

AGAPITO A. AQUINO, PETITIONER, VS. COMMISSION ON ELECTIONS, MOVE MAKATI, MATEO BEDON AND JUANITO ICARO, RESPONDENTS.

G.R. No. 120265. September 18, 1995

Ponente: KAPUNAN, J.

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KAPUNAN, J.:

The sanctity of the people's will must be observed at all times if our nascent democracy is to be preserved. In any challenge having the effect of reversing a democratic choice, expressed through the ballot, this Court should be ever so vigilant in finding solutions which would give effect to the will of the majority, for sound public policy dictates that all elective offices are filled by those who have received the highest number of votes cast in an election. When a challenge to a winning candidate's qualifications however becomes inevitable, the ineligibility ought to be so noxious to the Constitution that giving effect to the apparent will of the people would ultimately do harm to our democratic institutions.

On March 20, 1995, petitioner Agapito A. Aquino filed his Certificate of Candidacy for the position of Representative for the new Second Legislative District of Makati City. Among others, Aquino provided the following information in his certificate of candidacy, viz:

(7) RESIDENCE (Complete Address): 284 AMAPOLA COR. ADALLA STS., PALM VILLAGE, MAKATI.

x x x

(8) RESIDENCE IN THE CONSTITUENCY WHERE I SEEK TO BE ELECTED IMMEDIATELY PRECEDING THE ELECTION: _____ Years and 10 Months

x x x xxx xxx

THAT I AM ELIGIBLE for said Office; That I will support and defend the Constitution of the Republic of the Philippines and will maintain true faith and allegiance thereto; That I will obey the law, rules and decrees promulgated by the duly constituted authorities; That the obligation imposed to such is assumed voluntarily, without mental reservation or purpose of evasion, and that the facts therein are true to the best of my knowledge.[1]

On April 24, 1995, Move Makati, a duly registered political party, and Mateo Bedon, Chairman of the LAKAS--NUCD-UMDP of Barangay Cembo, Makati City, filed a petition to disqualify Agapito A. Aquino[2] on the ground that the latter lacked the residence qualification as a candidate for congressman which, under Section 6, Art. VI of the 1987 the Constitution, should be for a period not less than one (1) year immediately preceding the May 8, 1995 elections. The petition was docketed as SPA No. 95-113 and was assigned to the Second Division of the Commission on Elections (COMELEC).

On April 25, 1995, a day after said petition for disqualification was filed, petitioner filed another certificate of

candidacy amending the certificate dated March 20, 1995. This time, petitioner stated in Item 8 of his certificate that he had resided in the constituency where he sought to be elected for one (1) year and thirteen (13) days.[3]

On May 2, 1995, petitioner filed his Answer dated April 29, 1995 praying for the dismissal of the disqualification case.[4]

On the same day, May 2, 1995, a hearing was conducted by the COMELEC wherein petitioner testified and presented in evidence, among others, his Affidavit dated May 2, 1995,[5] lease contract between petitioner and Leonor Feliciano dated April 1, 1994,[6] Affidavit of Leonor Feliciano dated April 28, 1995[7] and Affidavit of Daniel Galamay dated April 28, 1995.[8]

After hearing of the petition for disqualification, the Second Division of the COMELEC promulgated a Resolution dated May 6, 1995, the decretal portion of which reads:

WHEREFORE, in view of the foregoing, this Commission (Second Division) RESOLVES to DISMISS the instant petition for Disqualification against respondent AGAPITO AQUINO and declares him ELIGIBLE to run for the Office of Representative in the Second Legislative District of Makati City.

SO ORDERED.[9]

On May 7, 1995, Move Makati and Mateo Bedon filed a Motion for Reconsideration of the May 6, 1995 resolution with the COMELEC en banc.

Meanwhile, on May 8, 1995, elections were held. In Makati City where three (3) candidates vied for the congressional seat in the Second District, petitioner garnered thirty eight thousand five hundred forty seven (38,547) votes as against another candidate, Augusto Syjuco, who obtained thirty five thousand nine hundred ten (35,910) votes.[10]

On May 10, 1995, private respondents Move Makati and Bedon filed an Urgent Motion Ad Cautelum to Suspend Proclamation of petitioner. Thereafter, they filed an Omnibus Motion for Reconsideration of the COMELEC's Second Division resolution dated May 6, 1995 and a 2nd Urgent Motion Ad Cautelum to Suspend Proclamation of petitioner.

On May 15, 1995, COMELEC en banc issued an Order suspending petitioner's proclamation. The dispositive portion of the order reads:

WHEREFORE, pursuant to the provisions of Section 6 of Republic Act No. 6646, the Board of Canvassers of the City of Makati is hereby directed to complete the canvassing of election returns of the Second District of Makati, but to suspend the proclamation of respondent Agapito A. Aquino should he obtain the winning number of votes for the position of Representative of the Second District of the City of Makati, until the motion for reconsideration filed by the petitioners on May 7, 1995, shall have been resolved by the Commission.

The Executive Director, this Commission, is directed to cause the immediate implementation of this Order. The Clerk of Court of the Commission is likewise directed to inform the parties by the fastest means available of this Order, and to calendar the hearing of the Motion for Reconsideration on May 17, 1995, at 10:00 in the morning, PICC Press Center, Pasay City.

SO ORDERED.[11]

On May 16, 1995, petitioner filed his Comment/Opposition with urgent motion to lift order of suspension of proclamation.

On June 1, 1995, petitioner filed a "Motion to File Supplemental Memorandum and Motion to Resolve Urgent Motion to Resolve Motion to Lift Suspension of Proclamation" wherein he manifested his intention to raise, among others, the issue of whether or not the determination of the qualifications of petitioner after the elections is lodged exclusively in the House of Representatives Electoral Tribunal pursuant to Section 17, Article VI of the 1987 Constitution.

Resolving petitioner's motion to lift suspension of his proclamation, the COMELEC en banc issued an Order on June 2, 1995, the decretal portion thereof reading:

Pursuant to the said provisions and considering the attendant circumstances of the case, the Commission RESOLVED to proceed with the promulgation but to suspend its rules, to accept the filing of the aforesaid motion, and to allow the parties to be heard thereon because the issue of jurisdiction now before the Commission has to be studied with more reflection and judiciousness.[12]

On the same day, June 2, 1995, the COMELEC en banc issued a Resolution reversing the resolution of the Second Division dated May 6, 1995. The fallo reads as follows:

WHEREFORE, in view of the foregoing, petitioners' Motion for Reconsideration of the Resolution of the Second Division, promulgated on May 6, 1995, is GRANTED. Respondent Agapito A. Aquino is declared ineligible and thus disqualified as a candidate for the Office of Representative of the Second Legislative District of Makati City in the May 8, 1995 elections, for lack of the constitutional qualification of residence. Consequently, the order of suspension of proclamation of the respondent should he obtain the winning number of votes, issued by this Commission on May 15, 1995 is now made permanent.

Upon the finality of this Resolution, the Board of Canvassers of the City of Makati shall immediately reconvene and, on the basis of the completed canvass of election returns, determine the winner out of the remaining qualified candidates, who shall be immediately proclaimed.

SO ORDERED.[13]

Hence, the instant Petition for Certiorari[14] assailing the orders dated May 15, 1995 and June 2, 1995, as well as the resolution dated June 2, 1995 issued by the COMELEC en banc. Petitioner raises the following errors for consideration, to wit:

A

THE COMELEC HAS NO JURISDICTION TO DETERMINE AND ADJUDGE THE DISQUALIFICATION ISSUE INVOLVING CONGRESSIONAL CANDIDATES AFTER THE MAY 8, 1995 ELECTIONS, SUCH DETERMINATION BEING RESERVED TO AND LODGE EXCLUSIVELY WITH THE HOUSE OF REPRESENTATIVE ELECTORAL TRIBUNAL

B

ASSUMING ARGUENDO THAT THE COMELEC HAS JURISDICTION, SAID JURISDICTION CEASED IN THE INSTANT CASE AFTER THE ELECTIONS, AND THE REMEDY/IES AVAILABLE TO THE ADVERSE PARTIES LIE/S IN ANOTHER FORUM WHICH, IT IS SUBMITTED, IS THE HRET CONSISTENT WITH SECTION 17, ARTICLE VI OF THE 1987 CONSTITUTION

C

THE COMELEC COMMITTED GRAVE ABUSE OF DISCRETION WHEN IT PROCEEDED TO PROMULGATE ITS QUESTIONED DECISION (ANNEX "C", PETITION) DESPITE IT OWN RECOGNITION THAT A THRESHOLD ISSUE OF JURISDICTION HAS TO BE JUDICIOUSLY

REVIEWED AGAIN, ASSUMING ARGUENDO THAT THE COMELEC HAS JURISDICTION, THE COMELEC COMMITTED GRAVE ABUSE OF DISCRETION, AND SERIOUS ERROR IN DIRECTING WITHOUT NOTICE THE SUSPENSION OF THE PROCLAMATION OF THE PETITIONER AS THE WINNING CONGRESSIONAL CANDIDATE AND DESPITE THE MINISTERIAL NATURE OF SUCH DUTY TO PROCLAIM (PENDING THE FINALITY OF THE DISQUALIFICATION CASE AGAINST THE PETITIONER) IF ONLY NOT TO THWART THE PEOPLE'S WILL

D

THE COMELEC'S FINDING OF NON-COMPLIANCE WITH THE RESIDENCY REQUIREMENT OF ONE YEAR AGAINST THE PETITIONER IS CONTRARY TO EVIDENCE AND TO APPLICABLE LAWS AND JURISPRUDENCE

E

IN ANY CASE, THE COMELEC CRITICALLY ERRED IN FAILING TO APPRECIATE THE LEGAL IMPOSSIBILITY ENFORCING THE ONE YEAR RESIDENCY REQUIREMENT OF CONGRESSIONAL CANDIDATES IN NEWLY CREATED POLITICAL DISTRICTS WHICH WERE ONLY EXISTING FOR LESS THAN A YEAR AT THE TIME OF THE ELECTION AND BARELY FOUR MONTHS IN THE CASE OF PETITIONER'S DISTRICT IN MAKATI

F

THE COMELEC COMMITTED SERIOUS ERROR AMOUNTING TO LACK OF JURISDICTION WHEN IT ORDERED THE BOARD OF CANVASSERS TO "DETERMINE AND PROCLAIM THE WINNER OUT OF THE REMAINING QUALIFIED CANDIDATES" AFTER THE ERRONEOUS DISQUALIFICATION OF YOUR PETITIONER IN THAT SUCH DIRECTIVE IS IN TOTAL DISREGARD OF THE WELL SETTLED DOCTRINE THAT A SECOND PLACE CANDIDATE OR A PERSON WHO WAS REPUDIATED BY THE ELECTORATE IS A LOSER AND CANNOT BE PROCLAIMED AS SUBSTITUTE WINNER[15]

I

In his first three assignments of error, petitioner vigorously contends that after the May 8, 1995 elections, the COMELEC lost its jurisdiction over the question of petitioner's qualifications to run for member of the House of Representatives. He claims that jurisdiction over the petition for disqualification is exclusively lodged with the House of Representatives Electoral Tribunal (HRET). Given the yet-unresolved question of jurisdiction, petitioner avers that the COMELEC committed serious error and grave abuse of discretion in directing the suspension of his proclamation as the winning candidate in the Second Congressional District of Makati City. We disagree.

