

RUFINO S. ANTONIO, JR., PETITIONER, VS. THE COMMISSION ON ELECTIONS, JORGE A. ABAD, RENEE E. AGUDO AND THE PROVINCIAL BOARD OF CANVASSERS, RESPONDENTS.

G.R. No. L-31604. April 17, 1970

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Petitions for writs of certiorari and prohibition to review and set aside a Resolution of the Commission on Elections in its Case No. RR-698, dated 2 February 1970, whereby the Commission unanimously rejected the returns for 21 precincts of Itbayat, Ivana, Mahatao, Uyugan, and Sabtang, all of the province of Batanes, for having been "prepared at gunpoint"; annulled and set aside the proclamation of Rufino Antonio, Jr. by the Provincial Board of Canvassers on 13 November 1969; and by majority vote ordered said Board of Canvassers to convene immediately and recanvass the results of the election for the lone congressional district of the province of Batanes, on the basis of the remaining returns for Precincts I, 1A, 2, 3, 3A, 4, 5, 6 and 7 of Basco and Precinct No. 4 of Sabtang, and to proclaim the winner on 10 February 1970, unless restrained by the Supreme Court; and directing the Recording Secretary to furnish copies of said Resolution to the President, the Speaker and Secretary, House of Representatives, and the House Electoral Tribunal.

The Commission on Elections (COMELEC for short) found, among other things, that after the national elections held on 11 November 1969 the Provincial Board of Canvassers of the Province of Batanes was convened for 12 November 1969 at 8:30 o'clock p. m. Three members failed to attend: the Vice-Governor and two members of the Provincial Board. In view of their absence, the Provincial Fiscal, as Chairman of the Board of Canvassers, asked the Officer-in-charge, COMELEC, Batanes, to appoint substitutes for the absent members, which was done. Thereafter, the Board immediately proceeded with the canvass, recessed at two o'clock, past midnight, to resume at 10:00 o'clock a. m., 13 November 1969, and completed the canvass at 3:00 o'clock in the afternoon. Immediately thereafter, the canvassers proclaimed independent candidate Rufino Antonio, Jr. Congressman-elect for the lone congressional district of Batanes and, some time later, he took his oath of office.

On 26 November and 3 December 1969, Jorge A. Abad, Liberal Party official candidate, and Mrs. Renee Agudo, Nacionalista Party official candidate, filed independent petitions with COMELEC, contesting the proclamation of Rufino Antonio, Jr. by the Provincial Board of Canvassers on the basis of terrorism practiced by armed men brought to Batanes by candidate Antonio and strategically distributed in all towns, who destroyed communication facilities and blocked airport landings, thereby effectively isolating the province; and that on election day these armed men had attacked the precincts of Itbayat, Uyugan, Ivana, Mahatao and Sabtang (except Precinct 4 of the latter), driven away the voters filled in the unused ballots with the name of Antonio, destroyed the ballots of those voters who had previously managed to vote, prepared the election returns without counting the votes, and thereafter coerced and intimidated the boards of inspectors of the precincts to sign the same at gunpoint. Both petitioners prayed that the proclamation of Rufino Antonio, Jr. by the Board of Canvassers be annulled and set aside, and that the election returns in all precincts in the towns of Batanes, except Basco and

Precinct No. 4 of Sabtang, be declared null and void. But while candidate Abed also prayed that the canvassing board be directed to make another canvass on the basis of election returns from Precinct 4 of Sabtang and the nine (9) precincts of Basco and thereafter proclaim the winner, candidate Agudo, in her turn, asked that the returns from Sabtang, Precinct 4, and Basco be declared not expressive of the will of the majority, since they represent only 28% of the registered voters of Batanes, and that the holding of a special election be recommended to the President of the Philippines.

Respondent (petitioner herein) Rufino Antonio; Jr. answered both petitions traversing the allegations thereof, and pleading the regularity and freedom of the election held, and, by way of special defenses, urged (1) lack of jurisdiction of COMELEC to determine questions involving election returns regarding members of the House of Representatives; (2) estoppel of Jorge Abad to maintain the proceedings because he had filed a protest against Antonio in the House Electoral Tribunal; (3) that COMELEC had no power to annul the proclamation or suspend its effects; (4) that both Abed and Agudo waived their rights to contest the proclamations or are estopped from asserting it in view of their failure to attend the canvass and impugn therein the validity of the questioned returns; and (5) lack of power of the COMELEC to annul the election or declare a failure to elect.

At the initial hearing on 5 December 1969, the COMELEC issued a resolution suspending the effects of the proclamation of Antonio pending final termination of the case and rejected the motions to dismiss filed by Antonio and the Provincial Board of Canvassers based on grounds substantially identical to the special defenses pleaded in Antonio's answers.

Thereafter, COMELEC proceeded to take evidence, summoning and hearing inter alia the chairmen of the boards of inspectors in the questioned precincts. Thereafter, it rendered a unanimous Resolution finding the factual claims of terrorism made by petitioners (respondents herein) Abad and Agudo to have been substantiated by proof. Overruling Antonio's special defenses, the COMELEC voided the returns of the questioned precincts and set aside his proclamation based thereon. The majority of the Commission (Chairman Ferrer and member Patajo) further resolved to order the Provincial Board of Canvassers to reconvene and recanvass the uncontested returns of Basco and Precinct 4 of Sabtang, and proclaim the winner. Commissioner Miraflor, however, was, of the opinion that (as contended by candidate Agudo) there was a failure of election that should be certified to the House of Representatives.

Rufino Antonio, Jr. then resorted to this Court, as stated heretofore, urging practically the same special defenses pleaded by him before the COMELEC and praying that the COMELEC resolution be set aside, and that the House Electoral Tribunal be declared with exclusive jurisdiction to hear and decide the issues raised by petitioners below.

WE gave the petition due course and required respondents Commission on Elections, Jorge Abad, Renee Agudo and the Provincial Board of Canvassers to answer Antonio's petition. And upon his motion, a writ of preliminary injunction was issued to stop the proclamation during the pendency of these proceedings. Thereafter, the case was heard, argued and submitted for decision.

The petitioner, Rufino Antonio, Jr., makes no attempt to question the findings of the COMELEC to the effect that the returns from the 21 questioned precincts were prepared under systematic threats and intimidation practiced by heavily armed men upon the members of the respective boards of inspectors. Said the Commission in its resolution:

"It would appear quite clear to the Commission that what transpired inside the polling place in Itbayat, Uyugan, Ivana, Mahatao and Sabtang, except Precinct 4 on election day, particularly in regard to the preparation of the returns in these precincts through the intervention or upon the dictation of armed goons, was

the culmination of an operation which had for its objective the election of one of the congressional candidates. The destruction of the communication facilities of RCPI and of the Bureau of Telecommunication in Basco, as well as of the radio phone of the Weather Bureau Station; the immobilization of practically all government and private motor vehicles, including those belonging to the Bureau of Public Highways and Bureau of Public Works, the Provincial Governor, the Superintendent of Schools and the Provincial Hospital ambulance; the presence of a private plane squatting across the runway of the Basco Airport since November 8, 1969; the unexplained presence of unidentified ships in the waters of Batanes; the mysterious trips of a helicopter; the frisking of all arrivals by PAL in search of arms; the checkpoints manned by PC Special Forces whose presence in Batanas had not been re-reported to the Commission on Elections in Manila, and as a matter of fact, the Commission had grounded the use of these PC Special Forces in Cagayan and Marinduque and in all other places where their presence had been re-reported to the Commission before election and on election day; checkpoints which prevented the free movement of not only the government officials including the Governor but also of the Bishop of Batanes who headed the CNEA in said province; the precision in movements of these armed goons who swooped down upon the helpless members of the board of inspectors, and drove away the voters awaiting for their turn to vote, destroying or burning the ballots validly cast and filling in the unused ballots with the name of their candidate - all of these occurrences and happenings formed part of a common pattern joined together like pieces of a jigsaw puzzle which when seen separately are meaningless and incomprehensible but put together reveal a picture so awesome and appalling, clearly pointing to the rape of democracy in Batanes on November 11, 1969. (Appendix "Y" of Antonio's Petition, pp. 31-33)."

