

## **KILUSAN NG MAMAMAYAN PARA SA MATUWID NA BAYAN, A COALITION OF CORPORATE ENTITIES DULY REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION, WHICH ARE PETITIONERS HEREIN AS WEL...**

*G.R. No. 259850. June 13, 2023*

Ponente: ROSARIO, J.

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### **ROSARIO, J.:**

Before the Court is a Petition for Mandamus to Compel the Respondent to Assert its Authority over the Foreign Election Technology Provider by Promulgating Mandatory Implementing Rules while Complying with Mandatory Public Consultation.[1]

Petitioners in the present case[2] are the following: Kilusan ng Mamamayan Para sa Matuwid na Bayan (KMMB); KMMB's member organizations, namely Capitol Christian Leadership, Buklod Pamilya Incorporated, KMP Koalisyon Pangkaunlaran ng Mamamayan, KNK Anak Ng Diyos Kadugo Ni Kristo; Jose Lagunsad Gonzales (Gonzales), Vicente Alejo Macatangay, Jr. (Macatangay, Jr.); Sharon Faith Samaco Paquiz (Paquiz); Nelson Java Celis (Celis); Melchor Gruela Magdamo (Magdamo); Rodrigo G. Cornejo (Cornejo); and Melanio Lazo Mauricio, Jr. (Mauricio, Jr.).[3]

Petitioners pray that the Court issue a writ of mandamus compelling the Commission on Elections (COMELEC) to (1) issue the implementing rules and regulations required by the laws mentioned in the Petition, and (2) towards that purpose, to conduct public consultations as soon as possible on the following concerns:

(1)

proper implementation of at least 15 mandatory minimum functional system capabilities for an automated election system under Section 7 of Republic Act (RA) No. 9369;

(2)

proper implementation of similar safeguards under other laws;

(3)

poll procedures respecting the right of watchers to "take photographs of the proceedings and incidents" in accordance with Section 179 of Batas Pambansa (BP) Blg. 881, otherwise known as the Omnibus Election Code, and the amplification of the same right to the "public" pursuant to RA No. 7166;

(4)

honest implementation of the Court's ruling in *Bagumbayan-VNP Movement, Inc. v. Commission on Elections*[4] on Voter Verified Paper Audit Trail until the Audit Trail Stage;

(5)

resolution of the discrepancies in Section 20(f) of COMELEC Resolution No. 10057, in relation to Section 2(f) of Resolution No. 10088 and Section 20(f) of Resolution No. 10460, with the end in view of deleting the sweeping ban against cameras in the phrase "whatever purpose" in Section 2(f);

(6)

electronic signatures under RA No. 9369, Sections 22 and 25 under which the machine number of a Smartmatic Vote Counting Machine (VCM) or iButton is only a machine identifier under Smartmatic control; such machine identifier is not and cannot be an electronic [digital] signature chosen by and under the independent control of each individual member of the Board of Election Inspectors/Board of Canvassers/Electoral Board;

(7)

honest implementation of the electronic [digital] signature system so that Electoral Board members may authenticate or reject each and every electronic transmission of election result before the Board proclaims a winning candidate under Section 22 of RA No. 9369;

(8)

compliance with Section 19 of RA No. 9369 requiring electronic transmission of election return copies direct to the Kapisanan ng mga Brodkaster ng Pilipinas free from Smartmatic interference;

(9)

random manual audit that is truly random; and

(10)

others which the Court may deem best in the interest of substantial justice for the People of the Philippines.[5]

Petitioners seek to compel the COMELEC to comply with the purportedly mandatory public consultation requirement when formulating vital implementing rules involving the national and local elections. They submit that the COMELEC committed grave abuse of discretion amounting to lack or excess of jurisdiction by its refusal to act on the Letter[6] dated February 14, 2022 of KMMB seeking the COMELEC's issuance of implementing rules and regulations required by the Constitution and the relevant laws on the "selection of the election system to be used during Philippine elections." Petitioners argue that mandamus will lie to compel the COMELEC to perform its duty to issue the said implementing rules and regulations required by the Constitution and the laws

governing the selection of the election system to be used during the Philippine elections, i.e. , BP Blg. 881, otherwise known as the Omnibus Election Code, RA Nos. 7166,[7] 8346[8] and 9369.[9]

Petitioners argue that a major reason for the unfaithful implementation of the law on the automation of elections is the absence of implementing rules for some of the crucial safeguards in the conduct of automated elections. Specifically, petitioners aver that after the May 13, 2019 elections, the COMELEC did not promulgate rules for mandatory minimum functional system capabilities for election automation technology as enumerated under Section 7 of RA No. 9369. Further, while the COMELEC activity calendar is full of so many schedules for so many perfunctory tasks, there is none for public consultation on the formulation of implementing rules for at least 15 minimum functional system capabilities.[10]

