EN BANC

[G.R. No. 222731, March 08, 2016]

BAGUMBAYAN-VNP MOVEMENT, INC., AND RICHARD J. GORDON, AS CHAIRMAN OF BAGUMBAYAN-VNP MOVEMENT, INC., PETITIONERS, VS. COMMISSION ON ELECTIONS, RESPONDENT.

R E S O L U T I O N

LEONEN, J.:

A petition for mandamus may be granted and a writ issued when an agency "unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office."[1]

Petitioners Bagumbayan Volunteers for a New Philippines Movement, Inc. (Bagumbayan-VNP, Inc.) and Former Senator Richard J. Gordon (Gordon) filed this Petition[2] for mandamus before this court to compel respondent Commission on Elections to implement the Voter Verified Paper Audit Trail security feature.

Bagumbayan-VNP, Inc. is a non-stock and non-profit corporation.[3] It operates through Bagumbayan Volunteers for a New Philippines,[4] a national political party duly registered with the Commission on Elections.[5]

Former Senator Gordon is a registered voter and taxpayer.[6] He is an official candidate for the Senate of the Philippines[7] and is the Chairperson of Bagumbayan-VNP, Inc. Gordon authored Republic Act No. 9369, the law that amended Republic Act No. 8436, otherwise known as the Automated Election System Law.[8]

The Commission on Elections is a government entity[9] "vested by law to enforce and administer all laws relative to the conduct of elections in the country."[10]

On December 22, 1997, Republic Act No. 8436[11] authorized the Commission on Elections to use an automated election system for electoral exercises.[12] After almost a decade, Republic Act No. 9369[13] amended Republic Act No. 8436. Republic Act No. 9369 introduced significant changes to Republic Act No. 8436, Batas Pambansa Blg. 881, otherwise known as the Omnibus Election Code, and other election-related statutes.[14]

Automation is hailed as a key "towards clean and credible elections," reducing the long wait and discouraging cheating.[15] In 2010 and 2013, the Commission on Elections enforced a nationwide automated election system using the Precinct Count Optical Scan (PCOS) machines. For the 2016 National and Local Elections, the Commission on Elections has opted to use the Vote-Counting Machine.[16] The vote-counting machine is a "paper-based automated election system,"[17] which is reported to be "seven times faster and more powerful than the PCOS because of its updated processor."[18] Likewise, it is reported to have more memory and security features,[19] and is "capable of producing the Voter Verification Paper Audit Trail (VVPAT)."[20] This VVPAT functionality is in the form of a printed receipt and a touch screen reflecting the votes in the vote-counting machine.[21]

Petitioners allege that under Republic Act No. 8436, as amended by Republic Act No. 9369, there are several safeguards or Minimum System Capabilities to ensure the sanctity of the ballot. Among these is the implementation of the VVPAT security feature, as found in Section 6(e), (f), and (n).

The full text of Section 6 is as follows:

SEC. 6. *Minimum System Capabilities*. - The automated election system must at least have the following functional capabilities:

(a) Adequate security against unauthorized access;

(b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;

(c) Error recovery in case of non-catastrophic failure of device;

(d) System integrity which ensures physical stability and functioning of the vote recording and counting process;

(e) *Provision for voter verified paper audit trail;*

(f) *System auditability which provides supporting documentation for verifying the correctness of reported election results;*

(g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election result in the shortest time possible;

(h) Accessibility to illiterates and disable voters;

(i) Vote tabulating program for election, referendum or plebiscite;

(j) Accurate ballot counters;

(k) Data retention provision;

(l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;

(m) Utilize or generate official ballots as herein defined;

(n) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and

(o) Configure access control for sensitive system data and function. (Emphasis supplied).

Petitioners claim that VVPAT "consists of physical paper records of voter ballots as voters have cast them on an electronic voting system."[22] Through it, the voter can verify if the choices on the paper record match the choices that he or she actually made in the ballot.[23] The voter can confirm whether the machine had actually read the ballot correctly. Petitioners seek to compel the Commission on Elections to have the vote-counting machine issue receipts once a person has voted.

