

TEOFISTO GUINGONA, JR., BISHOP LEO A. SORIANO, FE MARIA ARRIOLA, ISAGANI R. SERRANO, AND ENGR. RODOLFO LOZADA, CORONA, VS. COMMISSION ON ELECTIONS, RESPONDENT.

G.R. No. 191846. May 06, 2010

Ponente: CARPIO, J.

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CARPIO, J.:

The Case

In this special civil action for mandamus filed on 23 April 2010, petitioners invoke their constitutional rights to suffrage and to information in compelling respondent Commission on Elections (Comelec) to explain fully the complete details of its preparations for the 10 May 2010 elections, in view of the unraveling of alarming events of late.

The Antecedents

Petitioners cite various recent media reports, as follows:

- Smartmatic-Total Information Management Corporation supplied the wrong ultraviolet ink used in the printing of the ballots for the May 2010 elections. The security marks were unreadable by the Precinct Count Optical Scan (PCOS) machines. This prompted Comelec to disable the ultraviolet light detector in the PCOS machines, and to buy ultraviolet lamps for P30 million. Director Ferdinand Rafanan of the Comelec's legal department, who challenged Comelec's decision to buy ultraviolet lamps, was quoted as saying, "Why is Comelec shouldering this expense when it was not its fault that this deficiency came about."
- Senate Minority Leader Aquilino Pimentel, Jr. then disclosed that election officials bought nearly two million ballot secrecy folders for the May 2010 elections at an overpriced rate of P380 each without any public bidding. Comelec promptly canceled the awarding of the P690 million contract for the supply and delivery of the ballot secrecy folders, which the Bids and Awards Committee of Comelec had recommended to be awarded to OTC Paper Supply for 1,815,000 ballot secrecy folders.
- Another whistle blower, Dr. Arwin Serrano, the citizen's arm representative to the Comelec's Bids and Awards Committee, asked that the bidding for indelible ink be probed as well. According to Serrano, there were two bidders initially. After screening, Texas Resources Corporation was left as the sole bidder. Upon testing of a sample of its indelible ink, the product failed. The ink easily washed off and the mark left by it only appeared after the lapse of a few hours. Undeterred by the failed test, Comelec still used the ink supplied by Texas Resources Corporation.
- Comelec tried to re-bid the contract for the indelible ink. However, it backtracked on its plan saying that the lone bidder did not fail the test after all. Comelec spokesperson James Jimenez was quoted as saying, "It looks like there is no need to actually re-bid it, not to mention the fact that there is really not enough time left for that."

- On the second day of the overseas absentee voting in Hong Kong, the PCOS machines at precincts 15 and 16 at the Bayanihan Kennedytown Center failed to accept promptly the ballots shortly after the precincts reopened at 8 a.m. Inspection of the ballots showed no stray or ambiguous marks that could result in their rejection by the PCOS machines. Smartmatic officials blamed the combination of cold and humidity in Hong Kong for the malfunctioning machines.

- In an interview, Cesar Flores, president of Smartmatic, admitted that "Machines will break on election day, and machines will have to go to contingency procedures and there will be replacements, and there will be cases where no replacements will be available and the Board of Election Inspectors (BEIs) will have to resort to the next-door machines." Flores explained that hiccups could either be due to hardware failure or operational failure if the paper was inserted incorrectly or some connections were not plugged in. Flores continued, "It's very important that we say these things to the public and we manage the expectations of people. If you're planning on getting your headlines from machines broken, you're going to run out of space on your front page on election day."

- This series of unfortunate events and worrisome admissions notwithstanding, the Comelec subsequently approved a resolution awarding Smartmatic a contract amounting to P500 million for the tracking and delivery services of official ballots. No bidding was held for the contract, which Comelec claimed to be an emergency procurement.

- In an en banc resolution detailing the general instructions on the actual conduct of elections, Comelec specifically instructed BEIs not to key in their digital signatures before the PCOS machines transmit election results. Thus, any PCOS machine, including the reserves totaling 10,000 machines, can transmit election results to Comelec's central server even without digital authentication. The results can still be tallied as official results. In other words, even ballots that are not officially printed can be used in any PCOS machine. Official ballots are no longer precinct-specific. The volume of ballots can no longer be monitored. Petitioners call this Court's attention to the fact that reserve PCOS machines can be used to transmit pre-loaded results.

