the Impact of Disinformation on Politics, Society and Democracy, *available at* <https://up.edu.ph/the-problem-with-fake-news-up-experts-speak-on-the-impact-of-disinformation-on-politics-society-and-democracy> (last accessed Nov. 30, 2021) [<https://perma.cc/EA97-UFF8>].

288. *Id.* & STEPHEN JOHN ANTHONY WARD, THE INVENTION OF JOURNALISM ETHICS: THE PATH TO OBJECTIVITY AND BEYOND 10 & 310 (2004).

289. *Id.*

290. See Shu, et al., *supra* note 28, at 2.

291. Travis M. Andrews, *After ‘Disgusting’ Gang Rape Joke, Philippine Presidential Contender Duterte Widens Lead*, WASH. POST., Apr. 25, 2016, *available at* <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/25/after-disgusting-gang-rape-joke-philippine-presidential-contender-duterte-widens-lead> (last accessed Nov. 30, 2021) [<https://perma.cc/58NJ-RBF6>].

proliferating false endorsements,²⁹² narrative shifting,²⁹³ and fabrication of imposter news websites.²⁹⁴

According to a study by Professors Jonathan Corpus Ong and Jason Vincent A. Cabañes,²⁹⁵ one media enterprise — Twinmark Media Enterprises — focused on “creating political and pro-Duterte content around the time of the 2016 election” pursuant to “commercial experimentation[,]” and driven by the huge boost of advertisement revenues.²⁹⁶ It even created Trending News Portal, which was called “the ‘top source of news’ of pro-Duterte influencer” Mocha Uson until it was banned by Facebook.²⁹⁷ The report further stated that due to the success of Duterte’s political campaign, fueled by electoral disinformation, Twinmark continued “the heat of a loud and vitriolic political campaign,” and the “pro-Duterte content organically

292. Buddy Gomez, *OPINION: If Duterte Has Nothing to Hide...*, ABS-CBN NEWS, May 4, 2016, available at <https://news.abs-cbn.com/blogs/opinions/05/04/16/opinion-if-duterte-has-nothing-to-hide> (last accessed Nov. 30, 2021) [<https://perma.cc/HQ35-6MGN>].

293. BBC Trending, *Trolls and Triumph: A Digital Battle in the Philippines*, BBC NEWS, Dec. 7, 2016, available at <https://www.bbc.com/news/blogs-trending-38173842> (last accessed Nov. 30, 2021) [<https://perma.cc/2JXG-QY7Y>].

294. JONATHAN CORPUS ONG & JASON VINCENT A. CABAÑES, *POLITICS AND PROFIT IN THE FAKE NEWS FACTORY: FOUR WORK MODELS OF POLITICAL TROLLING IN THE PHILIPPINES* 4 (2019).

295. *Id.*

296. *Id.* at 18 & 19 (citing Warren de Guzman, *How Social Media ‘Influencers’ Helped Twinmark Disseminate Fake News*, ABS-CBN NEWS, Mar. 8, 2019, available at <https://web.archive.org/web/20210506093728/https://news.abs-cbn.com/news/03/08/19/how-social-media-influencers-helped-twinmark-disseminate-fake-news> (last accessed Nov. 30, 2021)).

297. ONG & CABAÑES, *supra* note 294, at 17-18 (citing Patricia Evangelista, *Mocha Uson: Fake News Victim or Fake News Peddler?*, RAPPLER, Oct. 21, 2017, available at <https://www.rappler.com/newsbreak/investigative/185560-mocha-uson-posts-news> (last accessed Nov. 30, 2021) [<https://perma.cc/W5L2-MNJV>]) & Resolution Urging the House Committee on Public Information to Investigate, in Aid of Legislation, the Alleged Building of Internet Troll Farms for the 2022 Elections With the Use of Public Funds by an Undersecretary of the Executive Department, H. Res. No. 1900, whereas cl. para. 4, 18th Cong., 3d Reg. Sess. (2021) (citing Rappler.com, *PH Company Banned by Facebook Spread Lies, Used Fake Accounts*, RAPPLER, Jan. 11, 2019, available at <https://www.rappler.com/technology/social-media/220741-facebook-remove-trending-news-portal-twinmark-media-enterprises> (last accessed Nov. 30, 2021) [<https://perma.cc/GL2S-T7AX>]).

generated many more clicks, likes, and shares for their websites compared to” the opposition.²⁹⁸