Petitioners also maintain that many people were misled into believing that several COMELEC Resolutions affecting transcendently important mandatory poll safeguards underwent public consultation prior to promulgation as an implementing rule. Petitioners cite as an example RA No. 9369 which expressly requires the implementation of an electronic digital signature system to prevent fraud during the electronic transmission of election results. However, Section 40(f)[11] and Section 40(g)[12] of COMELEC Resolution No. 8786, otherwise known as the "Revised General Instructions for The Board of Election Inspectors (BEI) on The Voting, Counting, and Transmission of Results in Connection with the 10 May 2010, National and Local Elections,"[13] went the opposite direction by commanding all Board of Election Inspectors nationwide to deactivate the digital signature system. Petitioners emphasize that no consultation was ever done by COMELEC prior to insertion of subsections (f) and (g) in Section 40 of COMELEC Resolution No. 8786.[14]

As another example, petitioners further cite Section 2(f)[15] of COMELEC Resolution No. 10088[16] which also did not have the benefit of public consultation. Petitioners emphasize that Section 179[17] of the Omnibus Election Code allows and even encourages poll watchers to take photographs. Further, RA No. 7166, which is an amendatory legislation to the Omnibus Election Code, gives the privilege of taking photographs not only to the poll watchers but also to the public. Also, Section 19 of RA No. 9369 expressly provides that any person may view or capture an image of the election return by means of cameras or any data capturing device. In contrast with the abovementioned laws, Section 2(f) of COMELEC Resolution No. 10088 imposed a sweeping ban against any capturing device, including digital cameras or cellular phones for whatever purpose, thereby suppressing and hiding the shortcomings of Smartmatic.[18]

Petitioners point out that RA Nos. 8436 and 9369 which are election automation laws entrust to the COMELEC the promulgation of rules and regulations for the implementation and enforcement of the said laws. Petitioners maintain that the rules and regulations under these election automation laws are quasi-legislative rules which require public hearing prior to promulgation; since the said rules and regulations are not merely interpretative in nature, the COMELEC has no excuse to avoid the public consultation requirement.[19]

Petitioners invoke the provision on public participation under the Administrative Code of 1987, i.e., Section 9(1) and (3),[20] Chapter 2 (Rules and Regulations), Book VII (Administrative Procedure). Petitioners explain that said provision requires the publication or circulation of notices of rule proposals to afford the opportunity for submissions of views prior to the adoption of any rule, and commands the observation of a contest procedure whenever the administrative agency receives an opposition to a rule-making proposal.[21] Thus, at the very least, COMELEC must open to public consultation the following purportedly questionable COMELEC resolutions:[22]

(1)

Resolution No. 8786, Section 40(f) and (g) insofar as the Resolution provides that, in the counting of ballots and transmission of results, the instruction is that when the Precinct Count Optical Scan (PCOS) displays the message "WOULD YOU LIKE TO DIGITALLY SIGN THE TRANSMISSION FILES WITH A BEI SIGNATURE KEY?," the "NO" option should be pressed.

(2)

Resolution No. 10458,[23] Section 4[24] (b) and (c) insofar as the Resolution provides that in the random selection of precincts for the random manual audit, the list of the specific municipalities/cities shall be released to the public at 2:00 p.m. on the day of the election, and that at 9:00 a.m. of the day after the election, the Random Manual Audit Committee shall randomly select, from the municipalities/cities identified earlier, the specific sample of precincts for a random manual audit; and Resolution No. 10460,[25] Section 20[26] insofar as it declares unlawful the voter's act of using capturing devices, including, but not limited to, digital cameras or cellular phones for whatever purpose while inside the polling place.[27]

Petitioners also pray that a temporary restraining order and/or the appropriate injunctive relief be issued, stopping the COMELEC from utilizing in any manner, Smartmatic, Inc., its VCMs, PCOS, and other gadgets and instruments for holding an automated system of elections, for the 2022 elections and thereafter unless the appropriate implementing rules and regulations have been promulgated by the COMELEC.[28]

We dismiss the Petition and deny the prayer for the issuance of a temporary restraining order or any injunctive relief.

At the outset, the Petition suffers from procedural defects. Notably, after petitioners filed the present Petition, the Court, in its Resolution[29] dated April 19, 2022, required petitioners to comply with the following procedural requirements:

(i)

requirement to submit proof of service (e.g., a written admission of the party served, or an affidavit of the party serving and registry receipts) of the Petition on the adverse party pursuant to Section 2(c), Rule 56, in relation to Section 17, Rule 13, 1997 Rules of Civil Procedure, as amended;

(ii)

requirement to submit a proper verification and certification against forum shopping as required by Rule 65 in relation to Sections 4 and 5, Rule 7, same Rules, it appearing that the affiant therein lacks competent evidence of identity; and

(iii)

requirement to provide competent evidence of identity of the affiant in the affidavit of service pursuant to Sections 2, 6 and 12, Rule II of the 2004 Rules on Notarial Practice, as amended.[30]