The Court further takes judicial notice of the fact, as widely reported in print and broadcast media, that with just six days to go before the 10 May 2010 elections, Comelec recalled 76,000 compact flash cards following widespread failure of the PCOS machines to read and tally the votes during the machine test conducted by Comelec and Smartmatic. Comelec spokesman James Jimenez was quoted as saying, "Right now we are assuming that all of the machines were affected. We have stopped the testing and are pulling out all memory cards for reconfiguration."

Prior to this, Comelec unanimously discarded the proposal of information technology experts for a parallel manual count to safeguard the integrity and credibility of the election results.

In light of the foregoing alarming developments, petitioners pray that the Court order respondent Comelec to explain the complete details of its preparations for the impending 10 May 2010 elections, specifically:

- The status of its negotiations for election supplies and paraphernalia, including contracts that did not undergo the bidding process;
- Nature and security of the machines, memory card, and other software and facilities to be used for the elections, including its current anti-hacking/tampering strategy of the votes and the electoral results;
- Content of the source code review mandated by RA 9369, and modes of access by the public to the source code;
- Schedule, venue, and specifications of the random manual audit mandated by RA 9369;
- Terms and protocols under which manual voting would be implemented in case failure of elections is to be

declared;

- Its readiness to shift to manual voting and the details adopted to ensure that the results cannot be manipulated;
- Certification from the Technical Evaluation Committee that the entire AES is 100% fully functional and that a continuity plan is already in place pursuant to Section 11[1] of RA 9369;
- Certification protocol and the actual certification issued by DOST certifying that the 240,000 BEI's all over the country are trained to use the AES as required by Section 3[2] of RA 9369.
- Status of investigations and prosecutions of the offenders behind the procurement scandals besetting the commission of late, including those mentioned in the petition.

In its Comment filed on 4 May 2010, respondent Comelec contends petitioners have no legal standing to file the present special civil action for mandamus. Respondent insists petitioners have no valid cause of action against it. Respondent argues there is no proof petitioners had requested the release of the public documents mentioned in the petition; hence, the extraordinary writ of mandamus is legally unavailing. Respondent Comelec maintains that the issues raised by petitioners have already been decided in *Roque v. Comelec*, where this Court held that "failure of elections consequent to voting machines failure would, in fine, be a very remote possibility" and that although the "AES has its flaws, Comelec and Smartmatic have seen to it that the system is well-protected with sufficient security measures." Respondent thus prays that the petition be dismissed for lack of merit.

The Court's Ruling

The Court, after a careful study of the case and mindful of the transcendental importance of the matters raised, grants the petition in part.

In order that a petition for mandamus may be given due course, it must be instituted by a party aggrieved by the alleged inaction of any tribunal, corporation, board, or person, which unlawfully excludes said party from the enjoyment of a legal right.[3] However, if the petition is anchored on the people's right to information on matters of public concern, any citizen can be the real party in interest. The requirement of personal interest is satisfied by the mere fact that the petitioner is a citizen, and therefore, part of the general public which possesses the right.[4] There is no need to show any special interest in the result. It is sufficient that petitioners are citizens and, as such, are interested in the faithful execution of the laws.[5]

The petitioners in this case are Teofisto Guingona, Jr., Bishop Leo A. Soriano, Jr., Quintin S. Doromal, Fe Maria Arriola, Isagani R. Serrano, and Engr. Rodolfo Lozada. All are Filipino citizens. They are thus clothed with personality to institute this special civil action for mandamus.

Coming now to the substantive issues, Section 7, Article III of the Constitution enshrines the people's fundamental right to information, thus:

Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law. (Emphasis supplied)

In *Valmonte v. Belmonte, Jr.*,[6] the Court explained the rationale of the right to information in this wise:

The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. Denied access to information on the inner workings of government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated. The postulate of public office is a

public trust, institutionalized in the Constitution to protect the people from abuse of governmental power, would certainly be mere empty words if access to such information of public concern is denied x x x.

x x x The right to information goes hand-in-hand with the constitutional policies of full public disclosure and honesty in the public service. It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government. (Emphasis supplied)

The people's constitutional right to information is intertwined with the government's constitutional duty of full public disclosure of all transactions involving public interest. For every right of the people, there is a corresponding duty on the part of those who govern to protect and respect that right. Section 28, Article II of the Constitution succinctly expresses this state policy:

Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest. (Emphasis supplied)

In *Legaspi v. Civil Service Commission*,^[7] the Court explained that the people's right to information is limited to matters of public concern. The Court then formulated a broad definition of what constitutes matters of public concern, to wit:

