

**BERNARDINO ABES, CARLOS L. ALBERT, ANTONIO C. AMOR,
NORBERTO CONDEZ, BENJAMIN GRECIA, LUISA G. ORENDAIN, JOSE
ABRENICA, ROSARIO L. PLANAS, PROCESO SEBASTIAN, VIDAL A.
TAN, LOREN...**

G.R. No. L-28348. December 15, 1967

Ponente: SANCHEZ, J.

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SANCHEZ, J.:

Petitioners' cry for relief, so their petition avers, is planted upon the constitutional mandate of free, orderly, and honest elections.[1] Specifically, they list a number of repressible acts. Amongst these are: (1) blank official registration forms were taken from the office of the Quezon City Comelec Registrar several weeks before election day, November 14, 1967; (2) active campaigning within the polling places by Nacionalista leaders or sympathizers of Nacionalista candidates were allowed; (3) voters were permitted to vote on mere mimeographed notices of certain Nacionalista candidates; (4) voters were compelled to fill their official ballots on open tables, desks and in many precincts outside the polling places; (5) forms of petitions for inclusion proceedings were obtainable only in the offices of candidates of the Nacionalista Party; (6) thousands of voters were allowed to vote on the strength of inclusion orders issued indiscriminately by two City Judges on election day; (7) thousands of voters sympathetic to the Nacionalista candidates were allowed to vote beyond the hours for voting allowed by law; (8) thousands of voters' I.D. registration cards of voters sympathetic to non-Nacionalista candidates were thrown and scattered in the Office of the Nacionalista candidate for Mayor; (9) voters' I.D. cards were delivered by partisan leaders of respondent Nacionalista candidates, and those who did not signify their preference for Nacionalista candidates were not given their I.D. cards; (10) the office of the corporation of which respondent Ismael Mathay, Jr. is the President was used as a place of registration which is "unauthorized"; (11) most of the precinct books of voters were not sealed within the deadline fixed by law; and (12) the resulting effect of irregularities is that about 51% of the registered voters were disenfranchised.

Petitioners, candidates of the Liberal Party, the Nacionalista Reform Party and the Quezon City Citizens League for Good Government, first went to the Commission on Elections (Comelec). Upon the claim that more than 50% of the registered voters were not able to vote during the elections of November 14, 1967, they prayed for Comelec's declaration that there was failure of election. They petitioned for suspension of the canvass and the proclamation of winning candidates. They sought nullification, too, of elections in Quezon City for city officials and asked that new elections be held. Comelec, in a minute resolution of November 23, 1967, denied the petition, ordered the board of canvassers to proceed with the canvass but not to proclaim any winning candidate for city offices and gave petitioners time "to go to the Supreme Court for the proper remedy."

Petitioners thus came to this Court on certiorari with a prayer for preliminary injunction.

Upon the petition and respondents' returns, the case was heard on the merits.

We plowed through a maze of allegations in the petition and the returns and the affidavits and other annexes. The

whole problem funnels down to the issue of whether Comelec has jurisdiction (1) to order the board of canvassers to suspend the canvassing and proclamation of the winning candidates; (2) to annul the elections in Quezon City; and (3) following such annulment, to direct the holding of another election.

1. By way of prefatory statement, it may serve our purpose if we emphasize once again that the board of canvassers is a ministerial body.[2] It is enjoined by law to canvass all votes on election returns submitted to it in due form.[3] It has been said, and properly, that its powers are "limited generally to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained." [4] Comelec is the constitutional body charged with the duty to enforce all laws relative to elections, duty bound to see to it that the board of canvassers perform its proper function.[5]

Pertinent rulings of this Court have since defined Comelec's powers in pursuance of its supervisory or administrative authority over officials charged with specific duties under the election code. It is within the legitimate concerns of Comelec to annul a canvass or proclamation based on incomplete returns,[6] or on incorrect or tampered returns; annul a canvass or proclamation made in an unauthorized meeting of the board of canvassers either because it lacked a quorum[7] or because the board did not meet at all.[8] Neither Constitution nor statute has granted Comelec or the board of canvassers the power, in the canvass of election returns, to look beyond the face thereof, once satisfied of their authenticity.