Petitioner Antonio actually rests his case on the arguments that all the questioned returns appear clean and regular on their face; that the Board of Provincial Canvassers was regularly constituted; that the validity of the questioned returns was not raised at any time during the canvass, which resulted in petitioner's proclamation. From these premises, he avers first of all that only the House Electoral Tribunal, and not the COMELEC, can review and set aside such canvass and proclamation. Yet he admits that under the repeated rulings of this Court the COMELEC can set aside an illegal proclamation such as one based on incomplete or tampered returns (Petitioner's memorandum, page 3). Over and over, in fact, has this Court held that it is the duty of canvassers to be satisfied of the genuineness of the returns, that the papers presented to them are not forged or spurious.[1] If the COMELEC in the exercise of its duties under Section 3 of the Revised Election Code, can require Boards of Canvassers to consider only genuine and authentic, not falsified, returns, it can logically require such boards to exclude from the canvass any returns that were actually the product of coercion, even if they be clean in their face. Direct authority to this effect is our decision in *Pacts vs. COMELEC*, L-29026, 28 September 1968, 25 SCRA, page 377, where we specifically ruled as follows:

"We must now say that an election return prepared at the point of a gun is no return at all; it is not one notch above a falsified or spurious return. Comelec was correct in ruling that there was no valid return for the office of Mayor at Precinct 22 and that no vote should be counted for said precinct in the canvass of votes for Mayor."

On the strength of *Angara vs. Electoral Commission* (1936) 63 Phil. 139, petitioner Antonio urges that the Electoral Tribunal of the House has, under the Constitution, exclusive jurisdiction to pass upon and determine the election, returns and qualifications of the members of the House of Representatives, and that such grant of power is intended to be as complete and unimpaired as if it had remained originally in the legislature; "and this is as effective a restriction upon the legislative power as an express prohibition in the Constitution" (cas. cit., page 176). But the *Angara* case did not involve any conflict between the Commission on Elections and the Electoral Tribunals, neither of which existed when that decision was rendered; and the fact that the powers of the Electoral Commission (now replaced by the House and Senate Electoral Tribunals) restrict and exclude the legislative power in matters concerning the election, returns and qualifications of the members of the House in election

contests, does not mean that the COMELEC may not now exercise its constitutional power to "enforce and administer all laws relative to the conduct of elections", and, in the course thereof, to require that canvassers base their proclamations only on genuine, authentic and untampered returns, and annul any pro-clamations departing from this rule.

"The purpose of the Revised Election Code is to protect the integrity of the elections and to suppress all evils that may vitiate its purity and defeat the will of the voters. The purity of the elections is one of the most fundamental re-quisites of popular government. The Commission on Elections, by constitutional mandate, must do everything in its power to secure a fair and honest canvass of the votes cast in the elections. In the performance of its duties, the Commission must be given a considerable latitude in adopting means and methods that will insure the accomplishment of the great objective for which it was created -- to promote free orderly and honest elections. The choice of means taken by the Commission on Elections, unless they are clearly illegal or constitute grave abuse of discretion, should not be interfered with. Technicalities, which are not conducive to free, orderly and honest elections, but on the contrary may defeat the will of the sovereign people as expressed by their votes, should not be allowed to hamper the Commission on Elections in the performance of its duties." CAUTON V. COMELEC L-15467, April 27, 1967 10 SCRA 911.

The true measure of the jurisdiction of the House and Senate Electoral Tribunals was set in our decision in *Vera vs. Avelino*, 77 Phil. 192, 200, to the effect that:

"The Convention, however, bent on circumscribing the latter's authority to contest' relating to the election, etc. altered the draft. The Convention did not intend to give it all the functions of the Assembly on the subject election and qualifications of its members. The distinction is not without a difference. 'As used in constitutional provisions', election contest 'relates only to statutory contests in which the contestant seeks not only to oust the intruder, but also to have himself inducted into office. ' (Laurel on Elections, Second Edition, p. 250; 20 C.J., 58.) "

In harmony with this principle, Section 182 of the Election Code provides that "in contests under their respective jurisdictions the Electoral tribunals of the Senate and the House of Representatives shall have and exercise the same powers which the law confers upon the Courts ...", it being well-known that the exercise of judicial powers are called for only upon the filing of the corresponding petition. Until a regular protest or contest is filed, therefore, the jurisdiction of the Electoral Tribunals does not come into play in order to exclude the authority of the COMELEC.

Thus, the power of the COMELEC to set aside returns that are falsified or are not authentic and genuine and to order the same excluded from a canvass is distinct and separate from the authority inherent in the Electoral Tribunals of the House or the Senate, in the course of an electoral protest, to set aside such returns whenever the statements of votes cast contained therein do not tally with the valid votes enclosed within the ballot boxes themselves. No conflict of jurisdiction can arise since the powers of the COMELEC and the Electoral Tribunals are exercised on different occasions and for different purposes. The COMELEC is not concerned with the veracity of the returns, but with their genuineness and regularity; and it is self-evident that a return accomplished by the election inspectors under threats and coercion by armed men is in law no return at all that the canvassers may take into account.[2] As a corollary, the COMELEC can set aside an improper canvass, as well as the resulting proclamation, and this Court has repeatedly so ruled[3].

"These cases, however, are not to be read as throwing overboard Comelec's authority to inquire into whether or not a proclamation is null and void. For, these cases merely emphasize the rule that where a proclamation is validly made ERRORS in the proclamation may only be raised in a full-dress election protest.

"The ratiocination advanced by petitioner fails to take stock of the fact that where a proclamation is null and void, that proclamation is no proclamation at all. This is axiomatic. To be remembered is *Mutuc v.*

Commission on Elections, *supra*, citing *Demafiles vs. Commission on Elections, supra*. Our ruling there is this: ' It is indeed true that after proclamation the usual remedy of any party aggrieved in an election is to be found in an election protest. But that is so only on the assumption that there has been a valid proclamation. Where as in this case at bar the proclamation itself is illegal the assumption of office cannot in any way affect the basic issues. ' (Ibid) "

It may be that the canvassers were not, at the time of the canvass, aware that the returns were coerced; that may relieve them from liability but does not validate such returns, nor prevent the COMELEC from sub-sequently voiding them and ordering a new canvass whenever said body is satisfied of the compulsive character of the returns.