In determining whether or not a particular information is of public concern, there is no rigid test which can be applied. "Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because such matters directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine in a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public. (Emphasis supplied)

There can be no doubt that the coming 10 May 2010 elections is a matter of great public concern. On election day, the country's registered voters will come out to exercise the sacred right of suffrage. Not only is it an exercise that ensures the preservation of our democracy, the coming elections also embodies our people's last ounce of hope for a better future. It is the final opportunity, patiently awaited by our people, for the peaceful transition of power to the next chosen leaders of our country. If there is anything capable of directly affecting the lives of ordinary Filipinos so as to come within the ambit of a public concern, it is the coming elections, more so with the alarming turn of events that continue to unfold. The wanton wastage of public funds brought about by one bungled contract after another, in staggering amounts, is in itself a matter of grave public concern.

It is not enough, however, that the information petitioners seek in a writ of mandamus is a matter of public concern. For mandamus to lie in a given case, the information must not be among the species exempted by law from the operation of the constitutional guarantee.^[8] In this case, respondent Comelec failed to cite any provision of law exempting the information sought by petitioners from the coverage of the government's constitutional duty to disclose fully information of public concern.

Respondent's claim that there is no proof a request has been made for the release of the public records mentioned in the petition is belied by its allegation in its own Comment that this matter has already been addressed in the recent case of *Roque v. Comelec*.^[9] Quoting the Court's ruling in that case on the issue of disclosure of the source code, respondent unwittingly admits a prior request for disclosure:

The fact that a source code review is not expressly included in the Comelec schedule of activities is not an indication, as petitioners suggest, that Comelec will not implement such review. Comelec, in its Comment on the Motion for Reconsideration, manifests its intention to make available and open the source code to all political and interested parties, but under a controlled environment to obviate replication and tampering of the source code.^[10]

Petitioners in *Roque v. Comelec*[11] in fact pressed Comelec for a source code review. To this day, however, Comelec has yet to disclose the source code as mandated by law. In any case, considering the lack of material time, the Court in the exercise of its equity jurisdiction may even dispense with the requirement of proof of a prior demand in this case.

The Court may, and given the alarming developments of late in the run-up to the 10 May 2010 elections, should compel Comelec to disclose fully the complete details of its preparations. In *Legaspi v. Civil Service Commission*,[12] the Court stressed that the constitutional duty to disclose information of public concern may be compelled by mandamus, to wit:

Thus, while the manner of examining public records may be subject to reasonable regulation by the government agency in custody thereof, the duty to disclose the information of public concern, and to afford access to public records cannot be discretionary on the part of said agencies. Certainly, its performance cannot be made contingent upon the discretion of such agencies. Otherwise, the enjoyment of the constitutional right may be rendered nugatory by any whimsical exercise of agency discretion. The constitutional duty, not being discretionary, its performance may be compelled by a writ of mandamus in a proper case. (Emphasis supplied)

Section 52(j) of *Batas Pambansa Blg. 881*, otherwise known as the Omnibus Election Code, mandates that Comelec shall carry out a continuing and systematic campaign to educate the public and fully inform the electorate about election laws, procedures, decisions, and other matters relative to the work and duties of the Comelec and the necessity of clean, free, orderly, and honest electoral processes. It provides:

Section 52. Powers and functions of the Commission on Elections. - In addition to the powers and functions conferred upon it by the Constitution, the Commission shall have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly and honest elections, and shall:

(j) Carry out a continuing and systematic campaign through newspapers of general circulation, radios and other media forms to educate the public and fully inform the electorate about election laws, procedures, decisions, and other matters relative to the work and duties of the Commission and the necessity of clean, free, orderly, and honest electoral processes. (Emphasis supplied)

Section 5(e) of *Republic Act No. 6713*, otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees, requires that all public documents must be made accessible to, and readily available for inspection by, the public within reasonable working hours. It states:

Section 5. Duties of Public Officials and Employees. - In the performance of their duties, all public officials and employees are under obligation to:

e) Make documents accessible to the public. - All public documents must be made accessible to, and readily available for inspection by, the public within reasonable working hours. (Emphasis supplied)

Section 3 of *Republic Act No. 9184*, otherwise known as the Government Procurement Reform Act, lays down the following categorical and definitive principles governing government procurement:

Section 3. Governing Principles on Government Procurement.

All procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government -owned and/or-controlled corporations, government financial institutions and local government units, shall, in all cases, be governed by these principles:

(a) Transparency in the procurement process and in the implementation of procurement contracts.