Petitioners argue that the canvassing should be stopped. But nothing in the petition herein would indicate that the returns were falsified after they left the hands of the election inspectors or that the returns are not genuine. The petition stresses the existence of other irregularities. For us now to give our stamp of approval to the petition to suspend canvass and proclamation is to stop both Comelec and the board of canvassers: the first, from performing its constitutional and legal duty to administer the election laws and supervise elections; and the second, from discharging its legal obligation to canvass the returns and proclaim the elected candidates. And worse, to suspend canvassing and proclamation at this late date may result in a vacuum in office of Quezon City elective officials after the term of the present incumbents shall have ended on December 31, 1967. Some such eventuality must be prevented. Canvassing and proclamation must proceed. Because, as Mr. Justice Querube C. Makalintal correctly observed in *City Board of Canvassers vs. Moscoso* L-16365, September 30, 1963, "to enjoin the city board of canvassers from assessing the returns would result in a lack of incumbents in the offices concerned after the termination of the current term and while the case remains pending in court."

2. Petitioners' next prayer is for the annulment of the elections held on November 14, 1967. Their bases: fraud, terrorism, and other illegal practices committed before and during the elections.

The primary grant of power to Comelec is found in Section 2, Article X of the Constitution, thus:

"SEC. 2. The Commission on Elections shall have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections and shall exercise all other functions which may be conferred upon it by law. It shall decide, save those involving the right to vote, all administrative questions, affecting elections, including the determination of the number and location of polling places, and the appointment of election inspectors and of other election officials. All law enforcement agencies and instrumentalities of the Government, when so required by the Commission, shall act as its deputies for the purpose of insuring free, orderly, and honest elections. The decisions, orders, and rulings of the Commission shall be subject to review by the Supreme Court."

Nothing in the foregoing constitutional precept will imply authority for Comelec to annul an election. So, too, did the Revised Election Code withhold from Comelec the specific power to annul an election.

The boundaries of the forbidden area into which Comelec may not tread are also marked by jurisprudence. That Comelec is not the proper forum to seek annulment of an election based on terrorism, frauds and other illegal practices, is a principle emphasized in decisions of this Court. Expressive of this rule is the following culled from *Nacionalista Party vs. Commission on Elections*, 85 Phil. 149, 155-156:

"What are the implications of the power vested in the Commission to enforce and administer all laws relative to the conduct of elections and to insure free, orderly, and honest elections? Does it include the power to annul an election which may not have been free, orderly, and honest?

It seems clear from the context of the constitutional provision in question as well as from other provisions already quoted above [Secs. 8 and 166, Revised Election Code] that such power is preventive only and not curative also; that is to say, it is intended to prevent any and all forms of election fraud or violation of the Election Law, but if it fails to accomplish that purpose, it is not the Commission on Elections that is charged with the duty to cure or remedy the resulting evil but some other agencies of the Government. We note from the text that the power to decide questions involving the right to vote is expressly withheld from the Commission although the right to vote is provided in the Election Law, the enforcement and administration of which is placed in the exclusive charge of the Commission. Parallel to the withholding of such power from the Commission is the vesting in other agencies of the more inclusive power to decide all contests relating to the election, returns, and qualifications of the members a Congress, namely, the Electoral Tribunal of the Senate in the case of the senators and the Electoral Tribunal of the House of Representatives in the case of the members of the latter. Election contests involving provincial and municipal officials are entrusted to the courts. (Sections 172 et seq., Revised Election Code.) The power to decide election contests necessarily includes the power to determine the validity or nullity of the votes questioned by either of the contestants." [9]

There has been neither deviation nor retreat from the foregoing pronouncement.

Indeed, in the more recent case of *Ututalum vs. Commission on Elections*, L-25349, December 3, 1965, this Court, speaking thru then Associate Justice, now Chief Justice, Roberto Concepcion, rather than break away from *Nacionalista Party vs. Commission on Elections*, bolstered jurisprudence on this point by reiterating that Comelec's powers are "essentially executive ('enforcement') and administrative ('administration') in nature."