It is urged that the respondents Abad and Agudo are in estoppel from questioning these coerced returns because of their failure to attend the canvassing and there to object to them. We find this contention untenable in view of the circumstances then prevailing. Not only was Abad sick at the time, but no adequate term was given for him to attend. In truth, the canvass was so precipitately conducted [starting at eight o'clock in the evening of the day following the election (12 November 1969) and completed at 3 o'clock of the following afternoon] that three of the de jure members of the Provincial Board of Canvassers had, like-wise, no opportunity to be present, and their substitutes were appointed without even attempting to secure from the COMELEC an order for their substitution, as required by section 159 of the Election Code. A reading of the minutes of the canvass proceedings leaves no doubt that the short notices (barely an hour) given to Vice-Governor Gato and two members of the Provincial Board were expressly designed to prevent their attendance, and this maneuver would suffice to annul the canvass (*Pacts vs. COMELEC, ante*).

In addition, some of the returns considered by the canvassers were plainly irregular on their face. Thus, for example, the returns for Precinct 1 of Sabtang showed only the signatures of two inspectors (See the photograph, Abad's Answer, Annex "D"); that of Precinct 2 of Sabtang (do, Annex "E") showed no count of the valid and spoiled ballots, nor did it show any votes for Senators; that of Precinct II -A of Itbayat contained an erasure by cancellation and a correction without initials (Annex "F"), and the same is true of the return for Precinct 1 of Ivana, where the votes of Jose W. Diokno for senator (224) appear cancelled without initials or explanation (Annex "J"). In the return for Precinct 2 of Mahatao (Annex "H"), an equally patent anomaly appears: the votes for candidates Abad (Jorge), Abad (Senen), Agudo and Villalva are set down as "One" in letters and eleven (11) in figures. Yet, despite such blatant anomalies, all these returns were improperly considered regular by the canvassers. Hitherto, in *Solidum vs. Macalalag*, L-28666, 20 May 1969, 28 SCRA 200; *Purísima vs. Salanga*, L-22335, 31 December 1965, 1965, 15 SCRA 704, and *Javier vs. Comelec*, L-22248, 30 January 1965, 13 SCRA 156, we have ruled that failure to investigate and to disregard patent irregularities, such as these, authorizes the COMELEC to annul the canvass and resulting proclamation.

To cap it all, there is the testimony of Governor Agudo, himself a member of the Board of Canvassers, that in Batanes "there was terrorism before, during and after the elections".

All these circumstances, precipitate canvassing, terrorism, lack of sufficient notice to members of the Board, and disregard of manifest irregularities on the face of the questioned returns, build up to prove that the alleged canvassing was mere ceremony that was predetermined and manipulated to result in nothing but the hurried proclamation of petitioner Antonio as Congressman-elect. They also establish convincingly that whatever objections to the returns could have been interposed by the respondent candidates, had they been given opportunity to do so, would have been useless, and would not have been considered nor varied the result. Wherefore, the failure of respondents to interpose seasonable objection at the canvassing aforesaid could not have amounted to either estoppel or waiver of their rights to object to the questioned returns.

Finally, Antonio's argument that Abad waived the remedy sought from the COMELEC by filing an unconditional protest with the House Electoral Tribunal on 28 November need not give pause: for the Electoral Tribunal itself admitted Abad's amended protest, recognized that the protest was filed *ex abundante cautela* and, upon Abad's motion, held further proceedings in abeyance "until after the Commission on Elections has resolved the matter or matters now pending before it". The House Electoral Tribunal, in other words, recognized the jurisdiction of the COMELEC, and beyond that this Tribunal is not called upon to go. Anyway, a cautelary protest does not deprive the COMELEC of its jurisdiction.[4]

Nor is petitioner's case bolstered by his taking an oath of office on 30 November 1969. "Where the proclamation itself is illegal, the assumption of office can not in any way affect the basic issues" (*Mutuc vs. COMELEC*, G. R. L-28517, 21 February 1968, 22 SCRA 662).

In case G. R. No. L-31609, candidate Renee Agudo appealed from the COMELEC resolution in so far as the same ordered the Provincial Board of Canvassers to reconvene and canvass the returns from those precincts not affected by terrorism and to proclaim the winner on the basis of such returns. Appellant Agudo takes the position that, since the votes recorded (1,363) for all the precincts of Basco and precinct 4 of Sabtang, and reported for the only precincts not questioned, represent only 28% of the total registered voters, the proper course of the COMELEC is to certify to a failure of election in order that a special election may be called.

Implicit in the stand taken by respondent Agudo is the assumption that for a candidate to be elected, he should receive the votes of a majority of the registered electors. This thesis finds no support in our election laws. There is no provision in our election statutes declaring that a majority of the registered voters must cast their votes, or that a winning candidate must receive a majority of the votes of the registered electors, or a majority of the votes cast. The only mention in the Election Code of the number of votes required of a congressional candidate is in section 165, providing that if from the canvass "it should appear that 2 or more have received the largest number of votes", then the canvassers shall draw lots and "shall proclaim as elected that candidate who may be favored by luck, and the candidate so proclaimed shall have the right to assume office in the same manner as if he had been elected by a plurality vote". A plurality of valid votes, therefore, is all that is required in order that a candidate may win the election, even if he obtains less than an actual majority.

It is, likewise, our view that the certification prayed for by respondent Agudo is not within the powers of the COMELEC to make. It is well to recall here that the Commission is constitutionally charged with the "enforcement and administration of all laws relative to the conduct of the elections" (Article X, section 2, Constitution). The Constitution also empowers the COMELEC to "decide, save those involving the right to vote, all administrative questions affecting elections", all with a view to ensuring "free, orderly and honest elections". We seriously doubt that a declaration of a failure to elect, notwithstanding the fact that 1,363 valid votes have been cast and counted, can be considered an "administrative question" that the COMELEC has power to decide. Such a certification has no bearing on the conduct of the elections or the electoral process, but concerns the results thereof. It would bring about the invalidation or nullification of the votes validly cast in the uncontested precincts, effectively disenfranchising the voters who cast them; and this Court has already ruled that "the power to decide election contests" (which is avowedly not lodged in the COMELEC) "includes the power to determine the validity or nullity of the votes questioned by either of the contestants." [5]

Be that as it may, all doubts on the question can be set at rest by resorting to the provisions of Section 177 of the Election Code. It prescribes that it is for the Court taking cognizance of an election protest to "declare who among the parties had been elected, or, in the proper case that none of them has been legally elected". Since the Electoral Tribunals of Congress, pursuant to Section 182 of the Election Code, "shall have and exercise the same powers which the law confers upon the Courts, it becomes plain that the declaration of a failure to elect must, in

the case, be sought from the Electoral Tribunal of the House and in the appropriate election contest, because such failure can only mean that none of the competing candidates has been legally elected. To give way to a protest wherein such declaration can be made, a winner must be proclaimed.