In their Compliance,[31] petitioners submitted Mauricio, Jr.'s affidavit stating that he served the Petition to the COMELEC through electronic transmission at [info@comelec.gov.ph](mailto:info@comelec.gov.ph), the latter's email address publicly listed in its website.[32] Notably, the page of the affidavit containing the notarization does not indicate Mauricio, Jr.'s competent evidence of identity. Further, the Verification and Sworn Certification Against Forum Shopping attached to the Compliance, which was executed by petitioners Macatangay, Jr., Paquiz, and Gonzales, lacks Paquiz's signature. Further, while the notary public certified that the affiants personally appeared before him and displayed to him the government IDs indicated below their names, the competent evidence of identification of Macatangay, Jr., Paquiz, and Gonzales do not appear below their names. Instead, the barely readable copy of the ID of Macatangay, Jr., and a copy of the ID of Gonzales were attached as the last pages of the Compliance or the Verification and Sworn Certification Against Forum Shopping.[33]

While it might be the case that the IDs of Macatangay, Jr. and Gonzales—copies of which were attached to the Compliance—were presented to the notary public at the time of notarization of the Verification and Sworn Certification Against Forum Shopping, such possibility is a mere speculation as the competent evidence of identity of Macatangay, Jr. and Gonzales do not appear on the face of the Verification and Sworn Certification Against Forum Shopping.

In addition, it must be noted from the Petition that KMP Koalisyon Pangkaunlarang ng Mamamayan and KNK Anak ng Diyos Kadugo ni Kristo had no duly authorized representatives to participate in the filing of the Petition as in fact, no person executed a Verification and Sworn Certification Against Forum Shopping on their behalf.[34] Also, some of the named petitioners, i.e., Celis, Magdamo, Cornejo, and Mauricio, Jr. failed to execute a Verification and Sworn Certification Against Forum Shopping either in the original Petition or by way of compliance to the Court's April 19, 2022 Resolution.

Thus, petitioners KMP Koalisyon Pangkaunlarang ng Mamamayan and KNK Anak ng Diyos Kadugo ni Kristo, as well as Paquiz, Celis, Magdamo, Cornejo, and Mauricio, Jr., should be dropped as petitioners.

As to the remaining petitioners, despite being given the chance to rectify the procedural infirmities of the Petition, they still failed to correct the said errors. Considering the procedural infirmities of the Petition, the Petition should be dismissed.

Parenthetically, not all of the remaining petitioners were able to show their legal standing to file the Petition.

As explained in *AES Watch v. COMELEC*[35] (*AES Watch*), "[t]he question in standing is whether such parties have 'allege[d] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court [so largely] depends for illumination of difficult constitutional questions.'"[36]

Specifically, on the part of petitioners which are organizations, they merely alleged that they are juridical corporate entities with capacity to sue and be sued, that their participation had been duly authorized by their respective boards of trustees, and that all leaders and members of the KMMB have been and continue to be facing public scrutiny for their advocacy. These averments do not meet the requisite personal and substantial interest which would grant them standing.[37]

However, on the part of the remaining individual petitioners Macatangay, Jr. and Gonzales, while they failed to allege any material injury, a relaxation of the rule on legal standing would have been warranted were it not for the dismissal of the present Petition based on procedural grounds, considering that they are filing the present Petition

as citizens. In *Francisco, Jr. v. House of Representatives*,<sup>[38]</sup> the Court discussed:

When suing as a citizen, the interest of the petitioner assailing the constitutionality of a statute must be direct and personal. He must be able to show, not only that the law or any government act is invalid, but also that he sustained or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of. In fine, when the proceeding involves the assertion of a public right, the mere fact that he is a citizen satisfies the requirement of personal interest.<sup>[39]</sup> (Citations omitted)

It also bears noting that petitioners failed to substantiate their allegation that there are no implementing rules for some of the crucial safeguards in the conduct of automated elections as prescribed under Section 7 of RA No. 9369. Petitioners even mentioned the conduct of Random Manual Audit and Resolution No. 10088 entitled "Amending Certain Provisions of Resolution No. 10057 dated February 11, 2016 or otherwise known as the General Instructions for the BEI on the Testing and Sealing of Vote Counting Machines (VCMs), and Voting, Counting and Transmission of Election Results in Connection with the 09 May 2016 National and Local Elections" which are among the measures availed by the COMELEC in ensuring the integrity of the national and local elections. Notable from the present Petition is petitioners' citation and elaborate discussion of various COMELEC Resolutions governing the conduct of automated elections.

Furthermore, in *AES Watch*, the Court noted the prohibition in COMELEC Resolution No. 10088 (which served as guidelines for the 2016 National Elections), i.e., that it shall be unlawful for a voter to "[u]se capturing devices, including, but not limited to, digital cameras or cellular phones for whatever purpose while inside the polling place." However, the Court emphasized that COMELEC Resolution No. 10460 for the 2019 Elections already removed the phrase "for whatever purpose." Specifically, the Court quoted both Section 2 of Resolution No. 10088 and Section 64 of Resolution No. 10460, to wit:

Resolution No. 10088

Resolution No. 10460

**(2016 NLE)**

**(2019 NLE)**

SEC. 2. Sections 20(a) and (f) of Resolution No. 10057 are hereby amended to read as follows:

"SEC. 20. Prohibitions on voting - It shall be unlawful for a voter to:

....

f) Use capturing devices, including, but not limited to, digital cameras or cellular phones for whatever purpose while inside the polling place[.]" (Emphasis supplied)

SEC. 64. Prohibitions on Voting. - It shall be unlawful for a voter to:

....