Petitioner conveniently confuses the distinction between an unproclaimed candidate to the House of Representatives and a member of the same. Obtaining the highest number of votes in an election does not automatically vest the position in the winning candidate. Section 17 of Article VI of the 1987 Constitution reads:

The Senate and the House of Representatives shall have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns and qualifications of their respective Members.

Under the above-stated provision, the electoral tribunal clearly assumes jurisdiction over all contests relative to the election, returns and qualifications of candidates for either the Senate or the House only when the latter become members of either the Senate or the House of Representatives. A candidate who has not been proclaimed[16] and who has not taken his oath of office cannot be said to be a member of the House of Representatives subject to Section 17 of Article VI of the Constitution. While the proclamation of a winning

candidate in an election is ministerial, B.P. 881 in conjunction with Sec. 6 of R.A. 6646 allows suspension of proclamation under circumstances mentioned therein. Thus, petitioner's contention that "after the conduct of the election and (petitioner) has been established the winner of the electoral exercise from the moment of election, the COMELEC is automatically divested of authority to pass upon the question of qualification" finds no basis in law, because even after the elections the COMELEC is empowered by Section 6 (in relation to Section 7) of R.A. 6646 to continue to hear and decide questions relating to qualifications of candidates. Section 6 states:

Sec. 6. Effect of Disqualification Case.- Any candidate who has been declared by final judgment to be disqualified shall not be voted for, and the votes cast for him shall not be counted. If for any reason a candidate is not declared by final judgment before an election to be disqualified and he is voted for and receives the winning number of votes in such election, the Court or Commission shall continue with the trial and hearing of the action, inquiry or protest and, upon motion of the complainant or any intervenor, may during the pendency thereof order the suspension of the proclamation of such candidate whenever the evidence of guilt is strong.

Under the above-quoted provision, not only is a disqualification case against a candidate allowed to continue after the election (and does not oust the COMELEC of its jurisdiction), but his obtaining the highest number of votes will not result in the suspension or termination of the proceedings against him when the evidence of guilt is strong. While the phrase "when the evidence of guilt is strong" seems to suggest that the provisions of Section 6 ought to be applicable only to disqualification cases under Section 68 of the Omnibus Election Code, Section 7 of R.A. 6646 allows the application of the provisions of Section 6 to cases involving disqualification based on ineligibility under Section 78 of B.P. 881. Section 7 states:

Section 7. Petition to Deny Due Course or to Cancel a Certificate of Candidacy.- The procedure hereinabove provided shall apply to petition to deny due course to or cancel a certificate of candidacy based on Sec. 78 of Batas Pambansa 881.

II

We agree with COMELEC's contention that in order that petitioner could qualify as a candidate for Representative of the Second District of Makati City the latter "must prove that he has established not just residence but domicile of choice."^[17]

The Constitution requires that a person seeking election to the House of Representatives should be a resident of the district in which he seeks election for a period of not less than one (1) year prior to the elections.^[18] Residence, for election law purposes, has a settled meaning in our jurisdiction.

In *Co v. Electoral Tribunal of the House of Representatives*^[19] this Court held that the term "residence" has always been understood as synonymous with "domicile" not only under the previous Constitutions but also under the 1987 Constitution. The Court there held:^[20]

The deliberations of the Constitutional Commission reveal that the meaning of residence vis-a-vis the qualifications of a candidate for Congress continues to remain the same as that of domicile, to wit:

Mr. Nollado: With respect to Section 5, I remember that in the 1971 Constitutional Convention, there was an attempt to require residence in the place not less than one year immediately preceding the day of elections. So my question is: What is the Committee's concept of residence for the legislature? Is it actual residence or is it the concept of domicile or constructive residence?

Mr. Davide: Madame President, insofar as the regular members of the National Assembly are concerned, the proposed section merely provides, among others, 'and a resident thereof', that is, in the district, for a period of not less than one year preceding the day of the election. This was in effect lifted from the 1973 Constitution,

the interpretation given to it was domicile (underscoring ours) Records of the 1987 Constitutional Convention, Vol. II, July 22, 1986, p. 87).

XXX

Mrs. Rosario Braid: The next question is on section 7, page 2. I think Commissioner Nollado has raised the same point that 'resident' has been interpreted at times as a matter of intention rather than actual residence.

Mr. De Los Reyes: Domicile.

Ms. Rosario Braid: Yes, So, would the gentlemen consider at the proper time to go back to actual residence rather than mere intention to reside?

Mr. De los Reyes: But we might encounter some difficulty especially considering that the provision in the Constitution in the Article on Suffrage says that Filipinos living abroad may vote as enacted by law. So, we have to stick to the original concept that it should be by domicile and not physical and actual residence. (Records of the 1987 Constitutional Commission, Vol. II, July 22, 1986, p. 110).

The framers of the Constitution adhered to the earlier definition given to the word "residence" which regarded it as having the same meaning as domicile.

Clearly, the place "where a party actually or constructively has his permanent home,"[21] where he, no matter where he may be found at any given time, eventually intends to return and remain, i.e., his domicile, is that to which the Constitution refers when it speaks of residence for the purposes of election law. The manifest purpose of this deviation from the usual conceptions of residency in law as explained in *Gallego vs Vera*[22] is "to exclude strangers or newcomers unfamiliar with the conditions and needs of the community" from taking advantage of favorable circumstances existing in that community for electoral gain. While there is nothing wrong with the practice of establishing residence in a given area for meeting election law requirements, this nonetheless defeats the essence of representation, which is to place through the assent of voters those most cognizant and sensitive to the needs of a particular district, if a candidate falls short of the period of residency mandated by law for him to qualify. That purpose could be obviously best met by individuals who have either had actual residence in the area for a given period or who have been domiciled in the same area either by origin or by choice. It would, therefore, be imperative for this Court to inquire into the threshold question as to whether or not petitioner actually was a resident for a period of one year in the area now encompassed by the Second Legislative District of Makati at the time of his election or whether or not he was domiciled in the same.

As found by the COMELEC en banc petitioner in his Certificate of Candidacy for the May 11, 1992 elections, indicated not only that he was a resident of San Jose, Concepcion, Tarlac in 1992 but that he was a resident of the same for 52 years immediately preceding that election.[23] At the time, his certificate indicated that he was also a registered voter of the same district.[24] His birth certificate places Concepcion, Tarlac as the birthplace of both of his parents Benigno and Aurora.[25] Thus, from data furnished by petitioner himself to the COMELEC at various times during his political career, what stands consistently clear and unassailable is that his domicile of origin of record up to the time of filing of his most recent certificate of candidacy for the 1995 elections was Concepcion, Tarlac.

Petitioner's alleged connection with the Second District of Makati City is an alleged lease agreement of a condominium unit in the area. As the COMELEC, in its disputed Resolution noted:

The intention not to establish a permanent home in Makati City is evident in his leasing a condominium unit instead of buying one. While a lease contract may be indicative of respondent's intention to reside in Makati City it does not engender the kind of permanency required to prove abandonment of one's original domicile especially

since, by its terms, it is only for a period of two (2) years, and respondent Aquino himself testified that his intention was really for only one (1) year because he has other "residences" in Manila or Quezon City:[26]

While property ownership is not and should never be an indicia of the right to vote or to be voted upon, the fact that petitioner himself claims that he has other residences in Metro Manila coupled with the short length of time he claims to be a resident of the condominium unit in Makati (and the fact of his stated domicile in Tarlac) "indicate that the sole purpose of (petitioner) in transferring his physical residence"[27] is not to acquire a new residence or domicile "but only to qualify as a candidate for Representative of the Second District of Makati City." [28] The absence of clear and positive proof showing a successful abandonment of domicile under the conditions stated above, the lack of identification - sentimental, actual or otherwise - with the area, and the suspicious circumstances under which the lease agreement was effected all belie petitioner's claim of residency for the period required by the Constitution, in the Second District of Makati. As the COMELEC en banc emphatically pointed out:

[T]he lease agreement was executed mainly to support the one year residence requirement as a qualification for a candidate of Representative, by establishing a commencement date of his residence. If a perfectly valid lease agreement cannot, by itself establish a domicile of choice, this particular lease agreement cannot do better.[29]

Moreover, his assertion that he has transferred his domicile from Tarlac to Makati is a bare assertion which is hardly supported by the facts in the case at bench. Domicile of origin is not easily lost. To successfully effect a change of domicile, petitioner must prove an actual removal or an actual change of domicile; a bona fide intention of abandoning the former place of residence and establishing a new one and definite acts which correspond with the purpose.[30] These requirements are hardly met by the evidence adduced in support of petitioner's claims of a change of domicile from Tarlac to the Second District of Makati. In the absence of clear and positive proof, the domicile of origin should be deemed to continue.

