

EN BANC

[G.R. NOS. 166143-47, November 20, 2006]

**ABDUSAKUR M. TAN AND BASARON BURAHAN, PETITIONERS,
VS. COMMISSION ON ELECTIONS, THE PROVINCIAL BOARD OF
CANVASSERS OF SULU, THE MUNICIPAL BOARDS OF
CANVASSERS OF MAIMBUNG, LUUK, TONGKIL, PANAMA, ALL
PROVINCE OF SULU, BENJAMIN LOONG AND NUR-ANA
SAHIDULLA, RESPONDENTS.**

D E C I S I O N [G.R. NO. 166891]

**BENJAMIN T. LOONG, PETITIONER, VS. COMMISSION ON
ELECTIONS (FIRST DIVISION) AND YUSOP H. JIKIRI,
RESPONDENTS.**

D E C I S I O N

VELASCO, JR., J.:

*We have found it necessary to regulate liberty;
so we find it necessary to regulate competition.*^[1]

—former U.S. Supreme Court Justice Louis Dembitz Brandeis

Election cases, indeed, "involve not only the adjudication of the private interests of rival candidates, but also the paramount need of dispelling the uncertainty which beclouds the real choice of the electorate x x x."^[2] The public nature of election cases is ensconced in the people's suffrage—which encompasses public choices and interests. In their capacity as having sovereign authority, the Filipino people are accorded the constitutional right of suffrage to select the representatives to public office. To ensure that Filipinos fully and freely enjoy this right and that their choices are recognized, the right of suffrage must be safeguarded. Courts should thus be vigilant in protecting this constitutional right so that the people's voice would not be stifled.

The Case

Before us are two petitions under Rule 65 of the Rules of Court. The first is the Petition for Certiorari and Prohibition with Prayer for the Issuance of a Writ of Preliminary Injunction and/or a Temporary Restraining Order^[3] under G.R. Nos. 166143-47 which seeks to set aside the October 18, 2004 Joint Resolution^[4] of the COMELEC *en banc* which rejected the prayer for declaration of failure of elections by petitioners Tan and Burahan in SPA Nos. 04-336, 04-337, 04-339, and 04-340, and by Yusop Jikiri in SPA No. 04-334 which is not under consideration in this petition. The other is a Petition for Certiorari with Prayer for a Temporary Restraining Order

and/or Writ of Preliminary Injunction^[5] under G.R. No. 166891 which seeks to annul and set aside the December 14, 2004^[6] and February 7, 2005^[7] Orders of the COMELEC First Division, which denied petitioner Loong's motion to dismiss in EPC Case No. 2004-66.

Through the Supreme Court *en banc* September 12, 2006 Resolution, these cases were consolidated because they arose substantially out of the same facts set forth below:

The Facts

Petitioners Abdusakur M. Tan and Basaron Burahan were the gubernatorial and vice-gubernatorial candidates, respectively, of Sulu Province in the May 10, 2004 national and local elections. On May 17, 2004, petitioners, together with other local candidates for congressman, mayor, and vice-mayor, filed with the COMELEC four (4) Petitions for Declaration of Failure of Elections in the towns of Maimbung, Luuk, Tongkil, and Panamao, all of Sulu Province, docketed as SPA Nos. 04-336,^[8] 04-337,^[9] 04-339,^[10] and 04-340,^[11] respectively. For the municipality of Luuk, Sulu, another Petition for Declaration of Failure of Elections was filed by another gubernatorial candidate, Yusop Jikiri, and it was docketed as SPA No. 04-334.^[12]

Petitioners Tan and Burahan alleged systematic fraud, terrorism, illegal schemes, and machinations allegedly perpetrated by private respondents and their supporters resulting in massive disenfranchisement of voters. Petitioners submitted various affidavits and photographs to substantiate their allegations:^[13]

In SPA No. 04-336 (Maimbung, Sulu), petitioners submitted the affidavits of poll watchers Ramil P. Singson, Otal Ibba, Sahak P. Ibrahim, Randy J. Jurri, Hayudini S. Jamuri, and municipal councilor candidate Jumdani Jumail.^[14]

In SPA No. 04-337 (Luuk, Sulu), petitioners submitted the affidavits of poll watchers Nijam Daud, Arsidan Abdurahman, Bensali Kamlian, Gamar Basala, Najir Ahamad, Apal A. Emamil, Say Abdurasi, Faizal Husbani, Sikal Lastam, Muktar Ailadja, Rujer Abdulkadil, Jurmin Suraid, Bakkar Jamil, Musid Madong, Nasib Nurin, Jul-Islam Benhar, Basiri Hamsah, and registered voters Sahaya Muksan, Juratol Asibon, Nuluddin Malihul, Tantung Tarani, Jul Ambri Abbil, and Harahun Arola.^[15]

In SPA No. 04-339 (Tongkil, Sulu), petitioners submitted the affidavits of poll watchers Talib Usama, Lingbird Sabtal, Yusop Mirih, Kasim Akol, Ammad Madon, Dayting Imamil, Nonoy T. Kiddang, Nilson Bakil, Boy Sabtal, Reagan Bensali, Alguiser Abdulla, Gaming Talib, Munir Ukkang, Abdurahim Sairil, Alcafon Talib, Rosefier Talib, Julbasil Sabtal, Darwin Lalik, Merinisa T. Abdurasid, Lim Tingkahan, and Mujina G. Talib,^[16] over-all coordinators of Tongkil mayoralty candidate Olum Sirail.

