

RESEARCH BRIEF

Current Issues in Philippine Jurisprudence: Understanding the Right to Free Speech and Expression

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Introduction

The right to free speech/expression is crucial to the proper functioning and success of any democracy. Without the recognition of such right, it is reasonable to maintain that citizens are hindered from actively participating in political discourse as well as in the process of nation-building. To see the significance of the recognition of such right and the implications of its curtailment, one only needs to consider its critical role in the electoral process. The practice of the right to free speech/expression is required during the electoral process in the sense that the right to vote necessitates the right to free speech/expression. In this and other similar contexts, it might, therefore, be said that the value we attribute to free speech/expression lies in its consequences. However, free speech/expression is also valuable in itself for it displays our capacity for autonomy. To be specific, it displays our capacity as rational beings who participate not only in the electoral process but also in collective governance. Since we value autonomy, we also value freedom of speech/expression.

From what has been said, it is important to note that how we develop and practice our autonomy is shaped by the social realm that we belong to. Consequently, how we understand and practice our freedom of speech/expression is also determined by the social realm that we are a part of. What this means is that the social and political conditions of the society that we are a part of also determine the circumstances for the practice and limitations of our right to free speech/expression. At the outset, it needs to be mentioned that the idea that freedom of speech/expression can be limited is not controversial. After all, our liberties are exercised under specific legal constraints. At this juncture, however, we are forced to ponder upon questions of vital importance not only to law and philosophy but also to the political maturity of our people and our social and political institutions: Under what circumstances can the government/state be justified in limiting our fundamental rights such as the right to freedom of speech/expression?

From the abovementioned context, this paper aims to show that the decisions to the procedural and

substantive issues in *Navarra v. COMELEC* (2015) are questionable since they give primacy to the right to free speech/expression over the right to equality and equal opportunity. The main reason for this is as follows: If we look at liberalism's emphasis on the importance of the role of autonomy in a representative democracy, we can see that our fundamental rights are founded upon our right to equality and our right to equal opportunity. Consequently, in cases where there is a conflict between our right to equality and equal opportunity and our other fundamental rights (e.g., our right to free speech/expression), our right to equality and equal opportunity takes precedence over our other rights. If the aforementioned argument is correct (or at least, plausible), it can be maintained that the decisions in *Navarra v. COMELEC* (2015) should have prioritized our right to equality and equal opportunity over our right to free speech/expression.

The paper is divided into five sections. Section I provides an introduction to the problem as well as the general structure of the main argument being offered as a solution to it. It also discusses, albeit very briefly, the overall significance of the paper. Section II provides an exposition and analysis of how the majority and dissenting opinions in *Navarra v. COMELEC* (2015) frame the right to free speech/expression. To be more specific, this section will emphasize that the Supreme Court's (henceforth the Court) decisions in *Navarra v. COMELEC* (2015) highlight how the aforementioned rights are framed within the context of a liberal ideology due to our government's adherence to a representative democracy. In addition, this section also discusses the first premise of the main argument, which states that: (P1) Since a representative democracy adopts a liberal ideology, it is crucial to understand our fundamental rights in line with the tenets of liberalism.

In Section III, the remaining premises of the main argument are fully discussed and developed. They are as follows: (P2) The tenets of liberalism are founded on the main assumption that individuals are autonomous beings. (P3) This assumption can take the form of the principle of autonomy which emphasizes that the right to equality and the right to equal opportunity are the foundations of our other fundamental rights. (P4) Since they are the foundations of our fundamental rights, they take precedence over our right to free speech/

expression. (P5) These primary rights along with our other fundamental rights are protected by our right to the equal protection of the law. (P6) In *Navarra v. COMELEC* (2015), an analysis of our right to practice freedom of speech/expression should be put side by side with how it affects our right to equal opportunity using the lens of our right to the equal protection of the law. (P7) To assess whether the issues in *Navarra v. COMELEC* (2015) can be evaluated using the equal protection clause of the Constitution of the Republic of the Philippines (1987), we must apply the three-tiered test of the doctrine of equal protection to these issues. From (P1)–(P7), it is concluded that the decisions in *Navarra v. COMELEC* (2015) are misguided in favoring the petitioners' claim that their right to free speech/expression (i.e. political speech) was infringed upon by the Commission on Elections (henceforth COMELEC) after it issued a letter and a notice for the removal of the former's second tarpaulin, which contained an election propaganda.

Section IV is devoted to the discussion of some possible counter-arguments to the main argument presented above. These counter-arguments attack (P4)–(P6) as they claim that: (1) a better hierarchy of our political and civil rights can be derived from the distinction between derogable and non-derogable rights, and (2) an actual application of the doctrine of equal protection by the Court shows that it protects freedom of speech/expression over the right to equal opportunity as can be seen in *1-UTAK v. COMELEC* (2015). Finally, Section V, the conclusion of the paper, provides some comments on the clash between individual rights and public welfare. In the process, a thought experiment will also be introduced to accentuate the crucial role of the right to equality and equal opportunity in the realization of the value of the right to free speech/expression.

There are two main reasons as to why the problem and the argument being offered in this paper merit a thorough exposition and a critical analysis. First, they provide us with an opportunity to give a rational critique of the decisions to the procedural and substantive issues in *Navarra v. COMELEC* (2015). In this context, it can be said that the position advanced in this paper can provide the Court with another way of looking at how we can understand the right to free

speech/expression when it is juxtaposed with the right to equality and equal opportunity. Second, on a more fundamental level, they provide us with an opportunity to make sense of the hierarchy of our civil and political rights. Though it is generally agreed upon that all our civil and political rights are not created equal and not without limitations, there is still the occasional question as to when they may be justifiably curtailed by the government/state. From these two main reasons, it can be said that the overall significance of this paper lies in its attempt to give a theoretical analysis and a practical application of a conception of civil and political rights where the right to equality and equal opportunity have greater value than the right to political speech/expression.