(f) Use of capturing devices such as but not limited to digital cameras, cellular phones with camera, or other means to copy the contents of the ballot, or otherwise make use of any other scheme to identify his vote[.]

(Emphasis supplied)

Lastly, AES Watch reiterated the ruling in *Capalla v. COMELEC*[40] that PCOS machines are capable of digitally-signed transmissions. In *Bagumbayan-VNP Movement, Inc. v. COMELEC*,[41] citing *Capalla*, the Court discussed that there is no infirmity as regards the signature of a PCOS machine being the equivalent of a digital signature.

ACCORDINGLY, the instant Petition for Mandamus is DISMISSED, and the prayer for temporary restraining order and/or any injunctive relief is DENIED.

**SO ORDERED.**

Caguioa, Lazaro-Javier, Zalameda, M. Lopez, Gaerlan, Dimaampao, Marquez, and Singh, JJ., concur.

Leonen,[\*\*] Acting C.J., see separate concurring opinion.

Gesmundo,[\*] C.J. and Hernando,[\*\*\*] J., on official leave.

Inting[\*\*\*\*] and Kho, Jr.,[\*\*\*\*\*] JJ., no part.

J. Lopez,[\*\*\*\*\*] J.,[\*] on leave.

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[\*] On official leave.

[\*\*] Acting Chief Justice per Special Order No. 2977 dated June 1, 2023.

[\*\*\*] On official leave.

[\*\*\*\*] No part.

[\*\*\*\*\*] On leave.

[\*\*\*\*\*] No part.

[1] Rollo, pp. 3-46.

[2] *Id.* at 3 and 9; the first page of the Petition indicates that the Petition filed is a Petition for Certiorari, Mandamus and Prohibition although the designation of the Petition as well as the discussion on the nature of the Petition shows that what petitioners filed was a Petition for Mandamus.

[3] *Id.* at 3, 10-11.

[4] 782 Phil 1306 (2016) [Per J. Leonen, En Banc].

[5] Rollo, pp. 43-44.

[6] *Id.* at 87-157.

[7] An Act Providing for Synchronized National and Local Elections and for Electoral Reforms, Authorizing Appropriations Therefor, and for Other Purposes, Approved November 26, 1991.

[8] 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, Approved December 22, 1997.

[9] An Act Amending 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, To Encourage Transparency, Credibility, Fairness And Accuracy Of Elections,

Amending For The Purpose Batas Pambansa Blg. 881, as Amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor and For Other Purposes," Approved January 23, 2007; see rollo, pp. 9, 12.

[10] Rollo, pp. 34-35.

[11] Section 40. Counting of ballots and transmission of results; Procedure. (Renumbered) (As Revised)

....

f) Thereafter, the PCOS shall automatically count the votes and immediately display a message "WOULD YOU LIKE TO DIGITALLY SIGN THE TRANSMISSION FILES WITH A BEI SIGNATURE KEY?", with a "YES" or "NO" option;

[12] Section 40. Counting of ballots and transmission of results; Procedure. (Renumbered) (As Revised)

....

g) Press "NO" option. The PCOS will display "ARE YOU SURE YOU DO NOT WANT TO APPLY A DIGITAL SIGNATURE?" with a "YES" and "NO" option;

[13] Promulgated on March 4, 2010.

[14] Rollo, p. 7.

[15] SECTION 2. Sections 20(a) and (f) of Resolution No. 10057 are hereby amended to read as follows:

"SEC. 20. Prohibitions on voting. - It shall be unlawful for a voter to:

a) Bring the ballot, ballot secrecy folder, marking pen or voter's receipt outside of the polling place; xxx

f) Use capturing devices, including, but not limited to, digital cameras or cellular phones for whatever purpose while inside the polling place;"

[16] Entitled "Amending Certain Provisions of Resolution No. 10057 dated February 11, 2016 or otherwise known as the General Instructions for the Boards of Election Inspectors (BEI) on the Testing and Sealing of Vote Counting Machines (VCMs), and Voting, Counting and Transmission of Election Results in Connection with the 09 May 2016 National and Local Elections," promulgated on April 12, 2016.