Finally, petitioner's submission that it would be legally impossible to impose the one year residency requirement in a newly created political district is specious and lacks basis in logic. A new political district is not created out of thin air. It is carved out from part of a real and existing geographic area, in this case the old Municipality of Makati. That people actually lived or were domiciled in the area encompassed by the new Second District cannot be denied. Modern-day carpetbaggers cannot be allowed take advantage of the creation of new political districts by suddenly transplanting themselves in such new districts, prejudicing their genuine residents in the process of taking advantage of existing conditions in these areas. It will be noted, as COMELEC did in its assailed resolution, that petitioner was disqualified from running in the Senate because of the constitutional two-term limit, and had to shop around for a place where he could run for public office. Nothing wrong with that, but he must first prove with reasonable certainty that he has effected a change of residence for election law purposes for the period required by law. This he has not effectively done.

III

The next issue here is whether or not the COMELEC erred in issuing its Order instructing the Board of Canvassers of Makati City to proclaim as winner the candidate receiving the next higher number of votes. The answer must be in the negative.

To contend that Syjuco should be proclaimed because he was the "first" among the qualified candidates in the May 8, 1995 elections is to misconstrue the nature of the democratic electoral process and the sociological and psychological underpinnings behind voters' preferences. The result suggested by private respondent would lead not only to our reversing the doctrines firmly entrenched in the two cases of *Labo vs Comelec*[31] but also to a massive disenfranchisement of the thousands of voters who cast their vote in favor of a candidate they believed

could be validly voted for during the elections. Had petitioner been disqualified before the elections, the choice, moreover, would have been different. The votes for Aquino given the acrimony which attended the campaign, would not have automatically gone to second placer Syjuco. The nature of the playing field would have substantially changed. To simplistically assume that the second placer would have received the other votes would be to substitute our judgment for the mind of the voter. The second placer is just that, a second placer. He lost the elections. He was repudiated by either a majority or plurality of voters. He could not be considered the first among qualified candidates because in a field which excludes the disqualified candidate, the conditions would have substantially changed. We are not prepared to extrapolate the results under such circumstances.

In these cases, the pendulum of judicial opinion in our country has swung from one end to the other. In the early case of *Topacio v. Paredes*[32] we declared as valid, votes cast in favor of a disqualified, ineligible or dead candidate provided the people who voted for such candidate believed in good faith that at the time of the elections said candidate was either qualified, eligible or alive. The votes cast in favor of a disqualified, ineligible or dead candidate cannot be considered stray votes, consequently, the candidate who obtained the next higher number of votes cannot be proclaimed as winner. According to this Court in the said case, "there is not, strictly speaking, a contest, that the wreath of victory cannot be transferred from an ineligible candidate to any other candidate when the sole question is the eligibility of the one receiving the plurality of the legally cast ballots."

Then in *Ticson v. Comelec*,[33] this Court held that votes cast in favor of a non-candidate in view of his unlawful change of party affiliation (which was then a ground for disqualification) cannot be considered in the canvassing of election returns and the votes fall into the category of invalid and nonexistent votes because a disqualified candidate is no candidate at all and is not a candidate in the eyes of the law. As a result, this Court upheld the proclamation of the only candidate left in the disputed position.

In *Geronimo v. Ramos*[34] we reiterated our ruling in *Topacio v. Paredes* that the candidate who lost in an election cannot be proclaimed the winner in the event the candidate who ran for the position is ineligible. We held in *Geronimo*:

[I]t would be extremely repugnant to the basic concept of the constitutionally guaranteed right to suffrage if a candidate who has not acquired the majority or plurality of votes is proclaimed a winner and imposed as the representative of a constituency, the majority of which have positively declared through their ballots that they do not choose him.

Sound policy dictates that public elective offices are filled by those who have received the highest number of votes cast in the election for that office, and it is fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried unless he or it receives a majority or plurality of the legal votes cast in the elections. (20 Corpus Juris 2nd, S 243, p. 676.)

However, in *Santos v. Comelec*[35] we made a turnabout from our previous ruling in *Geronimo v. Ramos* and pronounced that "votes cast for a disqualified candidate fall within the category of invalid or non-existent votes because a disqualified candidate is no candidate at all in the eyes of the law," reverting to our earlier ruling in *Ticson v. Comelec*.

In the more recent cases of *Labo, Jr. v. Comelec*:[36] *Abella v. Comelec*:[37] and *Benito v. Comelec*:[38] this Court reiterated and upheld the ruling in *Topacio v. Paredes* and *Geronimo v. Ramos* to the effect that the ineligibility of a candidate receiving the majority votes does not entitle the eligible candidate receiving the next higher number of votes to be declared elected, and that a minority or defeated candidate cannot be declared elected to the office. In these cases, we put emphasis on our pronouncement in *Geronimo v. Ramos* that:

The fact that a candidate who obtained the highest number of votes is later declared to be disqualified or not eligible for the office to which he was elected does not necessarily entitle the candidate who obtained the second highest number of votes to be declared the winner of the elective office. The votes cast for a dead, disqualified, or non-eligible person may be valid to vote the winner into office or maintain him there. However, in the absence of a statute which clearly asserts a contrary political and legislative policy on the matter, if the votes were cast in sincere belief that that candidate was alive, qualified, or eligible, they should not be treated as stray, void or meaningless.

Synthesizing these rulings we declared in the latest case of *Labo, Jr. v. COMELEC* that:[39]

While Ortega may have garnered the second highest number of votes for the office of city mayor, the fact remains that he was not the choice of the sovereign will. Petitioner Labo was overwhelmingly voted by the electorate for the office of mayor in the belief that he was then qualified to serve the people of Baguio City and his subsequent disqualification does not make respondent Ortega the mayor-elect. This is the import of the recent case of *Abella v. Comelec* (201 SCRA 253 [1991]), wherein we held that:

While it is true that SPC No. 88-546 was originally a petition to deny due course to the certificate of candidacy of Larrazabal and was filed before Larrazabal could be proclaimed, the fact remains that the local elections of Feb. 1, 1988 in the province of Leyte proceeded with Larrazabal considered as a bona fide candidate. The voters of the province voted for her in the sincere belief that she was a qualified candidate for the position of governor. Her votes was counted and she obtained the highest number of votes. The net effect is that petitioner lost in the election. He was repudiated by the electorate. xxx What matters is that in the event a candidate for an elected position who is voted for and who obtains the highest number of votes is disqualified for not possessing the eligibility, requirements at the time of the election as provided by law, the candidate who obtains the second highest number of votes for the same position cannot assume the vacated position. (Italics supplied)

Our ruling in *Abella* applies squarely to the case at bar and we see no compelling reason to depart therefrom. Like *Abella*, petitioner Ortega lost in the election. He was repudiated by the electorate. He was obviously not the choice of the people of Baguio City.

Thus, while respondent Ortega (GR No. 105111) originally filed a disqualification case with the Comelec (docketed as SPA-92-029) seeking to deny due course to petitioner's (Labo's) candidacy, the same did not deter the people of Baguio City from voting for petitioner Labo, who, by then, was allowed by the respondent Comelec to be voted upon, the resolution for his disqualification having yet to attain the degree of finality (Sec. 78, Omnibus Election Code).

And in the earlier case of *Labo v. Comelec* (supra), We held:

Finally, there is the question of whether or not the private respondent, who filed the quo warranto petition, can replace the petitioner as mayor. He cannot. The simple reason is that as he obtained only the second highest number of votes in the election, he was obviously not the choice of the people of Baguio City.

The latest ruling of the Court in this issue is *Santos v. Commission on Election*, (137 SCRA 740) decided in 1985. In that case, the candidate who placed second was proclaimed elected after the votes for his winning rival, who was disqualified as a turncoat and considered a non-candidate, were all disregarded as stray. In effect, the second placer won by default. That decision was supported by eight members of the Court then (Cuevas J., ponente, with Makasiar, Concepcion, Jr., Escolin, Relova, De la Fuente, Alampay, and Aquino, JJ., concurring) with three dissenting (Teehankee, acting C.J., Abad Santos and Melencio-Herrera) and another two reserving their votes (Plana and Gutierrez, Jr.). One was on official leave (Fernando, C.J.)

Re-examining that decision, the Court finds, and so holds, that it should be reversed in favor of the earlier case of *Geronimo v. Santos* (136 SCRA 435), which represents the more logical and democratic rule. That case, which reiterated the doctrine first announced in 1912 in *Topacio vs. Paredes* (23 Phil. 238) was supported by ten members of the Court. XXX.

The rule, therefore, is: the ineligibility of a candidate receiving majority, votes does not entitle the eligible candidate receiving the next highest number of votes to be declared elected. A minority or defeated candidate cannot be deemed elected to the office.

Indeed, this has been the rule in the United States since 1849 (*State ex rel. Dunning v. Giles*, 52 Am. Dec. 149).

It is therefore incorrect to argue that since a candidate has been disqualified, the votes intended for the disqualified candidate should, in effect, be considered null and void. This would amount to disenfranchising the electorate in whom sovereignty resides. At the risk of being repetitious, the people of Baguio City opted to elect petitioner Labo bona fide, without any intention to misapply their franchise, and in the honest belief that Labo was then qualified to be the person to whom they would entrust the exercise of the powers of the government. Unfortunately, petitioner Labo turned out to be disqualified and cannot assume the office.

Whether or not the candidate whom the majority voted for can or cannot be installed, under no circumstances can a minority or defeated candidate be deemed elected to the office. Surely, the 12,602 votes cast for petitioner Ortega is not a larger number than the 27,471 votes cast for petitioner Labo (as certified by the Election Registrar of Baguio City; rollo, p. 109; GR No. 105111).

This, it bears repeating, expresses the more logical and democratic view. We cannot, in another shift of the pendulum, subscribe to the contention that the runner-up in an election in which the winner has been disqualified is actually the winner among the remaining qualified candidates because this clearly represents a minority view supported only by a scattered number of obscure American state and English court decisions.[40] These decisions neglect the possibility that the runner-up, though obviously qualified, could receive votes so measly and insignificant in number that the votes they receive would be tantamount to rejection. Theoretically, the "second placer" could receive just one vote. In such a case, it is absurd to proclaim the totally repudiated candidate as the voters' "choice." Moreover, even in instances where the votes received by the second placer may not be considered numerically insignificant, voters preferences are nonetheless so volatile and unpredictable that the result among qualified candidates, should the equation change because of the disqualification of an ineligible candidate, would not be self-evident. Absence of the apparent though ineligible winner among the choices could lead to a shifting of votes to candidates other than the second placer. By any mathematical formulation, the runner-up in an election cannot be construed to have obtained a majority or plurality of votes cast where an "ineligible" candidate has garnered either a majority or plurality of the votes.