The Right to Free Speech/Expression as It is Framed in the Majority and Dissenting Opinions on the Navarra v. COMELEC Case

As stated earlier, this section seeks to develop and establish (P1) of the main argument. In the process of discussing (P1), it will also demonstrate how the majority and dissenting opinions in Navarra v. COMELEC (2015) characterize the right to free speech/expression. For the sake of clarity, as well as to ensure the thoroughness of the analysis that will follow, it is imperative to begin with the decisions on the procedural and substantive issues in Navarra v. COMELEC (2015). The Court's rulings on the procedural issues are as follows: (1) The Court claimed that it has jurisdiction over the case. (2) COMELEC committed a grave abuse of discretion by limiting political speech. (3) In directly filing the case to the Supreme Court, the petitioners did not violate the doctrine of hierarchy of courts. (4) COMELEC's rule regarding the second tarpaulin's size limitation does not involve a political question. (5) The argument on the exhaustion of administrative remedies is irrelevant in this case (Navarra v. COMELEC, 2015). As for the substantive issues, the Court maintained that (6) the regulation for the tarpaulin in question is content-based and not content-neutral. (7) COMELEC did not have a legal basis for regulating expressions made by private citizens. (8) COMELEC's letter and notice violated the petitioners' right to free speech/expression. Not only

that, (9) it violated the petitioners' right to equality. The Court also maintained that (10) COMELEC's notice and letter for the removal of the second tarpaulin violated the petitioners' right to property and (11) COMELEC's actions did not violate the petitioners' right to the free exercise of religion as well as the principle of the separation of church and state (Navarra v. COMELEC, 2015).

A country's system of governance has important implications to the kind of decisions that we can expect from the judiciary. In line with this, it is important to note that the Philippine government practices a representative democracy. The primary characteristic (or feature) of a representative democracy is that it adopts a system of government that allows its citizens to choose their representatives in the government. According to Michael Mezey (2008), the usual characteristics associated with a representative democracy are as follows:

- (1) (P)ublic policy is made by representatives of the people and not by the people themselves;
- (2) these representatives are elected by citizens typically grouped into units called constituencies;
- (3) as is the case in a democracy, all adult citizens, with only rare exceptions, are allowed to vote for representatives, and all citizens have one vote; and
- (4) representatives are accountable for their actions to those who elect them—their constituents—and can be replaced by them at the next election. (p. 2)

Mezey is not alone in describing the characteristics of a representative democracy this way. Amy Gutman (2007), for instance, gave a similar characterization of a representative democracy and maintained that these characterizations also provide us with the usual justifications for adopting a representative democracy (pp. 521–522). Take note that the characterizations provided above include the concept of accountability and this counts as one of the important justifications that one may provide for preferring a representative democracy over other alternatives. Although there seems to be no problem with the characteristics provided above, it is plausible to maintain that the overall description shows the inherent contradiction in the term representative democracy (Mezey, 2008, p. 2).

The inherent contradiction may be described this way. A democracy involves the practice of self-governance. Yet, in a representative democracy, the citizens are governed by their representatives. Even if they voted for these representatives, it is still the case that political decisions are made by a minority whose verdicts on an issue may not mirror the views of those they represent or, worse, their verdicts may be influenced by their own self-interests or the interests of those with financial or political resources. To address this contradiction, Mezey (2008) provided an additional requirement that will make a representative democracy purely democratic. To further this end, Mezey adopted (1)–(4) above but added that “democracy also requires political equality in the sense that all citizens hold equal political power” (p. 6). This emphasis on the role of political equality is crucial because it demonstrates that political equality takes a fundamental role compared to all our other rights. To put it explicitly, a representative system must give preference to our right to equality so that we may practice our other fundamental rights like our right to political speech/expression and our right to suffrage.

It is essential to note that the abovementioned characteristics of a representative democracy are a byproduct of a political system’s adherence to a liberal political ideology. Since it upholds a liberal political ideology, a representative democracy is also called a liberal democracy. That these two terms are interchangeable is not surprising. David Held (2006), for instance, noted that associating liberalism with a representative democracy should not be problematic for liberalism supports the main assumptions of a representative democracy as “(it) signifies the attempt to uphold the values of freedom of choice, reason and toleration in the face of tyranny, the absolutist system and religious intolerance” (p. 59). He continued to explain that the modern conception of liberalism as a view where “individuals should be free to pursue their own preferences in religious, economic and political affairs—in fact, in most matters that affect daily life” (Held, 2006, p. 59) is the main characteristic of representative democracies.

At this point, one of the factors necessary to support (P1) has been clearly established (i.e., a representative democracy is also a liberal democracy, and for

that matter, it adopts a liberal political ideology). To fully establish (P1), the proceeding discussion will demonstrate that it is crucial to understand our fundamental rights in line with the tenets of liberalism. At this juncture, it is also important to note that in the process of fully establishing (P1), the supporting claims for (P2) will also be shown. Recall that according to (P2), the tenets of liberalism are founded on the main assumption that individuals are autonomous beings.

