

## **RODULFO SARMIENTO, PETITIONER, VS. COMMISSION ON ELECTIONS, MUNICIPAL BOARD OF CAN-VASSERS OF VIRAC AND JOSE &#8220;CITO&#8221; ALBERTO II, RESPONDENTS.**

*G.R. No. 105628. August 06, 1992*

Ponente: DAVIDE, JR., J.

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### **DAVIDE, JR., J.:**

The special civil actions for certiorari, hereby jointly resolved, filed under Rule 65 of the Rules of Court, seek to set aside the Resolutions of respondent Commission on Elections (COMELEC) in the following Special Cases (SPC):

- 1) G.R. No. 105628 -- SPC No. 92-266 granting the appeal from the ruling of the Municipal Board of Canvassers of Virac, Catanduanes which ordered the exclusion from the canvass of one (1) election return;
- 2) G.R. No. 105725 -- SPC No. 92-323 reversing the ruling of the City Board of Canvassers of Iriga City which ordered the exclusion from the canvass of six (6) election returns and in UND No. 92-243 ordering the said Board of Canvassers to include in the canvass the election returns involved therein;
- 3) G.R. No. 105727 -- SPC No. 92-288 dismissing the appeal of petitioner from the ruling of the Provincial Board of Canvassers of Catanduanes which ordered the inclusion in the canvass the certificate of canvass for the municipality of Virac, excluding the returns from 48 precincts;
- 4) G.R. No. 105730 -- SPC No. 92-315 affirming the ruling of the Municipal Board of Canvassers of Jose Panganiban, Camarines Norte which dismissed petitioner's opposition to the composition of the said Municipal Board of Canvassers;
- 5) G.R. No. 105771 -- SPC No. 92-271 affirming the ruling of the Municipal Board of Canvassers of Cabusao, Camarines Sur which, among others, rejected petitioner's objection to certain election returns;
- 6) G.R. No. 105778 -- SPC No. 92-039 dismissing said case for non-compliance with Section 20 of R.A. No. 7166;
- 7) G.R. No. 105797 -- SPC No. 92-153 affirming the rulings of the Provincial Board of Canvassers of Davao Oriental which rejected petitioner's objections to the canvass of some certificates of canvass;
- 8) G.R. No. 105919 -- SPC No. 92-293 dismissing petitioner's appeal from the ruling of the Municipal Board of Canvassers of Upi Nuro, Maguindanao;
- 9) G.R. No. 105977 -- SPC No. 92-087 denying the amended pre-proclamation petition, which is an appeal from the rulings of the Municipal Board of Canvassers of Ternate, Cavite, and denying a subsequent motion to resolve the issues raised in said amended petition.

Comments had been filed only in G.R. No. 105727 and G.R. No. 105797. This Court dispenses with the Comments in the other cases.

Petitioners impugn the challenged resolutions above specified as having been issued with grave abuse of discretion in that, inter alia, the Commission, sitting en banc, took cognizance of and decided the appeals without first referring them to any of its Divisions.

Section 3, subdivision C, Article IX of the 1987 Constitution expressly provides:

"SEC. 3. The Commission on Elections may sit en banc or in two divisions, and shall promulgate its rules of procedure in order to expedite disposition of election cases, including pre-proclamation controversies. All such election cases shall be heard and decided in division, provided that motions for reconsideration of decisions shall be decided by the Commission en banc." (Emphasis supplied).

The 1973 Constitution prescribed another rule. Its Section 3, subdivision C of Article XII provided as follows:

"SEC. 3. The Commission on Elections may sit en banc or in three divisions. All election cases may be heard and decided by divisions, except contests involving Members of the Batasang Pambansa, which shall be heard and decided en banc. x x x"

It is clear from the abovequoted provision of the 1987 Constitution that election cases include pre-proclamation controversies, and all such cases must first be heard and decided by a Division of the Commission. The Commission, sitting en banc, does not have the authority to hear and decide the same at the first instance. In the COMELEC RULES OF PROCEDURE, pre-proclamation cases are classified as Special Cases[1] and, in compliance with the above provision of the Constitution, the two (2) Divisions of the Commission are vested with the authority to hear and decide these Special Cases.[2] Rule 27 thereof governs Special Cases; specifically, Section 9 of the said Rule provides that appeals from rulings of the Board of Canvassers are cognizable by any of the Divisions to which they are assigned and not by the Commission en banc. Said Section reads:

"SEC. 9. Appeals from rulings of Board of Canvassers. -- (a) A party aggrieved by an oral ruling of the board of canvassers who had stated orally his intent to appeal said ruling shall, within five days following receipt of a copy of the written ruling of the board of canvassers, file with the Commission a verified appeal, furnishing a copy thereof to the board of canvassers and the adverse party.