In fine, we are left with no choice but to affirm the COMELEC's conclusion declaring herein petitioner ineligible for the elective position of Representative of Makati City's Second District on the basis of respondent commission's finding that petitioner lacks the one year residence in the district mandated by the 1987 Constitution. A democratic government is necessarily a government of laws. In a republican government those laws are themselves ordained by the people. Through their representatives, they dictate the qualifications necessary for service in government positions. And as petitioner clearly lacks one of the essential qualifications for running for membership in the House of Representatives, not even the will of a majority or plurality of the voters of the Second District of Makati City would substitute for a requirement mandated by the fundamental law itself.

WHEREFORE, premises considered, the instant petition is hereby DISMISSED. Our Order restraining

respondent COMELEC from proclaiming the candidate garnering the next highest number of votes in the congressional elections for the Second District of Makati City is made PERMANENT.

SO ORDERED.

Regalado, Melo, Puno and Hermosisima, Jr., JJ., concur.

Padilla, J., separate concurring opinion.

Francisco, J., concurring and dissenting opinion.

Vitug, J., separate opinion.

Mendoza, J., see separate opinion

Narvasa, C.J., join Justice Mendoza in his separate opinion and for the reasons therein set forth, votes to grant the petition.

Davide, Jr., J., respectfully dissents. Please see dissenting opinion.

Romero and Bellosillo, JJ., concur in the dissenting opinion of J. Davide.

Feliciano, J., on official leave.

[1] Rollo, p. 61.

[2] Id., at 56-60.

[3] Id., at 63.

[4] Petition, Annex H; Rollo, p. 65.

[5] Id., Annex I; Rollo, p. 71.

[6] Id., Ibid.

[7] Id., Annex K, Id., at 74.

[8] Id., Annex L, Id., at 75.

[9] Petition, Annex "D"; Rollo, p. 55.

[10] Id., at 7-8 citing the completed canvass of election returns by the Board of Canvassers of Makati City as source.

[11] Id., Annex "A"; Rollo, pp. 30-31.

[12] Id., Annex "B"; Id., at 32-33.

[13] Id., Annex "C"; Id., at 48-49.

[14] The petition filed on June 6, 1995 prayed for the issuance of a temporary restraining order to enjoin public respondents from reconvening and determining the winner out of the remaining qualified candidates for Representative of the Second Congressional District of Makati City. As prayed for a temporary restraining order was issued by the Court on June 6, 1995.

[15] Id., at 12-14.

[16] B.P. 881, Sec. 231 provides:

The respective Board of Canvassers shall prepare a certificate of canvass duly signed and affixed with the imprint of the thumb of the right hand of each member, supported by a statement of the votes received by each candidate

in each polling place and, on the basis thereof, shall proclaim as elected the candidates who obtained the highest number of votes cast in the province, city, municipality or barangay. Failure to comply with this requirement shall constitute an election offense.

[17] Rollo, p. 35.

[18] CONST., art. VI, sec. 6.

[19] 199 SCRA 692 (1991).

[20] Id., at 713-714.

[21] MINOR, CONFLICT OF LAWS, 62

[22] 73 Phil. 453 (1941).

[23] Rollo, pp. 35-36.

[24] Id.

[25] Id.

[26] Id., at 37.

[27] Id., at 34-37.

[28] Resolution, p.3.

[29] Id.

[30] 18 Am. Jur 211-220.

[31] 176 SCRA 1 [1989].

[32] 23 Phil. 238 [1912].

[33] 103 SCRA 687 [1981].

[34] 136 SCRA 435 [May 14, 1985].

[35] 137 SCRA 740 [July 23, 1985].

[36] 176 SCRA 1 [1989].

[37] 201 SCRA 253 [1991].

[38] 235 SCRA 436 [1994].

[39] 211 SCRA 297 [1992].

[40] In England, where the election system is open and the voters known, knowledge of a candidate's ineligibility or disqualification is more easily presumed...and upon the establishment of such disqualification on the part of the majority candidate, the one receiving the next highest number of votes is declared elected. King v. Hawkins, 10 East 211; King v. Parry, 14 Id. 549; Gosling v. Veley, 7 Q.B. 406; French v. Nolan, 2 Moak 711; Reg v. Cooks, 3 E1. & B1. 249; Rex v. Monday, 2 Cowp. 530; Rex v. Foxcroft, Burr. 1017. In a few states in the United States the

settled law is directly opposite that taken by the Court in Labo and Abella, supra. For example, in Indiana, ballots cast for an ineligible candidate are not counted for any purpose. They cannot be counted to defeat the election of an opposing candidate by showing that he did not receive a majority of votes cast in such election. Votes made in favor of an ineligible candidate are considered illegal, and have no effect upon the election for any purpose. Consequently the qualified candidate having the highest number of legal votes is regarded as entitled to office. Price v. Baker, 41 Id. 572, See also, Gulick v. New, 14 Ind. 93 and Carson v. Mcphetridge, 15 Id. 327.

SEPARATE CONCURRING OPINION

PADILLA, J.:

I agree with the conclusion reached by the majority that petitioner Aquino has not shown by clear and convincing evidence that he had established his residence in the second district of Makati City for a period of not less than one (1) year prior to the 8 May 1995 elections. However, I do not fully subscribe to its proposition that petitioner's residence (in Makati) should be his "domicile of choice".

Article VI, Section 6 of the Constitution provides that:

"No person shall be a member of the House of Representatives unless he is a natural-born citizen of the Philippines and on the day of the election, is at least twenty-five years of age, able to read and write, and, except the party list representatives, a registered voter in the district in which he shall be elected, and a resident thereof for a period of not less than one year immediately preceding the day of the election." (Italics supplied)

In G.R. No. 119976, Marcos vs. Comelec, I have maintained that the phrase "a resident thereof for a period of not less than one year" means actual and physical presence in the legislative district of the congressional candidate, and that said period of one year must be satisfied regardless of whether or not a person's residence or domicile coincides.

To my mind, petitioner should be declared disqualified to run as representative in the 2nd district of Makati City in the 8 May 1995 elections not because he failed to prove his residence therein as his domicile of choice, but because he failed altogether to prove that he had actually and physically resided therein for a period of not less than one (1) year immediately preceding the 8 May 1995 elections.

Noteworthy is the established fact before the Comelec that petitioner admits having maintained other residences in Metro Manila apart from his leased condominium unit in Makati's 2nd district.[1] This clear admission made by petitioner against his interest weakens his argument that "where a party decides to transfer his legal residence so he can qualify for public office, he is free to do so." (see p. 20, Petition).

Petitioner evidently wants to impress the Court that his other residences in Metro Manila could never have become his domicile of choice because it never entered his mind and suddenly, seemingly not contented with these other residences, he rents a condominium unit in Makati, and calls it his domicile of choice - all these without adding clear and convincing evidence that he did actually live and reside in Makati for at least one year prior to 8 May 1995 — and that he no longer lived and resided in his other residences during said one year period.

It follows, likewise, that the lease contract relied upon by petitioner, standing alone, established only the alleged date (April 25, 1994) of its due execution. Stated otherwise, the lease contract tells us that petitioner had been leasing a condominium unit in Makati City for more than a year prior to 8 May 1995, but it does not prove that petitioner actually and physically resided therein for the same period, in the light of his admission that he maintained other residences in Metro Manila.

In light of petitioner's disqualification, the corollary issue to be resolved is whether or not jurisdiction continued to be vested in the Comelec to order the Makati Board of Canvassers "to determine and proclaim the winner out of the remaining qualified candidates" after petitioner had been declared post 8 May 1995 as disqualified.

I agree with the proposition advanced by the Solicitor General that sec. 6 of R.A. 6646 clearly provides that votes cast for a disqualified candidate shall not be counted, thus:

"Sec. 6. Effect of Disqualification Case. - Any candidate who has been declared by final judgment to be disqualified shall not be voted for, and the votes cast for him shall not be counted. If for any reason a candidate is not declared by final judgment before an election to be disqualified and he is voted for and receives the winning number of votes in such election, the Court or Commission shall continue with the trial and hearing of the action, inquiry or protest and, upon motion of the complainant or any intervenor, may during the pendency thereof order the suspension of the proclamation of such candidate whenever the evidence of his guilt is strong."

There can be no dispute that if a final judgment is rendered before the election, declaring a particular candidate as disqualified, such disqualified candidate shall not be voted for and votes cast for him shall not be counted, thus posing no problem in proclaiming the candidate who receives the highest number of votes among the qualified candidates.

But what about after the election? Sec. 6 appears categorical enough in stating: "if for any reason" no final judgment of disqualification is rendered before the elections, and the candidate facing disqualification is voted for and receives the winning number of votes, the Comelec or the Court is not ousted of its jurisdiction to hear and try the case up to final judgment, hence, the power to even suspend the proclamation of the erstwhile winning candidate when evidence of his guilt is strong.

It thus appears clear that the law does not dichotomize the effect of a final judgment of disqualification in terms of time considerations. There is only one natural and logical effect: the disqualified candidate shall not be voted and, if voted, the votes cast for him shall not be counted. *Ubi lex non distinguit nec nos distinguere debemus* (where the law does not distinguish, we should not distinguish.)

At this point, what I said in *Marcos*, *supra*, follows:

"What happens then when after the elections are over, one is declared disqualified? Then, votes cast for him "shall not be counted" and in legal contemplation, he no longer received the highest number of votes.

It stands to reason that Section 6 of RA 6646 does not make the second placer the winner simply because a "winning candidate is disqualified," but that the law considers him as the candidate who had obtained the highest number of votes as a result of the votes cast for the disqualified candidate not being counted or considered.