In *Navarra v. COMELEC* (2015), the majority’s characterization of the right to free speech/expression consistently emphasizes that the guarantees for an individual’s or an institution’s possession of a right are hinged on the assumption that they possess the capacity for autonomy. The *ponente*, Justice Marvic Leonen, recognized this point as he cited the idea put forth by Herbert Marcuse. Here is the actual passage that Justice Leonen quoted from Marcuse:

Liberty is self-determination, autonomy...It stipulates the ability to determine one’s own life: to be able to determine what to do and what not to do, what to suffer and what not. But the subject of this autonomy is never the contingent, private individual as that which he actually is or happens to be; it is rather the individual as a human being who is capable of being free with the others. And the problem of making possible such a harmony between every individual liberty and the other is not that of finding a compromise between competitors, or between freedom and law, between general and individual interest, common and private welfare in an established society, but of creating the society in which man is no longer enslaved by institutions which vitiate self-determination from the beginning. (Marcuse, 1965, pp. 86–87)

To further strengthen the point regarding the important role of autonomy and equality in the characterization of our right to free speech/expression in *Navarra v. COMELEC* (2015), consider how Justice Leonen advanced his argument by making use of (his interpretation of) Marcuse’s views in the following:

Marcuse suggests that the democratic argument—with all opinions presented to and deliberated by the people—“implies a necessary condition,

namely, that the people must be capable of deliberating and choosing on the basis of knowledge, that they must have access to authentic information, and that, on this basis, their evaluation must be the result of autonomous thought.” He submits that “(d)ifferent opinions and ‘philosophies’ can no longer compete peacefully for adherence and persuasion on rational grounds: the ‘marketplace of ideas’ is organized and delimited by those who determine the national and the individual interest... (T)here is a ‘natural right’ of resistance for oppressed and overpowered minorities to use extralegal means if the legal ones have proved to be inadequate.” Marcuse, thus, stands for an equality that breaks away and transcends from established hierarchies, power structures, and indoctrinations. The tolerance of libertarian society he refers to as “repressive tolerance.” (Navarra v. COMELEC, 2015, p. 57)

For the current purposes of this paper, what is crucial to the views presented above is that a liberal democracy can only function well if its citizens are capable of practicing autonomy (i.e., self-determination). By practicing autonomy, citizens are able to make rational and well-informed decisions. Consequently, they are capable of genuine democratic participation. The practice of autonomy, however, is partially dependent on a citizen’s capability to access a panoply of ideas in the political sphere. For instance, in the electoral process, rational and well-informed decisions may only be made if we have access to the political stance of the different candidates and their supporters (as well as their detractors). It is for this reason that the decisions in Navarra v. COMELEC (2015) give preference to political speech over our other fundamental rights. Justice Leonen stated:

Political speech is motivated by the desire to be heard and understood, to move people to action. It is concerned with the sovereign right to change the contours of power whether through the election of representatives in a republican government or the revision of the basic text of the Constitution... We protect both speech and medium because the quality of this freedom in practice will define the quality of

deliberation in our democratic society. (Navarra v. COMELEC, 2015, p. 10)

As the foregoing passage shows, political speech is crucial in changing the contours of power in society and the need to protect it stems from the idea that the success of a democracy is dependent on the quality of deliberation that citizens perform in arriving at their decisions/choices. So far, it has been shown that the decisions in Navarra v. COMELEC (2015) consider autonomy as an integral component of our right to free speech/expression. It is important to note that this point also applies to our right to vote since the right to vote is but an expression of our right to free speech/expression. Another important point needs to be mentioned: A closer look at the decisions in Navarra v. COMELEC (2015) reveal a particular interpretation of the hierarchy of rights—one which considers the right to free speech/expression (i.e., political speech) as more fundamental than other rights (i.e., the right to equal opportunity). This particular interpretation, however, is questioned by Justice Arturo Brion in his dissenting opinion:

(Freedom of expression) is not the god of rights to which all other rights and even government protection of state interest must bow. Speech rights are not the only important and relevant values even in the most democratic societies. Our Constitution, for instance, values giving equal opportunity to proffer oneself for public office, without regard to a person’s status, or the level of financial resources that one may have at one’s disposal. (Brion, 2015, pp. 24–25)

In his dissenting opinion, Justice Brion maintained that the right to free speech/expression should not take precedence over the right to equal opportunity amongst different electoral candidates. For the current purposes of this paper, what is important in Justice Brion’s opinion above is the claim that the Constitution (1987) considers the right to equal opportunity as more fundamental than the right to free speech/expression. This amounts to saying that the right to equal opportunity is necessary for the practice of the right to free speech/expression (e.g., political speech). As will be demonstrated later on, the right to equality

and equal opportunity can either weaken or strengthen the value of the right to free speech/expression.

To summarize, (P1) of the main argument has been fully established in this section. It has been shown that since the Philippines practices a representative democracy, it is crucial to understand our fundamental rights in line with the tenets of liberalism. It has also been shown that in framing our fundamental rights, liberalism operates on the assumption that individuals are autonomous beings, and as such, they are capable of making binding decisions that take all the citizens' interests into account. For these binding decisions to hold ground, a certain conception of equality must be established in order for us to practice our other fundamental rights. From this we can see that there is a certain hierarchy to our fundamental rights in the sense that some of them must be recognized/protected by the government/state in order for us to be able practice the others.

A Thorough Exposition of the Main Argument

This section seeks to establish (P2)–(P7) of the main argument by highlighting the role of autonomy in understanding the right to free speech/expression when it is juxtaposed with our rights to equality, equal opportunity, and the equal protection of the law. Following what has been established previously, it is important to note that in order to better understand and properly frame our fundamental rights, we must first clarify how autonomy is viewed from a liberal standpoint. In the following passage, Held (2006) introduced what he referred to as the principle of autonomy:

(P)ersons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in the process of deliberation about the conditions of their own lives and in the determination of these conditions, so long as they do not deploy this framework to negate the rights of others. (p. 267, [Emphasis removed from the original.]