By 2019, the campaign funds of politicians were significantly invested in social media.²⁹⁹ Candidates “from the national to the *barangay* [] level[,]” whether belonging to the administration or to opposition groups, “enlist digital workers for campaign operations, with operators ranging from the professional to the amateur to the *ad hoc*.”³⁰⁰

In response, “new interventions such as platform bans, fact-check partnerships, and digital advertising rules”³⁰¹ have been adopted by private organizations, legitimate media sources, and non-governmental advocacy groups, such as election watchdog Kontra Daya and Tsek.ph,³⁰² to prevent, or at least minimize, the spread of electoral disinformation.³⁰³

However, despite these mechanisms, electoral disinformation was still rampant in manipulating the seeds of political messages among groups of unsuspecting voters.³⁰⁴ These discrete methods “exploit citizens’ mistrust against the political establishment in exchange for clicks that can be monetiz[ed] through advertisements.”³⁰⁵ Accordingly, absent a strong and concrete law or policy from the State, the suppression of electoral disinformation cannot be accomplished by private organizations by themselves.³⁰⁶

298. ONG & CABAÑES, *supra* note 294, at 19.

299. Jonathan Corpus Ong, et al., Tracking Digital Disinformation in the 2019 Philippine Midterm Election, at 5, available at <https://www.newmandala.org/wp-content/uploads/2019/08/Digital-Disinformation-2019-Midterms.pdf> (last accessed Nov. 30, 2021) [<https://perma.cc/A26A-G6G5>].

300. *Id.* (emphasis supplied).

301. ONG & CABAÑES, *supra* note 294, at 4.

302. Quilanguing, *supra* note 287.

303. See ONG & CABAÑES, *supra* note 294, at 4.

304. *Id.* at 17.

305. Ong, et al., *supra* note 299, at 5.

306. See JONATHAN CORPUS ONG & ROSS TAPSELL, MITIGATING DISINFORMATION IN SOUTHEAST ASIAN ELECTIONS: LESSONS FROM INDONESIA, PHILIPPINES AND THAILAND 30 (2020).

In the upcoming 2022 elections, troll farms, or groups of people who are paid to or voluntarily spread fake news, are a cause for concern.³⁰⁷ Troll farms are a danger to “the country’s democracy, especially in the coming elections[.]” and could “create a false clamor for a fake presidential candidate.”³⁰⁸ It is expected that electoral disinformation will grow more widespread in the upcoming elections given the increase in online engagement, especially since the pandemic has compelled more people to spend more time at home and online.³⁰⁹

According to Jayeel Serrano Cornelio, Director and Associate Professor of the Development Studies Program at the Ateneo de Manila University, one of the effective ways to combat electoral disinformation is through voter education, which “should be ‘reframed’ to address new and existing issues in the electoral process[.]”³¹⁰

Fake news is a growing field of concern, especially in light of the weak protection of free expression in the Philippines, particularly during the election period.³¹¹ Due to lack of verification of news, citizens who may be legitimately airing their concerns during the elections could be censored through such fake news.³¹²

307. H. Res. No. 1900, whereas cl. para. 3 (citing James Titcomb, *Governments in 30 Countries Are Paying ‘Keyboard Armies’ to Spread Propaganda*, TELEGRAPH, Nov. 14, 2017, available at <https://www.telegraph.co.uk/technology/2017/11/14/governments-30-countries-pay-keyboard-armies-spread-propaganda> (last accessed Nov. 30, 2021) [<https://perma.cc/SXU6-WUY5>] & Scottie Barsotti, *Weaponizing Social Media: Heinz Experts on Troll Farms and Fake News*, available at <https://www.heinz.cmu.edu/media/2018/October/troll-farms-and-fake-news-social-media-weaponization> (last accessed Nov. 30, 2021) [<https://perma.cc/7EA9-74QE>]).

308. Nestor Corrales, *Probe Troll Farms, Lawmakers Urge*, PHIL. DAILY INQ., June 21, 2021, available at <https://newsinfo.inquirer.net/1448598/probe-troll-farms-lawmakers-urge> (last accessed Nov. 30, 2021) [<https://perma.cc/4RGV-CZKR>].

309. Katrina Domingo, *Expect 2022 Polls to Be ‘More Messy,’ Dirtier as COVID-19 Pandemic Persists, Says Expert*, ABS-CBN NEWS, Feb. 26, 2021, available at <https://news.abs-cbn.com/news/02/26/21/expect-2022-polls-to-be-more-messy-dirtier-as-covid-19-pandemic-persists-says-expert> (last accessed Nov. 30, 2021) [<https://perma.cc/U3J5-PQMW>].