As this law clearly reflects the legislative policy on the matter, then there is no reason why this Court should not re-examine and consequently abandon the doctrine in the *Jun Labo* case. It has been stated that "the qualifications prescribed for elective office cannot be erased by the electorate alone. The will of the people as expressed through the ballot cannot cure the vice of ineligibility" most especially when it is mandated by no less than the Constitution."

Therefore the candidate who received the highest number of votes from among the qualified candidates, should be proclaimed.

ACCORDINGLY, I vote to DISMISS the petition.

[1] See p. 4 Annex "C", Petition; Comelec En Banc Resolution dated 2 June 1995.

CONCURRING AND DISSENTING OPINION

FRANCISCO, J.:

I concur with the well written ponencia of my most esteemed colleague, Mr. Justice Kapunan. I wish, however, to express my views on some issues raised by the petitioner, viz., (1) jurisdiction over the disqualification suit, (2) domicile, (3) theory of legal impossibility, and (4) "second placer rule".

Petitioner emphatically maintains that only the House of Representatives Electoral Tribunal (HRET) can declare his disqualification, especially after the elections. To bolster this stand, the cases of *Co v. HRET*, 199 SCRA 692 (1991); *Robles v. HRET*, 181 SCRA 780 (1990); *Lazatin v. HRET*, 168 SCRA 391 (1988); and *Lachica v. Yap*, 25 SCRA 140 (1968), have been cited as supporting authorities. To my mind, this position is untenable. Section 17 of Article VI of the 1987 Constitution is clear and unambiguous that HRET jurisdiction applies only to the members of the House of Representatives. The operative acts necessary for an electoral candidate's rightful assumption of the office for which he ran are his proclamation and his taking an oath of office. Petitioner cannot in anyway be considered as a member of the House of Representatives for the purpose of divesting the Commission on Elections of jurisdiction to declare his disqualification and invoking instead HRET's jurisdiction, it indubitably appearing that he has yet to be proclaimed, much less has he taken an oath of office. Clearly, petitioner's reliance on the aforecited cases which when perused involved Congressional members, is totally misplaced, if not wholly inapplicable. That the jurisdiction conferred upon HRET extends only to Congressional members is further established by judicial notice of HRET Rules of Procedure,[1] and HRET decisions[2] consistently holding that the proclamation of a winner in the contested election is the essential requisite vesting jurisdiction on the HRET.

Moreover, a perusal of the records shows that the question on COMELEC's jurisdiction is now barred by estoppel. It is to be noted that in his May 2, 1995 Answer, as well as in his Memorandum and Supplemental Memorandum filed before the COMELEC's Second Division, petitioner never assailed COMELEC's lack of jurisdiction to rule on his qualification. On the contrary, he asked that the disqualification suit against him be dismissed on the following grounds: that it was filed outside the reglementary period; that the one year residence requirement of the 1987 Constitution is inapplicable due to the recent conversion of the municipality of Makati into a city under R.A. No. 7854; that he committed a simple inadvertence in filling up his certificate of candidacy; that the proper procedure to attack his qualification is by a quo warranto proceeding; that he had actually and physically resided in Makati for more than a year; and for lack of merit, the case should be outrightly dismissed. In a hearing conducted by the COMELEC on May 2, 1995, petitioner even submitted his evidence (e.g. affidavits, amended certificate of candidacy, copy of the lease contract) to prove that he is qualified for the position. Subsequently, on May 16, 1995, in response to the COMELEC En Banc's May 15, 1995 Order suspending the proclamation of the winner, petitioner filed his Comment/Opposition with Urgent Motion To Lift Order of Suspension of Proclamation asking for the lifting of the COMELEC's order of suspension. On May 19, 1995, petitioner again filed a Memorandum and averred that the recent conversion of Makati into a city made the one-year residence requirement inapplicable; that he resided in Makati for more than a year; that quo warranto is the right remedy to question his qualification. In passing, petitioner also alleged that the issue on his qualification should be "properly" ventilated in a full-dress hearing before the HRET, albeit praying for the dismissal of the motion for reconsideration for utter lack of merit (and not for lack of jurisdiction), and for lifting the suspension of his proclamation. It was only on June 01, 1995, in his Motion to File Supplemental Memorandum and Urgent Motion

to Resolve Motion to Lift Suspension of Proclamation, when the petitioner raised COMELEC's alleged lack of jurisdiction to resolve the question on his qualification. Clearly then, petitioner has actively participated in the proceedings both before the COMELEC's Second Division and the COMELEC En Banc asking therein affirmative reliefs. The settled rule is that a party who objects to the jurisdiction of the court and alleges at the same time any non-jurisdictional ground for dismissing the action is deemed to have submitted himself to the jurisdiction of the court.[3] Where a party voluntarily submits to the jurisdiction of the court and thereafter loses on the merits, he may not thereafter be heard to say that the court had no jurisdiction.[4] In *Jimenez v. Macaraig*,[5] the Court, citing *Crisostomo v. Court of Appeals*, 32 SCRA 54, 60 (1970), elaborated on the rationale for this doctrine in this wise:

"The petitioners, to borrow the language of Mr. Justice Bautista Angelo (*People vs. Archilla*, G.R. No. L-15632, February 28, 1961, 1 SCRA 699, 700-701), cannot adopt a posture of double-dealing without running afoul of the doctrine of estoppel. The principle of estoppel is in the interest of a sound administration of the laws. It should deter those who are disposed to trifle with the courts by taking inconsistent positions contrary to the elementary principles of right dealing and good faith (*People v. Acierto*, 92 Phil. 534, 541, [1953]).[6]

It is not right for a party who has affirmed and invoked the jurisdiction of a court in a particular matter to secure an affirmative relief to afterwards deny that same jurisdiction to escape an adverse decision.[7] Perforce, petitioner's asseveration that the COMELEC has no jurisdiction to rule on his qualification must fail.

Petitioner insists that domicile is a matter of personal intention. Thus, petitioner asserts that if he decides to transfer his legal residence so he can qualify for public office then he is entirely free to do so. This argument to hold water, must be supported by clear and convincing proofs that petitioner has effectively abandoned his former domicile and that his intention is not doubtful. Indeed, domicile once established is considered to continue and will not be deemed lost until a new one is established (*Co v. Electoral Tribunal of the House of Representatives*, 199 SCRA 692, 711 [1991]). Petitioner from childhood until his last election as senator has consistently maintained Concepcion, Tarlac, as his domicile. He moved to Amapola Street, Palm Village, Makati, and thereafter claimed the same to be his new domicile. This claim, however, is dismally unsupported by the records. The lease contract entered into by petitioner for a period of two years on the third floor condominium unit in Palm Village, Makati, in my view, does not prove his intent to abandon, his domicile of origin. The intention to establish domicile must be an intention to remain indefinitely or permanently in the new place.[8] This element is lacking in this instance. Worse, public respondent Commission even found that "respondent Aquino himself testified that his intention was really for only one (1) year because he has other 'residences' in Manila or in Quezon City ([citing] TSN, May 2, 1995, p. 92)".[9] Noting that petitioner is already barred from running for senator due to the constitutional consecutive two-term limit, his search for a place where he could further and continue his political career and sudden transfer thereto make his intent suspect. The best test of intention to establish legal residence comes from one's acts and not by mere declarations alone.[10] To acquire, or effect a change of domicile, the intention must be bona fide and unequivocal (28 C.J.S. §11). Petitioner, in my view, miserably failed to show a bona fide and unequivocal intention to effect the change of his domicile.

The theory of legal impossibility is advanced to justify non-compliance with the constitutional qualification on residency. Petitioner explains his theory in this wise:

"X X X THE COMELEC CRITICALLY ERRED IN FAILING TO APPRECIATE THE LEGAL IMPOSSIBILITY OF ENFORCING THE ONE YEAR RESIDENCY REQUIREMENT OF CONGRESSIONAL CANDIDATES IN NEWLY CREATED POLITICAL DISTRICTS WHICH WERE ONLY EXISTING FOR LESS THAN A YEAR AT THE TIME OF THE ELECTION AND BARELY FOUR MONTHS IN THE CASE OF PETITIONER'S DISTRICT IN MAKATI."[11]

Apparently, this theory is an offshoot of Republic Act No. 7854; an act converting the municipality of Makati into a highly urbanized city. This law enacted on January 2, 1995, established a second Congressional district in Makati in which petitioner ran as a Congressional candidate. Since the second district, according to petitioner, is barely four (4) months old then the one (1) year residence qualification provided by the Constitution is inapplicable. Petitioner's acts, however, as borne by the records, belie his own theory. Originally, he placed in his certificate of candidacy an entry of ten (10) months residence in Makati. Petitioner then had it amended to one (1) year and thirteen (13) days to correct what he claims as a mere inadvertent mistake. I doubt the sincerity of this representation. If petitioner is indeed persuaded by his own theory, the ten months residence he initially wrote would have more than sufficiently qualified him to run in the barely four-month old Makati district. The amendment only reveals the true intent of petitioner to comply with the one year constitutional requirement for residence, adding an extra thirteen (13) days for full measure. Petitioner apparently wanted to argue one way (theory of legal impossibility), but at the same time played it safe in the other (the constitutional one year residence requirement). And that is not all. If we were to adhere to petitioner's theory of legal impossibility, then residents in that district shorn of the constitutional six months residence requirement for prospective voters (Article V, Section 1 of the 1987 Constitution) would have certainly qualified to vote. That would have legitimized the entry and electoral exercise of flying voters -- one of the historic nemeses of a clean and honest election. Furthermore, to subscribe to petitioner's contention that the constitutional qualification of candidates should be brushed aside in view of the enactment of R.A. No. 7854 will indubitably violate the manner and procedure for the amendment or revision of the constitution outlined under Article XVIII of the 1987 Constitution. A legislative enactment, it has to be emphasized, cannot render nugatory the constitution. The constitution is superior to a statute. It is the fundamental and organic law of the land to which every statute must conform and harmonize.