He then expounded on this principle by making the following claims: (1) For individuals to enjoy equal rights and obligations within a social and political setting, they should have equal autonomy. (2) To have rights means to have entitlements for “the concept of ‘rights’ connotes...entitlements to pursue action and activity without the risk of arbitrary or unjust interference” (Held, 2006, p. 267). In effect, to have rights is also to have constraints on one's actions, especially during instances wherein one's actions infringe on the rights of others. (3) To be free and equal within a social and political context means that there is an avenue for debate and deliberation of public matters, which is available to all on a free and equal basis. (4) To state that individual rights need protection means that society must create institutional organs that ensure the freedom and equality of all individuals. (5) Finally, “group demands or group claims will always be of secondary standing to individual rights of freedom... (yet these demands and claims should be examined) in public debate on a free and equal basis” (Held, 2006, p. 267).

From Held's views above, we can therefore say that the principle of autonomy determines the conditions for individual liberty. Take note as well that the right to equality and equal opportunity play important roles not only in the explication of the principle of autonomy but also in the determination of the conditions for individual liberty. For the most part, this is done by outlining the entitlements available to an individual while at the same time determining the conditions when these entitlements may be enforced or forfeited by the government/state. These points demonstrate that the principle of autonomy, equality, and equal opportunity are closely connected concepts. To understand how these concepts are closely connected, consider what Michel Rosenfeld (1986) stated in the following:

(E)quality can play the dominant role in “equality of opportunity,” determining both what counts as an opportunity and which opportunities ought to be distributed equally... Establishing equal opportunity is desirable wherever equal results would be justified... Equality of opportunity would not be justified, however...where its pursuit would inhibit the realization of the greatest possible individual

autonomy consistent with equal autonomy for all. (p. 1711)

From the foregoing discussion, we can maintain that the right to equal opportunity is dependent on the right to equality. In effect, when we are weighing our fundamental rights/freedoms, our right to equal opportunity has less weight compared to our right to equality. In a similar vein, since the right to equality and the right to equal opportunity may be considered as the foundations of all our other rights, the right to free speech/expression has less weight compared to the former. This brings us to the question as to how we can protect our rights to equality, equal opportunity, and the practice of our autonomy.

Carl Wellman (2016) claimed that the right to the equal protection of the law safeguards our right to equal opportunity (pp. 134–135). He asserted that “the existing constitutional right to equal protection is sufficient to guarantee equal opportunity” (Wellman, 2016, p. 134). In the Philippines’ 1987 Constitution, the right to the equal protection of the law can be found in Article III, Section 1 of the Bill of Rights, which states that “(n)o... person (shall) be denied the equal protection of the laws.” Miriam Defensor Santiago (1983) provided a succinct statement of the doctrine of the equal protection of the law in the following:

Under the equal protection clause, the government may classify persons or “draw lines” in the creation and application of laws, provided that the classifications are not based upon impermissible criteria or arbitrarily used to burden a group of individuals...In brief, equal protection guarantees that similar people be dealt with in a similar manner, and that people of different circumstances will not be treated as if they were the same. (p. 5)

Clearly, the doctrine of the equal protection of the law also presumes the existence of autonomous agents whose actions may be limited by the government/state in the event that these actions infringe on the rights of others. In addition, it emphasizes the importance of the government’s creation and enforcement of edicts that ensure the equal treatment of people in similar circumstances. Again, the law can make

classifications and distinctions but these classifications and distinctions must not be based on arbitrary criteria. Furthermore, the doctrine of the equal protection of the law does not mean that the law should treat everyone equally since interpreting it this way can lead to unjust consequences. Again, what must be emphasized is that the law should ensure “that similar people be dealt with in a similar manner” (Santiago, 1983, p. 5).

To further understand the doctrine of the equal protection of the law, it is important to note that its application involves a three-tiered test. These tests are as follows: (1) the *rational basis* test, (2) the *strict scrutiny* test, and (3) the *intensified means* test. Justice Artemio Panganiban, in his dissenting opinion, stated that according to the rational basis test, the “courts will uphold a classification if it bears a rational relationship to an accepted governmental end” (Panganiban, 2004). The strict scrutiny test states that “(t)he Court will not accept every permissible government purpose as sufficient to support a classification... (I)t will require the government to show that it is pursuing a ‘compelling’ or ‘overriding’ end” (Santiago, 1983, p. 7). In addition, this test sets the standard for reviewing statutes and ordinances in terms of “the quality and the amount of governmental interests brought to justify the regulation of fundamental freedoms” (White Light Corporation v. City of Manila, 2009). Finally, the intensified means test states that “the Court should accept the articulated purpose of a legislation, but it should closely scrutinize the relationship between the classification and the purpose (of the legislation)” (Santiago, 1983, p. 8).

The main characteristics of the three-tiered test above, along with its implications to the assessment and practice of our fundamental rights, were described by Justice Jose Mendoza in the following:

(T)he concept of equal justice under the law requires the state to govern impartially, and it may not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective... (The equal protection clause) does not require the universal application of the laws to all persons or things without distinction. What it simply requires is equality among equals as determined according to a valid classification...

(The classification) must be of such a nature as to embrace all those who may thereafter be in similar circumstances and conditions....A law is not invalid because of simple inequality. The very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality. (*Biraogo v. The Philippine Truth Commission of 2010*, 2010, pp. 167–169)

Before applying the doctrine of the equal protection of the law to the pertinent procedural and substantive issues in *Navarra v. COMELEC* (2015), it is important to note that at this point, (P2)–(P5) of the main argument has been established. The remaining portion of this section will then seek to establish the remaining premises of the main argument, namely (P6) and (P7).