(b) Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and

qualified to participate in public bidding.

(c) Streamlined procurement process that will uniformly apply to all government procurement. The procurement process shall be simple and made adaptable to advances in modern technology in order to ensure an effective and efficient method.

(d) System of accountability where both the public officials directly or indirectly involved in the procurement process as well as in the implementation of procurement contracts and the private parties that deal with government are, when warranted by circumstances, investigated and held liable for their actions relative thereto.

(e) Public monitoring of the procurement process and the implementation of awarded contracts with the end in view of guaranteeing that these contracts are awarded pursuant to the provisions of this Act and its implementing rules and regulations, and that all these contracts are performed strictly according to specifications. (Emphasis supplied)

Section 1 of Republic Act No. 9369, otherwise known as An Act Amending Republic Act No. 8436, declares as a state policy a transparent and credible election process, thus:

SECTION 1. Declaration of Policy. - It is the policy of the State to ensure free, orderly, honest, peaceful, credible, and informed elections, plebiscites, referenda, recall, and other similar electoral exercises by improving on the election process and adopting systems, which shall involve the use of an automated election system that will ensure the secrecy and sanctity of the ballot and all election, consolidation, and transmission documents in order that the process shall be transparent and credible and that the results shall be fast, accurate, and reflective of the genuine will of the people. (Emphasis supplied)

Section 2 of Republic Act No. 9525, otherwise known as An Act Appropriating P11 Billion as Supplemental Appropriations for an Automated Election System, conditions the disbursement of the funds on the adoption of measures that will guarantee transparency and accuracy in the selection of the relevant technology of the machines to be used in the elections. It provides:

Section 2. Use of Funds. - The amounts herein appropriated shall be used for the purposes indicated and subject to: (i) the relevant special and general provisions of Republic Act No. 9498, or the FY 2008 General Appropriations Act, as reenacted, and subsequent General Appropriations Acts, and (ii) the applicable provisions of Republic Act No. 8436, entitled: "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in subsequent National and Local Electoral Exercises, Providing Funds Therefor and for Other Purposes", as amended by Republic Act No. 9369: Provided, however, That disbursement of the amounts herein appropriated or any part thereof shall be authorized only in strict compliance with the Constitution, the provisions of Republic Act No. 9369 and other election laws incorporated in said Act so as to ensure the conduct of a free, orderly, clean, honest and credible election and shall adopt such measures that will guarantee transparency and accuracy in the selection of the relevant technology of the machines to be used on May 10, 2010 automated national and local election. (Emphasis supplied)

Section 11 of Republic Act No. 9369 requires a continuity plan in case of a systems breakdown resulting in delay, obstruction, or nonperformance of the automated election system, thus:

SEC. 11. Section 9 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC.13. Continuity Plan. - The AES shall be so designed to include a continuity plan in case of a systems breakdown or any such eventuality which shall result in the delay, obstruction, or nonperformance of the electoral process. Activation of such continuity and contingency measures shall be undertaken in the presence of representatives of political parties and citizen's arm of the Commission who shall be notified by the election

officer of such activation.

"All political parties and party-lists shall be furnished copies of said continuity plan at their official addresses as submitted to the Commission. The list shall be published in at least two newspapers of national circulation and shall be posted at the website of the Commission at least fifteen (15) days prior to the electoral activity concerned." (Emphasis supplied)

Section 12 of Republic Act No. 9369 also mandates that the equipment or device for the automated election system shall be open for examination and testing by political parties, candidates, or their representatives. More importantly, the law provides that once a technology is selected for implementation, the Comelec shall promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review, thus:

SEC. 12. Section 10 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC.14. Examination and Testing of Equipment or Device of the AES and Opening of the Source Code for Review. - The Commission shall allow the political parties and candidates or their representatives, citizens' arm or their representatives to examine and test:

"The equipment or device to be used in the voting and counting on the day of the electoral exercise, before voting starts. Test ballots and test forms shall be provided by the Commission.

"Immediately after the examination and testing of the equipment or device, parties and candidates or their representatives, citizen's arms or their representatives, may submit a written comment to the election officer who shall immediately transmit it to the Commission for appropriate action.

"The election officer shall keep minutes of the testing, a copy of which shall be submitted to the Commission together with the minute of voting."