Affiant poll watcher Merinisa T. Abdurasid attested to taking seven (7) photographs^[17] allegedly showing electoral irregularities.

In SPA No. 04-340 (Panamao, Sulu), petitioners submitted the affidavits of poll watchers Amina D. Undug, Dinwaza Undug, Sitti Aiza Undug, Amina Undug, Indah

Taas Undug, Fadzrama Aukasa, Moreno Adjani, Nurhaida S. Undug, Nurjaina S. Abubakar, and Altimir A. Julhani.^[18]

Affiant poll watcher Altimir A. Julhani attested to taking five (5) photographs^[19] allegedly showing electoral irregularities.

Petitioners submitted additional affidavits and photographs, particularly the affidavits of Maimbung, Sulu poll watchers Aminkadra Abubakar, Abdulla Abubakar, Mhar Sappari, Nasirin Al-Najib, Marvin Saraji, Naufal Abubakar, Rhino Gumbahali, Basik Abton, Abzara H. Mudahi, Ayatulla Jakaria, Uttal Iba, Sin-sin Buklasan, Mardison I. Bakili, Abdurasmin Abdurahman, Binnar Pitong, Mahrif Sumlahani, Albinar S. Asaad, including that of photojournalist Alfred Jacinto-Corral^[20] who attested taking nine (9) photographs^[21] showing election irregularities.

Likewise, a report was submitted by Philippine Army 1Lt. Arthur V. Gelotin, Commanding Officer of Alpha Company, 563rd Infantry (Matapat) BN 11D, Tanduh Patong, Maimbung, Sulu, which allegedly showed massive failure of voters to cast their ballots.^[22]

Meanwhile, the COMELEC Second Division, acting on the Petitions for Declaration of Failure of Elections, issued its May 17, 2004 Order suspending the proclamation of the winning gubernatorial candidate of Sulu,^[23] but lifted the suspension three (3) days later. In the May 20, 2004 lifting Order, the COMELEC Second Division directed the Sulu PBOC to complete the canvass of votes and "to bring all canvass documents to Manila, and to proclaim the winning candidates for Governor in Manila."^[24]

Even before the filing of the four (4) aforesaid petitions, Abdusakur M. Tan had filed four (4) other petitions, one before the Municipal Board of Canvassers of Parang, Sulu for the **exclusion of election returns** from several precincts docketed as SPA No. 04-138, and the other three before the Provincial Board of Canvassers of Sulu to **exclude certificates of canvass** from Luuk, Panamao, and Parang docketed as SPA Nos. 04-163, 04-164 and 04-165, respectively. All these petitions were dismissed by the Boards concerned, prompting petitioner Tan to file an appeal with the COMELEC First Division which issued an Order^[25] on May 24, 2004 directing the concerned boards of canvassers to suspend their proceedings and to refrain from proclaiming any winning candidate.

However, on the same day that the COMELEC First Division issued the said Order, private respondent Benjamin Loong was proclaimed the winning governor of Sulu and he assumed office. This prompted petitioner Tan to file a Petition for Annulment of the Proclamation with the COMELEC First Division, docketed as SPA No. 04-205.

On June 21, 2004, the COMELEC First Division issued an Order^[26] which granted the petition and annulled the proclamation of respondent Loong as governor of Sulu Province.

In the meantime, on July 19, 2004, respondent Yusop H. Jikiri filed before the COMELEC a Petition of Protest *Ad Cautelam*,^[27] docketed as EPC No. 2004-66 praying, *inter alia*, for the recount or revision of the ballots cast and the examination

of election returns in four (4) municipalities of Sulu, namely, Luuk, Tongkil, Maimbung, and Parang.

The COMELEC *en banc*, through its October 18, 2004 Joint Resolution, dismissed all five (5) petitions filed on May 17, 2004 to declare a failure of elections. This prompted respondent Jikiri to immediately convert his petition *ad cautelam* into a regular election protest which was granted by the COMELEC First Division in an Order^[28] dated October 28, 2004.

**Ruling of the Commission on Elections *En Banc* in
SPA Nos. 04-334, 04-336, 04-337, 04-339, and 04-340**

On October 18, 2004, the COMELEC *en banc*, through a Joint Resolution,^[29] dismissed the five (5) Petitions to Declare Failure of Elections in the towns of Maimbung, Luuk, Tongkil, and Panamao, for lack of merit.

