

Republic of the Philippines  
**SUPREME COURT**  
Manila

EN BANC

**G.R. No. 181613**                      **September 11, 2009**

**ROSALINDA A. PENERA**, Petitioner,

vs.

**COMMISSION ON ELECTIONS and EDGAR T. ANDANAR**, Respondents.

DECISION

**CHICO-NAZARIO, J.:**

This Petition for Certiorari with Prayer for the Issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order<sup>1</sup> under Rule 65, in relation to Rule 64 of the Rules of Court, seeks the nullification of the Resolution<sup>2</sup> dated 30 January 2008 of the Commission on Elections (COMELEC) en banc. Said Resolution denied the Motion for Reconsideration of the earlier Resolution<sup>3</sup> dated 24 July 2007 of the COMELEC Second Division in SPA No. 07-224, ordering the disqualification of herein petitioner Rosalinda A. Penera (Penera) as a candidate for the position of mayor of the Municipality of Sta. Monica, Surigao del Norte (Sta. Monica) in the 2007 Synchronized National and Local Elections.

The antecedents of the case, both factual and procedural, are set forth hereunder:

Penera and private respondent Edgar T. Andanar (Andanar) were mayoralty candidates in Sta. Monica during the 14 May 2007 elections.

On 2 April 2007, Andanar filed before the Office of the Regional Election Director (ORED), Caraga Region (Region XIII), a Petition for Disqualification<sup>4</sup> against Penera, as well as the candidates for Vice-Mayor and Sangguniang Bayan who belonged to her political party,<sup>5</sup> for unlawfully engaging in election campaigning and partisan political activity prior to the commencement of the campaign period. The petition was docketed as SPA No. 07-224.

Andanar claimed that on 29 March 2007 – a day before the start of the authorized campaign period on 30 March 2007 – Penera and her partymates went around the different barangays in Sta. Monica, announcing their candidacies and requesting the people to vote for them on the day of the elections. Attached to the Petition were the Affidavits of individuals<sup>6</sup> who witnessed the said incident.

Penera alone filed an Answer<sup>7</sup> to the Petition on 19 April 2007, averring that the charge of premature campaigning was not true. Although Penera admitted that a motorcade did take

place, she explained that it was simply in accordance with the usual practice in nearby cities and provinces, where the filing of certificates of candidacy (COCs) was preceded by a motorcade, which dispersed soon after the completion of such filing. In fact, Penera claimed, in the motorcade held by her political party, no person made any speech, not even any of the candidates. Instead, there was only marching music in the background and "a grand standing for the purpose of raising the hands of the candidates in the motorcade." Finally, Penera cited *Barroso v. Ampig*<sup>8</sup> in her defense, wherein the Court supposedly ruled that a motorcade held by candidates during the filing of their COCs was not a form of political campaigning.

Also on 19 April 2007, Andanar and Penera appeared with their counsels before the ORED-Region XIII, where they agreed to submit their position papers and other evidence in support of their allegations.<sup>9</sup>

After the parties filed their respective Position Papers, the records of the case were transmitted to the COMELEC main office in Manila for adjudication. It was subsequently raffled to the COMELEC Second Division.*1avvphi1*

While SPA No. 07-224 was pending before the COMELEC Second Division, the 14 May 2007 elections took place and, as a result thereof, Penera was proclaimed the duly elected Mayor of Sta. Monica. Penera soon assumed office on 2 July 2002.

On 24 July 2007, the COMELEC Second Division issued its Resolution in SPA No. 07-224, penned by Commissioner Nicodemo T. Ferrer (Ferrer), which disqualified Penera from continuing as a mayoralty candidate in Sta. Monica, for engaging in premature campaigning, in violation of Sections 80 and 68 of the Omnibus Election Code.

The COMELEC Second Division found that:

On the afternoon of 29 March 2007, the 1st [sic] day to file the certificates of candidacy for local elective positions and a day before the start of the campaign period for the May 14, 2007 elections – [some of the members of the political party Partido Padajon Surigao], headed by their mayoralty candidate "Datty" Penera, filed their respective Certificates of Candidacy before the Municipal Election Officer of Sta. Monica, Surigao del Norte.

Accompanied by a bevy of supporters, [Penera and her partymates] came to the municipal COMELEC office on board a convoy of two (2) trucks and an undetermined number of motorcycles, laden with balloons ad [sic] posters/banners containing names and pictures and the municipal positions for which they were seeking election. Installed with [sic] one of the trucks was a public speaker sound subsystem which broadcast [sic] the intent the [sic] run in the coming elections. The truck had the posters of Penera attached to it proclaiming his [sic] candidacy for mayor. The streamer of [Mar Longos, a candidate for the position of Board Member,] was proudly seen at the vehicle's side. The group proceeded to motorcade until the barangays of Bailan, Libertad and as afar [sic] as Mabini almost nine (9) kilometers from Sta.

Monica. [Penera and her partymates] were seen aboard the vehicles and throwing candies to the residents and onlookers.

Various affidavits and pictures were submitted elucidating the above-mentioned facts. The above facts were also admitted in the Answer, the Position Paper and during the hearings conducted for this case, the only defense propounded by [Penera] is that such acts allegedly do not constitute campaigning and is therefore not proscribed by the pertinent election laws.

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What we however find disturbing is [Penera's] reference to the Ampig Case as the justification for the acts committed by [her]. There is really no reference to the acts or similar acts committed by [Penera] as having been considered as not constituting political campaign or partisan political activity. The issue in that case is whether or not the defect of the lack of a certification against non-forum [sic] shopping should result to the immediate dismissal of the election cases filed in that case. There is nothing in said case justifying a motorcade during the filing of certificates of candidacy. [Penera's] reliance thereon is therefore misplaced and of no potency at all.

x x x x

However, the photos submitted by [Andanar] only identified [Penera] and did not have any notation identifying or indicating any of the other [candidates from Penera's party]. It cannot be conclusively proven that the other [candidates from Penera's party] were indeed with Penera during the Motorcade. More importantly, the Answer and the Position Paper contain admissions referring only to [Penera]. There is therefore no justification for a whole sale [sic] disqualification of all the [candidates from Penera's party], as even the petition failed to mention particularly the participation of the other individual [party members].<sup>10</sup>

The afore-quoted findings of fact led the COMELEC Second Division to decree:

PREMISES CONSIDERED, this Commission resolves to disqualify [Penera] but absolves the other [candidates from Penera's party] from violation of section 80 and 68 of the Omnibus Elections [sic] Code.<sup>11</sup>

Commissioner Florentino A. Tuason, Jr. (Tuason) wrote a Separate Opinion<sup>12</sup> on the 24 July 2007 Resolution. Although Commissioner Tuason concurred with the ponente, he stressed that, indeed, Penera should be made accountable for her actions after the filing of her COC on 29 March 2007. Prior thereto, there was no candidate yet whose candidacy would have been enhanced by the premature campaigning.

