EN BANC

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

H. HARRY L. ROQUE, JR., JOEL R. BUTUYAN, ROMEL R. BAGARES, ALLAN JONES F. LARDIZABAL, GILBERT T. ANDRES, IMMACULADA D. GARCIA, ERLINDA T. MERCADO, FRANCISCO A. ALCUAZ, MA. AZUCENA P. MACEDA, AND ALVIN A. PETERS, PETITIONERS, VS. COMMISSION ON ELECTIONS, REPRESENTED BY HON. CHAIRMAN JOSE MELO, COMELEC SPECIAL BIDS AND AWARDS COMMITTEE, REPRESENTED BY ITS CHAIRMAN HON. FERDINAND RAFANAN, DEPARTMENT OF BUDGET AND MANAGEMENT, REPRESENTED BY HON. ROLANDO ANDAYA, TOTAL INFORMATION MANAGEMENT CORPORATION AND SMARTMATIC INTERNATIONAL CORPORATION, RESPONDENTS. PETE QUIRINO-QUADRA, PETITIONER-IN-INTERVENTION. SENATE OF THE PHILIPPINES, REPRESENTED BY ITS PRESIDENT, JUAN PONCE ENRILE, MOVANT-INTERVENOR.

R E S O L U T I O N

VELASCO JR., J.:

By Decision dated September 10, 2009, the Court denied the petition of H. Harry L. Roque, Jr., et al. for certiorari, prohibition, and mandamus to nullify the contract-award of the 2010 Election Automation Project to the joint venture of Total Information Management Corporation (TIM) and Smartmatic International Corporation (Smartmatic). The Court also denied the petition-in-intervention of Pete Q. Quadra, praying that the respondents be directed to implement the minimum requirements provided under pars. (f) and (g), Section 6 of Republic Act No. (RA) 8436, or the *Election Modernization Act*, as amended by RA 9369.

Petitioners Roque, et al. are again before the Court on a motion for reconsideration, as supplemented, praying, as they did earlier, that the contract award be declared null and void on the stated ground that it was made in violation of the Constitution, statutes, and jurisprudence.[1] Intervening petitioner also interposed a similar motion, but only to pray that the Board of Election Inspectors be ordered to manually count the ballots after the printing and electronic transmission of the election returns.

To both motions, private respondents TIM and Smartmatic, on the one hand, and public respondents Commission on Elections (Comelec), et al., on the other, have interposed their separate comments and/or oppositions.

As may be recalled, the underlying petition for certiorari, etc. on its face assailed the award by Comelec of the poll automation project to the TIM-Smartmatic joint venture, the challenge basically predicated on the non-compliance of the contract award with the pilot-testing requirements of RA 9369 and the minimum system

capabilities of the chosen automated election system (AES), referring to the Precinct Count Optical Scan (PCOS) system. The non-submission of documents to show the existence and scope of a valid joint venture agreement between TIM and Smartmatic was also raised as a nullifying ground, albeit later abandoned or at least not earnestly pursued.

The Court, in its September 10, 2009 Decision, dismissed the petition and the petition-in-intervention on the following main grounds: (1) RA 8436, as amended, does not require that the AES procured or, to be used for the 2010 nationwide fully automated elections must, as a condition *sine qua non*, have been pilot-tested in the 2007 Philippine election, it being sufficient that the capability of the chosen AES has been demonstrated in an electoral exercise in a foreign jurisdiction; (2) Comelec has adopted a rigid technical evaluation mechanism to ensure compliance of the PCOS with the minimum capabilities standards prescribed by RA 8436, as amended, and its determination in this regard must be respected absent grave abuse of discretion; (3) Comelec retains under the automation arrangement its supervision, oversight, and control mandate to ensure a free, orderly, and honest electoral exercise; it did not, by entering into the assailed automation project contract, abdicate its duty to enforce and administer all laws relative to the conduct of elections and decide, at the first instance, all questions affecting elections; and (4) in accordance with contract documents, continuity and back-up plans are in place to be activated in case the PCOS machines falter during the actual election exercise.