[17] SECTION 179. Rights and duties of watchers. — Upon entering the polling place, the watchers shall present and deliver to the chairman of the board of election inspectors his appointment, and forthwith, his name shall be recorded in the minutes with a notation under his signature that he is not disqualified under the second paragraph of Section 178. The appointments of the watchers shall bear the personal signature or the facsimile signature of the candidate or the duly authorized representatives of the political party or coalition of political parties who appointed him or of organizations authorized by the Commission under Section 180. The watchers shall have the right to stay in the space reserved for them inside the polling place. They shall have the right to witness and inform themselves of the proceedings of the board of election inspectors, including its proceedings during the registration of voters, to take notes of what they may see or hear, to take photographs of the proceedings and incidents, if any, during the counting of votes, as well as of election returns, tally boards and ballot boxes, to file a protest against any irregularity or violation of law which they believe may have been committed by the board of election inspectors or by any of its members or by any persons, to obtain from the board of election inspectors a certificate as to the filing of such protest and/or of the resolution thereon, to read the ballots after they shall have been read by the chairman, as well as the election returns after they shall have been completed and signed by the

members of the board of election inspectors without touching them, but they shall not speak to any member of the board of election inspectors, or to any voter, or among themselves, in such a manner as would distract the proceedings, and to be furnished with a certificate of the number of votes in words and figures cast for each candidate, duly signed and thumbmarked by the chairman and all the members of the board of election inspectors. Refusal of the chairman and the members of the board of election inspectors to sign and furnish such certificate shall constitute an election offense and shall be penalized under this Code.

[18] Rollo, p. 8.

[19] Id. at 9.

[20] Section 9, Chapter 2, Book VII of the Administrative Code of 1987 provides:

Section 9. Public Participation. -

(1) If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.

(2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.

(3) In case of opposition, the rules on contested cases shall be observed.

[21] Rollo, p 8.

[22] Id. at 42-43.

[23] Entitled "In the Matter of the General Instructions for the Conduct of Random Manual Audit (RMA) for the 13 May 2019 Automated Synchronized National and Local Elections and Subsequent Elections Thereafter," promulgated on December 5, 2018.

[24] SECTION 4. - The Random Selection of Precincts for the MA. The random selection of the precincts for the RMA shall be conducted publicly in the following manner:

a)

At 12:00 noon on Election Day, the RMAC shall first randomly select the municipality/city from which the clustered precincts are to be selected under paragraph c of this provision.

b)

The List of the Specific Municipalities/Cities shall be released to the public at 2:00 p.m. on Election Day.

c)

At 9:00 a.m. of the day after the election, the MAC shall randomly select, from the municipalities/cities identified earlier, the specific sample precincts for the RMA.

d)

The List of Specific Clustered Precinct/s per legislative district that have been randomly selected for RMA shall be released to the public at 10:00 a.m. on the same day.

The random selection shall be done using an automated random selection program recommended or developed by the PSA.

xxxx

[25] Entitled "General Instructions For The Electoral Boards (EBs) On The Process Of Voting Counting And Transmission Of Election Results In Connection With The 13 MAY 2019 National And Local Elections," promulgated on December 6, 2018.

[26] On page 40 of their Petition (rollo, p. 42), petitioners alleged that Section 20 of COMELEC Resolution No. 10460 states that "[i]t shall be unlawful for a voter to use capturing devices, including, but not limited to, cameras or cellular phones for whatever purpose while inside the polling place."

However, the actual text of Section 20 reads as follows:

Sec. 20. Voting Privilege of the Electoral Board. - EB members may vote in the polling places where they are assigned on election day as long as:

- a. They are registered voters of the city within the same legislative district, or municipality where they are assigned;
- b. Their voting in the polling place where they are not registered should be noted in the Minutes of Voting and Counting of Votes; and
- c. They shall add in the EDCVL their names and precinct numbers and the place where they are actually registered.

Any EB member, who is not registered in the city or municipality where they are assigned, or registered in the city of another legislative district, may vote in the polling place where they are registered, provided that:

- a. The voting in their place of assignment is light;
- b. Their absence shall not be for more than thirty (30) minutes;
- c. The EB members shall schedule the voting so that only one (1) member shall leave at any given time;
- d. They must be given priority in voting; and
- e. The fact that they exercised their voting privilege shall be noted in the Minutes.

In the alternative, the EB may avail of local absentee voting pursuant to Comelec Resolution No. 10443 dated 8 November 2018 entitled "Rules and Regulations on Local Absentee Voting in Connection with The May 13, 2019 National and Local Elections."

[27] Rollo, p. 42.

[28] Id. at 44.

[29] Id. at 160-161.

[30] Id. at 160.

[31] Id. at 163-72.

[32] Id. at 165.

[33] Id. at 167-172.

[34] Id. at 46-47.

[35] G.R. No. 246332, December 9, 2020 [Per J. Lopez, En Banc].

[36] Id.

[37] Id.

[38] 460 Phil. 830 (2003) [Per J. Carpio Morales, En Banc].

[39] Id. at 895-896.

[40] 687 Phil. 617 (2012) [Per J. Peralta, En Banc].

[41] 851 Phil. 685 (2019) [Per J. A. Reyes, Jr., En Banc].

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## SEPARATE CONCURRING OPINION

### LEONEN, SAJ.:

I concur in the ponencia that the Petition should be dismissed on procedural grounds and for petitioners' failure to show that public respondent Commission on Elections failed to comply with the requirements of Republic Act No. 8436, as amended by Republic Act No. 9369.

However, I would like to raise a few points.