It was the third member of the COMELEC Second Division, Commissioner Rene V. Sarmiento (Sarmiento) who put forth a Dissenting Opinion<sup>13</sup> on the 24 July 2007 Resolution. Commissioner Sarmiento believed that the pieces of evidence submitted by Andanar did not sufficiently

establish probable cause that Penera engaged in premature campaigning, in violation of Sections 80 and 68 of the Omnibus Election Code. The two photocopied pictures, purporting to be those of Penera, did not clearly reveal what was actually happening in the truck or who were the passengers thereof. Likewise, the Affidavits seemed to have been prepared and executed by one and the same person because they had similar sentence construction and form, and they were sworn to before the same attesting officer.

Penera filed before the COMELEC en banc a Motion for Reconsideration<sup>14</sup> of the 24 July 2007 Resolution of the COMELEC Second Division, maintaining that she did not make any admission on the factual matters stated in the appealed resolution. Penera also contended that the pictures and Affidavits submitted by Andanar should not have been given any credence. The pictures were mere photocopies of the originals and lacked the proper authentication, while the Affidavits were taken ex parte, which would almost always make them incomplete and inaccurate. Subsequently, Penera filed a Supplemental Motion for Reconsideration,<sup>15</sup> explaining that supporters spontaneously accompanied Penera and her fellow candidates in filing their COCs, and the motorcade that took place after the filing was actually part of the dispersal of said supporters and their transportation back to their respective barangays.

In the Resolution dated 30 January 2008, the COMELEC en banc denied Penera's Motion for Reconsideration, disposing thus:

WHEREFORE, this Commission RESOLVES to DENY the instant Motion for Reconsideration filed by [Penera] for UTTER LACK OF MERIT.<sup>16</sup>

The COMELEC en banc ruled that Penera could no longer advance the arguments set forth in her Motion for Reconsideration and Supplemental Motion for Reconsideration, given that she failed to first express and elucidate on the same in her Answer and Position Paper. Penera did not specifically deny the material averments that the motorcade "went as far as Barangay Mabini, announcing their candidacy and requesting the people to vote for them on Election Day," despite the fact that the same were clearly propounded by Andanar in his Petition for Disqualification and Position Paper. Therefore, these material averments should be considered admitted. Although the COMELEC en banc agreed that no undue importance should be given to sworn statements or affidavits submitted as evidence, this did not mean that such affidavits should not be given any evidentiary weight at all. Since Penera neither refuted the material averments in Andanar's Petition and the Affidavits attached thereto nor submitted countervailing evidence, then said Affidavits, even if taken ex parte, deserve some degree of importance. The COMELEC en banc likewise conceded that the pictures submitted by Andanar as evidence would have been unreliable, but only if they were presented by their lonesome. However, said pictures, together with Penera's admissions and the Affidavits of Andanar's witnesses, constituted sufficient evidence to establish Penera's violation of the rule against premature campaigning. Lastly, the COMELEC en banc accused Penera of deliberately trying to mislead the Commission by citing Barroso, given that the said case was not even remotely applicable to the case at bar.

Consistent with his previous stand, Commissioner Sarmiento again dissented<sup>17</sup> from the 30 January 2008 Resolution of the COMELEC en banc. He still believed that Andanar was not able to adduce substantial evidence that would support the claim of violation of election laws. Particularly, Commissioner Sarmiento accepted Penera's explanation that the motorcade conducted after the filing by Penera and the other candidates of their COCs was merely part of the dispersal of the spontaneous gathering of their supporters. The incident was only in accord with normal human social experience.

Still undeterred, Penera filed the instant Petition before us, praying that the Resolutions dated 24 July 2007 and 30 January 2008 of the COMELEC Second Division and en banc, respectively, be declared null and void for having been issued with grave abuse of discretion amounting to lack or excess of jurisdiction.

In a Resolution<sup>18</sup> dated 4 March 2008, we issued a Temporary Restraining Order (TRO), enjoining the COMELEC from implementing the assailed Resolutions, on the condition that Penera post a bond in the amount of ₱5,000.00. We also directed COMELEC and Andanar to comment on the instant Petition.

After the COMELEC, through the Office of the Solicitor General (OSG), and Andanar filed their respective Comments<sup>19</sup> on the Petition at bar, we required Penera, in a Resolution<sup>20</sup> dated 17 June 2008, to file a Reply. However, as no Reply was filed in due time, we dismissed Penera's Petition in a Resolution<sup>21</sup> dated 14 October 2008, in accordance with Rule 56, Section 5(e) of the Rules of Court.<sup>22</sup> Penera subsequently filed an Ex Parte Motion to Admit Reply,<sup>23</sup> which we treated as a Motion for Reconsideration of the Resolution dated 14 October 2008. On 11 November 2008, we issued another Resolution reinstating Penera's Petition.<sup>24</sup>

Penera presents the following issues for our consideration:

I.

Whether or not [Penera] has engaged in an election campaign or partisan political activity outside the campaign period.

II.

Whether the contents of the complaint are deemed admitted for failure of [Penera] to specifically deny the same.

III.

Whether or not [Andanar] has presented competent and substantial evidence to justify a conclusion that [Penera] violated Section 80 and 68 of the Omnibus Election Code.

IV.

Whether or not [the COMELEC] committed grave abuse of discretion amounting to lack of or in excess of jurisdiction in finding that the act of [Penera] in conducting a motorcade before the filing of her certificate of candidacy constitutes premature campaigning.

V.

Whether or not [the COMELEC] committed grave abuse of discretion amounting to lack of or in excess of jurisdiction when it resolves [sic] to disqualify [Penera] despite the failure of [Andanar] to present competent, admissible and substantial evidence to prove [the] violation of Section 68 and 80 of the Omnibus Election Code.

