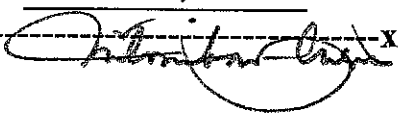


EN BANC

G.R. No. 259354 – NATIONAL PRESS CLUB OF THE PHILIPPINES, AUTOMATED ELECTION SYSTEM WATCH, and GUARDIANS BROTHERHOOD, INC., *petitioners*, v. COMMISSION ON ELECTIONS, *respondent*.

Promulgated:

June 13, 2023

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SEPARATE CONCURRING OPINION

LEONEN, J.:

The right to participate in the electoral process is not isolated to the moment citizens cast their votes. To be truly meaningful, the right should be accessible at every stage of the electoral process. Consistent transparency will ensure a healthy democracy. Thus, in allowing the exercise of this right, the Commission on Elections should be oriented towards creating as many opportunities for election transparency activities with due regard for reasonable security reasons.

I concur with the *ponencia* as it rules that the Commission on Elections cannot be compelled to implement individual digital signatures in a specific manner. I further concur that the Commission on Elections must allow observers to witness the printing of ballots and to disclose transmission documents. However, I respectfully disagree that observers are not allowed to witness the configuration and preparation of secure digital (SD) cards and vote counting machines (VCM), as well as inspect transmission hubs, servers, and data centers subject to reasonable security reasons.

As the *ponencia* astutely notes, courts may decide moot cases if:

first, there is a grave violation of the Constitution; second, the exceptional character of the situation and the paramount public interest is involved; third, when constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review.¹ (Citations omitted)

¹ *David v. Macapagal-Arroyo*, 522 Phil. 705, 754 (2006) [Per J. Sandoval-Gutierrez, *En Banc*].

This case presents an opportunity to establish guiding principles that will ensure free, orderly, honest, peaceful, credible, and informed elections,² especially as regards the duty of the Commission on Elections to allow the observation of printing of ballots and the examination and testing of equipment and devices of the automated election system. While the Commission on Elections voluntarily fulfilled petitioners' request prior to the resolution of the case, this Court may definitively rule on the Commission's duties under the law to protect the transparency of future elections. Otherwise, voters and concerned citizens may be forced to litigate during each campaign period depending on the inclination of government officials to yield to public outcry against restrictive practices in the electoral process.

The Petition prays for the issuance of a writ of mandamus, the requisites of which this Court discussed in *Lihaylihay v. Treasurer of the Philippines*.³

A writ of mandamus may issue in either of two (2) situations: first, "when 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"; second, "when any tribunal, corporation, board, officer or person... *unlawfully excludes another* from the use and enjoyment of a right or office to which such other is entitled."

The first situation demands a concurrence between a clear legal right accruing to petitioner and a correlative duty incumbent upon respondents to perform an act, this duty being imposed upon them by law.

Petitioner's legal right must have already been clearly established. It cannot be a prospective entitlement that is yet to be settled. In *Lim Tay v. Court of Appeals*, this Court emphasized that "[m]andamus will not issue to establish a right, but only to enforce one that is already established." In *Pefianco v. Moral*, this Court underscored that a writ of mandamus "never issues in doubtful cases."

Respondents must also be shown to have *actually* neglected to perform the act mandated by law. Clear in the text of Rule 65, Section 3 is the requirement that respondents "unlawfully *neglect*" the performance of a duty. The mere existence of a legally mandated duty or the pendency of its performance does not suffice.

The duty subject of mandamus must be ministerial rather than discretionary. A court cannot subvert legally vested authority for a body or officer to exercise discretion. In *Sy Ha v. Galang*:

[M]andamus will not issue to control the exercise of discretion of a public officer where the law imposes upon him the duty to exercise his judgment in reference to any

² Republic Act No. 8436 (1997), sec. 1, as amended by Republic Act No. 9369 (2007).

³ 836 Phil. 400 (2018) [Per J. Leonen, Third Division].

matter in which he is required to act, because it is his judgment that is to be exercised and not that of the court.