Finally, it has been contended that a second place candidate cannot be proclaimed a substitute winner. I find the proposition quite unacceptable. A disqualified "candidate" is not a candidate and the votes which may have been cast in his favor are nothing but stray votes of no legal consequence. A disqualified person like the petitioner receives no vote or zero vote. In short, no--candidate-no vote. Petitioner had therefore no right, in fact and in law, to claim first place for he has nothing to base his right. The legislative intent is clear as provided by R.A. 6646, Section 6, in that votes cast for a disqualified candidate shall not be counted as they are considered stray (Section 211, Rule 24, Omnibus Election Code). It is only from the ranks of qualified candidates can one be chosen as first placer and not from without. Necessarily, petitioner, a disqualified candidate, cannot be a first placer as he claims himself to be. To count the votes for a disqualified candidate would, in my view, disenfranchise voters who voted for a qualified candidate. Legitimate votes cast for a qualified candidate should not be penalized alongside a disqualified candidate. With this in mind, the other qualified candidate who garnered the highest number of votes should be proclaimed the duly elected representative of the district. I feel that the Labo doctrine ought to be abandoned.

I therefore vote to deny the petition and to lift the temporary restraining order issued by the Court dated June 6, 1995.

[1] Rule 16. Election Protest. — A verified petition contesting the election of any Member of the House of Representatives shall be filed by any candidate who has duly filed a certificate of candidacy and has been voted for the same office, within ten (10) days after the proclamation of the winner.

Rule 17. Quo Warranto. — A verified petition for quo warranto contesting the election of a Member of the House of Representatives on the ground of ineligibility or of disloyalty to the Republic of the Philippines shall be filed

by any voter within ten (10) days after the proclamation of the winner.

[2] Puzon, v. Evangelista Cua, HRET Case No. 42, July 25, 1988. Vol. 1 HRET Reports 9; Aznar v. Bacaltos, HRET Case No. 05, January 28, 1988, Vol. 1, HRET Reports 5; Ty Deling v. Villarín, HRET Case No. 53, May 2, 1950.

[3] Wang Laboratories, Inc. v. Mendoza, 156 SCRA 44, 53-54 (1987).

[4] La Campaña Food Products, Inc. v. Court of Appeals, 223 SCRA 152, 157 (1993).

[5] 219 SCRA 230 (1993).

[6] Id., at 239.

[7] Tijam v. Sibonghanoy, 23 SCRA 29, 35-36 (1968).

[8] 28 C.J.S. §11.

[9] Resolution, SPA No. 95-113, June 2, 1995, p. 4.

[10] Tanseco v. Arteché, 57 Phil. 227, 235 (1932).

[11] Petition, June 5, 1995, p. 20.

DISSENTING OPINION

DAVIDE, JR., J.:

In sustaining the COMELEC's acts of suspending the proclamation of petitioner Agapito A. Aquino and of proceeding to hear the disqualification case against him, the majority opinion relies on Section 6 of R.A. No. 6646 which it claims to be applicable by virtue of Section 7 thereof to petitions to deny due course to or cancel a certificate of candidacy under Section 78 of the Omnibus Election Code (B.P. Blg. 881).

I disagree.

In the first place, the petition to disqualify the petitioner in SPA No. 95-113 is not a petition to deny due course to or cancel a certificate of candidacy under Section 78, which reads:

SEC. 78. Petition to deny due course to or cancel a certificate of candidacy. — A verified petition seeking to deny due course or to cancel a certificate of candidacy may be filed by any person exclusively on the ground that any material representation contained therein as required under Section 74 hereof is false. The petition may be filed at any time not later than twenty-five days from the time of the filing of the certificate of candidacy and shall be decided, after due notice and hearing, not later than fifteen days before the election. (*Italics supplied*)

Nowhere in the petition in SPA No. 95-113 is it alleged by the private respondents that a material representation contained in the petitioner's certificate of candidacy is false. What is being attacked therein is the petitioner's lack of the one-year residence qualification in the new Second Legislative District of Makati City where he sought to be elected for the office of Congressman.

The rule governing disqualification cases on the ground of ineligibility, which is also invoked by the private respondents, is Rule 25 of the COMELEC Rules of Procedure, as amended on 15 February 1993. The amendment allows the filing of a petition to disqualify a candidate on the ground that he does not possess all the qualifications

provided for by the Constitution or by existing laws. In its original form, the rule only applied to petitions for disqualification based on the commission of any act declared by law to be a ground for disqualification. The rule as thus amended now reads as follows:

Rule 25 — Disqualification of Candidates

SECTION 1. Grounds for Disqualification. — -Any candidate who does not possess all the qualifications of a candidate as provided for by the Constitution or by existing law or who commits any act declared by law to be grounds for disqualification may be disqualified from continuing as a candidate.

SEC. 2. Who May File Petition for Disqualification. — Any citizen of voting age, or duly registered political party, organization or coalition of political parties may file with the Law Department of the Commission a petition to disqualify a candidate on grounds provided by law.

SEC. 3. Period to File Petition. — The petition shall be filed any day after the last day for filing of certificates of candidacy but not later than the date of proclamation.

SEC. 4. Summary Proceeding. — The petition shall be heard summarily after due notice.

SEC. 5. Effect of Petition if Unresolved Before Completion of Canvass. -- If the petition, for reasons beyond the control of the Commission, cannot be decided before the completion of the canvass, the votes cast for the respondent may be included in the counting and in the canvassing; however, if the evidence of guilt is strong, his proclamation shall be suspended notwithstanding the fact that he received the winning number of votes in such election.

The underscored portion is the amendment to Rule 25, which the COMELEC must have deemed necessary to fill up a procedural hiatus in cases of disqualifications based on other grounds in the light of this Court's interpretation in *Loong vs. Commission on Elections* (216 SCRA 760 [1992]) that Rule 25 refers only to disqualifications under Sections 12 and 68 of the Omnibus Election Code. This Court explicitly stated therein as follows:

We do not agree with private respondent Ututalum's contention that the petition for disqualification, as in the case at bar, may be filed at any time after the last day for filing a certificate of candidacy but not later than the date of proclamation, applying Section 3, Rule 25 of the Comelec Rules of Procedure.

Rule 25 of the Comelec Rules of Procedure refers to Disqualification of Candidates; and Section 1 of said rule provides that any candidate who commits any act declared by law to be a ground for disqualification may be disqualified from continuing as a candidate. The grounds for disqualification as expressed in Sections 12 and 68 of the Code are the following:

SEC. 12. Disqualification. — Any person who has been declared by competent authority insane or incompetent, or has been sentenced by final judgment for subversion, insurrection, rebellion or for any offense for which he has been sentenced to a penalty of more than eighteen months or for a crime involving moral turpitude, shall be disqualified to be a candidate and to hold any office, unless he has been given plenary pardon or granted amnesty.

SEC. 63 [sic]. Disqualifications. -- Any candidate who, in an action or protest in which he is a party is declared by final decision of a competent court guilty of, or found by the Commission of having (a) given money or other material consideration to influence, induce or corrupt the voters or public officials performing electoral functions; (b) committed acts of terrorism to enhance his candidacy; (c) spent in his election campaign an amount in excess of that allowed by this Code; (d) solicited, received or made any contribution prohibited under Sections 89, 95, 96, 97 and 104; or (e) violated any of Sections 80, 83, 85, 86 and 261, paragraphs d, e, k, v, and cc, sub-paragraph 6, shall be disqualified from continuing as a candidate, or if he has been elected,

from holding the office. Any person who is a permanent resident of or an immigrant to a foreign country shall not be qualified to run for any elective office under this Code, unless said person has waived his status as permanent resident or immigrant of a foreign country in accordance with the residence requirement provided for in the election laws.

The petition filed by private respondent Ututalum with the respondent Comelec to disqualify petitioner Loong on the ground that the latter made a false representation in his certificate of candidacy as to his age, clearly does not fall under the grounds of disqualification as provided for in Rule 25 but is expressly covered by Rule 23 of the Comelec Rules of Procedure governing petitions to cancel certificate of candidacy. Moreover, Section 3, Rule 25 which allows the filing of the petition at any time after the last day for the filing of certificates of candidacy but not later than the date of proclamation, is merely a procedural rule issued by respondent Commission which, although a constitutional body, has no legislative powers. Thus, it can not supersede Section 78 of the Omnibus Election Code which is a legislative enactment.

Second, even if we assume for the sake of argument that the petition in SPA No. 95-113 fall under Section 78 of the Omnibus Election Code, still Section 6 of R.A. No. 6646 cannot be applied by virtue of Section 7 thereof. Sections 6 and 7 reads:

SEC. 6. Effect of Disqualification Case. — Any candidate who has been declared by final judgment to be disqualified shall not be voted for, and the votes cast for him shall not be counted. If for any reason a candidate is not declared by final judgment before an election to be disqualified and he is voted for and receives the winning number of votes in such election, the Court or Commission shall continue with the trial and hearing of the action, inquiry or protest and, upon motion of the complainant or any intervenor, may during the pendency thereof order the suspension of the proclamation of such candidate whenever the evidence of his guilt is strong.

SEC. 7. Petition to Deny Due Course to or Cancel a Certificate of Candidacy. — The procedure hereinabove provided shall apply to petitions to deny due course to or cancel a certificate of candidacy as provided in Section 78 of Batas Pambansa Blg. 881.

The "procedure hereinabove provided" mentioned in Section 7 cannot be construed to refer to Section 6 which does not provide for a procedure but for the EFFECTS of disqualification cases. It can only refer to the procedure provided in Section 5 of the said Act on nuisance candidates which reads as follows:

SEC. 5. Procedure in Cases of Nuisance Candidates. — (a) A verified petition to declare a duly registered candidate as a nuisance candidate under Section 69 of Batas Pambansa Blg. 881 shall be filed personally or through duly authorized representative with the Commission by any registered candidate for the same office within five (5) days from the last day for the filing of certificates of candidacy. Filing by mail shall not be allowed.

(b) Within three (3) days from the filing of the petition, the Commission shall issue summons to the respondent candidate together with a copy of the petition and its enclosures, if any.

(c) The respondent shall be given three (3) days from receipt of the summons within which to file his verified answer (not a motion to dismiss) to the petition, serving copy thereof upon the petitioner. Grounds for a motion to dismiss may be raised as affirmative defenses.