First, the law provisions implementing automated elections are mandatory. In *Bagumbayan-VNP Movement, Inc. v. Commission on Elections*,<sup>[1]</sup> this Court granted the petition for mandamus to compel the Commission on Elections "to enable the vote verification feature of the vote-counting machines,"<sup>[2]</sup> which is one of the required minimum system capabilities of the automated election system. We reasoned:

The minimum functional capabilities enumerated under Section 6 of Republic Act 8436, as amended, are mandatory. These functions constitute the most basic safeguards to ensure the transparency, credibility, fairness[,] and accuracy of the upcoming elections.<sup>[3]</sup>

Second, while Republic Act No. 8436, as amended by Republic Act No. 9369, does not explicitly state that public consultation is required, the law does provide for the Advisory Council:

SECTION 6. Minimum System Capabilities. — The automated election system must at least have the following functional capabilities:

. . . .

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. (Emphasis supplied)

The Advisory Council is composed of representatives from the public and private sectors:

SECTION 8. The Advisory Council. — The Commission shall create an Advisory Council, hereafter referred to as the Council, which shall be convened not later than eighteen (18) months prior to the next scheduled electoral exercise, and deactivated six months after completion of canvassing: Provided, for purposes of the 2007 elections, the Advisory Council shall be immediately convened within ten (10) days after the effectivity of this Act.

The Council shall be composed of the following members, who must be registered Filipino voters, of known independence, competence and probity:

(a)

The Chairman of the Commission on Information and Communications Technology (CICT) who shall act as

the chairman of the Council;

(b)

One member from the Department of Science and Technology;

(c)

One member from the Department of Education;

(d)

One member representing the academe, to be selected by the chair of the Advisory Council from among the list of nominees submitted by the country's academic institutions;

(e)

Three members representing ICT professional organizations to be selected by the chair of the Advisory Council from among the list of nominees submitted by Philippine-based ICT professional organizations. Nominees shall be individuals, at least one of whom shall be experienced in managing or implementing large-scale IT projects.

(f)

Two members representing nongovernmental electoral reform organizations, to be selected by the chair of the Advisory Council from among the list of nominees submitted by the country's nongovernmental electoral reform organizations.

A person who is affiliated with any political party or candidate for any national position, or is related to a candidate for any national position by affinity or consanguinity within the fourth civil degree, shall not be eligible for appointment or designation to the Advisory Council. Should any such situation arise at any time during the incumbency of a member, the designation or appointment of that member shall ipso facto be terminated.

Any member of the Advisory Council is prohibited from engaging, directly or indirectly, with any entity that advocates, markets, imports, produces or in any manner handles software, hardware or any equipment that may be used for election purposes for personal gain.

Any violation of the two immediately preceding paragraphs shall disqualify said member from the Advisory Council and shall be punishable as provided in this Act and shall be penalized in accordance with the Anti-Graft and Corrupt Practices Act and other related laws.

The Council may avail itself of the expertise and services of resource persons who are of known independence, competence[,] and probity, are nonpartisan, and do not possess any of the disqualifications applicable to a member of the Advisory Council as provided herein. The resource persons shall also be subject to the same prohibitions and penalties as the members of the Advisory Council.

The Commission on Information and Communications Technology (CICT), shall include in its annual

appropriation the funds necessary to enable the Council to effectively perform its functions.

At the very least, the Commission on Elections should consult with the Advisory Council in developing an evaluation system to determine if an automated election system meets the minimum functional capabilities required by law.

Here, it is impliedly admitted from the Petition's allegations that the Commission on Elections complied with the law. Petitioners stated:

INTER-AGENCY PUBLIC CONSULTATION

198. The obligation to be open for public participation is inter-agency in nature because election automation technology is no longer an exclusive prerogative of Comelec alone.

199. Republic Act No. 9369 Section 9 provides for creation of a Comelec Advisory Council under three other government agencies = Department of Information and Communication[s] Technology (DICT) + Department of Science and Technology (DOST) + Department of Education (DepEd) = together with experts from the private sector.

200. The Comelec Advisory Council shall recommend technology, participate as non-voting member in the Bids and Awards Committee (BAC), participate as non-voting member in the steering committee, provide advice, and report within six months from election date to the [Joint Congressional Oversight Committee].

201. Incidentally, with or without public participation, Comelec had a history of rejecting majority of Advisory Council recommendations in favor of perpetuating Smartmatic monopoly. Not only the Advisory Council but no less than President Rodrigo Roa Duterte himself said "[d]ispose of that Smartmatic and look for a new one that is free of fraud." [4]

It is clear that petitioners question the Commission on Elections' alleged rejection of the Advisory Council's recommendations, not the lack of consultation as it claims.

Acceptance or rejection of the Advisory Council's recommendations is a policy decision well within the Commission on Elections' powers. Without any showing that its rejection amounted to unlawful neglect to perform a duty enjoined by law, [5] mandamus will not lie.

Third, some of the resolutions questioned by petitioners pertain to the 2010 and 2019 national and local elections. These issues—on the digital signatures, the conduct of the random manual audit, and the absolute prohibition on the use of cameras—are now moot.