Petitioners Roque, et al., as movants herein, seek a reconsideration of the September 10, 2009 Decision on the following issues or grounds:

1. The Comelec's public pronouncements show that there is a "high probability" that there will be failure of automated elections;

2. Comelec abdicated its constitutional functions in favor of Smartmatic;

3. There is no legal framework to guide the Comelec in appreciating automated ballots in case the PCOS machines fail;

4. Respondents cannot comply with the requirements of RA 8436 for a source code review;

5. Certifications submitted by private respondents as to the successful use of the machines in elections abroad do not fulfill the requirement of Sec. 12 of RA 8436;

6. Private respondents will not be able to provide telecommunications facilities that will assure 100% communications coverage at all times during the conduct of the 2010 elections; and

7. Subcontracting the manufacture of PCOS machines to Quisdi violates the Comelec's bidding rules.

Both public and private respondents, upon the other hand, insist that petitioners'

motion for reconsideration should be held devoid of merit, because the motion, for the most part, either advances issues or theories not raised in the petition for certiorari, prohibition, and mandamus, and argues along speculative and conjectural lines.

Upon taking a second hard look into the issues in the case at bar and the arguments earnestly pressed in the instant motions, the Court cannot grant the desired reconsideration.

Petitioners' threshold argument delves on possibilities, on matters that may or may not occur. The conjectural and speculative nature of the first issue raised is reflected in the very manner of its formulation and by statements, such as "the public pronouncements of public respondent COMELEC[2] x x x clearly show that there is a high probability that there will be automated failure of elections";[3] "there is a high probability that the use of PCOS machines in the May 2010 elections will result in failure of elections";[4] "the unaddressed logistical nightmares--and the lack of contingency plans that should have been crafted as a result of a pilot test--make an automated failure of elections very probable";[5] and "COMELEC committed grave abuse of discretion when it signed x x x the contract for full automation x x x despite the likelihood of a failure of elections."[6]

Speculations and conjectures are not equivalent to proof; they have little, if any, probative value and, surely, cannot be the basis of a sound judgment.

Petitioners, to support their speculative venture vis-à-vis the possibility of Comelec going manual, have attributed certain statements to respondent Comelec Chairman Melo, citing for the purpose a news item on *Inquirer.net*, posted September 16, 2009.[7]

Reacting to the attribution, however, respondents TIM and Smartmatic, in their comment, described the Melo pronouncements as made in the context of Comelec's contingency plan. Petitioners, however, the same respondents added, put a misleading spin to the Melo pronouncements by reproducing part of the news item, but omitting to make reference to his succeeding statements to arrive at a clearer and true picture.

Private respondents' observation is well-taken. Indeed, it is easy to selectively cite portions of what has been said, sometimes out of their proper context, in order to assert a misleading conclusion. The effect can be dangerous. Improper meaning may be deliberately attached to innocent views or even occasional crude comments by the simple expediency of lifting them out of context from any publication. At any event, the Court took it upon itself to visit the website, whence petitioners deduced their position on the possible failure of automated elections in problem areas and found the following items:

> Allaying fears of failure of elections in 2010, the x x x [Comelec] said it will prepare for manual balloting, especially for areas with problems in electricity and telecommunications network coverage. x x x

> "Aside from preparations for poll automation, Comelec is also preparing

for manual elections *sa mga liblib na lugar* [in remote places] x x x, provinces with no electricity and would have issues in electronic transmission. We are ready for manual polls in at least 30 percent or 50 percent of the country as a last contingency measure in case the contingency plans for automation are difficult to implement," said Melo.

The poll chief was reacting to statements expressing the possibility of failure of elections due to the novelty of poll automation.

"The occurrence of nationwide failure of elections as alleged by doomsayers is impossible. Under the laws of probability, all 80,000 PCOS machines nationwide cannot breakdown. Maybe several would but we have standby units for this and we also have preparations for manual elections," he said.[8] (Emphasis added.)