(d) The Commission may designate any of its officials who are lawyers to hear the case and receive evidence. The proceeding shall be summary in nature. In lieu of oral testimonies, the parties may be required to submit position papers together with affidavits or counter-affidavits and other documentary evidence. The hearing officer shall immediately submit to the Commission his findings, reports, and recommendations within five (5) days from the

completion of such submission of evidence. The Commission shall render its decision within five (5) days from receipt thereof.

(e) The decision, order, or ruling of the Commission shall, after five (5) days from receipt of a copy thereof by the parties, be final and executory unless stayed by the Supreme Court.

(f) The Commission shall within twenty-four hours, through the fastest available means, disseminate its decision or the decision of the Supreme Court or the city or municipal election registrars, boards of election inspectors and the general public in the political subdivision concerned.

and which is the only procedure that precedes Section 7 of the said Act. Heretofore, no law provided for the procedure to govern cases under Section 78. Applying to such cases, through Section 7 of R.A. No. 6646, the procedure applicable to cases of nuisance candidates is prudent and wise, for both cases necessarily require that they be decided before the day of the election; hence, only summary proceedings thereon can adequately respond to the urgency of the matter.

Third, Section 6 merely supplements Section 72 of the Omnibus Election Code providing as follows:

SEC. 72. Effects of disqualification cases and priority. — The Commission and the courts shall give priority to cases of disqualification by reason of violation of this Act to the end that a final decision shall be rendered not later than seven days before the election in which the disqualification is sought.

Any candidate who has been declared by final judgment to be disqualified shall not be voted for, and the votes cast for him shall not be counted. Nevertheless, if for any reason, a candidate is not declared by final judgment before an election to be disqualified and he is voted for and receives the winning number of votes in such election, his violation of the provisions of the preceding sections shall not prevent his proclamation and assumption to office.

by granting the COMELEC or the Court the authority to continue hearing the case and to suspend the proclamation if the evidence of guilt is strong. As observed by this Court in its majority opinion, "the phrase 'when the evidence of guilt is strong' seems to suggest that the provisions of Section 6 ought to be applicable only to disqualification cases under Section 68 of the Omnibus Election Code."

Fourth, the amended Rule 25 of the COMELEC Rules of Procedure, which is the only rule governing petitions filed before election or proclamation for the disqualification of a candidate on the ground that he lacks the qualifications provided for by the Constitution or by law, does not, as can be gathered from Section 5 thereof, authorize the COMELEC to continue hearing the case after the election.

Fifth, even assuming that the second sentence of Section 6 of R.A. No. 6646 is applicable to disqualification cases based on the ground of lack of qualification, it cannot be applied to a case which does not involve elective regional, provincial, and city officials, and where suspension of proclamation is not warranted because of the absence of strong evidence of guilt or ineligibility. In such a case, the candidate sought to be disqualified but who obtains the highest number of votes has to be proclaimed. Once he is proclaimed, the COMELEC cannot continue with the case, and the remedy of the opponent is to contest the winning candidate's eligibility within ten days from proclamation in a quo warranto proceeding which is within the jurisdiction of the metropolitan or municipal trial courts, in the case of barangay officials; the regional trial courts, in the case of municipal officials (Section 2(2), Article IX-C, Constitution; Section 253, paragraph 2, B.P. Blg. 881); the House of Representatives Electoral Tribunal, in the case of Congressmen; the Senate Electoral Tribunal, in the case of Senators (Section 17, Article VI, Constitution); and the Supreme Court en banc, in the case of the President or Vice-President (Section 4, Article VII, Constitution).

If what is involved is an elective regional, provincial, or city official, and the case cannot be decided before the election, the COMELEC can, even after the proclamation of the candidate sought to be disqualified, proceed with the case by treating it as a petition for quo warranto, since such a case properly pertains to the exclusive jurisdiction of the COMELEC (Section 2(2), Article IX-C, Constitution; Section 253, B.P. Blg. 881).

But even granting for the sake of argument that Sections 6 and 7 of R.A. No. 6646, in relation to Section 78 of the Omnibus Election Code and the amended Rule 25 of the COMELEC Rules of Procedure, are applicable, the order of suspension of the petitioner's proclamation issued on 15 May 1995 is null and void for having been issued with grave abuse of discretion. What was before the COMELEC en banc at that stage was the decision of the Second Division of 6 May 1995 dismissing the petition to disqualify the petitioner and declaring him qualified for the position. That decision is a direct and positive rejection of any claim that the evidence of the petitioner's guilt is strong. Note that it was only on 2 June 1995, when the COMELEC en banc reversed the decision of the Second Division, that it was found that the evidence of the petitioner's ineligibility is strong. It would have been otherwise if the Second Division had disqualified the petitioner.

Besides, at the time the questioned order was issued, there was no hearing yet on the private respondents' motions for the suspension of the petitioner's proclamation. In fact, in that order the COMELEC en banc admitted that the said motions could not be resolved without hearing, thus:

Pending the resolution of the petitioners' Motion for Reconsideration filed on May 7, 1995; Urgent Motion Ad Cautelam to Suspend Proclamation of Respondent (May 10, 1995) filed on May 10, 1995; and OMNIBUS MOTION (For Reconsideration of the Honorable Commission's [Second Division] Resolution dated May 6, 1995, and 2nd Urgent Motion Ad Cautelam to Suspend Proclamation of Respondent Aquino, which cannot be resolved without hearing, without violating the right of the respondent to due process....

For being void from the beginning, it is as if the order of 15 May 1995 had not existed and could not, therefore, be made permanent by the COMELEC en banc through its resolution of 2 June 1995 whose dispositive portion reads in part: "[c]onsequently, the order of suspension of the respondent should he obtain the winning number of votes, issued by this Commission on 15 May 1995 is now made permanent."

Absent a valid finding before the election or after the canvass of election returns that the evidence of the petitioner's guilt or ineligibility is strong, the COMELEC should not have suspended the proclamation of the petitioner. After the completion of the canvass the petitioner should have been proclaimed.

This case then must be distinguished from that of *Imelda Romualdez-Marcos vs. Commission on Elections*, G.R. No. 119976, where the COMELEC en banc affirmed before the elections, or on 7 May 1995, the Second Division's resolution of 24 April 1995 disqualifying Mrs. Marcos.

Accordingly, the order of 15 May 1995 and the resolution of 2 June 1995 of the COMELEC en banc must be annulled and set aside, and the COMELEC, through its City Board of Canvassers of Makati, must be ordered to immediately proclaim the petitioner, without prejudice to the right of his opponents to file a petition for quo warranto with the House of Representatives Electoral Tribunal, which is the sole judge of all contests relating to the election, returns and qualifications of the Members of the House of Representatives (Section 17, Article VI, Constitution).

In view of the foregoing, a disquisition on the merits of the ground for the petitioner's disqualification will no longer be proper.

I vote to GRANT the instant petition, to ANNUL and SET ASIDE the challenged order and resolution of the Commission on Elections en banc, and to DIRECT the Board of Canvassers of Makati City to reconvene and

proclaim the petitioner as the winning candidate, without prejudice on the part of any aggrieved party to file the appropriate action in the House of Representatives Electoral Tribunal.

SEPARATE OPINION

VITUG, J.:

I find what I would consider as the relevant issues in this petition as similar in almost all material respects to those obtaining in G.R. No. 119976 (Imelda Romualdez-Marcos vs. Commission on Elections and Cirilo Roy Montejo). Let me then here just reiterate what I have there said in my separate opinion.

The case at bench deals with explicit Constitutional mandates.

The Constitution is not a pliable instrument. It is a bedrock in our legal system that sets up ideals and directions and render steady our strides hence. It only looks back so as to ensure that mistakes in the past are not repeated. A compliant transience of a constitution belittles its basic function and weakens its goals. A constitution may well become outdated by the realities of time. When it does, it must be changed but while it remains, we owe it respect and allegiance. Anarchy, open or subtle, has never been, nor must it ever be, the answer to perceived transitory needs, let alone societal attitudes, or the Constitution might lose its very essence.

Constitutional provisions must be taken to be mandatory in character unless, either by express statement or by necessary implication, a different intention is manifest (see *Marcelino vs. Cruz*, 121 SCRA 51).

The two provisions initially brought to focus are Section 6 and Section 17 of Article VI of the fundamental law. These provisions read:

"Sec. 6. No person shall be a Member of the House of Representatives unless he is a natural-born citizen of the Philippines and, on the day of the election, is at least twenty-five years of age, able to read and write, and, except the party-list representatives, a registered voter in the district in which he shall be elected, and a resident thereof for a period of not less than one year immediately preceding the day of the election."

"Sec. 17. The Senate and the House of Representatives shall each have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications of their respective Members. Each Electoral Tribunal shall be composed of nine Members, three of whom shall be Justices of the Supreme Court to be designated by the Chief Justice, and the remaining six shall be Members of the Senate or the House of Representatives, as the case may be, who shall be chosen on the basis of proportional representation from the political parties and the parties or organizations registered under the party-list system represented therein. The senior Justice in the Electoral Tribunal shall be its Chairman."

The Commission on Election (the "COMELEC") is constitutionally bound to enforce and administer "all laws and regulations relative to the conduct of election x x x" (Art. IX, C, Sec. 2, Constitution) that, there being nothing said to the contrary, should include its authority to pass upon the qualification and disqualification prescribed by law of candidates to an elective office. Indeed, pre-proclamation controversies are expressly placed under the COMELEC's jurisdiction to hear and resolve (Art. IX, C, Sec. 3, Constitution).

The matter before us specifically calls for the observance of the constitutional one-year residency requirement. This issue (whether or not there is here such compliance), to my mind, is basically a question of fact or at least inextricably linked to such determination. The findings and judgment of the COMELEC, in accordance with the long established rule and subject only to a number of exceptions under the basic heading of "grave abuse of discretion," are not reviewable by this Court.