To rebut the decisions in *Navarra v. COMELEC* (2015), one only needs to show that the enforcement of COMELEC's letter and notice for the removal of the second tarpaulin is valid since the COMELEC's edict, which is based on Republic Act No. 9006 (henceforth R.A. 9006; 2001), also known as the Fair Elections Act, demonstrates that the right to equal opportunity takes precedence over the right to political speech. To demonstrate this, we shall use the three-tiered test of the doctrine of the equal protection of the law. Using the rational basis test, we can maintain that R.A. 9006 (2001) created an acceptable classification of citizens as belonging to either electoral candidates or non-candidates. COMELEC Resolution No. 9615 (2013) made this distinction as it defined an electoral candidate in the following way:

The term "candidate" refers to any person seeking an elective public office, who has filed his certificate of candidacy, and who has not died, withdrawn his certificate of candidacy, had his certificate of candidacy denied due course or cancelled, or has been otherwise disqualified before the start of the campaign period when he filed his certificate of candidacy... It also refers to any registered national, regional, or sectoral party, organization or coalition thereof that has filed a manifestation of intent to participate under the party-list system, which has not withdrawn the said manifestation, or which

has not been disqualified before the start of the campaign period. (COMELEC Resolution No. 9615, 2013, pp. 2–3)

By specifying who may be considered as electoral candidates, the resolution is also specifying who may be counted as non-candidates. This classification is significant because there are certain regulations that are applicable only to electoral candidates after they file their certificates of candidacy. That this classification furthers a legitimate governmental interest is evident in the principle behind R.A. 9006 (2001) that "(t)he State shall...guarantee or ensure equal opportunity for public service...(to)assure free, orderly, honest, peaceful and credible elections" (R.A. 9006, 2001, p. 1). Take note that it is within the state's interest that electoral candidates be given equal opportunity for public service for this is one way by which the state can ensure honest, credible, and fair elections. In addition, by respecting these candidates' right to equal opportunity, we are ensuring conditions that will allow for rational decision making during the election period. In effect, we are raising the probability that we will elect government representatives who will also respect our right to equal opportunity.

Using the strict scrutiny test, we can maintain the following: (1) COMELEC is justified in regulating the petitioners' right to free speech/expression. (2) COMELEC has a legal basis for regulating expressions made by private citizens. (3) Finally, the regulation for the tarpaulin should be content-neutral and not content-based. To strengthen these points, consider Section 3 of R.A. 9006 (2001), which gives COMELEC the right to regulate election propaganda. The aforementioned section states,

Election propaganda whether on television, cable television, radio, newspapers or any other medium is hereby allowed for all registered political parties, national, regional, sectoral parties or organizations participating under the party-list elections and for all bona fide candidates seeking national and local elective positions subject to the limitation on authorized expenses of candidates and political parties, observance of truth in advertising and to the supervision and regulation by the Commission

on Elections (COMELEC)...lawful election propaganda shall include...Handwritten or printed letters...Cloth, paper or cardboard posters whether framed, or posted, with an area not exceeding two (2) feet by three (3) feet...other forms of election propaganda not prohibited by the Omnibus Election Code or this Act. (R. A. 9006, 2001, pp. 1–2)

Take note that this regulation does not specify that an election propaganda can only be posted by an electoral candidate. Consequently, the regulation can also be applied to election propaganda used by non-candidates (e.g., private citizens). For this reason, one may argue that COMELEC is justified in issuing a letter and notice for the second tarpaulin's removal. For the same reason, COMELEC is justified in regulating the petitioners' right to free speech/expression. The regulation, however, is aimed not at the content of the second tarpaulin but on its size. In other words, COMELEC, in this sense, is allowed to make a content-neutral regulation on the second tarpaulin since it counts as an election propaganda.

A further application of the strict scrutiny test also compels us to ask whether the government's/state's interest, as it is stated in R.A. 9006 (2001), is important enough to validate the regulation on free speech/expression in regard to the case at hand. On this question, it can be maintained that the state will be pursuing a compelling end by regulating the petitioners' right to free speech/expression for what is at stake is the protection of a more fundamental right (i.e., the right to equal opportunity). If the state allows the continuous posting of the second tarpaulin, it is giving greater opportunity to the candidates listed under "Team Buhay" as opposed to the candidates listed under "Team Patay." One can even state that the ruling, by giving preference to the petitioners, practiced what Justice Mendoza called "undue favoritism" (*Biraogo v. The Philippine Truth Commission of 2010*, 2010) to a particular group (i.e., the Roman Catholic Church). Justice Brion echoes this view in his dissenting opinion:

The Court will recall that we immediately issued a temporary restraining order to halt further Comelec action, so that the petitioner

was effectively the prevailing party when the elections - the critical time involved in this case - took place. Subsequently, the interest advocated in the disputed tarpaulin was decided by this Court to the satisfaction of the public at large, among them the Church whose right to life views prevailed. (Brion, 2015, p. 2)

As the foregoing discussion shows, COMELEC's resolution, based on R. A. 9006 (2001), does not really suffer from constitutional infirmity. If the foregoing discussion is correct, then it can be said that it passes the strict scrutiny test. Given that the intensified means test is conceived of as an intermediate test, it is also reasonable to say that the case at hand also passes this test. This is to say that in terms of classification/s as well as purpose/s, it can be said that COMELEC's actuations are necessary for the success of the electoral process.

In applying the doctrine of the equal protection of the law to the *Navarra v. COMELEC* case, claims (1)–(3) (under the strict scrutiny test) have been established. Such being the case, the following can also be deduced: (4) COMELEC has jurisdiction over the case since it did not commit a grave abuse of discretion in issuing the letter and notice and thereby limiting the petitioners' right to political speech. (5) The petitioners violated the doctrine of hierarchy of courts. (6) Finally, the petitioners also violated the doctrine of exhaustion of administrative remedies.