Penera claims that the COMELEC exercised its discretion despotically, arbitrarily and whimsically in disqualifying her as a mayoralty candidate in Sta. Monica on the ground that she engaged in premature campaigning. She asserts that the evidence adduced by Andanar was grossly insufficient to warrant the ruling of the COMELEC.

Penera insists that the COMELEC Second Division erred in its findings of fact, basically adopting Andanar's allegations which, contrary to the belief of the COMELEC Second Division, Penera never admitted. Penera maintains that the motorcade was spontaneous and unplanned, and the supporters merely joined Penera and the other candidates from her party along the way to, as well as within the premises of, the office of the COMELEC Municipal Election Officer. Andanar's averments – that after Penera and the other candidates from her party filed their COCs, they held a motorcade in the different barangays of Sta. Monica, waived their hands to the public and threw candies to the onlookers – were not supported by competent substantial evidence. Echoing Commissioner Sarmiento's dissent from the assailed COMELEC Resolutions, Penera argues that too much weight and credence were given to the pictures and Affidavits submitted by Andanar. The declaration by the COMELEC that it was Penera in the pictures is tenuous and erroneous, as the COMELEC has no personal knowledge of Penera's identity, and the said pictures do not clearly reveal the faces of the individuals and the contents of the posters therein. In the same vein, the Affidavits of Andanar's known supporters, executed almost a month after Andanar filed his Petition for Disqualification before the ORED-Region XIII, were obviously prepared and executed by one and the same person, because they have a similar sentence construction, and computer font and form, and were even sworn to before the same attesting officer on the same date.

We find no merit in the instant Petition.

The questions of fact

Crystal clear from the above arguments is that Penera is raising only questions of fact in her Petition presently before us. We do not find any reason to pass upon the same, as this Court is

not a trier of facts. It is not the function of the Court to review, examine and evaluate or weigh the probative value of the evidence presented. A question of fact would arise in such an event.

The sole function of a writ of *certiorari* is to address issues of want of jurisdiction or grave abuse of discretion, and it does not include a review of the tribunal's evaluation of the evidence.<sup>25</sup> Because of its fact-finding facilities and its knowledge derived from actual experience, the COMELEC is in a peculiarly advantageous position to evaluate, appreciate and decide on factual questions before it. Factual findings of the COMELEC, based on its own assessments and duly supported by evidence, are conclusive on this Court, more so in the absence of a grave abuse of discretion, arbitrariness, fraud, or error of law in the questioned resolutions. Unless any of these causes are clearly substantiated, the Court will not interfere with the findings of fact of the COMELEC.<sup>26</sup>

Grave abuse of discretion is such capricious and whimsical exercise of judgment equivalent to lack of jurisdiction. Mere abuse of discretion is not enough. It must be grave, as when it is exercised arbitrarily or despotically by reason of passion or personal hostility. The abuse must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.<sup>27</sup>

We find no grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the COMELEC Second Division in disqualifying Penera as a mayoralty candidate in Sta. Monica in the Resolution dated 24 July 2007; and also on the part of the COMELEC en banc in denying Penera's Motion for Reconsideration on the Resolution dated 30 January 2008. Said Resolutions are sufficiently supported by substantial evidence, meaning, such evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>28</sup>

The prohibited act of premature campaigning is defined under Section 80 of the Omnibus Election Code, to wit:

**SECTION 80. *Election campaign or partisan political activity outside campaign period.* — It shall be unlawful for any person, whether or not a voter or candidate, or for any party, or association of persons, to engage in an election campaign or partisan political activity except during the campaign period: *Provided,* That political parties may hold political conventions or meetings to nominate their official candidates within thirty days before the commencement of the campaign period and forty-five days for Presidential and Vice-Presidential election. (Emphasis ours.)**

If the commission of the prohibited act of premature campaigning is duly proven, the consequence of the violation is clearly spelled out in Section 68 of the said Code, which reads:

**SECTION. 68. Disqualifications.** - Any candidate who, in an action or protest in which he is a party is declared by final decision of a competent court guilty of, or found by the Commission of having xxx (e) **violated any of Sections 80, 83, 85, 86 and 261, paragraphs d, e, k, v, and cc, subparagraph 6, shall be disqualified from continuing as a candidate, or if he has been**

**elected, from holding the office.** Any person who is a permanent resident of or an immigrant to a foreign country shall not be qualified to run for any elective office under this Code, unless said person has waived his status as permanent resident or immigrant of a foreign country in accordance with the residence requirement provided for in the election laws. (Emphases ours.)

In the case at bar, it had been sufficiently established, not just by Andanar's evidence, but also those of Penera herself, that Penera and her partymates, after filing their COCs on 29 March 2007, participated in a motorcade which passed through the different barangays of Sta. Monica, waived their hands to the public, and threw candies to the onlookers.

Indeed, Penera expressly admitted in her Position Paper that:

Respondents actually had a motorcade of only two (2) jeppneys [sic] and ten (10) motorcycles after filing their Certificate of Candidacy at 3:00 P.M., March 29, 2007 without any speeches made and only one streamer of a board member Candidate and multi-colored balloons attached to the jeppneys [sic] and motorcycles.<sup>29</sup> (Emphasis ours.)

Additionally, the Joint Affidavit of Marcial Dolar, Allan Llatona, and Renante Platil, attached to Penera's Position Paper, gave an even more straightforward account of the events, thus:

1. That on March 29, 2007 at 3:00 P.M. at Sta. Monica, Surigao del Norte, Mayorality Candidates Rosalinda CA. Penera [sic] and her parties of four (4) kagawads filed their certificate of candidacy at the COMELEC Office;
2. That their [sic] was a motorcade consisting of two jeppneys [sic] and 10 motorcycles after actual registration with the COMELEC with jeeps decorated with balloons and a streamer of Margarito Longos, Board Member Candidate;
3. That the motorcade proceeded to three (3) barangays out of the 11 barangays while supporters were throwing sweet candies to the crowd;
4. That there was merriment and marching music without mention of any name of the candidates more particularly lead-candidate Rosalinda CA. Penera [sic];
5. That we were in the motorcade on that afternoon only riding in one of the jeepneys.<sup>30</sup> (Emphases ours.)

In view of the foregoing admissions by Penera and her witnesses, Penera cannot now be allowed to adopt a conflicting position.