(b) The appeal filed with the Commission shall be docketed by the Clerk of Court concerned.

(c) The answer/opposition shall be verified.

(d) The Division to which the case is assigned shall immediately set the case for hearing." (Emphasis supplied)

x x x

A motion to reconsider the decision or resolution of the Division concerned may be filed within five (5) days from its promulgation.[3] The Clerk of Court of the Division shall, within twenty-four (24) hours from the filing thereof, notify the Presiding Commissioner of such fact; in turn, the latter shall certify the case to the Commission en banc.[4] Thereafter, the Clerk of Court of the Commission shall calendar the motion for reconsideration for the resolution of the Commission en banc within ten (10) days from the certification.[5]

Indisputably then, the COMELEC en banc acted without jurisdiction, or with grave abuse of discretion, when it resolved the appeals of petitioners in the abovementioned Special Cases without first referring them to any of its Divisions. Said resolutions are, therefore, null and void and must be set aside. Consequently, the appeals are deemed pending before the Commission for proper referral to a Division.

A resolution directing the COMELEC to assign said Special Cases to the Divisions pursuant to Section 8, Rule 3 of its Rules on assignment of cases would, logically, be in order. However, Section 16 of R.A. No. 7166[6] provides that all pre-proclamation cases pending before it shall be deemed terminated at the beginning of the term

of the office involved. The said section provides as follows:

x x x

"All pre-proclamation cases pending before the Commission shall be deemed terminated at the beginning of the term of the office involved and the rulings of the boards of canvassers concerned shall be deemed affirmed, without prejudice to the filing of a regular election protest by the aggrieved party. However, proceedings may continue when on the basis of the evidence thus far presented, the Commission determines that the petition appears meritorious and accordingly issues an order for the proceeding to continue or when an appropriate order has been issued by the Supreme Court in a petition for certiorari."

The terms of the offices involved in the Special Cases subject of these petitions commenced at noon of 30 June 1992.[7] These cases have thus been rendered moot and such a resolution would only be an exercise in futility.

Accordingly, the instant petitions are DISMISSED without prejudice to the filing by petitioners of regular election protests. If the winning candidates for the positions involved in the Special Cases subject of these petitions have already been proclaimed, the running of the period to file the protests shall be deemed Suspended by the pendency of such cases before the COMELEC and of these petitions before this Court.

The Temporary Restraining Orders issued in G.R. No. 105727, G.R. No. 105730 and G.R. No. 105797 are hereby LIFTED.

### **SO ORDERED.**

Narvasa, C.J., Gutierrez, Jr., Padilla, Bidin, Griño-Aquino, Medialdea, Regalado, Romero, Nocon and Bellosillo, JJ., concur.

Cruz, J., see concurring opinion.

Feliciano, J., please see concurring and dissenting opinion.

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[1] Section 4 (h), Rule 1.

[2] Section 3, Rule 3.

[3] Section 2, Rule 19.

[4] Section 5, Rule 19.

[5] Section 6, Id.

[6] An Act Providing For Synchronized National And Local Elections And For Electoral Reforms, Authorizing Appropriations Therefor, And For Other Purposes.

[7] Section 2, Article XVIII, 1987 Constitution.

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### **SEPARATE OPINION**

**CRUZ, J.:**

My brother Feliciano submits powerfully persuasive arguments, as usual, and I am tempted to join him except for the prescription of the Constitution. Article IX-C, Section 3, says quite clearly:

Sec. 3. The Commission on Elections may sit en banc or in two divisions, and shall promulgate its rules of procedure in order to expedite disposition of election cases, including pre-proclamation controversies. All such election cases shall be heard and decided in division, provided that motions for reconsideration of decisions shall be decided by the Commission en banc.