The Justices are unanimous in the conclusion that the proclamation of petitioner Rufino S. Antonio, Jr. was correctly and properly annulled and set aside by the Commission on Elections in view of the large scale and unprecedented terrorism practiced by armed goons in favor of said candidate, and, therefore, the action of the Commission must be; and is, affirmed in this respect. The justices are, however, evenly divided on the issue whether the COMELEC should have ordered, as it did, a recanvass and proclamation on the basis of the returns for Precincts 1, 1A, 2, 3, 3A, 4, 5, 6 and 7 of Basco and No. 4 of Sabtang. Five justices, including the writer of this opinion, believe that such a proclamation is a necessary precedent to a protest in the Electoral Tribunal of the House, wherein the question of failure to elect may be resolved. Five other Justices dissent, believing that the proclamation ordered by COMELEC is improper under the circumstances, and that the COMELEC should confine itself to declaring a failure of election and to certifying the matter to the House Electoral Tribunal or, as proposed by Mr. Justice Enrique Fernando, to the House of Representatives direct. Under the Rules of Court (Section 11, Rule 56), a rehearing on this second point must be had.

WHEREFORE, the petition of candidate Rufino S. Antonio is hereby dismissed, and the order of COMELEC invalidating his proclamation is affirmed. But the petition of candidate Agudo that COMELEC certify a failure of election and recommend the holding of a special election, as well as the petition of candidate Abad that a proclamation be ordered made on the basis of the valid returns, are ordered set for reargument and new hearing as soon as practicable.

SO ORDERED.

Dizon, Makalintal, and Zaldivar, JJ., concur.

Concepcion, C.J., voted in favor of this opinion.

Teehankee, J., files a separate opinion

Ruiz Castro and Villamor, JJ., concur in the separate opinion of Justice Teehankee.

Reyes, JBL., Acting C. J., certifies that Mr. Justice Antonio P. Barredo voted in favor of Justice Teehankee's opinion.

Fernando, J., see concurring and dissenting opinion.

[1] Demafiles vs. Commission on Elections, L-28396, 29 December 1967; 21 SCRA 1462, 1466; Ong vs. Commission on Elections, 29 January 1968, 22 SCRA 241, 249; Espino vs. Zaldivar, L-22325, 11 December 1967, 21 SCRA, 1215; Cauton vs. Comelec, L-25467, 27 April 1967, 19 SCRA 911.

[2] Pacis vs. COMELEC, supra.

[3] Aguam vs. COMELEC, L-28955, 28 May 1968, 23 SCRA 889-890, and cases cited therein; Mutuc vs. COMELEC, L-28517, 21 Feb. 1968, 22 SCRA 669.

[4] Pacis vs. COMELEC, ante.

[5] Nacionalista Party vs. Commission on Elections, 85 Phil. 149, 156; Abes vs. COMELEC, L-28348, 15 December 1967, 21 SCRA, 1252, and cases therein cited.

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CONCURRING AND DISSENTING

FERNANDO, J.:

To the extent that the ably-written opinion of Justice J. B. L. Reyes sustains the resolution of the respondent Commission on Elections annulling the proclamation of petitioner Rufino S. Antonio, Jr., I am in full agreement and vote accordingly. It is with regret, however, that I find myself unable to agree with its conclusion, affirming the resolution of a majority of respondent Commission ordering the Provincial Board of Canvassers of Batanes, to convene immediately and recanvass the results of the election for the lone congressional district of the province of Batanes on the basis of the returns for precincts 1, 1A, 2, 3, 3A, 4, 5, 6 and 7 of Basco and precinct 4 of Sabtang and to proclaim the winner as a result of such recanvass. While it is to be admitted that there was no failure to abide by our previous decisions of pertinence and relevance, there is, to my mind, the unique fact of the mass coercion and terrorism employed during the day of election on November 11, 1969, so vividly placed on record in the challenged resolution of the respondent Commission on Elections. That, for me at least, calls for a departure from our previous decisions cited in support of the opinion of the Court. There is much in the equally lucid separate opinion of Justice Teehankee that calls for approval, but, for reasons hereafter to be set forth, I cannot likewise yield assent to his conclusion that the ultimate resolution of the question as to who should be declared the duly elected Congressman for Batanes should be left to the House Electoral Tribunal. Hence, this separate concurring and dissenting opinion.

1. The opinion of Justice Reyes quotes from the finding of facts a respondent Commission, which for us is conclusive, the following: "It would appear quite clear to the Commission that what transpired inside the polling place in Itbayat, Uyugan, Ivana, Mahatao and Sabtang, except Precinct 4 on election day, particularly in regard to the preparation of the returns in these precincts through the intervention or upon the dictation of armed goons, was the culmination of an operation which had for its objective the election of one of the congressional candidates.' " After particularizing the destruction of the communication facilities; the immobilization of practically all government and private motor vehicles; the presence of a private plane squatting across the runway of the Basco Airport since November 8, 1969; the unexplained presence of unidentified ships in the waters of Batanes; the mysterious trips of a helicopter; the frisking of all arrivals by PAL in search of arms; the checkpoints manned by PC Special Forces whose presence in Batanes had not even been reported to it; check-points which prevented the free movement of government officials including the Governor; "the precision in movement of such armed goons who swooped down upon the helpless members of the board of inspectors, and drove away the voters awaiting for their turn to vote, destroying or burning the ballots validly cast and filling in the unused ballots with the name of their candidate," respondent Commission, as noted in the opinion of Justice Reyes, appeared to be more than justified in concluding, "all of these occurrences and happenings formed part of a common pattern joined together like pieces of a jigsaw puzzle which when seen separately are meaningless and incomprehensible but put together reveal a picture so awesome and appalling, clearly pointing to the rape of democracy in Batanes on November 11, 1969." The choice of words while quite emphatic cannot very well be characterized as an exercise in hyperbole.

2. There has been of late on our part, especially so since *Cauton v. Commission on Elections*,^[1] a marked recognition of the broad power of respondent Commission to assure that the canvassing and proclamation reflect with fidelity and accuracy the true results of an election. Thereby there may be an approximation of the

constitutional objective of insuring that it would be "free, orderly, and honest." [2] The underlying assumption, it would appear to me, is that the electors are able to cast their votes, thereafter to be counted by the boards of inspectors, preparatory to their being canvassed so that the proclamation could be made. If the facts contradict such an assumption as in this case, the term used by respondent Commission, "rape of democracy" depicting the tragic plight of the voters on election day, then cannot see my way clear to according the seal of our approval to the conclusion reached by the majority of respondent Commission that under the unique circumstances thus disclosed, there could be a valid canvassing and proclamation.

3. Nor is this to lose sight of the fact that the returns for precincts 1, 1A, 2, 3, 3A, 4, 5, 6 and 7 of Basco as well as precinct 4 of Sabtang could be utilized for the purpose of the canvass and the subsequent proclamation of the candidate elected as congressman. What appears for me decisive is that more than a majority of the electors were prevented from exercising their right to vote. This is equivalent to no election at all having been held. So it would appear likewise for Justice Teehankee, in whose separate opinion Justice Castro joins: "Here, more than two-thirds of the returned votes totalling 4,499 had likewise been rejected for intimidation and coercion of the inspectors, such that the less than one-third remainder of 1,363 votes did not constitute a valid constituency for a valid election. The Comelec majority admitted as much, recognizing that 'the remaining returns constitute only 28% of the constituency.' Dissenting Commissioner Miraflor gave in addition the figures from the 1953 to the 1967 elections showing therefrom the average percentage of voting in Batanes to be 85% of the registered voters, and remarking that '(T)he popular will is expressed by such stable and regular percentages of voting. Applying these percentages of voting in past elections to the 1969 elections, of the 4,866 registered voters as reported by the election registrars, around 85% or 4,137 would have cast their votes in the 1969 elections. To me, the results of only 10 out of 31 precincts, or of 1,363 votes out of 4,137 possible actual voters, or of 32.94% of the voters voting is not indicative of the popular will of the people of Batanes.'"