"Once an AES technology is selected for implementation, the Commission shall promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review thereof." (Emphasis supplied)

In sum, petitioners' prayer to compel Comelec to explain fully its preparations for the coming 10 May 2010 elections finds overwhelming support in the Constitution, specifically under Section 7 of Article III and Section 28 of Article II on the people's right to information and the State's corresponding duty of full public disclosure of all transactions involving public interest; the jurisprudential doctrines laid down in *Valmonte v. Belmonte, Jr.*, *Legaspi v. Civil Service Commission*, and *Akbayan Citizens Action Party v. Aquino*; as well as Section 52(j) of *Batas Pambansa Blg. 881* otherwise known as the Omnibus Election Code; Section 5(e) of Republic Act No. 6713 otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees; Section 3 of Republic Act No. 9184 otherwise known as the Government Procurement Reform Act; Sections 1, 11, and 12 of Republic Act No. 9369 otherwise known as An Act Amending Republic Act No. 8436; and Section 2 of Republic Act No. 9525 otherwise known as An Act Appropriating P11 Billion as Supplemental Appropriations for an Automated Election System.

Respondent Comelec cannot shirk its constitutional duty to disclose fully to the public complete details of all information relating to its preparations for the 10 May 2010 elections without violating the Constitution and relevant laws. No less than the Constitution^[13] mandates it to enforce and administer election laws. The Comelec chairman and the six commissioners are beholden and accountable to the people they have sworn to serve. This Court, as the last bulwark of democracy in this country, will spare nothing in its constitutionally granted powers to ensure that the fundamental right of the people to information on matters of public concern, especially on matters that directly affect our democratic processes, is fully guaranteed, protected, and implemented.

However, due to the proximity of the 10 May 2010 elections which is less than five days away, we shall grant only the specific reliefs prayed for by petitioners which by necessity must be disclosed before the 10 May 2010 elections or are expressly mandated by law to be disclosed or performed in connection with the holding of the 10 May 2010 elections. Petitioners can press Comelec for the other reliefs after the 10 May 2010 elections, and if they still fail to secure such reliefs, they may take such actions as may be allowed under the law.

WHEREFORE, we GRANT the petition in part. Respondent Commission on Elections is ORDERED, within two (2) days from receipt of this Resolution, to disclose to petitioners and the public the following:

- The nature and security of all equipment and devices, including their hardware and software components, to be used in the 10 May 2010 automated elections, as provided for in Section 7[14] of Republic Act No. 9369;
- The source code for review by interested parties as mandated by Section 12[15] of Republic Act No. 9369;
- The terms and protocols of the random manual audit, as mandated by Section 24[16] of Republic Act No. 9369;
- A certification from the Technical Evaluation Committee that the entire Automated Election System is fully functional and that a continuity plan is already in place, as mandated by Sections 9[17] and 11[18] of Republic Act No. 9369; and
- The certification protocol and the actual certification issued by the Department of Science and Technology that the 240,000 Board of Election Inspectors all over the country are trained to use the Automated Election System, as required by Section 3[19] of Republic Act No. 9369.

This Resolution is immediately executory.

SO ORDERED.

Puno, C.J., Carpio Morales, Nachura, Leonardo-De Castro, Brion, Peralta, Bersamin, Del Catillo, Villarama, Jr., Perez, and Mendoza, JJ., concur.

Corona and Velasco Jr., JJ., reserves his right to submit a separate dissenting opinion

Abad, J., see dissenting opinion

[1] SEC. 11. Section 9 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC.13. Continuity Plan. - The AES shall be so designed to include a continuity plan in case of a systems breakdown or any such eventuality which shall result in the delay, obstruction or nonperformance of the electoral process. Activation of such continuity and contingency measures shall be undertaken in the presence of representatives of political parties and citizen's arm of the Commission who shall be notified by the election officer of such activation.

"All political parties and party-lists shall be furnished copies of said continuity plan at their official addresses as submitted to the Commission. The list shall be published in at least two newspaper of national of circulation and shall be posted at the website of the Commission at least fifteen (15) days prior to the electoral activity concerned."

[2] SEC. 3. Section 3 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC 3. Board of Election Inspectors. - Where AES shall be adopted, at least one member of the Board of Election Inspectors shall be an information technology-capable person, who is trained or certified by the DOST to use the EAS. Such certification shall be issued by the DOST, free of charge."

[3] Legaspi v. Civil Service Commission, 234 Phil. 521 (1987).

[4] Akbayan Citizens Action Party v. Aquino, G.R. No. 170516, 16 July 2008, 558 SCRA 468.

[5] Id.