To summarize, in this section, it has been argued that by focusing on the role of autonomy in the formation of our fundamental rights, we can see that the right to equality and the right to equal opportunity take precedence over our right to free speech/expression. In the foregoing discussion, this particular conception of a hierarchy of rights has been employed using the doctrine of the equal protection of the law as our guide in settling the procedural and substantive issues in *Navarra v. COMELEC* (2015). The usage of the said doctrine is appropriate since it has already been shown that the right to the equal protection of the law may be seen as an overseer of our other fundamental rights. As an overseer, the said doctrine can be used to settle issues where there is a conflict between our fundamental rights. In addition, by using the said doctrine in the assessment of the issues in the *Navarra*

v. COMELEC case, we arrived at the conclusion that the Court's decisions were misguided in its emphasis on the importance of freedom of speech/expression over the right of electoral candidates for equal opportunity to run for public office.

It must be made clear that in attempting to refute the Court's decisions in *Navarra v. COMELEC* (2015), I am not condoning infringements on political speech. The view expressed in this paper merely states that in some scenarios, it is in the state's best interest to limit/regulate political speech, especially if by doing so safeguards other rights that are more fundamental (e.g., our right to equality and equal opportunity). The following section will now discuss some counter-arguments against the position expressed in the previous discussions as well as their refutations.

Counter-Arguments and Their Refutations

There are at least two counter-arguments that come to mind in relation to the main argument presented in this paper. The first focuses on (P3) and (P4). The second counter-argument, on the other hand, questions (P6). The approach of both counter-arguments, however, are different. Whereas the first one focuses on a theoretical approach in the rebuttal of the claims that have been presented, the second one focuses on an actual application of the doctrine of the equal protection of the law in assessing a scenario where an institutional organ of the government attempted to limit political speech.

The first counter-argument may take the following form: (P1*) We should understand our political and civil rights within the bigger picture provided by the United Nations General Assembly's (1966) *International Covenant on Civil and Political Rights* (henceforth ICCPR). (P2*) ICCPR distinguishes between derogable and non-derogable rights where the latter take precedence over the former. (P3*) If we will establish and adhere to a hierarchy of rights, it should be based on the relationship between derogable and non-derogable rights. (P4*) Since freedom of speech, as well as freedom of thought, conscience, and religion, are considered as non-derogable rights, they should take precedence over the right to equal opportunity. Consequently, the refutations we made to the decisions

in *Navarra v. COMELEC* (2015) that were dependent on a different hierarchy of rights are mistaken.

To elaborate on this counter-argument, let us begin by differentiating between derogable and non-derogable rights. Derogable rights refer to rights that can be temporarily suspended by governments in case of a state emergency. Non-derogable rights, on the other hand, refer to rights that cannot be suspended by the state even during state emergencies. Freedom of speech, freedom of thought, conscience, and religion belong to the class of non-derogable rights. There are arguments that maintain that non-derogable rights should be considered as primary rights. Following the ideas put forth by Tom Farer (1992, pp. 115–119), these arguments highlight the following: (1) The practice of our other political and civil rights are dependent on the recognition of our non-derogable rights. (2) Genuine participation in government affairs requires the practice of non-derogable rights, which may only be achieved if the state ensures that there is ample social protection for its citizens' actions. (3) Finally, participation in a fair election ensures the practice of all rights.

Since the right to free speech/expression, freedom of thought, conscience, and religion are considered as non-derogable rights, it seems that they take a primary role in the roster of our political and civil rights. Yet the practice of these rights also have important limitations. In the ICCPR, freedom of thought, conscience, and religion can be limited when it is necessary "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (The United Nations General Assembly, 1966, p. 178). Freedom of speech/expression, on the other hand, may be limited "(a) (f)or respect of the rights or reputations of others; (b) (f)or the protection of national security or of public order (*ordre public*), or of public health or morals" (p. 178).

If we look at these restrictions, an initial analysis of the pertinent issues in *Navarra v. COMELEC* (2015) shows that the petitioners' freedom to manifest their religious beliefs as well as their freedom of expression were indeed violated by COMELEC's letter and notice for the removal of the second tarpaulin, which contains their religious views. For instance, they did not seem to violate any fundamental freedom or the freedom of others by expressing their distaste for the electoral candidates who voted for the Reproductive Health

Law of 2012. In addition, if we agree with the Court's decision that the order for the tarpaulin's removal counts as a content-based regulation, an appeal to the clear and present danger test, which is mirrored in the second restriction for freedom of speech above, shows that the content of the tarpaulin does not pose any problem related to national security. Most importantly, if we frame this as a clash between the aforementioned freedoms and the right to equal opportunity, it would seem that free speech/expression, as well as the freedom of thought and religion, has a primary role compared to the right to equal opportunity for they are non-derogable rights. For that matter, our rebuttal of the Court's decisions in *Navarra v. COMELEC* (2015), which is based on a different hierarchy of rights, is mistaken.

Amongst the premises of this counter-argument, one may attack (P3*) and (P4*). In relation to (P3*), we can maintain that viewing the classification of rights in ICCPR as merely divided into derogable and non-derogable rights is misleading. Andrew Ashworth (2013), for instance, claimed that the rights in ICCPR are better categorized as either non-derogable, qualified or prima facie, or strong rights (pp. 31–44). A right is qualified or prima facie if “the right is declared, but it is also declared that it may be interfered with on certain grounds, so long as the restriction is as minimal as possible” (Ashworth, 2013, p. 32). On the other hand, strong rights pertain to rights that “demonstrate that they have a strength which is not qualified to the extent that the rights in Articles 8–11 (of the ICCPR) are qualified” (Ashworth, 2013, p. 33). From the distinctions put forth by Ashworth, we can create a hierarchy of rights where non-derogable rights are more important than strong rights and where strong rights are more important than qualified or prima facie rights. Ashworth (2013) himself hinted at this hierarchy in the following:

(T)his is a significant distinction—it suggests that, although strong rights are less fundamental than the non-derogable rights, any arguments for curtailing a strong right must at least be more powerful than the kind of ‘necessary in a democratic society’ argument that is needed to establish the acceptability of interference with one of the qualified rights. (p. 33)

As per Ashworth's classification, the right to free speech/expression as well as the right to freedom of thought, conscience, and religion, are categorized as prima facie or qualified rights and not non-derogable rights. They exist in the lowest branch of the hierarchy of rights that we established above. Demonstrating this, however, is not sufficient to disprove (P4*). After all, in order to fully disprove it, we must show that the right to equal opportunity takes precedence over qualified or prima facie rights.