The language of the provision suggests that it is jurisdictional and not merely directory and therefore requires that all election cases be heard first by the division, whose decision may be reconsidered only by the Commission en banc.

The Supreme Court itself cannot consider in the first instance cases coming under the exclusive original jurisdiction of a lower court, like a petition for declaratory relief. Even in the interest of a speedy administration of justice, we can exercise only appellate jurisdiction over such a case under Article VIII, Section 5(2) of the Constitution.

I find the quoted provision ill-considered, to say the least, in view of the practical difficulties it may spawn. But we are dealing with a mandatory provision of the Constitution which, unless amended (corrected may be a better word), must be observed.

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**CONCURRING AND DISSENTING OPINION****FELICIANO, J.:**

I concur in the result reached by the majority in the captioned cases, i.e., the dismissal of the various Petitions for Certiorari in the cases disposed of by this Joint Resolution.

I am, however, compelled to dissent from the Joint Resolution to the extent that that Resolution holds that the Comelec En Banc acted without jurisdiction, or with grave abuse of discretion, when it dismissed, for instance, the appeal from the Municipal Board of Canvassers of Cabusao, Camarines Sur, of petitioner Genova, among others, without first referring such appeal to either of its Divisions, and holding such dismissal as null and void and setting the same aside.

Article IX(C) (3) of the 1987 Constitution reads as follows:

"Sec. 3. The Commission on Elections may sit en banc or in two divisions, and shall promulgate its rules of procedure in order to expedite disposition of election cases, including pre-proclamation controversies. All such election cases shall be heard and decided in division, provided that motions for reconsideration of decisions shall be decided by the Commission en banc."

It is important to start with the general proposition that the Comelec may sit En Banc or in two (2) divisions. It is also helpful to note that the powers and functions of the Commission as specified in Article IX(C)(2) of the Constitution are lodged in "The Commission on Elections" as a whole; Section 2 did not try to distinguish between powers and functions which are to be exercised En Banc and those to be exercised by Divisions.

The second important constitutional principle is that the fundamental objective of the above-quoted Article

IX(C)(3) is the expediting of the disposition of both election cases and pre-proclamation controversies. We have, in many cases, stressed heavily the need for disposing of election protests as rapidly as possible.[1] We have also many times ruled that pre-proclamation controversies are administrative and summary in character and are to be resolved with the utmost dispatch subject, of course, to the requirements of notice to the parties and fairness in procedure.[2]

Thirdly, I submit it is clear that the term "election cases" in the last sentence of Article IX(C)(3) is properly read as referring to election contests or election protests, and not to all proceedings or controversies arising out of or relating to elections. Article IX(C)(3), in its first sentence, clearly distinguishes "election cases" from "pre-proclamation controversies," and extends the constitutional objective of expeditious disposition not only to "election cases" but also to "pre-proclamation controversies." Thus, while the second sentence of Article IX(C)(3) speaks of "all such election cases," there is no indiscriminate lumping together of election protests or election cases properly so-called with pre-proclamation controversies.

It is pointed out by my distinguished brother in the Court, Davide, J., that Rule 3(3) of the Rules of Procedure of the Comelec (Comelec Rules) provides that:

"Sec. 3. The Commission sitting in divisions. -- The Commission shall sit in two (2) divisions to hear and decide protests or petitions in ordinary actions, special actions, special cases, provisional remedies, contempt and special proceedings except in accreditation of citizen's arms of the Commission," (Underscoring supplied)

that "special cases" embrace pre-proclamation controversies (Rule 27, Comelec Rules), and that Rule 27(9) of the Comelec Rules states, among other things, that

"(d) the Division to which [the appeal from rulings of a Board of Canvassers] is assigned shall immediately set the case for hearing."

The majority is here, of course, trying to interpret Article IX(C)(3) of the 1987 Constitution by referring to relevant provisions of the Comelec Rules adopted after the 1987 Constitution went into effect. From the foregoing, my learned brother Davide concludes that

"[i]t is clear from [Article IX(C)(3) of the 1987 Constitution] that election cases include pre-proclamation controversies, and all such cases must first be heard and decided by a Division of the Commission. The Commission en banc does not have the authority to hear and decide it at the first instance. x x x."