More importantly, the conduct of a motorcade is a form of election campaign or partisan political activity, falling squarely within the ambit of Section 79(b)(2) of the Omnibus Election Code, on "[h]olding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda

for or against a candidate[.]” A motorcade is a procession or parade of automobiles or other motor vehicles.<sup>31</sup> The conduct thereof during election periods by the candidates and their supporters is a fact that need not be belabored due to its widespread and pervasive practice. The obvious purpose of the conduct of motorcades is to introduce the candidates and the positions, to which they seek to be elected, to the voting public; or to make them more visible so as to facilitate the recognition and recollection of their names in the minds of the voters come election time. Unmistakably, motorcades are undertaken for no other purpose than to promote the election of a particular candidate or candidates.

In the instant Petition, Penera never denied that she took part in the conduct of the motorcade after she filed her COC on the day before the start of the campaign period. She merely claimed that the same was not undertaken for campaign purposes. Penera proffered the excuse that the motorcade was already part of the dispersal of the supporters who spontaneously accompanied Penera and her partymates in filing their COCs. The said supporters were already being transported back to their respective barangays after the COC filing. Penera stressed that no speech was made by any person, and there was only background marching music and a "grand standing for the purpose of raising the hands of the candidates in the motorcade.

We are not convinced.

As we previously noted, Penera and her witnesses admitted that the vehicles, consisting of two jeepneys and ten motorcycles, were festooned with multi-colored balloons; the motorcade went around three barangays in Sta. Monica; and Penera and her partymates waved their hands and threw sweet candies to the crowd. With vehicles, balloons, and even candies on hand, Penera can hardly persuade us that the motorcade was spontaneous and unplanned.

For violating Section 80 of the Omnibus Election Code, proscribing election campaign or partisan political activity outside the campaign period, Penera must be disqualified from holding the office of Mayor of Sta. Monica.

#### The questions of law

The dissenting opinion, however, raises the legal issue that Section 15 of Republic Act No. 8436, as amended by Republic Act No. 9369, provides a new definition of the term "candidate," as a result of which, premature campaigning may no longer be committed.

Under Section 79(a) of the Omnibus Election Code, a candidate is "any person aspiring for or seeking an elective public office, who has filed a certificate of candidacy by himself or through an accredited political party, aggroupment, or coalition of parties."

Republic Act No. 8436,<sup>32</sup> enacted on 22 December 1997, authorized the COMELEC to use an automated election system for the process of voting, counting of votes, and canvassing/consolidating the results of the national and local elections. The statute also mandated the COMELEC to acquire automated counting machines, computer equipment,

devices and materials; and to adopt new electoral forms and printing materials. In particular, Section 11 of Republic Act No. 8436 provided for the specifications of the official ballots to be used in the automated election system and the guidelines for the printing thereof, the relevant portions of which state:

SECTION 11. Official ballot. - The Commission shall prescribe the size and form of the official ballot which shall contain the titles of the positions to be filled and/or the propositions to be voted upon in an initiative, referendum or plebiscite. Under each position, the names of candidates shall be arranged alphabetically by surname and uniformly printed using the same type size. A fixed space where the chairman of the Board of Election inspectors shall affix his/her signature to authenticate the official ballot shall be provided.

Both sides of the ballots may be used when necessary.

For this purpose, the deadline for the filing of certificate of candidacy/petition for registration/manifestation to participate in the election shall not be later than one hundred twenty (120) days before the elections: Provided, That, any elective official, whether national or local, running for any office other than the one which he/she is holding in a permanent capacity, except for president and vice-president, shall be deemed resigned only upon the start of the campaign period corresponding to the position for which he/she is running: Provided, further, That, unlawful acts or omissions applicable to a candidate shall take effect upon the start of the aforesaid campaign period: Provided, finally, That, for purposes of the May 11, 1998 elections, the deadline for filing of the certificate of candidacy for the positions of President, Vice President, Senators and candidates under the Party-List System as well as petitions for registration and/or manifestation to participate in the Party-List System shall be on February 9, 1998 while the deadline for the filing of certificate of candidacy for other positions shall be on March 27, 1998. (Emphases ours.)

On 10 February 2007, Republic Act No. 9369<sup>33</sup> took effect. Section 13 of Republic Act No. 9369 amended Section 11 of Republic Act No. 8436 and renumbered the same as the new Section 15 of Republic Act No. 8436. The pertinent portions of Section 15 of Republic Act No. 8436, as amended by Republic Act No. 9369, now read:

SECTION.15. *Official Ballot.* - The Commission shall prescribe the format of the electronic display and/or the size and form of the official ballot, which shall contain the titles of the position to be filled and/or the proposition to be voted upon in an initiative, referendum or plebiscite. Where practicable, electronic displays must be constructed to present the names of all candidates for the same position in the same page or screen, otherwise, the electronic displays must be constructed to present the entire ballot to the voter, in a series of sequential pages, and to ensure that the voter sees all of the ballot options on all pages before completing his or her vote and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot. Under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size. The maiden or married name shall be listed in the official ballot, as preferred by the

female candidate. Under each proposition to be vote upon, the choices should be uniformly indicated using the same font and size.

A fixed space where the chairman of the board of election inspector shall affix her/her signature to authenticate the official ballot shall be provided.

For this purpose, the Commission shall set the deadline for the filing of certificate of candidacy/petition of registration/manifestation to participate in the election. Any person who files his certificate of candidacy within this period shall only be considered as a candidate at the start of the campaign period for which he filed his certificate of candidacy: *Provided*, That, unlawful acts or omissions applicable to a candidate shall effect only upon the start of the aforesaid campaign period: *Provided, finally*, That any person holding a public appointive office or position, including active members of the armed forces, and officers, and employees in government-owned or-controlled corporations, shall be considered *ipso factor* resigned from his/her office and must vacate the same at the start of the day of the filing of his/her certification of candidacy. (Emphases ours.)

In view of the third paragraph of Section 15 of Republic Act No. 8436, as amended, the Dissenting Opinion argues that Section 80 of the Omnibus Election Code can not be applied to the present case since, as the Court held in *Lanot v. Commission on Elections*,<sup>34</sup> the election campaign or partisan activity, which constitute the prohibited premature campaigning, should be designed to promote the election or defeat of a particular candidate or candidates. Under present election laws, while a person may have filed his/her COC within the prescribed period for doing so, said person shall not be considered a candidate until the start of the campaign period. Thus, prior to the start of the campaign period, there can be no election campaign or partisan political activity designed to promote the election or defeat of a particular candidate to public office because there is no candidate to speak of.