Not that petitioners are bereft of remedy. The course to pursue is pointed out to them in *City Board of Canvassers vs. Moscoso*, heretofore cited, (L-16365, September 30, 1963) -

"The question of whether or not there had been terrorism, vote-buying and other irregularities in the 1959 elections in Tacloban City should be ventilated in a regular election protest, pursuant to section 174 of the Election Code, and not in a petition to enjoin the city board of canvassers from canvassing the election returns and proclaiming the winning candidates for municipal offices. The duty of the board in this regard is more or less ministerial; it does not pass upon the validity or invalidity of the ballots cast, and its action is necessarily without prejudice to the determination of such question in a proper court proceeding later. This proceeding, under section 174, should be filed within two weeks after the proclamation of the result of the election and hence necessarily implies a previous canvass of the votes by the board of canvassers. x x x ." [10]

The ratiocination advanced that there was failure of election due to rampancy of terrorism, frauds, and other irregularities, before and during elections, such that allegedly about 51% of the registered voters were not able to vote, will not carry the day for petitioners. For, in the first place, this is grounded upon bare assertions. Respondents contest the correctness thereof. And in the answer of respondents Amoranto, Mathay and others, they aver that out of 162,457 registered voters in Quezon City, 100,382 voters actually cast their votes - about 62% of the registered voters. But above all, as pointed out in *City Board of Canvassers vs. Moscoso*, supra, nullity of an election for municipal officials should be determined in a petition contesting the election of municipal officers-elect to be filed before the Court of First Instance. [11]

3. As unconvincing is petitioners' prayer that Comelec direct a new election in Quezon City. We have searched in vain for any constitutional or legal precept that would grant Comelec that power.

All that there is in the statute books is Section 8 of the Revised Election Code, which reads:

"SEC. 8. Postponement of Election. - When for any serious cause the holding of an election should become impossible in any political division or sub-division, the President, upon recommendation of the Commission on Elections, shall postpone the election therein for such time as he may deem necessary." [12]

This refers to postponement before elections. This is not a remedy after elections. Just a few days ago, we were called upon to rule on a petition (*Janaire vs. Commission on Elections*, L-28315, December 8, 1967) praying that this Court direct Comelec to order the holding of an election in a precinct located in the island-barrio of Sibay, Caluya, Antique, where elections failed to take place on the date specified by law. And this, because "when the persons entrusted by the local COMELEC registrar with the delivery of the list of registered voters arrived at the island they were fired upon and had to go back to Caluya, returning to Sibay only at 6:30 in the evening of the same day, at which time however the board of election inspectors refused to hold the election on the ground that it was against the law to do so." Citing Sections 8 and 21 (c) of the Revised Election Code, this Court, speaking thru Mr. Justice Makalintal, there held (citing *Ututalum vs. Commission on Elections*, supra) that "no elections may be held on any other date, except when so provided by another Act of Congress, or upon orders of a body or officer to whom Congress may have delegated either its aforementioned power or the authority to ascertain or fill in the details in the execution of that power," and added that -

"In the same decision [*Ututalum vs. Commission on Elections*] this Court not only took note of the failure of the law to afford redress, either before the Commission on Elections or before the courts, to persons adversely affected by such failure, but recognized its possible effects upon the very institution of suffrage. The voters in precincts where no election is held on the date fixed by law, we said, 'will in effect . . . be disfranchised, and unscrupulous politicians would be encouraged to resort to acts of terrorism in areas favoring their opponents, in order to offset the latter's advantage therein, and thus eventually defeat the will of the majority and undermine the foundation of our democracy.' It is undeniable that the situation is fraught with dangerous possibilities.

The remedy, however, lies in Congress. The hiatus in our election law may be filled only by legislation, not by judicial fiat."

4. The petition before this Court in effect seeks to nullify Comelec order of November 23, 1967 heretofore adverted to. There was no lack nor excess of jurisdiction. No grave abuse of discretion was involved. Correctly did Comelec decline to direct the Quezon City board of canvassers to suspend canvass and proclamation. Comelec is powerless to annul the election. Nor can it direct a new election. We cannot compel Comelec to act as petitioners prayed for. Absent Comelec's legal duty, mandamus will not issue.

For the reasons given, we vote to dismiss the petition.

No costs allowed.

SO ORDERED.

Concepcion, C.J., Dizon, Makalintal, Bengzon, Zaldivar, Ruiz Castro, and Angeles, JJ., concur.