This Court distinguished discretionary functions from ministerial duties, and related the exercise of discretion to judicial and quasi-judicial powers. In *Samson v. Barrios*:

Discretion, when applied to public functionaries, means a power or right conferred upon them by law of acting officially, under certain circumstances, according to the dictates of their own judgments and consciences, uncontrolled by the judgments or consciences of others. A purely ministerial act or duty, in contradistinction to a discretionary act, is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment, upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer, and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion nor judgment. . . . Mandamus will not lie to control the exercise of discretion of an inferior tribunal . . . , when the act complained of is either judicial or quasi-judicial. . . . It is the proper remedy when the case presented is outside of the exercise of judicial discretion.

Mandamus, too, will not issue unless it is shown that “there is no other plain, speedy and adequate remedy in the ordinary course of law.” This is a requirement basic to all remedies under Rule 65, i.e., *certiorari*, prohibition, and mandamus.⁴ (Emphasis in the original, citations omitted)

Section 22 of Republic Act No. 8436, as amended by Republic Act No. 9369, states in no uncertain terms that “[t]he election returns transmitted electronically and digitally signed shall be considered as official election results and shall be used as the basis for the canvassing of votes and the proclamation of a candidate.” As a constitutional body designated to enforce and administer all laws and regulations relative to the conduct of an election, it is not discretionary upon the Commission on Elections whether to implement this provision.

However, as the *ponencia* found, the Commission on Elections has been implementing this provision since 2010, albeit VCMs have affixed digital signatures rather than individual teachers comprising the electoral board. Such should be deemed substantial compliance in light of the current logistical constraints present in the mode of implementation sought by petitioners. Section 1 of Republic Act No. 8436, as amended by Republic Act No. 9369, “recognizes the mandate and authority of the Commission [on Elections] to prescribe the adoption and use of the most suitable technology

⁴ *Id.* at 412–414.

of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose.”

On the configuration and preparation of SD cards and VCMs, the *ponencia* judiciously observed that Republic Act No. 8436, as amended by Republic Act No. 9369, has been expanded to allow the examination and testing not only of counting machines but of equipment or device of the automated election system.⁵ The automated election system refers to “a system using appropriate technology which has been demonstrated in the voting, counting, consolidating, canvassing, and transmission of [the] election result, and other electoral [processes].”⁶ Section 28 of the same Act enumerates examples of electronic devices such as “counting machine, memory pack/diskette, memory pack receiver and computer set.”

As the *ponencia* ruled, examination and testing have been expanded to the entire automated election system. However, I respectfully disagree with the *ponencia* that the right to examine and test may only be exercised after the devices are configured because the law mentions the provision of test ballots and test forms. Lawmakers cannot be expected to foresee and enumerate what technologies and processes may be developed to implement automated elections. Hence, the terminologies used in the law are not overly specific. The wording in the law at present is broad enough to encompass the inclusion of the configuration and preparation of SD cards and VCMs among the matters which interested parties have a right to observe before voting starts. The interpretation should not be unduly narrowed to refer only to the point after configuring the devices.

Indeed, for the implementation of an automated election system, SD cards and VCMs must be prepared and configured. To assess the reliability of these devices, it is essential to go through this phase. The effectiveness of the system will be impacted by accurate programming of these technologies. Examining the setup and preparation of SD cards and VCMs fosters greater transparency, much like how voting processes may be examined, not just the printed ballots. Thus, the Commission on Elections must allow petitioners to witness the configuration and preparation of SD cards and VCMs.

As regards allowing the inspection of transmission hubs, servers, and data centers, the same is also mandatory upon the Commission on Elections. Here, the *ponencia* cites the policy declaration in the law to ensure the secrecy and sanctity of the ballot and all election, consolidation, and transmission documents to rule that mandamus will not lie. I am of the view that the secrecy and sanctity of the ballot and all election, consolidation, and transmission documents are not incompatible with transparency with critical information regarding transmission hubs, servers, and data centers. Election transparency initiatives actually aim to involve voters in defending the

⁵ Republic Act No. 8436 (1997), sec. 14, as amended by Republic Act No. 9369 (2007).