According to the Dissenting Opinion, even if Penera's acts before the start of the campaign period constitute election campaigning or partisan political activities, these are not punishable under Section 80 of the Omnibus Election Code given that she was not yet a candidate at that time. On the other hand, Penera's acts, if committed within the campaign period, when she was already a candidate, are likewise not covered by Section 80 as this provision punishes only acts outside the campaign period.

The Dissenting Opinion ultimately concludes that because of Section 15 of Republic Act No. 8436, as amended, the prohibited act of premature campaigning in Section 80 of the Omnibus Election Code, is practically impossible to commit at any time.

We disagree. Section 80 of the Omnibus Election Code remains relevant and applicable despite Section 15 of Republic Act No. 8436, as amended.

A close reading of the entire Republic Act No. 9369, which amended Republic Act No. 8436, would readily reveal that that it did not contain an express repeal of Section 80 of the Omnibus

Election Code. An express repeal is one wherein a statute declares, usually in its repealing clause, that a particular and specific law, identified by its number or title, is repealed.<sup>35</sup> Absent this specific requirement, an express repeal may not be presumed.

Although the title of Republic Act No. 9369 particularly mentioned the amendment of Batas Pambansa Blg. 881, or the Omnibus Election Code, to wit:

An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System x x x, **Amending for the Purpose Batas Pambansa Blg. 881, As Amended** x x x. (Emphasis ours.),

said title explicitly mentions, not the repeal, but the amendment of Batas Pambansa Blg. 881. Such fact is indeed very material. Repeal of a law means its complete abrogation by the enactment of a subsequent statute, whereas the amendment of a statute means an alteration in the law already existing, leaving some part of the original still standing.<sup>36</sup> Section 80 of the Omnibus Election Code is not even one of the specific provisions of the said code that were expressly amended by Republic Act No. 9369.

Additionally, Section 46,<sup>37</sup> the repealing clause of Republic Act No. 9369, states that:

*Sec. 46. Repealing Clause.* – All laws, presidential decrees, executive orders, rules and regulations or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

Section 46 of Republic Act No. 9369 is a general repealing clause. It is a clause which predicates the intended repeal under the condition that a substantial conflict must be found in existing and prior acts. The failure to add a specific repealing clause indicates that the intent was not to repeal any existing law, unless an irreconcilable inconsistency and repugnancy exist in the terms of the new and old laws. This latter situation falls under the category of an implied repeal.<sup>38</sup>

Well-settled is the rule in statutory construction that implied repeals are disfavored. In order to effect a repeal by implication, the later statute must be so irreconcilably inconsistent and repugnant with the existing law that they cannot be made to reconcile and stand together. The clearest case possible must be made before the inference of implied repeal may be drawn, for inconsistency is never presumed. There must be a showing of repugnance clear and convincing in character. The language used in the later statute must be such as to render it irreconcilable with what had been formerly enacted. An inconsistency that falls short of that standard does not suffice.<sup>39</sup>

Courts of justice, when confronted with apparently conflicting statutes, should endeavor to reconcile the same instead of declaring outright the invalidity of one as against the other. Such alacrity should be avoided. The wise policy is for the judge to harmonize them if this is possible, bearing in mind that they are equally the handiwork of the same legislature, and so give effect

to both while at the same time also according due respect to a coordinate department of the government.<sup>40</sup>

To our mind, there is no absolute and irreconcilable incompatibility between Section 15 of Republic Act No. 8436, as amended, and Section 80 of the Omnibus Election Code, which defines the prohibited act of premature campaigning. It is possible to harmonize and reconcile these two provisions and, thus, give effect to both.

The following points are explanatory:

First, Section 80 of the Omnibus Election Code, on premature campaigning, explicitly provides that "[i]t shall be unlawful for any person, whether or not a voter or candidate, or for any party, or association of persons, to engage in an election campaign or partisan political activity, except during the campaign period." Very simply, premature campaigning may be committed even by a person who is not a candidate.

For this reason, the plain declaration in Lanot that "[w]hat Section 80 of the Omnibus Election Code prohibits is 'an election campaign or partisan political activity' by a 'candidate' 'outside' of the campaign period,"<sup>41</sup> is clearly erroneous.

Second, Section 79(b) of the Omnibus Election Code defines election campaign or partisan political activity in the following manner:

SECTION 79. Definitions. - As used in this Code:

x x x x

(b) The term "election campaign" or "partisan political activity" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office which shall include:

- (1) Forming organizations, associations, clubs, committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate;
- (2) Holding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate;
- (3) Making speeches, announcements or commentaries, or holding interviews for or against the election of any candidate for public office;
- (4) Publishing or distributing campaign literature or materials designed to support or oppose the election of any candidate; or

(5) Directly or indirectly soliciting votes, pledges or support for or against a candidate.

True, that pursuant to Section 15 of Republic Act No. 8436, as amended, even after the filing of the COC but before the start of the campaign period, a person is not yet officially considered a candidate. Nevertheless, a person, upon the filing of his/her COC, already explicitly declares his/her intention to run as a candidate in the coming elections. The commission by such a person of any of the acts enumerated under Section 79(b) of the Omnibus Election Code (i.e., holding rallies or parades, making speeches, etc.) can, thus, be logically and reasonably construed as for the purpose of promoting his/her intended candidacy.

When the campaign period starts and said person proceeds with his/her candidacy, his/her intent turning into actuality, we can already consider his/her acts, after the filing of his/her COC and prior to the campaign period, as the promotion of his/her election as a candidate, hence, constituting premature campaigning, for which he/she may be disqualified. Also, conversely, if said person, for any reason, withdraws his/her COC before the campaign period, then there is no point to view his/her acts prior to said period as acts for the promotion of his/her election as a candidate. In the latter case, there can be no premature campaigning as there is no candidate, whose disqualification may be sought, to begin with.<sup>42</sup>

Third, in connection with the preceding discussion, the line in Section 15 of Republic Act No. 8436, as amended, which provides that "any unlawful act or omission applicable to a candidate shall take effect only upon the start of the campaign period," does not mean that the acts constituting premature campaigning can only be committed, for which the offender may be disqualified, during the campaign period. Contrary to the pronouncement in the dissent, nowhere in the said proviso was it stated that campaigning before the start of the campaign period is lawful, such that the offender may freely carry out the same with impunity.