It seems to me, however, that Rules 3(3) and 27(9)(d) of the Comelec Rules were not intended to establish a wall of separation between the Divisions and the Commission En Banc. Thus, for instance, while election cases properly so-called are designated as "ordinary actions" and assigned to the Divisions, the Comelec Rules authorize the Commission itself to intervene or act in such ordinary actions. For instance:

#### "Rule 20 -- Election Protests

x x x x x x x x

Sec. 6. Revision of ballots. -- When the allegations in a protest or counter-protest so warrant, or whenever in the opinion of the Commission or Division the interest of justice so demands, it shall immediately order the ballot boxes containing ballots and their keys, list of voters with voting records, book of voters, and other documents used in the election to be brought before the Commission, and shall order the revision of the ballots. For this purpose, the Commission may constitute a committee on the revision of ballots, to be composed of a chairman, who shall be a lawyer from the Commission, and two members, one member and his substitute to be proposed by the protestant, and the other member and his substitute by the protestee.

The revision of the ballots shall be made in the office of the Clerk of Court concerned at such places as the

Commission or the Division shall designate, and shall be completed within three (3) months from the date of the order, unless otherwise directed by the Commission.

Sec. 7. Partial determination of the case. -- The Commission or the Division concerned may direct the protestant and, in case there is a counter-protest, the counter-protestant, to state and designate in writing his or their choice of the precincts, numbering not more than twenty-five (25%) per centum of the total number of precincts involved in the protest and counter-protest, if any, whose ballot boxes shall first be opened, and shall thereafter make a partial determination of the case x x x."

x x x x x x x x

## Rule 30 -- Injunction

Sec. 1. Preliminary Injunction. -- The Commission or any of its Divisions may grant preliminary injunction in any ordinary action, special action, special case or special relief pending before it.

x x x x x x x x."

(Underscoring supplied)

Another difficulty with the position taken by the majority is that under the Comelec Rules, not all pre-proclamation controversies are necessarily assigned to a Division. There are certain pre-proclamation controversies which, under the Comelec Rules, are to be filed directly with the Commission and to be heard and decided by the Commission En Banc:

## "Rule 27 -- Pre-Proclamation Controversies

x x x x x x x x

Sec. 4. Pre-proclamation controversies which may be filed directly with the Commission. -- (a) The following pre-proclamation controversies may be filed directly with the Commission:

(1) When the issue involves the illegal composition or proceedings of the board of canvassers as when a majority or all the of the members do not hold legal appointments or are in fact usurpers; or when the canvassing has been a mere ceremony that was pre--determined and manipulated to result in nothing but a sham as where there was convergence of circumstances of precipitate canvassing, terrorism, lack of sufficient notice to the members of the board of canvassers and disregard of manifest irregularities on the facts of the questioned returns or certificates of canvass in appropriate cases;

(2) When the issue involves the correction of manifest errors in the tabulation or tallying of the results during the canvassing as where (1) a copy of the election returns or certificate of canvass was tabulated more than once, (2) two or more copies of the election returns of one precinct, or two or more copies of certificate of canvass were tabulated separately, (3) there had been a mistake in the copying of the figures into the statement of votes or into the certificate of canvass, or (4) so-called returns from non-existent precincts were included in the canvass, but such errors could not have been discovered during the canvassing despite the exercise of due diligence and proclamation of the winning candidates had already been made.

x x x x x x x x

(d) The Clerk of Court concerned shall immediately set the petition for hearing.

(e) The petition shall be heard and decided by the Commission en banc.

x x x x x x x x."

(Underscoring supplied.)

There is another factor which needs to be considered. The appeals of the various petitioners in these cases from rulings of the several Boards of Canvassers involved (whether municipal or provincial) were resolved by the Commission directly. Since all the members of the Commission En Banc (and therefore, all the members of each of the two [2] Divisions of the Commission) were present when these cases were disposed of and dismissed, it will be seen that, literally, the several appeals were heard by all the members of a Division and at the same time by all the members of the Commission En Banc. It may be seen then that the second sentence of Article IX(C) (3) of the 1987 Constitution, quoted above, has been literally and effectively complied with. To say, therefore, that the cases here involved must first be decided by a Division and then only referred to the Commission En Banc by a motion for reconsideration, appears to be an exaltation of form over substance. The present situation must be distinguished from a situation where a constitutional or statutory provision requires a matter to be resolved by a Commission En Banc but is instead resolved only by a Division of that Commission or body. In this latter situation, the decision of a Division of the Commission or other agency is not reasonably to be equated with the decision of the Commission En Banc; for the latter is necessarily composed of more commissioners than constitute one division thereof.