The COMELEC *en banc* ruled that there was no failure of election in the subject municipalities of Sulu. It reasoned that it could only exercise the extraordinary remedy of declaring a failure of election in the three instances mentioned in *Carlos v. Angeles*,^[30] in relation to Section 6 of the Omnibus Election Code^[31] and Section 4 of RA 7166, which in gist are: (1) the election is not held, (2) the election is suspended, or (3) the election results in a failure to elect.

In dismissing the petitions, the COMELEC held that none of the grounds relied upon by petitioners fall under any of the three instances justifying a declaration of failure of election. First, the COMELEC found that based upon the evidence presented by the parties, a valid election was held as scheduled. Second, there was no suspension of the election as voting continued normally. Third, private respondent Loong was elected by a plurality of votes as proclaimed by the Provincial Board of Canvassers (PBC).

While the authenticity and integrity of the election returns from the municipalities of Luuk and Panamao were questioned by petitioner Tan, those of Maimbung and Tongkil were left undisturbed throughout the preparation, transmission, custody, and canvass of the returns. Petitioners alleged that fraud and terrorism took place in Luuk and Panamao because voters were forced to affix their signatures and thumbprints; and the ballots in Luuk and Panamao were filled out by respondents' poll watchers and supporters.

Citing *Grand Alliance for Democracy v. COMELEC*,^[32] the COMELEC *en banc* ruled that the grounds raised by petitioners were best ventilated in an election protest.

The COMELEC did not give credence to petitioners' evidence in support of their allegations of fraud and terrorism since their evidence consisted mainly of affidavits executed by their own poll watchers. The Commission considered the affidavits self-serving and insufficient to annul the results of the election. Besides, it pointed out that petitioners presented only a single affidavit of an alleged disenfranchised voter. Thus, on October 18, 2004, the COMELEC, through a Joint Resolution, dismissed the petitions for lack of merit. Petitioners' counsel received a copy of the Joint Resolution on October 21, 2004.

However, the Joint Resolution was not concurred in by COMELEC Commissioner Mehol K. Sadain who signed it with a note: "DISSENTING. DISSENTING OPINION TO FOLLOW." Subsequently, Commissioner Sadain submitted his Dissenting Opinion^[33] on November 23, 2004 or 36 days after the joint resolution was issued. The Commissioner opined that there was failure of elections as the voters were allegedly not sufficiently informed about the change and transfer of polling places (clustering of precincts) approved^[34] by the COMELEC *en banc* on May 9, 2004 or on the eve of the May 10, 2004 elections. Commissioner Sadain cited *Hassan v. COMELEC*^[35] and *Basher v. COMELEC*^[36] which held that insufficient notice of the change of date and venue deprived voters of the opportunity to participate in the elections.

This basis of Commissioner Sadain's Dissenting Opinion, however, was not raised by the petitioners in their May 17, 2004 petitions (for declaration of failure of elections) before the COMELEC.

The Sadain Dissenting Opinion was released on November 23, 2004, and a copy of the opinion was served on petitioners' counsel on November 24, 2004. Petitioners filed the instant petition in G.R. Nos. 166143-47 on December 13, 2004, 19 days after they received a copy of the Sadain Dissenting Opinion, and 53 days after they received a copy of the October 18, 2004 Joint Resolution.

Denial by the COMELEC First Division of Petitioner Loong's motion to dismiss in EPC No. 2004-66

After the dismissal of the petitions to declare failure of elections on October 18, 2004 and the conversion of respondent Jikiri's protest *ad cautelam* to a regular election protest on October 28, 2004, petitioner Benjamin T. Loong filed on November 8, 2004 his Answer with Motion to Dismiss and/or with Counter Protest.^[37] Petitioner Loong anchored his motion to dismiss on the ground that the COMELEC had no jurisdiction to take cognizance of an election protest filed out of time.

On December 14, 2004, the COMELEC First Division issued the first assailed Order^[38] denying petitioner Loong's motion to dismiss, ruling that the protest was not filed out of time as there were still pending pre-proclamation cases before it, the result of which could affect Loong's motion. It further held that it did not matter that these pre-proclamation cases were not filed by respondent Jikiri but by another candidate, Abdusakur M. Tan, as Section 248 of the Omnibus Election Code does not require that the petition to annul or suspend the proclamation be filed by the protestant. Thus, the COMELEC First Division concluded that these pending pre-proclamation cases would not prevent respondent Jikiri from converting his protest *ad cautelam* into a regular one, and which fact would not preclude the Commission from deciding the election protest case. After all, the COMELEC First Division noted that pre-proclamation controversies and election protest cases have different causes of action, and thus, could proceed independently. Finally, the COMELEC First Division directed the concerned parties to take the appropriate steps to address the financial and personnel requirements for the protest and counter-protest proceedings.

Subsequently, petitioner Loong's Motion for Reconsideration^[39] was denied through the second assailed February 7, 2005 Order^[40] which directed COMELEC field