In any case, a review of the questioned resolutions shows that the Commission on Elections has addressed the matters they raised in its issuances relative to the 2022 national and local elections.

On the digital signatures, petitioners question COMELEC Resolution No. 8786, applicable to the 2010 national and local elections, which instructed the Board of Election Inspectors to choose not to digitally sign the transmission files. [6] This instruction has since been revised:

COMELEC Resolution No. 8786, March 4, 2010 [7]

Vote Counting Machine Operational Guide as of December 20, 2021 [8]

SECTION 40. Counting of ballots and transmission of results; Procedure. (Renumbered) (As revised)

....

f)

Thereafter, the PCOS shall automatically count the votes and immediately display a message WOULD YOU LIKE TO DIGITALLY SIGN THE TRANSMISSION FILES WITH A BEI SIGNATURE KEY?, with a YES or NO option;

g)

Press NO option. The PCOS will display ARE YOU SURE YOU DO NOT WANT TO APPLY A DIGITAL SIGNATURE? with a YES and NO option[.]

The members of the Electoral Board add their digital signatures before the results are printed and transmitted to the appropriate board of canvassers.[9]

Petitioners also argue that the digital signatures should represent the identity of a person, not that of the machine that transmitted results.[10] I agree that this Court has addressed the issue on digital signatures in *Archbishop Capalla v. Commission on Elections*,<sup>[11]</sup> *Bagumbayan-VNP Movement, Inc. v. Commission on Elections*,<sup>[12]</sup> and *AES Watch v. Commission on Elections*.<sup>[13]</sup> Particularly, in *AES Watch*:

As gleaned from the wording of the law, the signature may be any distinctive mark or characteristic that represents the identity of a person. Thus, a machine signature of a PCOS machine may validly be considered the functional equivalent of the aforementioned "digital signature," as it represents the identity of the individual, said signature naturally being created specifically for the person him or herself inputting the details.<sup>[14]</sup> (Emphasis supplied)

Thus, the digital signature represents the individual who encoded it, and the machine that transmitted the results.

On the conduct of the random manual audit, petitioners argue that 2:00 p.m. on election day, as per COMELEC Resolution No. 10458, "is too late because by that time many are already aware which precincts are clean and which are fraudulent."<sup>[15]</sup> However, for the 2022 national and local elections, the Commission on Elections has moved the time to 10:00 a.m., as shown in COMELEC Resolution No. 10774:

COMELEC Resolution No. 10458  
dated December 5, 2018<sup>[16]</sup>

COMELEC Resolution No. 10774  
dated March 23, 2022<sup>[17]</sup>

SECTION 4. — Random Selection of Precincts for the RMA. The random selection of the precincts for the RMA shall be conducted publicly in the following manner:

....

b.

The List of the Specific Municipalities/Cities shall be released to the public at 2:00 p.m. on Election Day.

c.

At 9:00 a.m. of the day after the election, the RMAC shall randomly select, from the municipalities/cities

identified earlier, the specific sample precincts for the RMA.

SECTION 5. Random Selection of Clustered Precincts for the RMA. The random selection of the clustered precincts for the RMA shall be conducted publicly on the day after the elections in the following manner:

a.

At ten o'clock in the morning (10:00 A.M.), the RMAC shall randomly select the specific clustered precincts per legislative district for the RMA;

b.

At twelve o'clock noon (12:00 P.M.), the List of Randomly Selected Clustered Precincts per legislative district and the Contingency List of Randomly, Selected Clustered Precincts per legislative district shall be released to the public;

c.

A Contingency List of Randomly Selected Clustered Precincts shall also be generated after the List of Randomly Selected Clustered Precincts has been produced. The grounds for the utilization of the Contingency List of Randomly Selected Clustered Precincts shall be determined by the RMAC; and

The random selection shall be done using an automated random selection program recommended or developed by the PSA.

The RMAC shall promptly provide RMA-RDTs with the Lists of Specific Municipalities/Cities, Randomly Selected Clustered Precincts, and the Contingency List of Randomly Selected Clustered Precinct.

Finally, on the absolute prohibition on the use of cameras, petitioners argue that this goes against several election-related laws.[18] For example, Section 179 of the Omnibus Election Code allows watchers "to take photographs of the proceedings and incidents, if any, during the counting of votes, as well as of election returns, tally boards and ballot boxes." [19] As noted in the ponencia, the Commission on Elections has, since the 2019 national and local elections, "removed the phrase 'for whatever purpose.'" [20] It clarified that the prohibition is specific to instances when a voter's ballot may be identified. COMELEC Resolution No. 10727, [21] applicable to the 2022 national and local elections, provides:

SECTION 19. Powers and Functions of the Electoral Board. — In addition to the powers and functions prescribed by law or by the rules and regulations issued by the Commission, the EBs shall:

....

f.

Prohibit the use of cellular phones, cameras, or any recording device by the voters during voting;

....