[6] 252 Phil. 264, 271-272 (1989).

[7] Supra note 3 at 535.

[8] Id.

[9] G.R. No. 188456, 10 February 2010.

[10] Respondent's Comment, pp. 19-20.

[11] Supra note 9.

[12] Supra note 3 at 533.

[13] Section 2(1) of Article IX(C) of the Constitution.

Sec. 2. The Commission on Elections shall exercise the following powers and functions:

(1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall.

[14] SEC. 7. Section 7 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC.6. Minimum System Capabilities. - "The automated election system must at least have the following functional capabilities:

(a) Adequate security against unauthorized access;

(b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;

(c) Error recovery in case of non-catastrophic failure of device;

(d) System integrity which ensures physical stability and functioning of the vote recording and counting process;

(e) Provision for voter verified paper audit trail;

(f) System auditability which provides supporting documentation for verifying the correctness of reported election results;

(g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election result in the shortest time possible;

(h) Accessibility to illiterates and disable voters;

(i) Vote tabulating program for election, referendum or plebiscite;

(j) Accurate ballot counters;

(k) Data retention provision;

(l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;

- (m) Utilize or generate official ballots as herein defined;
- (n) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and
- (o) Configure access control for sensitive system data and function.

"In the procurement of this system, the Commission shall develop and adopt an evaluation system to ascertain that the above minimum system capabilities are met. This evaluation system shall be developed with the assistance of an advisory council."

[15] SEC. 12. Section 10 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC.14. Examination and Testing of Equipment or Device of the AES and Opening of the Source Code for Review. - The Commission shall allow the political parties and candidates or their representatives, citizens' arm or their representatives to examine and test:

"The equipment or device to be used in the voting and counting on the day of the electoral exercise, before voting starts. Test ballots and test forms shall be provided by the Commission.

"Immediately after the examination and testing of the equipment or device, parties and candidates or their representatives, citizen's arms or their representatives, may submit a written comment to the election officer who shall immediately transmit it to the Commission for appropriate action.

"The election officer shall keep minutes of the testing, a copy of which shall be submitted to the Commission together with the minute of voting."

"Once an AES technology is selected for implementation, the Commission shall promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review thereof." (Emphasis supplied)

[16] SEC. 24. A new Section 29 is hereby provided to read as follows:

"SEC 29. Random Manual Audit. - Where the AES is used, there shall be a random manual audit in one precinct per congressional district randomly chosen by the Commission in each province and city. Any difference between the automated and manual count will result in the determination of root cause and initiate a manual count for those precincts affected by the computer or procedural error."

[17] SEC. 9. New Sections 8, 9, 10, and 11 are hereby provided to read as follows:

XXXX

"SEC. 11. Functions of the Technical Evaluation Committee. - The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercise, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act based, among others, on the following documented results:

- The successful conduct of a field testing process followed by a mock election event in one or more cities/municipalities;
- The successful completion of audit on the accuracy, functionality, and security controls of the AES software;
- The successful completion of a source code review;
- A certification that the source code is kept in escrow with the Bangko Sentral ng Pilipinas;
- A certification that the source code reviewed is one and the same as that used by the equipment;

- The development, provisioning, and operationalization of a continuity plan to cover risks to the AES at all points in the process such that a failure of elections, whether at voting, counting, or consolidation, may be avoided. xxx

[18] SEC. 11. Section 9 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC.13. Continuity Plan. - The AES shall be so designed to include a continuity plan in case of a systems breakdown or any such eventuality which shall result in the delay, obstruction, or nonperformance of the electoral process. Activation of such continuity and contingency measures shall be undertaken in the presence of representatives of political parties and citizen's arm of the Commission who shall be notified by the election officer of such activation.

"All political parties and party-lists shall be furnished copies of said continuity plan at their official addresses as submitted to the Commission. The list shall be published in at least two newspapers of national circulation and shall be posted at the website of the Commission at least fifteen (15) days prior to the electoral activity concerned."

[19] SEC. 3. Section 3 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC 3. Board of Election Inspectors. - Where AES shall be adopted, at least one member of the Board of Election Inspectors shall be an information technology-capable person, who is trained or certified by the DOST to use the AES. Such certification shall be issued by the DOST free of charge."

DISSENTING OPINION

ABAD, J.:

When the Court took up this case on Tuesday, May 4, 2010, a number of Justices, including myself, voted to grant the petition provided that it would be revised to show that the Court makes no judgment that the Commission on Elections (COMELEC) has failed to comply with what Republic Act 8436 requires of it in the conduct of the May 10, 2010 Automated Election System or, if it failed in any way, that the COMELEC has no just reason for such failure or has taken no steps to remedy the situation.