According to petitioners, the VVPAT "will ensure transparency and reduce any attempt to alter the results of the elections."[24] There will be "an electronic tally of the votes cast" or the vote stored in the vote-counting machine, as well as "a paper record of the individual votes" cast or the VVPAT receipt.[25] Should there be any doubt, "the electronically generated results . . . can then be audited and verified through a comparison . . . with these paper records."[26]

In the Terms of Reference for the 2016 National and Local Elections Automation Project, the Commission on Elections lists the Minimum Technical Specifications of the Optical Mark Reader or Optical Scan System, precinct-based technologies that the poll body shall accept.[27]

Component 1 (B), subparagraphs (5) and (19) states as follows:

5. The system's hardware shall have a display panel that is capable to display customizable messages or prompts of each stage of the process execution, including prompts and messages for user interaction purposes.

. . .

19. The system shall have a *vote verification feature* which *shall display **and print the voter's choices***, which can be enabled or disabled in the configuration using the [Election Management System]. (Emphasis supplied)

Petitioners claim that the Commission on Elections refuses to implement the VVPAT function based on fears that the security feature may aid in vote-buying, and that the voting period may take longer.[28] On February 9, 2016, petitioners read from ABS-CBN News Online that with a vote of 7-0, the Commission on Elections En Banc decided not to implement the VVPAT for the 2016 Elections.[29] Petitioners attached a copy of the article.[30] Other news reports state that the Commission on Elections ruled similarly against the voting receipts in 2010 and 2013.[31]

At the Joint Congressional Oversight Committee on the Automated Election System on February 16, 2016,[32] the Commission on Elections, through its Chairperson Andres D. Bautista (Chairperson Bautista), supposedly gave its reasons for refusing to issue paper receipts. First, "politicians can use the receipts in vote buying[;]" second, it may increase voting time to five to seven hours in election precincts:[33]

[T]he poll body has decided against printing the receipt because it might be used for vote buying and that it would result in the vote-counting process being extended from six to seven hours since it takes about 13 seconds to print a receipt, meaning each machine would have to run for that long for the receipts.

Bautista said another "big concern" is that "there might be losing candidates who might question the results, basically instructing their supporters that when the machine prints out the receipt, regardless of what the receipt says, they will say that it's not correct."[34]

On February 11, 2016, the Commission on Elections issued Resolution No. 10057[35] providing for "rules and general instructions on the process of testing and sealing, [as well as] voting, counting, and transmission of election results."[36] Adopting Resolution No. 10057 by a vote of 7-0, the Commission on Elections En Banc made no mention using VVPAT receipts for the 2016 national elections.

Petitioners argue that the Commission on Elections' fears are "baseless and speculative."[37] In assailing the Commission on Elections' reasons, petitioners cite the Position Paper[38] of alleged automated elections expert, Atty. Glenn Ang Chong (Atty. Chong). Atty. Chong recommended that the old yellow ballot boxes be used alongside the voting machine. The VVPAT receipts can be immediately placed inside the old ballot boxes.[39]

After the voter casts his or her vote, he or she gets off the queue and walks to where the old ballot box is. There, the voter may verify if the machine accurately recorded the vote; if so, the voter drops the VVPAT receipt into the old ballot box.[40] Should there be any discrepancy, the voter may have it duly recorded with the poll watchers for analysis and appropriate action.[41] The poll watchers must ensure that all receipts are deposited into the old ballot box.[42] This will guarantee that no voter can sell his or her vote using the receipt.[43]

At the end of the polling, the old ballot boxes shall be turned over to the accredited citizens' arm or representatives of the public for the manual verification count of the votes cast. A member of the Board of Election Inspectors may supervise the count. The result of the manual verification count (using the old ballot boxes) shall be compared with that of the automated count (saved in the vote-counting machine).[44]

Petitioners add that during Senate deliberations,[45] the main proponent of the amendatory law, Former Senator Gordon, highlighted

the importance of "an audit trail usually supported by paper[.]"[46]

On November 10, 2015, Bagumbayan-VNP, Inc. sent Commission on Elections Chairperson Bautista a letter demanding the implementation of the VVPAT feature for the May 9, 2016 Elections.[47] However, the Commission on Elections never answered the letter.[48]

According to petitioners, the inclusion of VVPAT, a "mandatory requirement under the automated election laws, [has been] flagrantly violated by [COMELEC] during the 2010 and 2013 Elections." They claim that the previous demands made on the Commission on Elections to reactivate the VVPAT security feature "fell on deaf ears."[49] In the 2010 and 2013 Elections, all a voter received from the voting machines were the words, "Congratulations! Your vote has been counted," or an otherwise similar phrase.[50]