I do not find much need to do a complex exercise on what seems to me to be a plain matter. Generally, the term "residence" has a broader connotation that may mean permanent (domicile), official (place where one's official duties may require him to stay) or temporary (the place where he sojourns during a considerable length of time). For civil law purposes, i.e., as regards the exercise of civil rights and the fulfillment of civil obligations, the domicile of a natural person is the place of his habitual residence (see Article 50, Civil Code). In election cases, the controlling rule is that heretofore announced by this Court in *Romualdez vs. Regional Trial Court, Branch 7, Tacloban City* (226 SCRA 408, 409); thus:

"In election cases, the Court treats domicile and residence as synonymous terms, thus: '(t)he term 'residence' as used in the election law is synonymous with 'domicile,' which imports not only an intention to reside in a fixed place but also personal presence in that place, coupled with conduct indicative of such intention.' 'Domicile' denotes a fixed permanent residence to which when absent for business or pleasure, or for like reasons, one intends to return. x x x. Residence thus acquired, however, may be lost by adopting another choice of domicile. In order, in turn, to acquire a new domicile by choice, there must concur (1) residence or bodily presence in the new locality, (2) an intention to remain there, and (3) an intention to abandon the old domicile. In other words, there must basically be *animus manendi* coupled with *animus non revertendi*. The purpose to remain in or at the domicile of choice must be for an indefinite period of time; the change of residence must be voluntary; and the residence at the place chosen for the new domicile must be actual."

Using the above tests, I am not convinced that we can charge the COMELEC with having committed grave abuse of discretion in its assailed resolution.

The COMELEC's jurisdiction, in the case of congressional elections, ends when the jurisdiction of the Electoral Tribunal concerned begins. It signifies that the protestee must have theretofore been duly proclaimed and has since become a "member" of the Senate or the House of Representatives. The question can be asked on whether or not the proclamation of a candidate is just a ministerial function of the Commission on Elections dictated solely on the number of votes cast in an election exercise. I believe, it is not. A ministerial duty is an obligation the performance of which, being adequately defined, does not allow the use of further judgment or discretion. The COMELEC, in its particular case, is tasked with the full responsibility of ascertaining all the facts and conditions such as may be required by law before a proclamation is properly done.

The Court, on its part, should, in my view at least, refrain from any undue encroachment on the ultimate exercise of authority by the Electoral Tribunals on matters which, by no less than a constitutional fiat, are explicitly within their exclusive domain. The nagging question, if it were otherwise, would be the effect of the Court's peremptory pronouncement on the ability of the Electoral Tribunal to later come up with its own judgment in a contest "relating to the election, returns and qualification" of its members.

Prescinding from all the foregoing, I should like to next touch base on the applicability to this case of Section 6 of Republic Act No. 6646, in relation to Section 72 of Batas Pambansa Blg. 881, each providing thusly:

REPUBLIC ACT NO. 6646

"xxx xxx xxx.

"SEC. 6. Effect of Disqualification Case. - Any candidate who has been declared by final judgment to be disqualified shall not be voted for, and the votes cast for him shall not be counted. If for any reason a candidate is not declared by final judgment before an election to be disqualified and he is voted for and receives the winning number of votes in such election, the Court or Commission shall continue with the trial and hearing of the action, inquiry or protest and, upon motion of the complainant or any intervenor, may during the pendency thereof order the suspension of the proclamation of such candidate whenever the evidence of his guilt is strong."

BATAS PAMBANSA BLG. 881

"xxx xxx xxx.

"SEC. 72. Effects of disqualification cases and priority. -The Commission and the courts shall give priority to cases of disqualification by reason of violation of this Act to the end that a final decision shall be rendered not later than seven days before the election in which the disqualification is sought.

"Any candidate who has been declared by final judgment to be disqualified shall not be voted for, and the votes cast for him shall not be counted. Nevertheless, if for any reason, a candidate is not declared by final judgment before an election to be disqualified, and he is voted for and receives the winning number of votes in such election, his violation of the provisions of the preceding sections shall not prevent his proclamation and assumption to office."

I realize that in considering the significance of the law, it may be preferable to look for not so much the specific instances they ostensibly would cover as the principle they clearly convey. Thus, I will not scoff at the argument that it should be sound to say that votes cast in favor of the disqualified candidate, whenever ultimately declared as such, should not be counted in his or her favor and must accordingly be considered to be stray votes. The argument, nevertheless, is far outweighed by the rationale of the now prevailing doctrine first enunciated in the case of *Topacio vs. Paredes* (23 Phil. 238 [1912]) which, although later abandoned in *Ticzon vs. Comelec* (103 SCRA 687 [1981]), and *Santos vs. COMELEC* (137 SCRA 740 [1985]), was restored, along with the interim case of *Geronimo vs. Ramos* (136 SCRA 435 [1985]), by the *Labo* (176 SCRA 1 [1989]), *Abella* (201 SCRA 253 [1991]), *Labo* (211 SCRA 297 [1992]) and, most recently, *Benito* (235 SCRA 436 [1994]) rulings. *Benito vs. Comelec* was a unanimous decision penned by Justice Kapunan and concurred in by Chief Justice Narvasa, Justices Feliciano, Padilla, Bidin, Regalado, Davide, Romero, Melo, Quiason, Puno, Vitug and Mendoza (Justices Cruz and Bellosillo were on official leave). For easy reference, let me quote from the first *Labo* decision:

"Finally, there is the question of whether or not the private respondent, who filed the quo warranto petition, can replace the petitioner as mayor. He cannot. The simple reason is that as he obtained only the second highest number of votes in the election, he was obviously not the choice of the people of Baguio City.

"The latest ruling of the Court on this issue is *Santos v. Commission on Elections*, (137 SCRA 740) decided in 1985. In that case, the candidate who placed second was proclaimed elected after the votes for his winning rival, who was disqualified as a turncoat and considered a non-candidate, were all disregarded as stray. In effect, the second placer won by default. That decision was supported by eight members of the Court then, (Cuevas, J., ponente, with Makasiar, Concepcion, Jr., Escolin, Relova, De la Fuente, Alampay and Aquino, JJ., concurring.) with three dissenting (Teahankee, Acting C.J., Abad Santos and Melencio-Herrera, JJ.) and another two reserving their vote. (Plana and Gutierrez, Jr., JJ.) One was on official leave. (Fernando, C.J.)

"Re-examining that decision, the Court finds, and so holds, that it should be reversed in favor of the earlier case of *Geronimo v. Ramos*, (136 SCRA 435) which represents the more logical and democratic rule. That case, which reiterated the doctrine first announced in 1912 in *Topacio v. Paredes*, (23 Phil. 238) was supported by ten members of the Court, (Gutierrez, Jr., ponente, with Teahankee, Abad Santos, Melencio-Herrera, Plana, Escolin, Relova, De la Fuente, Cuevas and Alampay, JJ., concurring) without any dissent, although one reserved his vote, (Makasiar, J.) another took no part, (Aquino, J.) and two others were on leave. (Fernando, C.J. and Concepcion, Jr., J.) There the Court held:

"x x x it would be extremely repugnant to the basic concept of the constitutionally guaranteed right to suffrage if a candidate who has not acquired the majority or plurality of votes is proclaimed a winner and imposed as the representative of a constituency, the majority of which have positively declared through their ballots that they do not choose him.

'Sound policy dictates that public elective offices are filled by those who have received the highest number of votes cast in the election for that office, and it is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried unless he or it receives a majority or plurality of the legal votes cast in the election. (20 Corpus Juris 2nd, S 243, p. 676.)

'The fact that the candidate who obtained the highest number of votes is later declared to be disqualified or not eligible for the office to which he was elected does not necessarily entitle the candidate who obtained the second highest number of votes to be declared the winner of the elective office. The votes cast for a dead, disqualified, or non-eligible person may not be valid to vote the winner into office or maintain him there. However, in the absence of a statute which clearly asserts a contrary political and legislative policy on the matter, if the votes were cast in the sincere belief that the candidate was alive, qualified, or eligible, they should not be treated as stray, void or meaningless.' (at pp. 20-21)"

Accordingly, I am constrained to vote for the dismissal of the petition.

SEPARATE OPINION

MENDOZA, J.:

For the reasons expressed in my separate opinion in the companion case, G.R. No. 119976, Imelda Romualdez-Marcos v. Commission on Elections, I am of the opinion that the Commission on Elections has no jurisdiction over petitions for disqualification of candidates based on alleged ineligibility for the office to which they seek election.

The May 15, 1995 resolution of the COMELEC en banc, suspending the proclamation of petitioner should he obtain the highest number of votes for Representative of the Second District of Makati, Metro Manila, purports to have been issued pursuant to § 6 of R.A. No. 6646. This provision authorizes the COMELEC to order the suspension of the proclamation "whenever the evidence of his guilt is strong." As explained in my separate opinion in G.R. No. 119976, however, this provision refers to proceedings under § 68 of the Omnibus Election Code which provides for the disqualification of candidates found guilty of using what in political parlance have been referred to as "guns, goons or gold" to influence the outcome of elections. Since the disqualification of petitioner in this case was not sought on this ground, the application of § 6 of R.A. No. 6646 is clearly a grave abuse of discretion on the part of the COMELEC.

Nor may the petition to disqualify petitioner in the COMELEC be justified under § 78 of the OEC which authorizes the filing of a petition for the cancellation of certificates of candidacy since such a petition may be filed "exclusively on the ground that a material representation contained [in the certificate] as required under section 74 is false." There was no allegation that in stating in his certificate of candidacy that he is a resident of Amapola St., Palm Village, Guadalupe Viejo, Makati, Metro Manila, petitioner made any false representation.

For this reason, I am of the opinion that the COMELEC had no jurisdiction over SPA No. 95-113; that its proceedings in SPA No. 95-113, including the questioned orders, are void; and that the qualifications of petitioner Agapito A. Aquino for the position of Representative of the Second District of the City of Makati may only be inquired into by the House of Representatives Electoral Tribunal.

This conclusion makes it unnecessary for me to express my view at this time on the question whether, in the event the candidate who obtained tie highest number of votes is declared ineligible, the one who received the next highest number of votes is entitled to be declared the winner.

Accordingly, I vote (1) to grant the petition in this case and (2) to annul the proceedings of the Commission on

Elections in SPA No. 95-113, including the questioned orders, dated May 6, 1995, May 15, 1995, and the two orders both dated June 2, 1995, so far as they declare petitioner Agapito A. Aquino to be ineligible for the position of Representative of the Second District of the City of Makati and direct the City Board of Canvassers of Makati to determine and proclaim the winner out of the remaining qualified candidates.

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