Petitioners next maintain that the Comelec abdicated its constitutional mandate[9] to decide all questions affecting elections when, under Article 3.3[10] of the poll automation contract, it surrendered control of the system and technical aspects of the 2010 automated elections to Smartmatic in violation of Sec. 26[11] of RA 8436. Comelec, so petitioners suggest, should have stipulated that its Information Technology (IT) Department shall have charge of the technical aspects of the elections.

Petitioners' above contention, as well as the arguments, citations, and premises holding it together, is a rehash of their previous position articulated in their memorandum[12] in support of their petition. They have been considered, squarely addressed, and found to be without merit in the Decision subject hereof. The Court is not inclined to embark on another extended discussion of the same issue again. Suffice it to state that, under the automation contract, Smartmatic is given a specific and limited technical task to assist the Comelec in implementing the AES. But at the end of the day, the Smarmatic-TIM joint venture is merely a service provider and lessor of goods and services to the Comelec, which shall have exclusive supervision and control of the electoral process. Art. 6.7 of the automation contract could not have been more clear:

> 6.7 Subject to the provisions of the General Instructions to be issued by the Commission En Banc, **the entire process of voting, counting, transmission, consolidation and canvassing of votes shall [still] be conducted by COMELEC's personnel and officials** and their performance, completion and final results according to specifications and within specified periods shall be the shared responsibility of COMELEC and the PROVIDER. (Emphasis added.)

The aforequoted provision doubtless preserves Comelec's constitutional and statutory responsibilities. But at the same time, it realistically recognizes the complexity and the highly technical nature of the automation project and addresses the contingencies that the novelty of election automation brings.

Petitioners' posture anent the third issue, i.e, there no is legal framework to guide Comelec in the appreciation of automated ballots or to govern manual count should PCOS machines fail, cannot be accorded cogency. *First*, it glosses over the continuity and back-up plans that would be implemented in case the PCOS machines falter during the 2010 elections.[13] The overall fallback strategy and options to address even the worst-case scenario--the wholesale breakdown of the 80,000 needed machines nationwide and of the 2,000 reserved units--have been discussed in some detail in the Decision subject of this recourse. The Court need not belabor them again.

While a motion for reconsideration may tend to dwell on issues already resolved in the decision sought to be reconsidered--and this should not be an obstacle for a reconsideration--the hard reality is that petitioners have failed to raise matters substantially plausible or compellingly persuasive to warrant the desired course of action.

Second, petitioners' position presupposes that the Comelec is, in the meanwhile, standing idly by, totally unconcerned with that grim eventuality and the scenarios petitioners envision and depict. Comelec, to reiterate, is the constitutional body tasked to enforce and administer all laws and regulations relative to the conduct of an election. In the discharge of this responsibility, Comelec has been afforded enough latitude in devising means and methods that would enable it to accomplish the great objective for which it was created. In the matter of the administration of laws relative to the conduct of elections, the Court--or petitioners for that matter--must not, by any preemptive move or any excessive zeal, take away from Comelec the initiative that by law pertains to it.[14] It should not be stymied with restrictions that would perhaps be justified in the case of an organization of lesser responsibility.[15]

Significantly, petitioners, in support of their position on the lack-of-legal-framework issue, invoke the opinion of Associate, later Chief, Justice Artemio Panganiban in *Loong v. Comelec*,[16] where he made the following observations: "Resort to manual appreciation of the ballots is precluded by the basic features of the automated election system,"[17] and "the rules laid down in the Omnibus Election Code (OEC) for the appreciation and counting of ballots cast in a manual election x x x are inappropriate, if not downright useless, to the proper appreciation and reading of the ballots used in the automated system."[18] Without delving on its wisdom and validity, the view of Justice Panganiban thus cited came by way of a dissenting opinion. As such, it is without binding effect, a dissenting opinion being a mere expression of the individual view of a member of the Court or other collegial adjudicating body, while disagreeing with the conclusion held by the majority.[19]

Petitioners insist next that public respondents cannot comply with the requirement of a source code[20] review as mandated by Sec. 14 of RA 8436, as amended, which provides:

> SEC. 14. *Examination and Testing of Equipment or Device of the AES and Opening of the Source Code of Review*.--Once an AES Technology is selected for implementation, the Commission shall promptly make the