Petitioners claim that under Section 28 of Republic Act No. 9369, amending Section 35 of Republic Act No. 8436, anyone "interfering with and impeding . . . the use of computer counting devices and the processing, storage, generation and transmission of election results, data or information" commits a felonious act.[51] The Commission on Elections allegedly did so when it refused to implement VVPAT.[52]

In view of the foregoing, petitioners filed a Special Civil Action for Mandamus under Rule 65, Section 3 of the Rules of Court. They ask this court to compel the Commission on Elections to comply with the provisions of Section 6(e), (f), and (n) of Republic Act No. 8436, as amended.

Petitioners argue that mandamus is proper to "enforce a public right" and "compel the performance of a public duty."[53] Under Article VIII, Section 5(1) of the Constitution, this court has original jurisdiction over petitions for mandamus. In addition, Rule 65, Section 4 of the Rules of Court allows for a civil action for mandamus to be directly filed before this court.[54] There is no reglementary period in a special civil action for mandamus.[55]

According to petitioners, the law prescribes the "minimum" criteria of adopting VVPAT as one of the security features. The use of the word "must"[56] makes it mandatory to have a paper audit "separate and distinct from the ballot."[57] The Commission on Elections allegedly has neither leeway "nor right to claim that the ballot itself is the paper audit trail."[58] Likewise, the words, "voter verified" in VVPAT means the voter, not the Commission on Elections, must be the one verifying the accuracy of the vote cast.[59]

Petitioners conclude that the Commission on Elections' "baseless fear of vote buying" is no excuse to violate the law. "There is greater risk of cheating on a mass scale if the VVPAT were not implemented because digital cheating" is even more "difficult to detect . . . than cheating by isolated cases of vote buying."[60]

In the Resolution dated February 23, 2016, this court required the Commission on Elections to comment on the petition within a non-extendible period of five (5) days after receiving the notice.

Instead of submitting its Comment, the Commission on Elections filed a Motion for Additional Time to File Comment through the Office of the Solicitor General.[61] The Office of the Solicitor General alleged that it "has not yet received a copy of the Petition and has yet to obtain from COMELEC the documents relevant to this case."[62]

It is not often that this court requires the filing of a comment within a non-extendible period. This is resorted to when the issues raised by a party is fundamental and the ambient circumstances indicate extreme urgency. The right of voters to verify whether vote-counting machines properly recorded their vote is not only a statutory right; it is one that enables their individual participation in governance as sovereign. Among all government bodies, the Commission on Elections is the entity that should appreciate how important it is to respond to cases filed by the public to enable these rights. It perplexes this court that the Commission on Elections failed to immediately transmit relevant documents to the Office of the Solicitor General to allow them to respond within the time granted.

The Office of the Clerk of Court En Banc noted that both the Commission on Elections and the Office of the Solicitor General were already furnished with a copy of the Petition when this court ordered them to file a comment.[63] Due to the urgency to resolve this case, this court denied the Commission on Elections' Motion. This court cannot fail to act on an urgent matter simply because of the non-compliance of the Commission on Elections and the Office of the Solicitor General with its orders. This court cannot accept the lackadaisical attitude of the Commission on Elections and its counsel in addressing this case. This court has been firm that as a general rule, motions for extension are not granted, and if granted, only for good and sufficient cause.[64] Counsels, even those from government, should not assume that this court will act favorably on a motion for extension of time to file a pleading.[65]

For this court's resolution is whether the Commission on Elections may be compelled, through a writ of mandamus, to enable the Voter Verified Paper Audit Trail system capability feature for the 2016 Elections.

We grant the Petition.

Mandamus is the relief sought "[w]hen 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," and "there is no other plain, speedy and adequate remedy in the ordinary course of law."[66]

Through a writ of mandamus, the courts "compel the performance of a clear legal duty or a ministerial duty imposed by law upon the defendant or respondent"[67] by operation of his or her office, trust, or station. The petitioner must show the legal basis for the duty, and that the defendant or respondent failed to perform the duty.

Petitioners argue that the Commission on Elections unlawfully neglected to perform its legal duty of fully implementing our election laws, specifically Republic Act No. 8436, Section 6(e), (f), and (n), as amended by Republic Act No. 9369:[68]

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

. . . .