4. It would then be, to my way of thinking, to disregard the republican character of our polity as enjoined by the Constitution [3] to predicate a choice on the part of the people of Batanes as to who their Congressman shall be considering what did transpire. As we pointed out in a recent case: "A republic then to be true to its name requires that the government rests on the consent of the people, consent freely given, intelligently arrived at, honestly recorded, and thereafter counted. Only thus can they be really looked upon as the ultimate sources of established authority. It is their undeniable right to have officials of their unfettered choice. The election law has no justification except as a means for assuring a free, honest and Orderly expression of their views." [4]

The words of Justice Laurel are equally apposite: "As long as popular government is an end to be achieved and safeguarded, suffrage, whatever may be the modality and form devised, must continue to be the means by which the great reservoir of power must be emptied into the receptacular agencies wrought by the people through their Constitution in the interest of good government and the common weal. Republicanism, in so far as it implies the adoption of a representative type of government, necessarily points to the enfranchised citizen as a particle of popular sovereignty and as the ultimate source of the established authority." [5] If on the undisputed facts, the wishes of more than a majority of the enfranchised citizens of Batanes, would not even be taken into account, then for me less than full respect is accorded to one of the most fundamental principles of our Constitution.

5. What is to be done then? Considering that under the view I take of the case, in the light of the incontrovertible facts so meticulously and vividly spelled out by the respondent Commission, it should certify to Congress that unfortunately the right to vote was frustrated and nullified so that the appropriate remedial measure in the form of a new election could be provided for by appropriate legislation. Vast and extensive are indeed the implications flowing from the generous grant under the Constitution to respondent Commission to "have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections" and to "exercise all other

functions which may be conferred upon it by law." [6] Thereby the totality of the executive power heretofore exercised by the President insofar as the execution of such statutes is concerned is transferred to an independent constitutional agency to assure that there be neutrality and impartiality and thus safeguard the right of suffrage from being reduced to a farce or mockery. [7] It could happen though, as it did happen in this instance, that notwithstanding the firmness and vigor with which respondent Commission pursued measures to live up to such delicate responsibility, forces, which it could not anticipate and beyond its control, could impress on its efforts the doom of futility. It could very well be of course that natural or fortuitous causes could have led to a similar result of no election having taken place. The fact that here the cause for such frustration of the electoral powers was man-made should not, for me, call for a distinction as to the legal consequence.

To be more specific, respondent Commission is required to submit to the President and the Congress, "following each election, a report on the manner in which such election was conducted." [8] In compliance with such constitutional duty, all that respondent Commission has to do is to acquaint the President and the Congress of what did happen in Batanes on November 11, 1968, as found by it after due hearing and embodied in its resolution now before us. There was indeed, in the vivid language of respondent Commission, "the rape of democracy."

Such being the case, Congress can be trusted to act. It is the sole agency that under the Constitution can provide for the holding of an election that would thus give the opportunity for all qualified electors of Batanes so-minded to make full use of their basic right to vote. The power to call for a special election and when it shall be held is legislative in character. [9] It appears clear to me that upon Congress being officially informed in accordance with the above constitutional provision of what occurred in Batanes, tragic in its implications for the rule of law, it can be expected in turn to remedy matters in the only way that the situation calls for, the enactment of a measure as to when the voters of that province will have their right of suffrage truly respected and given force and effectivity. That, for me at least, is the appropriate response to the unique situation that, it is to be hoped, will not be repeated.

6. It is in the light of the above that I find myself unable to go along with Justices Teehankee and Castro, with whose opinion I am in the main in agreement, as to their conclusion that the ultimate disposition of the matter should be left to the House Electoral Tribunal. While not devoid of merit such an approach would for me entail further delay, which could be avoided, as it is not improbable that after due hearing the House Electoral Tribunal would arrive at a similar conclusion reached by respondent Commission as to no election having in fact taken place. Moreover, I am not fully convinced that the House Electoral Tribunal could assume jurisdiction in the absence of a valid proclamation of the winning candidate, a prerequisite which from the view I have of the case cannot be validly satisfied. [10]

[1] L-25467, April 27, 19 SCRA 911. The other cases are *Espino v. Zaldivar*, L-22325, Dec. 11, 1967, 21 SCRA 1204; *Ong v. Commission on Elections*, L-28415, Jan. 29, 1968, 22 SCRA 241; *Mutuc v. Commission on Elections*, L-28517, Feb. 21, 1968, 22 SCRA 662; *Pedido v. Commission on Elections*, L-28539, March 30, 1968, 22 SCRA 1403; *Aguam v. Commission on Elections*, L-28955, May 28, 1968, 23 SCRA 883; *Pelayo Jr. v. Commission on Elections*, L-28869, June 29, 1968, 23 SCRA 1374; *Pacis v. Commission on Elections*, L-29026, Sept. 28, 1968, 25 SCRA 377; *Ligot v. Commission on Elections*, L-31380, Jan. 21, 1970; *Abrigo v. Commission on Elections*, L-31374, Jan. 21, 1970; *Moore v. Commission On Elections*, L-31394, Jan. 23, 1970; *Ilarde v. Commission on Elections*, L-31446, Jan. 23, 1970

[2] Art. X, Sec. 2, Constitution of the Philippines.

[3] "The Philippines is a republican state." Art. II, Section 1, Constitution.

[4] *Badelies v. Cabili*, L-29333, Feb. 27, 1969, 27 SCRA 113.

[5] *Moya v. Del Fierro*, 69 Phil., 199, 204 (1939).

[6] Art. X, Sec. 2, Constitution.

[7] Cf. *Abcede v. Hon. Imperial*, 103 Phil. 136 (1958).

[8] Art. X, Sec. 4, Constitution.

[9] *Ututalum v. Commission CM Elections*, L-25349, Dec. 3, 1965, 15 SCRA 465 cited with approval in *Jenairo v. Commission on Elections*, L-28315, Dec. 8, 1967, 21 SCRA 1173.

[10] Cf. *Lachica v. Yap*, L-25379, Sept. 25, 1968, 25 SCRA 140.

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SEPARATE OPINION

TEEHANKEE, J.:

Two jurisdictional questions challenging the authority of the Comelec to issue the Resolution before us are raised in the petitions submitted for decision.

Petitioner Antonio in Case L-31604 challenges Comelec's annulment of his proclamation, notwithstanding its apparent due regularity, as an encroachment on the jurisdiction of the House Electoral Tribunal.

Petitioner Agudo in Case L-31609 challenges the authority of Comelec to order a recanvass and the proclamation of Abad on the basis of the remaining valid returns of 10 out of 31 precincts in 1 out of the 6 towns of the entire province of Batanes, when Comelec itself concedes that there has been a failure of election.