310. *Id.*

311. Barron, *supra* note 33, at 47.

312. *Id.*

VII. CONCLUSION AND RECOMMENDATIONS

Freedom of expression is an inviolable and universal human right.³¹³ It must be protected against excessiveness of the State.³¹⁴ Only in limited instances may this freedom be regulated,³¹⁵ especially during the elections. So that every “individual is able to make informed electoral choices, the general population must be informed and made aware of the political agendas of the candidates and of their ability to secure the public’s natural rights.”³¹⁶ Free speech “continues to fulfill this essential role not only during elections, but also throughout the political process, as it serves as a means of keeping elected officials honest.”³¹⁷

In the Philippines, certain laws restrict free expression and can be utilized during the election period. Libel laws are perhaps the most prominent, imposing criminal sanctions on malicious imputations.³¹⁸ The Author believes that it is high time to decriminalize libel laws to prevent their weaponization against ordinary citizens who simply wish to voice their expressions, especially at a critical period for national governance. Nevertheless, if the decriminalization of libel cannot be achieved in the future, the duty rests on the courts to exercise restraint in applying the harsh law on libel and similar restrictions on freedom of expression.

The Court has rendered decisions championing freedom of expression during the elections. Indeed, the exercise of the right to vote is the great

313. UDHR, *supra* note 13, art. 19.

314. *See Chavez*, 545 SCRA at 527 (J. Carpio, concurring opinion).

Any citizen must be allowed to take up the cudgels for those who have been cowed into inaction because freedom of expression is a vital public right that *must be defended by everyone and anyone*.

Freedom of expression, being fundamental to the preservation of a free, open[,] and democratic society, is of *transcendental importance* that must be defended by every patriotic citizen at the earliest opportunity.

Chavez, 545 SCRA at 527 (J. Carpio, concurring opinion) (emphasis supplied).

315. *See ICCPR*, *supra* note 14, art. 19, ¶ 3 (a)-(b).

316. *Yanchukova*, *supra* note 191, at 865. *See also The Diocese of Bacolod*, 747 SCRA at 90-91 (citing Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know”*, 72 MD. L. REV. 1, 9 (2012)).

317. *Yanchukova*, *supra* note 191, at 865. *See also Chavez*, 545 SCRA at 528 (J. Carpio, concurring opinion).

318. REV. PENAL CODE, art. 353.

equalizer in a democratic society.³¹⁹ No matter how powerful a politician is during his or her tenure, he or she will always be subject to the judgment of the people through their exercise of their right to vote.³²⁰ This right can only be effectively exercised when the freedom of expression of the electorate is protected, safeguarded, and defended by the democratic institutions where the right can be asserted.³²¹ Consequently, the electorate may be purposefully educated as to who among the candidates are worthy of public office.³²² As such, the courts play a vital role in ensuring that the freedom of expression remains sacred and unalterable.³²³

Another aspect of concern in the Philippines with respect to freedom of expression and the elections is the proliferation of fake news or election disinformation. As discussed, the Philippines has no specific law that regulates election disinformation, especially on social media.³²⁴ It is thus essential that the Philippines adopt a legal framework to effectively address fake news without, however, unnecessarily restricting freedom of expression of the people.

319. ANGKLA: Ang Partido ng mga Pilipinong Marino, Inc. (ANGKLA) and Serbisyo sa Bayan Party (SBP) v. Commission on Elections, et al., G.R. No. 246816, Sept. 15, 2020, at 20, *available at* <https://sc.judiciary.gov.ph/15997> (last accessed Nov. 30, 2021). The decision referenced Justice Estela Perlas-Bernabe's separate concurring opinion, calling the "one person, one vote" truism an "equalizer" that "is a knock against elitism and advances the egalitarian concept that all persons are equal before the eyes of the law." *Id.* & ANGKLA: Ang Partido ng mga Marinong Pilipino, Inc. (ANGKLA) and Serbisyo sa Bayan Party (SBP) v. Commission on Elections, et al., G.R. No. 246816, Sept. 15, 2020, at 10, *available at* <https://sc.judiciary.gov.ph/16002> (J. Perlas-Bernabe, concurring opinion) (last accessed Nov. 30, 2021).

320. *See The Diocese of Bacolod*, 747 SCRA at 77.

To ensure order in running the state's affairs, sovereign powers were delegated[,] and *individuals would be elected or nominated in key government positions to represent the people. On this note, the theory on deliberative democracy may evolve to the right of the people to make government accountable. Necessarily, this includes the right of the people to criticize acts made pursuant to governmental functions.*

The Diocese of Bacolod, 747 SCRA at 77 (emphases supplied).