As previously established, a person, after filing his/her COC but prior to his/her becoming a candidate (thus, prior to the start of the campaign period), can already commit the acts described under Section 79(b) of the Omnibus Election Code as election campaign or partisan political activity. However, only after said person officially becomes a candidate, at the beginning of the campaign period, can said acts be given effect as premature campaigning under Section 80 of the Omnibus Election Code. Only after said person officially becomes a candidate, at the start of the campaign period, can his/her disqualification be sought for acts constituting premature campaigning. Obviously, it is only at the start of the campaign period, when the person officially becomes a candidate, that the undue and iniquitous advantages of his/her prior acts, constituting premature campaigning, shall accrue to his/her benefit. Compared to the other candidates who are only about to begin their election campaign, a candidate who had previously engaged in premature campaigning already enjoys an unfair headstart in promoting his/her candidacy.

As can be gleaned from the foregoing disquisition, harmony in the provisions of Sections 80 and 79 of the Omnibus Election Code, as well as Section 15 of Republic Act No. 8436, as amended, is

not only very possible, but in fact desirable, necessary and consistent with the legislative intent and policy of the law.

The laudable and exemplary intention behind the prohibition against premature campaigning, as declared in *Chavez v. Commission on Elections*,<sup>43</sup> is to level the playing field for candidates of public office, to equalize the situation between the popular or rich candidates, on one hand, and lesser-known or poorer candidates, on the other, by preventing the former from enjoying undue advantage in exposure and publicity on account of their resources and popularity. The intention for prohibiting premature campaigning, as explained in *Chavez*, could not have been significantly altered or affected by Republic Act No. 8436, as amended by Republic Act No. 9369, the avowed purpose of which is to carry-on the automation of the election system. Whether the election would be held under the manual or the automated system, the need for prohibiting premature campaigning – to level the playing field between the popular or rich candidates, on one hand, and the lesser-known or poorer candidates, on the other, by allowing them to campaign only within the same limited period – remains.

We cannot stress strongly enough that premature campaigning is a pernicious act that is continuously threatening to undermine the conduct of fair and credible elections in our country, no matter how great or small the acts constituting the same are. The choice as to who among the candidates will the voting public bestow the privilege of holding public office should not be swayed by the shrewd conduct, verging on bad faith, of some individuals who are able to spend resources to promote their candidacies in advance of the period slated for campaign activities.

Verily, the consequences provided for in Section 68<sup>44</sup> of the Omnibus Election Code for the commission of the prohibited act of premature campaigning are severe: the candidate who is declared guilty of committing the offense shall be disqualified from continuing as a candidate, or, if he/she has been elected, from holding office. Not to mention that said candidate also faces criminal prosecution for an election offense under Section 262 of the same Code.

The Dissenting Opinion, therefore, should not be too quick to pronounce the ineffectiveness or repeal of Section 80 of the Omnibus Election Code just because of a change in the meaning of candidate by Section 15 of Republic Act No. 8436, as amended, primarily, for administrative purposes. An interpretation should be avoided under which a statute or provision being construed is defeated, or as otherwise expressed, nullified, destroyed, emasculated, repealed, explained away, or rendered insignificant, meaningless, inoperative, or nugatory.<sup>45</sup> Indeed, not only will the prohibited act of premature campaigning be officially decriminalized, the value and significance of having a campaign period before the conduct of elections would also be utterly negated. Any unscrupulous individual with the deepest of campaign war chests could then afford to spend his/her resources to promote his/her candidacy well ahead of everyone else. Such is the very evil that the law seeks to prevent. Our lawmakers could not have intended to cause such an absurd situation.

The Dissenting Opinion attempts to brush aside our preceding arguments by contending that there is no room for statutory construction in the present case since Section 15 of Republic Act No. 8436,<sup>46</sup> as amended by Section 13 of Republic Act No. 9369,<sup>47</sup> is crystal clear in its meaning. We disagree. There would only be no need for statutory construction if there is a provision in Republic Act No. 8436 or Republic Act No. 9369 that explicitly states that there shall be no more premature campaigning. But absent the same, our position herein, as well as that of the Dissenting Opinion, necessarily rest on our respective construction of the legal provisions involved in this case.

Notably, while faulting us for resorting to statutory construction to resolve the instant case, the Dissenting Opinion itself cites a rule of statutory construction, particularly, that penal laws should be liberally construed in favor of the offender. The Dissenting Opinion asserts that because of the third paragraph in Section 15 of Republic Act No. 8436, as amended, the election offense described in Section 80 of the Omnibus Election Code is practically impossible to commit at any time and that this flaw in the law, which defines a criminal act, must be construed in favor of Penera, the offender in the instant case.

The application of the above rule is uncalled for. It was acknowledged in Lanot that a disqualification case has two aspects: one, electoral;<sup>48</sup> the other, criminal.<sup>49</sup> The instant case concerns only the electoral aspect of the disqualification case. Any discussion herein on the matter of Penera's criminal liability for premature campaigning would be nothing more than obiter dictum. More importantly, as heretofore already elaborated upon, Section 15 of Republic Act No. 8436, as amended, did not expressly or even impliedly repeal Section 80 of the Omnibus Election Code, and these two provisions, based on legislative intent and policy, can be harmoniously interpreted and given effect. Thus, there is no flaw created in the law, arising from Section 15 of Republic Act No. 8436, as amended, which needed to be construed in Penera's favor.

The Dissenting Opinion further expresses the fear that pursuant to our "theory," all the politicians with "infomercials" prior to the filing of their COCs would be subject to disqualification, and this would involve practically all the prospective presidential candidates who are now leading in the surveys.