I

Petitioner Antonio challenges the Comelec Resolution annulling his proclamation on November 13, 1969, by the Provincial Board of Canvassers as the winning candidate for the lone Congressional district of Batanes, on the ground that such annulment was beyond the jurisdiction and authority of the Comelec, contending that "Where there is no objection during the canvass, which is completed with due regularity, and the proclamation is made, any action to correct the canvass and set aside the proclamation would fall within the exclusive jurisdiction of the Electoral Tribunal."^[1]

The fallacy of petitioner Antonio's contention lies in his failure to consider one overriding factor, i. e. the undisputed finding of the Comelec, after the hearings held by it upon complaints of his two principal opponents, Liberal Party official candidate Jorge Abad and Nacionalista Party official candidate Renee Agudo, in discharge of its constitutional duty of enforcing and administering our laws relative to the conduct of elections for the Purpose of insuring free, orderly and honest elections, that the proclamation of petitioner Antonio was based upon twenty-one (21) void gun-point returns, out of a total of thirty-one (31) returns of the province.

The Comelec's uncontroverted finding was that Election Day in 5 out of 6 towns in Batanes "involved a wholesale operation to frustrate the popular will through the use of returns extracted at the point of a gun from helpless boards of inspectors and that the techniques and methods used by the malefactors to achieve their ends (were) most sophisticated and devastatingly effective."

An illegal proclamation based on spurious or manufactured returns, be they returns manufactured by criminal collusion of the inspectors or at the point of a gun is no proclamation and is null and void. Petitioner Antonio himself concedes "that the Corn-elec can set aside an illegal proclamation, such as one based on incomplete or tampered returns, or when the board of canvassers is unlawfully constituted or had no quorum or did not meet at all." [2] And certainly, as we said in the second Pacis case, "an election return prepared at the point of a gun is no return at all; it is not one notch above a falsified or spurious return." [3] His proclamation on November 13, 1969, based on twenty-one (21) gun-point and spurious returns, was therefore illegal and null and void. As this Court, through Mr. Justice Sanchez stated in *Solidum vs. Macalalag*, [4] "(E)ven on the assumption that the proclamation is valid petitioner's case still fails. For procla-mation is in umbilical dependence upon the returns." Where the canvass and proclamation, otherwise regular and valid, were based on spurious returns, the canvass and proclamation must likewise be held to be equally spurious.

This Court so pointed out as early as *Nacionalista Party vs. Cornelec* [5] that "(T)he canvassers are to be satisfied at the genuineness of the returns -- namely, that the papers present-ed to them are not forged and spurious, that they are returns, and that they are signed by the proper officers where the returns are obviously manufactured, as where they show a great excess of votes over what could legally have been cast, the board will not be compelled to canvass them."

Petitioner Antonio's contention that simply because no ob-jection was made by his opponents in the first instance during the canvass to the inclusion of the twenty-one (21) gun-point returns and the proceedings were completed and his proclamation made with apparent due regularity, the Comelec was thereby foreclosed and deprived of jurisdiction to investigate the complaints made at the earliest opportunity for the annulment of the canvass and proclama-tion, must therefore fail, because:

1. The fact that the twenty-one (21) gun-point returns were not denounced as such at the canvassing of November 13, 1969, prescinding from the other circumstances of "precipitate canvass-ing, terrorism, lack of sufficient notice to members of the Board, and disregard of manifest irregularities on the face of the ques-tioned returns" cited by Mr. Justice Reyes in the main opinion, does not in any way cure their being void returns ab initio.
2. This was not then a question of a mere error in the pro-clamation to be threshed out in a regular election protest, but a proclamation that was null and void ab initio because based on void returns. Thus, in *Aguam vs. Comelec*, [6] this Court up-held the Comelec resolution (issued on April 27, 1968) and sus-tained its jurisdiction in giving due course more than five (5) months after the proclamation (on November 21, 1967) to the respondent-complainant Balindong's petition filed (on January 6, 1968) with Comelec one and a half (1 -1/2) months after the pro-clamation. The Comelec had ordered the opening of the ballot box to determine the genuineness of a decisive election return, a tampered copy of which was used in the proclamation, not-withstanding that the two-weeks period from proclamation, allowed for protests, had long elapsed, and therein petitioner Aguam had assumed (on December 30, 1967) the questioned office. We reiter-ated therein the rule that "where, as in the case at bar, the pro-clamation itself is illegal, the assumption of office cannot in any way affect the basic issues." With the annulment of the procla-mation, notwithstanding that respondent Balindong, as in this case, had no material time and opportunity to question the inclusion of the disputed return during the canvassing, respondent Balindong was eventually ordered proclaimed by the Comelec and assumed the office.

3. We stated in the first Pacis case[7] that "(S)ound practice seeks to accommodate every plausible theory which will discourage if not eliminate, minimize if not curb, unlawful proclamation of, and assumption of public trust by, the wrong man. Clean elections control the appropriateness of the remedy." In the second Pacis case, *supra*, we cited the judicial approval accorded Comelec's broad power under the Constitution and the statutes and its exclusive authority "to decide, save those involving the right to vote all administrative questions, affecting elections", [8] pointing out that "(I)ndeed, the diversity of election frauds and anomalies that have been concocted by rival parties, surpassing legislative anticipation and scuttling the prescribed manner of conducting elections, necessitate resort to Comelec's general power of administration and supervision."

4. Under the circumstances, what the board of canvassers has done improperly in the matter of the precipitate and illegal proclamation of Antonio may be undone by Comelec upon timely application or on its own initiative, and similarly, what the board has failed to do may be done by Comelec, under its broad powers of "direct and immediate supervision" over the provincial canvassing board. (Section 3, Revised Election Code). As we said in the analogous case of *Cauton vs. Comelec*, [9] "(O)nce the Commission on Elections is convinced that the election returns in the hands of the board of canvassers do not constitute the proper basis in ascertaining the true result of the elections, it should be its concern, nay its duty, to order the taking of such steps as may be necessary in order that the proper basis for the canvass is obtained or made available."

5. That Comelec, rather than the House Electoral Tribunal is the proper agency vested with jurisdiction to ascertain that only genuine returns, as against forged, spurious or manufactured or gun-point returns, are used for the canvass and proclamation is borne out by the fact that it is Comelec that is vested by the Constitution with the authority for deputizing all law enforcement agencies and instrumentalities of the Government for the purpose of insuring free, orderly and honest elections. The House Tribunal aside from not being vested with jurisdiction, simply does not have the resources and facilities, not to mention that after the elections, the six House members thereof are simply in no position to attend to and decide such urgent administrative questions affecting the elections and there is a hiatus with the cessation in office of non-re-elected members, which has to await the Tribunal's reorganization after the new Congress is convened in the following year on the fourth Monday of January.