321. *See The Diocese of Bacolod*, 747 SCRA at 77.

322. *Id.* at 90-91 (citing Sullivan, *supra* note 316, at 9).

323. *See The Diocese of Bacolod*, 747 SCRA at 41.

324. Buan, *supra* note 277.

There are three models that may be adopted: the liberal regulations of the United States;³²⁵ the court-assisted regulations of European countries through summary procedure to classify fake news;³²⁶ or the strict curtailment of disinformation by Singapore, which is usually directed towards government critics.³²⁷ Any legal framework the Philippines will adopt must be thoroughly studied so that the inviolable right to freedom of expression during elections will not be impeded on whatever platform it is voiced or articulated.

For the coming 2022 elections, the Philippine government must act swiftly to stop or, at the very least, minimize the spread of electoral disinformation as it stifles the marketplace of ideas in exercising the right to vote.³²⁸

Three components may be adopted to achieve this purpose. First, the State must enact a law or pass regulations to combat electoral disinformation, without bias as to whether the intended target is an ally or opposition of the current administration. Second, the State must promote voter education to address the growing concern of electoral disinformation, especially on the different social media platforms.³²⁹ Third, different stakeholders, such as citizens organizations, legitimate media sources, and non-governmental advocacy groups, should become engaged in the campaign against electoral disinformation.³³⁰ This multi-sectoral approach should be espoused to protect the freedom of expression of the citizenry in time for elections, where the wheels of democracy are at their optimum.

As participants in the democratic process of representative government, all citizens have an interest in receiving information about political affairs.³³¹

325. See FLORANGEL ROSARIO-BRAID, COMMUNICATION AND SOCIETY: THE PHILIPPINE CONTEXT 8 (1991). “Philippine jurisprudence follows closely American jurisprudence in the liberal interpretation of freedom of speech.” *Id.*

326. Krzywoń, *supra* note 232, at 686.

327. See generally Aswad, *supra* note 266, at 1018–20.

328. See generally Hana Bordey, ‘Demonized’ in 2019, *Opposition Urges Crackdown vs. Trolls Ahead of Eleksyon 2022*, GMA NEWS, June 22, 2021, available at https://www.gmanetwork.com/news/topstories/nation/792529/demonized-in-2019-opposition-urges-crackdown-vs-trolls-ahead-of-eleksyon-2022/story/?fbclid=IwAR13nX-gr179VxhBA8lZFylaXuOSTj_UMdDsFloY9sc5f4J5J81L85osVOE (last accessed Nov. 30, 2021) [<https://perma.cc/Y2RU-F7HZ>].

329. See Domingo, *supra* note 309.

330. See generally Quilinguing, *supra* note 287.

331. *Lange v. Australian Broadcasting* (1997) 145 ALR 96, 115 (Austl.).

A voter's consideration of convenience and his or her own welfare in relation to the welfare of the society is advanced by discussion and dialogue on political matters.³³² Necessarily, this includes information on the qualification of the candidates as presented on traditional and social media.³³³ Additionally, those expressions which tend to offend our senses must be given due consideration, as a democratic society should be open, broadminded, tolerant, and open to pluralism.³³⁴

As a closing note, governmental authorities, which necessarily include the courts, should not overlook the great social value that freedom of expression imparts upon the democratic process, especially with respect to the processing of information during the elections. Speech restrictions that are dictated by fear and subversion may be abused by the government in the context of state preservation, and it is up to the citizenry to be vigilant of these possible abuses. Government authorities should be mindful of the fact that too much concern for the security of the State, or their own interests as government officials, will tend to have an injurious effect on the right to freedom of expression.

Lastly, it must be remembered that sovereign power, which resides in the people,³³⁵ is exercised on the people's behalf by representatives. Freedom of communication in public affairs and political discussion is indispensable to accountability and responsibility of the representatives to the electorate.³³⁶ Without such freedom of communication, the representative government would not be truly embodying its purpose as a government by and of the people.

332. Jane Gingrich, *Visibility, Values, and Voters: The Informational Role of the Welfare State*, 76 J. POL. 565, 565 (2014).

333. *See id.* at 567.

334. *Id.* at 568.

335. PHIL. CONST. art. II, § I.

336. *Australian Capital Television v. Commonwealth of Australia* (1992) 108 ALR 577, 594 (Austl.).