⁶ Republic Act No. 8436 (1997), sec. 2, as amended by Republic Act No. 9369 (2007).

ballot's integrity and confidentiality against fraud and other anomalies. Additionally, the ballot's secrecy and sanctity apply to its contents, which include the votes cast and the voter's identity.

The reason behind the principle of ballot secrecy is to avoid vote buying through voter identification. Thus, voters are prohibited from exhibiting the contents of their official ballots to other persons, from making copies thereof, or from putting distinguishing marks thereon so as to be identified. Also proscribed is finding out contents of the ballots cast by particular voters or disclosing those of disabled or illiterate voters who have been assisted. Clearly, what is forbidden is the association of voters with their respective votes, for the purpose of assuring that the votes have been cast in accordance with the instructions of a third party.⁷

There is no such threat to the secrecy and sanctity of the ballot where concerned citizens demand disclosure of the means, methods, and digital infrastructures by which ballots will collectively be processed. This Court has even recognized that automation of elections will further safeguard the secrecy and sanctity of the ballot:

In a democratic system of government, the people's voice is sovereign. Corollarily, choosing through the ballots the [persons] who are to govern the country is perhaps the highest exercise of democracy. It is thus the interest of the state to insure honest, credible and peaceful elections, where the sanctity of the votes and the secrecy of the ballots are safeguarded, where the will of the electorate is not frustrated or undermined. For when the popular will itself is subverted by election irregularities, then the insidious seeds of doubt are sown and the ideal of a peaceful and smooth transition of power is placed in jeopardy. To automate, thus breaking away from a manual system of election, has been viewed as a significant step towards clean and credible elections, unfettered by the travails of the long wait and cheating that have marked many of our electoral exercises.⁸

The *ponencia* points out that Section 35(c) of Republic Act No. 8436, as amended by Republic Act No. 9369, disallows physical access to transmission hubs, servers, and data centers. However, a closer reading of the provision will show that it does not prevent authorized physical access thereto. Rather, it prohibits access by using, altering, destroying, or disclosing any computer data, program, system software, network, or any computer-related devices, facilities, hardware, or equipment. The qualified "whether classified or declassified" further reveals that such refers to hacking and tampering with the foregoing. The same does not penalize the ocular inspection of transmission hubs, servers, and data centers integral to the automated election system.

⁷ *ABS-CBN Broadcasting Corp. v. Commission on Elections*, 380 Phil. 780, 804 (2000) [Per J. Panganiban, *En Banc*].

⁸ *Roque, Jr. v. Commission on Elections*, 615 Phil. 149-190 (2009) [Per J. Velasco, Jr., *En Banc*].

The Commission on Elections may better guarantee the secrecy and sanctity of the ballot by allowing greater participation in election transparency activities relating to the automated election system.

In all instances of election transparency activities, the public's right to participate in election transparency activities should be the primordial consideration. This right of participation goes hand-in-hand with the constitutional right of the people to information on matters of public concern:

Article II, Section 28 -- Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transaction involving public interest.

Article III, Section 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.⁹

The right to information allows the public to ensure honesty in public service and check abuses in the government.¹⁰ The right to participate in election transparency activities enables citizens to ensure clean, credible elections. Yet, this Court is mindful that there may be reasonable security reasons to regulate the exercise of this right. These reasonable security reasons must be clearly and convincingly shown. In creating an exemption for reasonable security reasons, the Commission on Elections should always “try to resolve the tension in a way that protects the right of participation.”¹¹

ACCORDINGLY, I vote to DISMISS the Petition.



MARVIC M.V.F. LEONEN
Senior Associate Justice

⁹ CONST., art. II, sec. 28, and art. III, sec. 7.

¹⁰ *Sabio v. Gordon*, 535 Phil. 687 (2006) [Per J. Sandoval-Gutierrez, *En Banc*].

¹¹ *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301 (2015) [Per J. Leonen, *En Banc*].