The Justices with me had insisted that the Court's non-condemnation of the COMELEC be made clear. We did not want to add at this time to that body's woes or to exacerbate the public fear regarding the conduct of the country's first automated election. I believe that every responsible citizen should help make a success of the election scheduled four days from today. If it fails, despite all the cooperation given the COMELEC, then that would be the time to inquire why it failed and make those who contributed to such failure account for their actions or omissions, a role that does not belong to the Supreme Court.

Unfortunately, I am not satisfied that the opinion of the Court as revised after the voting reflects the revisions that some of the Justices who voted conditionally envisioned. Surely this is not the fault of the ponente but a divergence of view regarding how best to write what the Court collectively thinks. Still I cannot join the majority opinion for this reason.

Since the shortness of time does not permit me to elaborate on this dissenting opinion as I would like to, I reserve the right to submit a supplemental dissenting opinion later on.

DISSENTING OPINION

CORONA, J.:

Aware of its distinct role in the constitutional scheme, the Court declared "judicial supremacy is never judicial superiority (for it is co-equal with the other branches) or judicial tyranny (for it is supposed to be the least dangerous branch)."[1] Rather, it is the conscious and cautious awareness and acceptance of the Court's proper place in the overall scheme of government with the objective of asserting and promoting the supremacy of the Constitution.[2]

Regrettably, the majority opinion may have either inadvertently overlooked the duty of self-consciousness imposed by the Court upon itself or overeagerly sidestepped such duty at the expense of an independent constitutional body, the Commission on Elections (COMELEC). In any case, the Court may have scored positive points[3] with the public but trespassed on the constitutional prerogatives of the COMELEC. At the same time, the ponencia may have also wittingly or unwittingly contributed to the very problems that it was supposed to be addressing.

Thus, I dissent.

Mandamus is a remedy in cases where any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station.[4] For mandamus to lie, the duty must not only be ministerial but must also be a duty enjoined by law, a duty which the tribunal or person unlawfully neglects to perform.[5] Before mandamus is issued, the following requisites should be satisfied:

- (1) petitioner must show a clear legal right to the act demanded; thus, it will never be issued in doubtful cases;[6]
- (2) respondent must have the duty to perform the act because the same is mandated by law;
- (3) respondent unlawfully neglects the performance of the duty enjoined by law;
- (4) the act to be performed is ministerial, not discretionary and
- (5) there is no other plain, speedy and adequate remedy in the ordinary course of law.[7]

By issuing a writ of mandamus against the COMELEC, the ponencia effectively indicts that body for unlawful negligence in the performance of its duty. Yet, nowhere did the ponencia make a finding that the COMELEC was guilty of non-feasance with respect to the matters that the said body had been ordered to produce. There is thus a gaping hole in the ponencia's reasoning. This significant and substantial omission not only makes the issuance of mandamus against the COMELEC baseless. It is contrary to the presumption of regularity in the COMELEC's performance of its official duty and, more importantly, it violates the entitlement of that body to substantive due process.

This is not all, however. The ponencia accepted petitioners' claims hook, line and sinker. It treated as facts the media reports cited by petitioners. Worse, it took judicial cognizance of "facts" simply because these were "widely reported in print and broadcast media." The rule, however, is that courts cannot take judicial notice of newspaper accounts, which is hearsay evidence twice removed.[8] What compounds this is that such hearsay evidence is being used as the basis by the Court as it dangerously dips its finger into the exclusive constitutional authority of the COMELEC to "[e]nforce and administer all laws relative to the conduct of an election"[9] by compelling the COMELEC through mandamus to produce the things it is required to furnish the public in this

case. Lest the Court forget, it is timely to point out:

[I]n the matters of the administration of the laws relative to the conduct of elections, we must not by any excessive zeal take away from the [COMELEC] the initiative which by constitutional and legal mandates properly belongs to it.[10]

And there is more. The ponencia commits yet another major lapse when it simply brushed aside a significant point raised by the COMELEC's - petitioners' failure to prove that they made a request to the COMELEC to release the records or information mentioned in the petition. The ponencia made short shrift of this critical matter by referring to the COMELEC's admission as regards to the request for a review of the source code. However, the information as to the source code is but one of the many and varied matters subject of the petition. It cannot and it should not be considered as a request for all the other information sought by petitioners.[11] Such failure on the part of petitioners is fatal to their petition because mandamus requires the exhaustion of available administrative remedies.[12] Petitioners did not exhaust the administrative remedies available to them when they filed a petition directly to this Court without having made a prior request to the COMELEC for the production of the information that they seek in this case.