An approach that will establish the importance of the right to equal opportunity over the qualified or prima facie rights mentioned above may appeal to the process of the distribution of rights within a society. In this context, it is important to note that for a fair distribution of rights to take into effect, there must be the assumption that each individual has a right to equal opportunity. This assumption is necessary because the distribution of rights may be unfair if each individual is not given the equal opportunity to avail of the entitlements provided by the government/state. At this point, we have debunked (P4*) by showing that the distribution of rights in society is dependent on the assumption that a fair distribution of rights requires the recognition of each individual's right to equality of opportunity. By showing this, we have demonstrated that the right to equal opportunity still holds precedence over qualified or prima facie rights.

The second counter-argument highlights the use of the equal protection doctrine in showing that the right to political speech has greater weight than the right to equal opportunity based on the Court's decisions in *1-UTAK v. COMELEC* (2015). In this case, the Court maintained that “prohibiting owners of PUVs and transport terminals from posting election campaign materials violates the equal protection clause” (*1-UTAK v. COMELEC*, 2015, p. 20). The reasons for this are hinged on the Court's position that the classifications forwarded by COMELEC Resolution No. 9615 (2013) Section 7(g) items (5) and (6) have no pertinent relationship to a legitimate government end. The classifications given by COMELEC are as follows: (1) distinction between PUV's, transport terminals, and private vehicles and (2) distinction between owners of PUV's and transport terminals and owners of private vehicles. The Court ruled that the classifications set by

the pertinent sections in COMELEC Resolution No. 9615 (2013) for (1) above are unacceptable for they do not bear a rational relationship to an established governmental end. To be sure, the classification is necessary so that the government can regulate the franchise and permit to operate of PUV's. However, COMELEC Resolution No. 9615 is not concerned with the purpose of this classification because its prohibitions are aimed at regulating the use of election propaganda. Consequently, COMELEC cannot use (1) above as a basis for regulating election propaganda. The Court also maintained that COMELEC cannot use (2) above for regulating election propaganda for it does not offer a substantial distinction. Although PUV's and transport terminals are accessible to the public, they are still owned by private entities. Since private entities like the owners of private vehicles are allowed to post election propaganda on their properties, the same privilege is available to the owners of PUV's and transport terminals.

From the foregoing discussion, it can be seen that the issues in *Navarra v. COMELEC* (2015) and *1-UTAK v. COMELEC* (2015) bear important similarities with each other largely because they tackle the role of political speech in the electoral process. However, in *1-UTAK v. COMELEC* (2015), the *ponencia* used the doctrine of equal protection to emphasize the importance of the role of political speech in the election process. It maintained that classifications that are irrelevant to a government end are unacceptable if they are insubstantial and if they limit political speech. To put force on the weight of its decision, the Court maintained,

(T)he guaranty of equal protection of the laws is not a guaranty of equality in the application of the laws to all citizens of the state. Equality of operation of statutes does not mean their indiscriminate operation on persons merely as such, but on persons according to the circumstances surrounding them. It guarantees equality, not identity of rights. The Constitution does not require that things, which are different in fact, be treated in law as though they were the same. The equal protection clause does not forbid discrimination as to things that are different. (*1-UTAK v. COMELEC*, 2015, p. 21)

At this point, one might ask how the decisions in *1-UTAK v. COMELEC* (2015) affect the main argument of this paper. To answer this question, it is crucial to point out that political speech held precedence over other rights in *1-UTAK v. COMELEC* (2015) since the classifications and distinctions set by COMELEC are unacceptable and insubstantial. On the other hand, the classifications and distinctions upheld in the main argument of this paper are necessary to further a government end (i.e., to ensure the occurrence of a peaceful, honest, credible, and fair elections).

If the scenario permits, there should be no conflict between the right to equal opportunity and the right to political speech. For instance, in *Ang Ladlad LGBT Party v. COMELEC* (2010), the Court demonstrated how the protection of these rights go hand in hand. The *ponencia* maintained that the respondent not only violated the petitioners' right to equal opportunity but also their right to free speech/expression. This is so because the respondents claimed that the classification that differentiates between homosexuals and heterosexuals is necessary in determining who may run for public office. It also prevents a minority whose forms of speech and conduct which the public views as immoral and unacceptable to run in the electoral process (*Ang Ladlad LGBT Party v. COMELEC*, 2010). The Court claimed that this classification does not pass the rational basis test. It stated that just because the views of a minority may offend, shock, or disturb the public, this does not necessarily mean that these views should be silenced by the state (*Ang Ladlad LGBT Party v. COMELEC*, 2010). The Court emphasized how the right to equality of opportunity and the right to free speech/expression are closely connected as it stated,

From the standpoint of the political process, the lesbian, gay, bisexual, and transgender have the same interest in participating in the party-list system on the same basis as other political parties similarly situated... Hence, laws of general application should apply with equal force to LGBTs, and they deserve to participate in the party-list system on the same basis as other marginalized and under-represented sectors... Under our system of laws, every group has the right to promote its agenda and

attempt to persuade society of the validity of its position through normal democratic means.... Freedom of expression constitutes one of the essential foundations of a democratic society, and this freedom applies not only to those that are favorably received but also to those that offend, shock, or disturb. (*Ang Ladlad LGBT Party v. COMELEC*, 2010, pp. 12–13)

As we can see, the right to equal opportunity, in this case, enables the recognition of a minority's right to political speech. This is a perfect example of how both rights complement each other. Only by recognizing *Ang Ladlad's* right to equal opportunity to run for public office can we ensure that we are giving the group a fair chance for their views to directly influence the law-making process in the legislative branch of our government.