Reyes, JBL, J., concurs with both opinion.

Fernando, J., concurs in a separate opinion.

[1] Section 2, Article X of the Constitution.

[2] Nacionalista Party vs. Commission on Elections, 85 Phil. 149, 157.

[3] Sections 160 and 168, Revised Election Code; Nacionalista Party vs. Commission on Elections, *supra*; Canton vs. Commission on Elections, L-25467, April 27, 1967.

[4] 29 C.J.S., p. 656.

[5] Section 3, Revised Election Code; Canton vs. Commission on Elections, *supra*.

[6] *Abendante vs. Relato*, 94 Phil. 8, 15.

[7] *Santos vs. Commission on Elections*, L-16413, January 26, 1960.

[8] *Espino vs. Dumlao*, L-22325, December 11, 1967.

[9] Emphasis supplied.

[10] Emphasis supplied.

[11] Section 174, Revised Election Code.

[12] Emphasis supplied.

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CONCURRING OPINION

FERNANDO, J.:

The opinion of Justice Sanchez is impressive both for exhaustiveness and scholarly research. It reflects with care and fidelity the state of the law. The result arrived at is thus immune from any valid objection. It deserves assent, which I give.

Why the concurring opinion then? For one thing, the subject is of the utmost importance for the litany of grievances cited by petitioners, even if due allowances be made for excess of partisan zeal and disappointment of expectations, exposes serious defects in the electoral process. Add to this the inability of the judiciary to afford any remedy, if there be full and scrupulous adherence to the rule of law, which certainly should be the case always, allowing for human imperfection of course, and it becomes understandable why there should be stress on the need for an effort to improve matters, both earnest, and, it is to be hoped, effective. Otherwise, the law itself might indeed be in disrepute. That is something that should, by all means, be avoided.

One might say that assuming the truth of the sad and unfortunate plight in which petitioners, through no fault of their own, found themselves, an election protest affords a remedy. In theory it is so. The actualities many a time have proved the opposite. The long period required for a final decision and expenses that must be met render this remedy not only costly but in not a few occasions futile.

Why then, it may pertinently be asked by those burning with impatience and zeal for the needed reforms, cannot the judiciary do anything about the matter? The answer is simple. Under our constitutional system, only the people are possessed of rights, to protect which governmental agencies are delegated powers. There can be no presumption then of authority or competence; it must be shown to exist.

Whatever may be said in favor of the petition, it is quite barren as the answer of respondent so clearly shows of any legal precept, whether statute or decision, that reveals that the grievance is a matter proper for judicial correction. One of the counsel of petitioners, with commendable candor, admitted at the oral argument that at the time of the filing of this petition, their search for any such legal support was fruitless. It must have been so also as of the time they were heard. Certainly then, in a government of laws and not of men, such absence of a legal mooring is fatal.

Should this not be a case then for the judiciary to fill a gap, one could very well say an aching void in the law? The answer as is expressed so clearly and so plausibly in the majority opinion is that such a power was thus with-held, as shown by the past decisions of this Court to which adherence is indeed called for.

It could have been different if we had in our Civil Code a comparable provision to that found in the Swiss Civil Code of 1907 which provides that in default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of custom according to the rules which he would establish if he were to assume the part of a legislator. Even in such a case, as Cardozo pointed in words that have the ring both of beauty and of truth: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." [1]

While, as Holmes pointed out, judges "do and must legislate, * * * they can do so only interstitially; they are confined from molar to molecular motions." [2] For under the theory of separation of powers, it is to the Congress that the power of legislation belongs. At the most then, to paraphrase Cardozo, the judiciary can fill in the gaps or clear up the ambiguities. Unfortunately for petitioners, in this instance, there is no gap to be filled nor ambi-guities to be cleared. Hence, with due awareness of the possibility that grave shortcomings vitiated the past election in Quezon City, but with full recognition that to cure what could be assumed to be an existing evil the very great evil of assuming power where none exists should be avoided, this petition cannot prosper.

[1] Cardozo, *The Nature of the Judicial Process* (1921), p. 141.

[2] *Southern Pacific Co. v. Jensen* (1917), 244 US 205, 221.

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