This fear is utterly unfounded. It is the filing by the person of his/her COC through which he/she explicitly declares his/her intention to run as a candidate in the coming elections. It is such declaration which would color the subsequent acts of said person to be election campaigning or partisan political activities as described under Section 79(b) of the Omnibus Election Code. It bears to point out that, at this point, no politician has yet submitted his/her COC. Also, the plain solution to this rather misplaced apprehension is for the politicians themselves to adhere to the letter and intent of the law and keep within the bounds of fair play in the pursuit of their candidacies. This would mean that after filing their COCs, the prudent and proper course for them to take is to wait for the designated start of the campaign period before they commence their election campaign or partisan political activities. Indeed, such is the only way for them to avoid disqualification on the ground of premature campaigning. It is not for us to carve out

exceptions to the law, much more to decree away the repeal thereof, in order to accommodate any class of individuals, where no such exception or repeal is warranted.

Lastly, as we have observed at the beginning, Penera's Petition is essentially grounded on questions of fact. Penera's defense against her disqualification, before the COMELEC and this Court, rests on the arguments that she and her partymates did not actually hold a motorcade; that their supporters spontaneously accompanied Penera and the other candidates from her political party when they filed their certificates of candidacy; that the alleged motorcade was actually the dispersal of the supporters of Penera and the other candidates from her party as said supporters were dropped off at their respective barangays; and that Andanar was not able to present competent, admissible, and substantial evidence to prove that Penera committed premature campaigning. Penera herself never raised the argument that she can no longer be disqualified for premature campaigning under Section 80, in relation to Section 68, of the Omnibus Election Code, since the said provisions have already been, in the words of the Dissenting Opinion, rendered "inapplicable," "repealed," and "done away with" by Section 15 of Republic Act No. 8436, as amended. This legal argument was wholly raised by the Dissenting Opinion.

As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change theory on appeal. Points of law, theories, issues, and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. Basic considerations of due process underlie this rule.<sup>50</sup> If we do not allow and consider the change in theory of a case by a party on appeal, should we not also refrain from motu proprio adopting a theory which none of the parties even raised before us?

Nonetheless, the questions of fact raised by Penera and questions of law raised by the Dissenting Opinion must all be resolved against Penera. Penera should be disqualified from holding office as Mayor of Sta. Monica for having committed premature campaigning when, right after she filed her COC, but still a day before the start of the campaign period, she took part in a motorcade, which consisted of two jeepneys and ten motorcycles laden with multi-colored balloons that went around several barangays of Sta. Monica, and gave away candies to the crowd.

### Succession

Despite the disqualification of Penera, we cannot grant Andanar's prayer to be allowed to assume the position of Mayor of Sta. Monica. The well-established principle is that the ineligibility of a candidate receiving majority votes does not entitle the candidate receiving the next highest number of votes to be declared elected.<sup>51</sup>

In this case, the rules on succession under the Local Government Code shall apply, to wit:

SECTION 44. Permanent Vacancies in the Offices of the Governor, Vice-Governor, Mayor, and Vice-Mayor. – If a permanent vacancy occurs in the office of the xxx mayor, the x x x vice-mayor concerned shall become the x x x mayor.

x x x x

For purposes of this Chapter, a permanent vacancy arises when an elective local official fills a higher vacant office, refuses to assume office, **fails to qualify or is removed from office**, voluntarily resigns, or is otherwise permanently incapacitated to discharge the functions of his office. (Emphases ours.)

Considering Penera’s disqualification from holding office as Mayor of Sta. Monica, the proclaimed Vice-Mayor shall then succeed as Mayor.

WHEREFORE, premises considered, the instant Petition for Certiorari is hereby DISMISSED. The Resolutions dated 24 July 2007 and 30 January 2008 of the COMELEC Second Division and en banc, respectively, in SPA No. 07-224 are hereby AFFIRMED. In view of the disqualification of petitioner Rosalinda A. Penera from running for the office of Mayor of Sta. Monica, Surigao del Norte, and the resulting permanent vacancy therein, it is hereby DECLARED that the proclaimed Vice-Mayor is the rightful successor to said office. The Temporary Restraining Order issued on 4 March 2008 is hereby ORDERED lifted. Costs against the petitioner.

SO ORDERED.

**MINITA V. CHICO-NAZARIO**

Associate Justice

WE CONCUR:

**REYNATO S. PUNO**

Chief Justice

**LEONARDO A. QUISUMBING**

Associate Justice

**CONSUELO YNARES-SANTIAGO**

Associate Justice

**ANTONIO T. CARPIO**

Associate Justice

**RENATO C. CORONA**

Associate Justice

**CONCHITA CARPIO MORALES**

Associate Justice

**PRESBITERO J. VELASCO, JR.**

Associate Justice

**ANTONIO EDUARDO B. NACHURA**

Associate Justice

**TERESITA J. LEONARDO-DE CASTRO**

Associate Justice

**ARTURO D. BRION**  
Associate Justice

**DIOSDADO M. PERALTA**  
Associate Justice

**LUCAS P. BERSAMIN**  
Associate Justice

**MARIANO C. DEL CASTILLO**  
Associate Justice

**ROBERTO A. ABAD**  
Associate Justice

## CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

**REYNATO S. PUNO**  
Chief Justice

### Footnotes

<sup>1</sup> Rollo, pp. 3-28.

<sup>2</sup> Penned by Commissioner Nicodemo T. Ferrer with Acting Chairman Resurreccion Z. Borra and Commissioners Romeo A. Brawner, Florentino A. Tuason, Jr., and Moslemen T. Macarambon, Sr., concurring, and Commissioner Rene V. Sarmiento, dissenting; rollo, pp. 41-52.

<sup>3</sup> Penned by Commissioner Nicodemo T. Ferrer with Commissioner Florentino A. Tuason, Jr., concurring, and Commissioner Rene V. Sarmiento, dissenting; id. at 29-40.

<sup>4</sup> Id. at 53-54.

<sup>5</sup> Arcelito Petallo, Renato Virtudazo, Glorina Aparente, Silverio Tajos, Jose Platil, Medardo Sunico, Edelito Lerio and Sensualito Febra.

<sup>6</sup> Loreta Billona, Hermilo Botona and Victorino Florendo; rollo, pp. 55-57.

<sup>7</sup> Id. at 58-59.

<sup>8</sup> 385 Phil. 237 (2000).

<sup>9</sup> Rollo, p. 127.

<sup>10</sup> Id. at 30-33.

<sup>11</sup> Id. at 33.

<sup>12</sup> Id. at 34-36.

<sup>13</sup> Id. at 37-40.

<sup>14</sup> Id. at 97-108.

<sup>15</sup> Id. at 112-126.