Conclusion

In our discussion of our rights to equal opportunity, equal protection of the law, and free speech/expression, we have shown that these rights are crucial components of any legal system, political constitution, in fact, any society worthy of being called civilized. The importance of these rights stems from the assumption that they are derived from our capacity to function as autonomous beings. Not only that, it can also be said that the recognition of these rights can also protect and enhance our autonomy. In addition, these rights are crucial in ensuring our genuine participation in a democratic polity. Admittedly, these rights also have important limitations. In the case of our right to free speech/expression, one of its limitations is set by its position in the hierarchy of rights that we established earlier. In pertinent situations, it should not take precedence over our right to equality and equal opportunity.

At face value, the clash between our right to political speech and our right to equal opportunity may seem to be a conflict between two individual rights. However, if we look at it from a wider perspective, we can see that it is a conflict between an individual right and public welfare. To be sure, we are entitled to express our political stance, especially during the electoral process. We can, for instance, use this freedom

to influence others in the hopes that such an influence will lead others to properly choose their representatives in government. This freedom, however, should be tempered when what is at stake is public welfare. Although it is in the interest of the public to be given access to a panoply of ideas, this paper argues that it is in the greater interest of the public that we ensure the protection of the right to equal opportunity since it is only by upholding this right that we can ensure a fair distribution of entitlements in a society. It is important to note that this is also one of the goals of the election process. It aims to ensure the continuance of a government that enforces and gives edicts that will ensure the greatest equality possible for all.

Of course, the conflict above may be framed in a different way. For instance, we may state that the conflict lies in the importance of safeguarding the individual right to equal opportunity as opposed to the right to political speech which ensures public welfare. In this scenario, we may emphasize again the role of political speech in guiding the decisions of the public during the electoral process. The right to political speech, in this sense, aims to protect public welfare. Yet, even if we frame the conflict in this way, the right to equal opportunity still takes precedence over the right to political speech. However, in this case, the reason is different. We should uphold the individual right to equal opportunity for it is directly derived from the principle of autonomy. To be specific, the fact that we are autonomous beings immediately entitles us to the right to equality and the right to equal opportunity.

To further see why we should give preference to equal opportunity over free speech/expression, it is helpful to introduce a thought experiment. Suppose there exists a society purely composed of *literati*. The head committee of this society decides to initiate a competition for the best sonnet. Note that there are no restrictions on the topic of the sonnet. The primary aim of this competition is to get a sampling of poems that demonstrate the poetry writing skills of the society's members. These samples will be used to determine the necessary steps the committee needs to take in order to improve the poetry writing skills of its members. Note that the committee did not require all of its members to join the competition. However, since each member has developed a taste and skill for poetry, they all decided

to participate in the contest. After all the entries have been submitted, the members of the committee chose the sonnets that they will judge at random. At the same time, each judge has his/her own set of standards for assessing the quality of his/her chosen sonnet. For some reason, the process of arriving at the winner, as described above, was leaked to the members of the society. We can just imagine the outrage expressed by the members of the society after the winner was announced even if, by all objective standards, it is indeed the best sonnet produced in the group.

It is evident that this thought experiment considers the act of producing and submitting the sonnets as akin to the exercise of free speech/expression. This is obvious for two reasons: First, producing a sonnet has an intrinsic value. It allows the author to express his sentiments and grievances in a poem. In addition, it allows the author to express his artistic acumen in the end product of his creation. This same intrinsic value can be seen in the practice of free speech/expression. It is a right that allows us to express our sentiments and grievances in public. Second, producing and submitting the sonnet in our thought experiment also has an extrinsic value. It will allow the committee to determine how to further hone the poetry writing skills of their members. In a similar manner, the practice of free speech/expression has an extrinsic value. It does not merely allow the government to address the injustices relayed by the minority, it also allows the government to gauge the amount of political participation of its constituents. Furthermore, in the same manner that producing and submitting the sonnets will give the members of the society a chance to influence the decision of the committee on how to improve their poetry writing skills, practicing political speech allows us to take an active role in collective governance.

As for the right to equal opportunity, its manifestation in our thought experiment can be seen in the act of choosing and judging the sonnets that will merit the award. Although equality of opportunity was recognized in the submission of the sonnets, it was set aside in the appraisal of which sonnet will receive the award. As we have seen, by setting aside the right to equal opportunity in choosing the winning piece, the best sonnet produced in the group appears to have lost

its value. This shows us the deep-seated relationship between freedom of speech/expression and equal opportunity. The value that we attribute to free speech/expression is lost when it is exercised in conditions that do not allow for equal opportunity. This supplies a fresh way of looking at these rights. It is important to note that the clash we demonstrated between the right to free speech/expression and the right to equal opportunity should not be seen as a clash between foes. Rather, it should be seen as a benign confrontation between two friends. The value of our right to freedom of speech/expression can only be realized if it is grounded on the right to equal opportunity.

It is unfortunate that there are cases where the confrontation between these two rights leads to a conflict between individual rights and public welfare. In an ideal scenario, there should be no conflict between them. Though we aim for the ideal, there will always be cases where there is conflict between the two. In my estimation, we can only prevent or at least minimize these conflicts if we recognize and respect the rights of others. This should not be too difficult for the presumption of these rights' existence stems from our capacity for autonomy, a capacity that we all share.

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