6. When the Comelec rejects or orders the exclusion from the canvass of void returns, because they are obviously manufactured. (as in the *Lagumbay* case) or tampered returns (as in the *Cauton* case) or spurious or "gun point returns, as in the case at bar (and in the *Pacis* case), it does not in law annul the returns but merely complies with its duty of seeing to it that only genuine returns are used in the canvass for determining and proclaiming the true result of the election. Where an authentic untampered copy of the return may be retrieved from the ballot box, we have upheld its authority to order the opening of the ballot box, in order to retrieve such copy, as in the *Cauton* and *Aguam* cases. Of course, where all the copies of the returns are spurious, because manufactured by collusion or at gunpoint, there simply are no returns to go by for the returns, not being genuine, have to be excluded from the canvass. The Comelec does not thereby encroach on the jurisdiction of the House Electoral Tribunal and "in effect set aside the election in the precincts covered by the (manufactured or gun-point) returns" as claimed by petitioner Antonio.

7. It is the House Electoral Tribunal that may properly set aside the election in the precincts covered by otherwise genuine and valid returns, when in a proper electoral contest before it, it conducts a tally of the valid ballots deposited within the ballot boxes and finds them at variance with the returns as canvassed. It then sets aside the count of the ballots per the returns and makes its own count. This is the proper jurisdiction over election returns of the House Electoral Tribunal, when in an election contest, it sets aside the results of the returns and goes by the primary evidence of the ballots themselves.

II

With twenty-one (21) out of thirty-one (31) returns in five (5) out of six (6) towns of the entire province of Batanes thus indisputably determined to be void returns, such that there remain only the returns from the 9 precincts of Basco and from Precinct 4 of Sabtang which may be validly canvassed, representing only 28% of the province's total registered voters, petitioner Agudo challenges the jurisdiction and authority of Comelec to order in the same questioned Resolution the canvassing board to re-canvass the results of the election on the basis of such remaining valid returns and proclaim the winner on the basis thereof.

It is clear that Comelec does not have the authority to annul an election nor to direct the holding of a new election.[10]

What is the jurisdiction and authority, then, of Comelec when it is confronted with a situation such as in the case at bar where there has been a failure of election due to the "awesome and appalling" frustration of the popular will? Mindful as it is of the doctrine that "where more than one half of the votes cast in a particular election had been annulled the remainder does not constitute a valid constituency" and that "to have a representative elected by only one town and one precinct of another town in a congressional district of six municipalities would be revolting to the very essence of our system of representative democracy,"[11] does it have the authority to order the canvassing board nevertheless to proclaim respondent Abad as congressman-elect on the basis of the plurality of 709 votes received by him from the 1,363 recorded votes in the remaining 10 precincts, representing only 28% of the total registered voters of 4,866?

To be sure, a plurality of valid votes is all that is required in order that a candidate may win the election, regardless of the actual number of ballots cast, but this principle is qualified by the important condition that it must be a plurality of valid votes of a valid constituency. The House Electoral Tribunal as the "sole judge" of House election contests, has in *Soliman vs. Taruc and Noel v. Soto*,[12] annulling the elections subject of the protests, adopted the doctrine that at least over half of the total votes of a district must not have been rejected for intimidation or similar causes in order that there may remain a valid constituency, citing *Hind's Precedents* that "when two-thirds of the returned votes of a district had been rejected for intimidation, the remainder did not constitute a valid constituency and (that) there had been no valid election," and that "the House declared vacant a seat in a case wherein over half of the total votes of a district had been rejected for intimidation."

Here, more than two-thirds of the returned votes totalling 4,499,[13] had likewise been rejected for intimidation and coercion of the inspectors, such that the less than one-third remainder of 1,363 votes did not constitute a valid constituency for a valid election. The Comelec majority admitted as much, recognizing that "the remaining returns . . . constitute only 28% of the constituency." Dissenting Commissioner Miraflor gave in addition the figures from the 1953 to the 1967 elections showing therefrom the average percentage of voting in Batanes to be 85% of the registered voters, and remarking that "(T)he popular will is expressed by such stable and regular percentages of voting. Applying these percentages of voting in past elections to the 1969 elections, of the 4,866 registered voters as reported by the election registrars, around 85% or 4,137 would have cast their votes in the 1969 elections. To me, the results of only 10 out of 31 precincts, or of 1,363 votes out of 4,137 possible actual voters, or of 32.94% of the voters voting is not indicative of the popular will of the people of Batanes."

Abad would claim that there was a valid constituency claim-ing that "there were 946 registered voters who actually voted freely in 19 of the 21 questioned precincts before the armed goons arrived and disrupted the electoral processes" and "adding 1363 and 946 gives a total of 2,309 qualified electors who were able to validly vote. This is 55.8% or a clear majority of 4,137, the probable actual voting electors for 1969." [14] There are several gaps in this contention: (a) 826 out of these 946 votes cast before the disruption of the electoral processes

by the armed goons were cast in three (3) precincts of Ivana and three (3) precincts of Mahatao or a total of 6 precincts out of twenty-one (21) precincts where the re -turns were falsified; in the other fifteen (15) precincts, only 8 to 10 votes were cast, and the voting was then stopped; (b) all these 946 votes were destroyed or burned by the armed goons, and it is now impossible to determine for whom they were cast; they certainly represent a sizeable block more than sufficient to overcome the 306-vote margin of Abad over his nearest rival, Agudo, (709 against 403) from the remaining 1,363 valid votes; and (c) more than two-thirds of the expected 85% or 4,137 probable voters were prevented from casting their votes or had their votes nullified (4,137 less 1,363 - 2, 774). Even if all these 2,774 voters, and not only 946 voters were able to cast their votes before the forcible disruption of the proceedings and the taking over of the precincts by the armed goons, Abad's contention would be untenable, for it is precisely the blocking and destruction of the valid votes of said 2,774 voters that nullified the election and left it impossible to determine the popular will and vote from the remaining less than one-third 1,363 votes.

Under the Constitution, members of the House of Representatives "shall be elected by the qualified electors" from the congressional districts[15] section 160 of the Election Code' requires the provincial board of canvassers "as soon as all the statements are before it . . . to make a canvass of all the votes cast" and "(U)pon the completion of the statements . . . proclaim in accordance therewith, who has been elected to the House of Representatives from each legislative district . . . "

When 21 returns out of 31 returns in 5 out of 6 towns comprising the province have been rejected as manufactured gun point returns and the evidence before the Comelec incontestably establishes that the holding of the election to determine the popular vote and will was frustrated by mass coercion and terrorism, it was folly on the Comelec's part to close its eyes to the hard facts and to require the canvassing board nevertheless to canvass the remaining ten precincts and fictionally proclaim respondent Abad with 709 votes as having received the plurality of the votes of the entire province. As observed by dissenting Commissioner Miraflor, "one town alone, comprising around less than one-third of the voting population should not be the basis for the election of an entire province" and the Comelec majority itself confessed that this was revolting to the very essence of our system of representative democracy." In fact, the Comelec majority in their Resolution urges the House Electoral Tribunal to annul the election, stating expressly that "(P)erhaps a proclamation of the Board of Canvassers of the winning candidate, which shows on its face that it is based on less than one third of the constituency would be sufficient cue for the House Electoral Tribunal to do, what the Commission on Elections cannot do because of the limitations of the latter's powers under the Constitution.