(e) Provision for voter verified paper audit trail;

(f) System auditability which provides supporting documentation for verifying the correctness of reported election results;

. . . .

(n) Provide the voter a system of verification to find out whether or not the machine has registered his choice;

Commission on Elections Resolution No. 10057 promulgated on February 11, 2016 did not include mechanisms for VVPAT. Under Part III of the Resolution, it merely stated:

SEC. 40. Manner of voting. -

a. The voter shall:

1. Using a ballot secrecy folder and the marking pen provided by the Commission, fill his/her ballot by fully shading the circle beside the names of the candidates and the party, organization or coalition participating in the party-list system of representation, of his/her choice; and

2. After accomplishing his/her ballot, approach the VCM, insert his/her ballot in the ballot entry slot;

    i. The VCM will display "PROCESSING.../PAKIHINTAY... KASALUKUYANG PINOPROSESO";

    ii. The ballot shall automatically be dropped inside the ballot box. The VCM will then display the message "YOUR VOTE HAS BEEN CAST/ANG IYONG BOTO AY NAISAMANA."

    iii. The VCM will display the message "AMBIGUOUS MARK DETECTED" if the ovals are not properly shaded or an unintentional mark is made. It will display the message "AMBIGUOUS MARKS DETECTED/MAY MALABONG MARKA SA BALOTA." The following options shall be provided "TO CAST BALLOT PRESS/PARA IPASOK ANG BALOTA, PINDUTIN" or "TO RETURN BALLOT, PRESS/PARA IBALIK ANG BALOTA, PINDUTIN." Press the "TO RETURN BALLOT, PRESS/PARA IBALIK ANG BALOTA, PINDUTIN" to return the ballot to the voter. Let the voter review the ballot and ensure that the ovals opposite the names of the candidate voted for are fully shaded.

    iv. In case of illiterate voters, PWD voters who are visually-impaired, and senior citizens (SCs) who may need the use of headphones, the BEI shall insert the headphones so they can follow the instructions of the VCM.

b. The poll clerk/support staff shall:

1. Monitor, from afar, the VCM screen to ensure that the ballot was successfully accepted;

2. Thereafter, whether or not the voter's ballot was successfully accepted, apply indelible ink to the voter's right forefinger nail or any other nail if there be no forefinger nail; and

3. Instruct the voter to return the ballot secrecy folder and marking pen, and then leave the polling place.

In a press conference last March 4, 2016, Commission on Elections Chairperson Andres Bautista manifested that the Commission on Elections decided "to err on the side of transparency" and resolved to allow voters to have 15-second on-screen verification of the votes they have casted through the vote-counting machine.[69] Allowing on-screen verification is estimated to add two (2) hours to the voting period on May 9, 2016. As reported, the meeting of the Commission on Elections En Banc to pass this Resolution was on March 3, 2016, three (3) days after they were required to file a comment before this court.

Nonetheless, the inaction of the Commission on Elections in utilizing the VVPAT feature of the vote-counting machines fails to fulfill the duty required under Republic Act No. 8436, as amended.

Article XI(C), Section 2 of the 1987 Constitution empowered the Commission of Elections to "[e]nforce and administer all laws and regulations relative to the conduct of an election." One of the laws that the Commission on Elections must implement is Republic Act No. 8436, as amended by Republic Act No. 9369, which requires the automated election system to have the capability of providing a voter-verified paper audit trail.

Based on the technical specifications during the bidding, the current vote-counting machines should meet the minimum system capability of generating a VVPAT. However, the Commission on Elections' act of rendering inoperative this feature runs contrary to why the law required this feature in the first place. Under Republic Act No. 8436, as amended, it is considered a policy of the state that the votes reflect the genuine will of the People.[70] The full text of the declaration of policy behind the law authorizing the use of an automated election system states:

SECTION 1. *Declaration of Policy*. — It is the policy of the State to ensure free, orderly, honest, peaceful, credible and informed elections, plebiscites, referenda, recall and other similar electoral exercises by improving on the election process and adopting systems, which shall involve the use of an automated election system that will ensure the secrecy and sanctity of the ballot and all election, consolidation and transmission documents in order that the process shall be transparent and credible and that the results shall be fast, accurate and reflective of the genuine will of the people.

The State recognizes the mandate and authority of the Commission to prescribe the adoption and use of the most suitable