

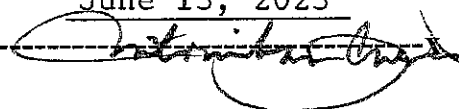
EN BANC

G.R. No. 259850 – 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 WELL, NAMELY, CAPITOL CHRISTIAN LEADERSHIP, BUKLOD PAMILYA INCORPORATED, KMP, KOALISYONG PANGKAUNLARAN NG MAMAMAYAN, and KNK; ANAK NG DIYOS KADUGO NI KRISTO, and JOSE LAGUNSA GONZALES, VICENTE ALEJO MACATANGAY, JR., SHARON FAITH SAMACO PAQUIZ, NELSON JAVA CELIS, MELCHOR GRUELA MAGDAMO, RODRIGO G. CORNEJO, and MELANIO LAZO MAURICIO, JR., Petitioners, v. COMMISSION ON ELECTIONS, Respondent.

Promulgated:

June 13, 2023

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SEPARATE CONCURRING OPINION

LEONEN, J.:

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>

<sup>1</sup> 782 Phil. 1306 (2016) [Per J. Leonen, *En Banc*].

<sup>2</sup> *Id.* at 1324.

<sup>3</sup> *Id.* at 1322.



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.”<sup>4</sup>

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,<sup>5</sup> *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.<sup>6</sup> This instruction has since been revised:

COMELEC Resolution No. 8786, March 4, 2010 <sup>7</sup>	Vote Counting Machine Operational Guide as of December 20, 2021 <sup>8</sup>
<p>SECTION 40. Counting of ballots and transmission of results; Procedure. (Renumbered) (As revised)</p> <p>....</p> <p>f) Thereafter, the PCOS shall automatically count the votes and immediately display a</p>	<p>The members of the Electoral Board add their digital signatures before the results are printed and transmitted to the appropriate board of canvassers.<sup>9</sup></p>

<sup>4</sup> *Rollo*, p. 42.

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

<sup>6</sup> *Rollo*, p. 42.

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *Id.*

<p>message WOULD YOU LIKE TO DIGITALLY SIGN THE TRANSMISSION FILES WITH A BEI SIGNATURE KEY?, with a YES or NO option;</p> <p>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[.]</p>	
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Petitioners also argue that the digital signatures should represent the identity of a person, not that of the machine that transmitted results.<sup>10</sup> 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:

<p>COMELEC Resolution No. 10458 dated December 5, 2018<sup>16</sup></p>	<p>COMELEC Resolution No. 10774</p>
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<sup>10</sup> *Rollo*, pp. 37–38.

<sup>11</sup> 687 Phil. 617 (2012) [Per J. Peralta, *En Banc*].

<sup>12</sup> 851 Phil. 685 (2019) [Per J. A. Reyes, Jr., *En Banc*].

<sup>13</sup> G.R. No. 246332, December 9, 2020 [Per J. Lopez, *En Banc*].

<sup>14</sup> *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*].

<sup>15</sup> *Rollo*, p. 42.

<sup>16</sup> *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*,

<p>SECTION 4. — <i>Random Selection of Precincts for the RMA.</i> The random selection of the precincts for the RMA shall be conducted publicly in the following manner:</p> <p>.....</p> <p>b. The List of the Specific Municipalities/Cities shall be released to the public at 2:00 p.m. on Election Day.</p> <p>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.</p>	<p>dated March 23, 2022<sup>17</sup></p> <p>SECTION 5. <i>Random Selection of Clustered Precincts for the RMA.</i> The random selection of the clustered precincts for the RMA shall be conducted publicly on the day after the elections in the following manner:</p> <p>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;</p> <p>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;</p> <p>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</p> <p>The random selection shall be done using an automated random selection program recommended or developed by the PSA.</p> <p>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.</p>
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Finally, on the absolute prohibition on the use of cameras, petitioners argue that this goes against several election-related laws.<sup>18</sup> For example, Section 179 of the Omnibus Election Code allows watchers “to take

available at <https://comelec.gov.ph/?r=2019NLE/Resolutions/res10458> (last accessed on March 20, 2023).

<sup>17</sup> *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).

<sup>18</sup> Petitioners cite the Batas Pambansa Blg. 881 or the Omnibus Election Code, Republic Act No. 7166, and Republic Act No. 9369. *Rollo*, p. 8.

photographs of the proceedings and incidents, if any, during the counting of votes, as well as of election returns, tally boards and ballot boxes.”<sup>19</sup> As noted in the *ponencia*, the Commission on Elections has, since the 2019 national and local elections, “removed the phrase ‘for whatever purpose.’”<sup>20</sup> It clarified that the prohibition is specific to instances when a voter’s ballot may be identified. COMELEC Resolution No. 10727,<sup>21</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> *Ponencia*, p. 10.

<sup>21</sup> *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).

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**.



**MARVIC M.V.F. LEONEN**  
Senior Associate Justice