Finally, assuming *arguendo* that the majority have correctly read Article IX(C) (3) of the 1987 Constitution, it should still be pointed out that most, if not all, of the cases or proceedings at bar, and the other seven hundred (700) plus cases or proceedings which the Commission En Banc summarily and similarly disposed of, are not even genuine pre-proclamation controversies. Only certain statutorily defined grounds or issues may be raised in a pre-proclamation controversy. In the case(s) at bar, the grounds or issues sought to be raised by the individual petitioners are so insubstantial in nature as to fall considerably short of a genuine pre-proclamation controversy. Indeed, in most if not all of the cases at bar, the grounds raised and the evidence submitted are so slight and tenuous as to lead to the belief that they were initiated for no more edifying reason than to delay the proclamation of the winners (*per canvassing*) in the elections sought to be disputed. Had the Commission En Banc taken seriously (undeservedly, in my view) the seven hundred (700) plus proceedings before it and required each to be heard first by Division and then by the Commission En Banc on a motion for reconsideration, several years would doubtless have been required to dispose of all those proceedings, had Section 16 of R.A. No. 7166 not been enacted.

My ultimate submission is that we must read the second sentence of Article IX(C) (3) of the 1987 Constitution in such a manner as to avoid handcuffing, as it were, the Comelec and denying it the essential flexibility it badly needs to be able to carry out the basic constitutional mandate of "*expedit[ing] disposition of election [protests and] pre-proclamation controversies.*" This teleological or purpose-oriented reading may be achieved by regarding that second sentence as directory and not mandatory (or jurisdictional) in character. The legal distinction between directory and mandatory provisions is as applicable to fundamental as it is to statutory laws.<sup>[3]</sup> The characterization of a constitutional or statutory provision as directory rather than mandatory is not determined simply by the particular grammatical terms employed; indeed, the problem of distinguishing between directory and mandatory language would not arise if the use of "*will*" or "*shall*" instead of "*may*" were regarded as conclusive. That characterization is most rationally made on the basis of the major purpose or objective which shines through the constitutional language and which must be given effect.

Alternatively, the second sentence of Article IX(C) (3) of the 1987 Constitution may be read, without departing from the literal terms used in that provision, as encompassing only election cases properly so called, i.e., election protests, and not pre-proclamation controversies.

For all the foregoing, I reach the conclusion that the Commission En Banc did not act with grave abuse of

discretion nor without or in excess of jurisdiction in dismissing the alleged pre-proclamation controversies at bar, without first requiring each and everyone of them to be heard in Division.

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[1] E.g., *Lindo v. Commission on Elections*, 194 SCRA 25 (1991); *Fecundo v. Berjamen*, 180 SCRA 235 (1989).

[2] E.g., *Dimaporo v. Commission on Elections*, 186 SCRA 769 (1990); *Abella v. Larrazabal*, 180 SCRA 509 (1989); *Sanchez v. Commission on Elections*, 153 SCRA 67 (1987); *Bautista v. Commission on Elections*, G.R. No. 78994, 10 March 1988; *Dipatuan v. Commission on Elections*, 185 SCRA 86 (1990). See also Section 18, R.A. No. 7166.

[3] *Marcelino v. Cruz, Jr.*, 121 SCRA 51 (1983). In this case, our Court interpreted Article X(11) (1) of the 1973 Constitution relating to the periods within which cases must be resolved by this Court and other courts to be directory, not mandatory or jurisdictional, because, among other things, it referred to "matters merely procedural." The Court also said: "[c]onstitutional provisions are to be construed as mandatory, unless by express provision or necessary implication, a different intention is manifest. The difference between mandatory and directory provisions is often determined on grounds of expediency, the reason being that less injury results to the general public by disregarding than by enforcing the letter of the law." (121 SCRA at 56; citations omitted)

See, e.g., *Mikell v. Philadelphia School District*, 4 ALR 2d 962 (1948); *Albemarle Oil and Gas Co. v. Morris*, 121 S.E. 60 (1924), both of which deal with state constitutional provisions.

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