SECTION 66. Prohibitions on Voting. — It shall be unlawful for a voter to:

....

f.

Use of capturing devices such as but not limited to digital cameras, cellular phones with camera, or other means to copy the contents of the ballot, or otherwise make use of any other scheme to identify his vote[.]

In any case, these issues are moot.

To reiterate, Republic Act No. 8436, as amended by Republic Act No. 9369, requires the Commission on Elections to seek assistance from the Advisory Council in evaluating minimum system capabilities. This is the minimum requirement that, based on petitioners' allegations, the Commission has complied with.

ACCORDINGLY, I vote that the Petition be DISMISSED.

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[1] 782 Phil. 1306 (2016) [Per J. Leonen, En Banc].

[2] *Id.* at 1324.

[3] *Id.* at 1322.

[4] *Rollo*, p. 42.

[5] See *Bagumbayan-VNP Movement, Inc. v. Commission on Elections*, 782 Phil. 1306 (2016) [Per J. Leonen, En Banc].

[6] *Rollo*, p. 42.

[7] Revised General Instructions for the Board of Election Inspectors (BEI) on the Voting, Counting, and Transmission of Results in Connection with the 10 May 2010, National and Local Elections, available at <https://comelec.gov.ph/?r=References/ComelecResolutions/NLE/2010NLE/res8786> (last accessed on March 20, 2023).

[8] Vote Counting Machine (VCM) Operational Guide as of December 20, 2021, available at <https://comelec.gov.ph/?r=2022NLE/VCMOperationalGuide> (last accessed on March 20, 2023).

[9] Id.

[10] Rollo, pp. 37-38.

[11] 687 Phil. 617 (2012) [Per J. Peralta, En Banc].

[12] 851 Phil. 685 (2019) [Per J. A. Reyes, Jr., En Banc].

[13] G.R. No. 246332, December 9, 2020 [Per J. Lopez, En Banc].

[14] AES Watch v. Commission on Elections, G.R. No. 246332, Dec. 9, 2020 [Per J. Lopez, En Banc], citing Bagumbayan-VNP Movement, Inc. v. Commission on Elections, 851 Phil. 685 (2019) [Per J. A.B. Reyes, Jr., En Banc].

[15] Rollo, p. 42.

[16] In the Matter of the General Instructions for the Conduct of Random Manual Audit (RMA) for the 13 May 2019 Automated Synchronized National and Local Elections and Subsequent Elections Thereafter, available at <https://comelec.gov.ph/?r=2019NLE/Resolutions/res10458> (last accessed on March 20, 2023).

[17] In The Matter of the Amendment of the General Instructions for the Conduct of Random Manual Audit (RMA) for the 9 May 2022 Automated Synchronized National and Local Elections and Subsequent Elections Thereafter, available at <https://comelec.gov.ph/?r=2022NLE/Resolutions/res10774> (last accessed on March 20, 2023).

[18] Petitioners cite the Batas Pambansa Blg. 881 or the Omnibus Election Code, Republic Act No. 7166, and Republic Act No. 9369. Rollo, p. 8.

[19] ELECTION CODE, sec. 179 provides:

SECTION 179. Rights and duties of watchers. — Upon entering the polling place, the watchers shall present and deliver to the chairman of the board of election inspectors his appointment, and forthwith, his name shall be recorded in the minutes with a notation under his signature that he is not disqualified under the second paragraph of Section 178. The appointments of the watchers shall bear the personal signature or the facsimile signature of the candidate or the duly authorized representatives of the political party or coalition of political parties who appointed him or of organizations authorized by the Commission under Section 180. The watchers shall have the right to stay in the space reserved for them inside the polling place. They shall have the right to witness and inform themselves of the proceedings of the board of election inspectors, including its proceedings during the registration of voters, to take notes of what they may see or hear, to take photographs of the proceedings and incidents, if any, during the counting of votes, as well as of election returns, tally boards and ballot boxes, to file a protest against any irregularity or violation of law which they believe may have been committed by the board of election inspectors or by any of its members or by any persons, to obtain from the board of election inspectors a certificate as to the filing of such protest and/or of the resolution thereon, to read the ballots after they shall have been read by the chairman, as well as the election returns after they shall have been completed and signed by the

members of the board of election inspectors without touching them, but they shall not speak to any member of the board of election inspectors, or to any voter, or among themselves, in such a manner as would distract the proceedings, and to be furnished with a certificate of the number of votes in words and figures cast for each candidate, duly signed and thumbmarked by the chairman and all the members of the board of election inspectors. Refusal of the chairman and the members of the board of election inspectors to sign and furnish such certificate shall constitute an election offense and shall be penalized under this Code.

[20] Ponencia, p. 10.

[21] General Instructions for the Constitution, Composition and Appointment of Electoral Boards; the Process of Final Testing and Sealing Machines; and the Voting, Counting and Transmission of Election Results in Connection with the 09 May 2022 National and Local Elections, available at <https://comelec.gov.ph/?r=2022NLE/Resolutions/res10727> (last accessed on March 20, 2023).

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