Added to the litany of mistakes of the ponencia, the order to produce various documents[13] is tyrannical as it is unreasonable. It requires the COMELEC to produce those things within a period of two days only! Yet, with four days remaining before the May 10, 2010 elections, the hands of the COMELEC are already full as that body attends to the urgent last minute concerns of the elections. As it is, and based on the very same media reports upon which the ponencia greatly relied upon,[14] the COMELEC is already flooded with a multitude of concerns and it is sorely running out of time to address the said concerns. Yet, the Court imposes an additional burden that is made all the more heavy by the tyranny of time within which that burden is supposed to be overcome. The law does not exact compliance with the unreasonably impossible and impossibly unreasonable.

All things considered, fidelity to our role in the constitutional scheme, as well as prudence and respect for an independent constitutional body call for the immediate recall of the mandamus writ issued against the COMELEC.

Accordingly, I respectfully vote to dismiss the petition.

[1] Dueñas, Jr. v. House of Representatives Electoral Tribunal, G.R. No. 185401, 21 July 2009, 593 SCRA, 316.

[2] Id.

[3] In layman's term, this is simply a "pogi point." However, it is not the business of the Court to win public approbation. Indeed, the Court is a counter-majoritarian force. Its duty is to provide a check to the possible excesses of the majority.

[4] Section 3, Rule 65, Rules of Court.

[5] Id.

[6] Pefianco v. Moral, 379 Phil.468 (2000).

[7] Section 3, Rule 65, Rules of Court.

[8] State Prosecutors v. Muro, A.M. No. RTJ-92-876, 19 September 1994, 236 SCRA 505.

[9] Section 2(1), Article IX-C, Constitution.

[10] *Sumulong v. COMELEC*, 73 Phil. 288 (1924).

[11] In particular, petitioners pray that the Court order the COMELEC to provide them with the "official and complete details" of (a) the status of its negotiations for election supplies and paraphernalia, including contracts that did not undergo the bidding process; (b) the nature and security of the machines, memory-card, and other software and facilities to be used for the May 10, 2010 automated elections, including its current anti-hacking/tampering strategy over the votes and the electoral results; (c) the content of the source code review mandated by RA 9369, and terms and modes of access by the public to said source code; (d) the schedule, venue, and specifications of the random manual audit mandated by RA 9369; (e) the terms and protocols under which manual voting would be implemented in case failure of elections is to be declared; (f) its readiness to shift to manual voting and the details adopted to ensure that the results cannot be manipulated under a Garci type of operation; (f) a certification from the Technical Evaluation Committee that the entire automated election system (AES) is 100% fully functional and that a continuity plan is already in place pursuant to Section 11 of RA 9369; (g) a certification protocol and the actual certification issued by the Department of Science and Technology (DOST) certifying that the 240,000 board of election inspectors (BEIs) all over the country are trained to use the AES as required by Section 3 of RA 9369 and (h) the status of investigations and prosecutions of the offenders behind the procurement scandals besetting the commission of late, including those mentioned in the petition.

[12] *Systems Plus Computer College of Caloocan City v. Local Government of Caloocan City*, 455 Phil. 956 (2003).

[13] In particular, the COMELEC is ordered to produce the following information: (a) the nature and security of all equipment and devices, including their hardware and software components, to be used in the May 10, 2010 automated elections, as provided for in Section 7 of RA 9369; (b) the source code and the modes by which any interested political party or group may conduct its own source code review, as mandated by Section 12 of RA 9369; (c) the terms and protocols of the random manual audit, as mandated by Section 24 of RA 9369; (d) a certification from the Technical Evaluation Committee that the entire AES is fully functional and that a continuity plan is ready in place, as mandated by Sections 9 and 11 of RA 9369 and (e) the certification protocol and the actual certification issued by the DOST that the 240,000 BEIs all over the country are trained to use the AES, as required by Section 3 of RA 9369.

[14] This point is made only to meet the ponencia in its own level and to show the absurdity of its consequences even based on its own premise. Therefore, this should not be taken to be contradictory to the position made earlier in this opinion that it was improper to issue a writ of mandamus based solely on media accounts.

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