The Comelec's lapse is caused by its thinking that it has no authority to declare, as suggested by Commissioner Miraflor, that the records of the hearing conducted by it show that "There was no election in Batanes in the sense that the popular will of the electorate could not be determined and is not reflected in the valid votes remaining." This is one step short of annulling the election and is the logical consequence of the development of our jurisprudence since Lagumbay, based on Nacionalista Party, decreeing the rejection of "obviously manufactured returns,' down to Pacis authorizing the Comelec to receive evidence aliunde outside of the face of the returns themselves as to "election returns prepared at the point of a gun" and to reject such returns, as confirmed in Ilarde,[16] where we held that "canvass proceedings are administrative and summary in nature, and a strong prima facie case backed up by a specific offer of the evidence and indication of its nature and importance has to be made out to warrant the reception of evidence aliunde and the presentation of witnesses and the delays necessarily entailed thereby."

As expounded in Nacionalista Farjy, "questions of illegal voting and fraudulent practices are passed on by another tribunal" in the appropriate election contest; But since here, by indisputable evidence and testimony of the

inspectors themselves, more than two-thirds of the returns were gun-point manufactured returns and no elections were held in the towns covered thereby and in the 6 pre-cincts where a sizable number of voters voted, their votes were destroyed[17], the Comelec cannot but just declare this fact and that no valid constituency has therefore remained to express the true will of the electorate. If the evidence had shown that the same massive coercion and manufacture of returns had been done in the 9 precincts of the remaining town of Basco, thus leaving one single valid return from a single precinct of Sabtang,, would not the Com-elec have made such a declaration? Be it 10 precincts instead of 1 precinct remaining out of 31 precincts, may be a matter of impact, but it is no less "revolting to the very essence of our system of representative democracy."

What is the Comelec to do with such a declaration of failure of the election in Batanes?

Pending before the House Electoral Tribunal is Electoral Case No. 202 docketing the cautelary protest, filed by respondent Abad against petitioner Antonio, wherein in a cautelary resolution of its own dated December 19, 1969, "Ex abundante cautela the House Electoral Tribunal resolved to hold in abeyance the final resolution on the urgent ex-parte motion mentioned above (Antonio's motion for the preservation and safekeeping of the election documents) until after the Commission on Elections has resolved the matter or Matters now pending before it." [18]

Comelec has properly resolved the matter of the nullity of the proclamation of Antonio on November 13, 1969, but since it found that there was a failure of election in the province as the less than one-third of the electorate that was able to record its votes per the remaining valid returns in the lone town of Basco did not constitute a valid constituency, it should refrain from any resolution of the equally important matter of non-election through the sham proclamation ordered by it from the votes of the admittedly non-valid constituency, but certify the plain fact of failure of election and forward its records to the House Electoral Tribunal.

It will of course be asked: with the annulment of Antonio's proclamation, the cautelary protest of Abad against him has become moot and academic. This presents no legal obstacle to the Comelec certifying the plain fact of failure of election and forwarding its records to the House Electoral Tribunal, in the docketed case of Abad or as a separate case. Proclamation of a winner, under the peculiar circumstances of the case at bar where factually there has been a failure of election and no winner, is not a condition sine qua non for the Electoral Tribunal to take cognizance of the Comelec certification and hear all the interested candidates, particularly, Antonio, Abad and Agudo. In effect, the Electoral Tribunal will have before it a three-pronged contest, with Antonio claiming that there was a valid election in the entire province and he was the winner, Abad claiming in turn there was a valid election only in the town of Basco and one precinct in the town of Sabtang and that the remaining votes recorded therein constituted a valid constituency with himself as the winner, and Agudo claiming against both that there was no winner clue to the failure of the election.

The House Electoral Tribunal, not the Comelec, under the division of powers between the two agencies made by the Constitution,[19] is the constitutional agency vested with exclusive jurisdiction to decide the conflicting claims which present as real an electoral contest as any it has passed upon.

The House Electoral Tribunal, then, as the constitutional agency entrusted with the function of "sole judge of all contests relating to the election, returns and qualifications" of members of the House of Representatives may make the formal declaration of nullity of the election per the sufficient cue" given by the Com-elec. Or it may choose to disregard its doctrine that where more than half of the votes cast in an election has been annulled, the remainder does not constitute a valid constituency and proclaim Abad nevertheless as the winner by a plurality of the remaining votes, insignificant though they may be and non-expressive of the will of the electorate of the entire province. Or it may check the veracity of all the returns themselves in accordance with its exclusive prerogative

by going into the primary evidence of the ballot boxes and examining the ballots themselves, and verifying whether it could retrieve a sufficient number of valid ballots to constitute a valid constituency.

I vote, therefore, for the affirmance of the Comelec Resolution insofar as it annuls the proclamation of Rufino Antonio, Jr. with the rejection of the election returns from the twenty -one Precincts enumerated therein, but vote for the reversal of the Resolution insofar as it directs the board of canvassers to recanvass the results of the election for the lone congressional district of Batanes on the basis of the remaining returns for nine precincts of Basco and Precinct 4 of Sabtang and proclaim Jorge Abad as the winner on the basis thereof. The question of whether there remained an election for which a winner may be proclaimed or whether there was a failure of election since the remaining returns do not represent a valid constituency under the prevailing doctrine of the House Electoral Tribunal is one that pertains to the exclusive jurisdiction of said Tribunal and should be certified thereto as indicated in the body of this opinion for resolution.

[1] Antonio Memorandum, p. 8.

[2] Antonio Memorandum, p. 3, citing *Pacis vs. Comelec*, L-28455, Feb. 10, 1968; *Campos vs. Comelec*, L-28439, Dec. 29, 1967; *Salcedo vs. Comelec*, L-16360, Jan. 30, 1960; *Santos vs. Comelec*, L-16413, Jan. 26, 1960; *Es-pino vs. Dumlao*, L-22325, Dec. 11, 1967; *Chiongbian vs. Comelec*, L-19202, Dec. 11, 1961; *Cauton vs. Com-elec*, L-29982, Jan. 9, 1969.

[3] *Pacis vs. Comelec*, supra, fn. 2, at p. 390.

[4] L-28666, May 20, 1969, 28 SCRA 200, 210.

[5] 85 Phil. 149, 157-158 (Dec. 13, 1949).

[6] L-28955, May 28, 1968, 23 SCRA 883.

[7] *Pacis v. Comelec*, L-28455, Feb. 10, 1968, 22 SCRA, 539.

[8] Sec. 2, Article X, Constitution of the Philippines.

[9] L-25467, April 27, 1967, 19 SCRA 911.

[10] *Abel vs. Comelec* L-28348, Dec. 15, 1967, 21 SCRA 1252; *Borromeo v. Comelec*, L-29369, July 24, 1969, 28 SCRA 775; and *Nacionalista Party vs. Comelec*, supra.

[11] Comelec Resolution, pp. 45, 48.

[12] ETHR Case No. 13 and ETHR Case No. 42 respectively.

[13] Certificate of Canvass, Annex B-1, Antonio petition.

[14] Abad Memorandum, pp. 24-25.

[15] Article V, sec. 5.

[16] L-31446, January 23, 1970.

[17] 3 precincts of Ivana and 3 precincts of Mahatao, totally 826 votes, Annex A of Annex B of Abad's Answer in L-31604; Rollo, pp. 508-509; see Comelec Resolution.

[18] Abad Answer, Annex A, Rollo, p. 500.

[19] See *Nacionalista Party vs. Comelec*, supra.

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