<sup>16</sup> Id. at 48.

<sup>17</sup> Id. at 49-52.

<sup>18</sup> Id. at 138.

<sup>19</sup> Id. at 161-165, 190-208.

<sup>20</sup> Id. at 210.

<sup>21</sup> Id. at 215.

<sup>22</sup> Sec. 5. Grounds for dismissal of appeal. – The appeal may be dismissed *motu proprio* or on motion of the respondent on the following grounds:

x x x x

(e) Failure to comply with any circular, directive or order of the Supreme Court without justifiable cause;

<sup>23</sup> Rollo, pp. 217-225.

<sup>24</sup> Id. at 227-228.

<sup>25</sup> *Bantay Republic Act or BA-RA 7941 v. Commission on Elections*, G.R. No. 177271, 4 May 2007, 523 SCRA 11, cited in *Cadangen v. Commission on Elections*, G.R. No. 177179, 5 June 2009.

<sup>26</sup> *Alvarez v. Commission on Elections*, 405 Phil. 950, 959 (2001).

<sup>27</sup> *Cantoria v. Commission on Elections*, G.R. No. 162035, 26 November 2004, 444 SCRA 538, 543, cited in *Basmala v. Commission on Elections*, G.R. No. 176724, 6 October 2008, 567 SCRA 664, 668.

<sup>28</sup> *Doruelo v. Commission on Elections*, 218 Phil. 346 (1984).

<sup>29</sup> Rollo, p. 76.

<sup>30</sup> *Id.* at 77.

<sup>31</sup> Motorcade. Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. <http://dictionary.reference.com/browse/motorcade> (accessed: July 16, 2009).

<sup>32</sup> AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES.

<sup>33</sup> Republic Act No. 9369 is entitled "AN ACT AMENDING REPUBLIC ACT NO. 8436, ENTITLED 'AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, TO ENCOURAGE TRANSPARENCY, CREDIBILITY, FAIRNESS AND ACCURACY OF ELECTIONS, AMENDING FOR THE PURPOSE BATAS PAMPANSA BLG. 881, AS AMEMDED, REPUBLIC ACT NO. 7166 AND OTHER RELATED ELECTIONS LAWS, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES.'" It was published in the newspapers *Malaya* (26 January 2007) and *Business Mirror* (26-27 January 2007). It thus took effect fifteen (15) days after its publication or on 10 February 2007.

<sup>34</sup> G.R. No. 164858, 16 November 2006, 507 SCRA 114.

<sup>35</sup> *Mecano v. Commission on Audit*, G.R. No. 103982, 11 December 1992, 216 SCRA 500, 504.

<sup>36</sup> *Black's Law Dictionary* (6th Ed [1990]), p. 1299.

<sup>37</sup> Erroneously cited as Section 47 in the Revised Dissenting Opinion.

<sup>38</sup> *Intia, Jr. v. Commission on Audit*, 366 Phil. 273, 290 (1999), citing *Mecano v. Commission on Audit*, *supra* note 35.

<sup>39</sup> *Agujetas v. Court of Appeals*, G.R. No. 106560, 23 August 1996, 261 SCRA 17, 34-35.

<sup>40</sup> *Ty v. Trampe*, G.R. No. 117577, 1 December 1995, 250 SCRA 500, 514-515, citing *Gordon v. Veridiano*, 11 December 1992, 216 SCRA 500, 505-506.

<sup>41</sup> G.R. No. 164858, 16 November 2006, 507 SCRA 114, 146.

<sup>42</sup> This same reasoning holds true for a person (who is neither a candidate nor a voter) who commits any of the acts described under Section 79(b) of the Omnibus Election Code for the promotion of the election of another person who has already filed a certificate of candidacy; the former shall be prosecuted for the election offense of premature campaigning only in the event that the latter actually continues with his/her candidacy after the start of the campaign period.

<sup>43</sup> 480 Phil. 915 (2004).

<sup>44</sup> Sec. 68. Disqualifications. - Any candidate who, in an action or protest in which he is a party is declared by final decision of a competent court guilty of, or found by the Commission of having xxx (e) violated any of Sections 80, 83, 85, 86 and 261, paragraphs d, e, k, v, and cc, subparagraph 6, **shall be disqualified from continuing as a candidate, or if he has been elected, from holding the office.** x x x (Emphasis ours.)

<sup>45</sup> Paras v. Commission on Elections, 332 Phil. 56, 64 (1996).

<sup>46</sup> AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES.

<sup>47</sup> AN ACT AMENDING REPUBLIC ACT NO. 8436, ENTITLED "AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, TO ENCOURAGE TRANSPARENCY, CREDIBILITY, FAIRNESS AND ACCURACY OF ELECTIONS, AMENDING FOR THE PURPOSE BATAS PAMBANSA BLG. 881, AS AMENDED, REPUBLIC ACT NO. 7166 AND OTHER RELATED ELECTIONS LAWS, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES."

<sup>48</sup> The electoral aspect of a disqualification case determines whether the offender should be disqualified from being a candidate or from holding office. Proceedings are summary in character and require only clear preponderance of evidence. An erring candidate may be disqualified even without prior determination of probable cause in a preliminary investigation. The electoral aspect may proceed independently of the criminal aspect, and vice-versa. (Lanot v. Commission on Elections, supra note 34.)

<sup>49</sup> The criminal aspect of a disqualification case determines whether there is probable cause to charge a candidate for an election offense. The prosecutor is the COMELEC, through its Law Department, which determines whether probable cause exists. If there is probable cause, the COMELEC, through its Law Department, files the criminal information before the proper court. Proceedings before the proper court demand a full-blown hearing and require proof beyond reasonable doubt to convict. A criminal conviction shall result in the disqualification of the offender, which may even include disqualification from holding a future public office. (Lanot v. Commission on Elections, supra note 34.)

<sup>50</sup> Spouses Pasco v. Pison-Arceo Agricultural and Development Corporation, G.R. No. 165501, 28 March 2006, 485 SCRA 514, 523.

<sup>51</sup> Labo, Jr. v. Commission on Elections, 211 Phil. 297, 312 (1992).

## DISSENTING OPINION

### **CARPIO, J.:**

The ponencia disqualified Rosalinda A. Penera (Penera) from running for the office of Mayor of Sta. Monica, Surigao del Norte and declared the proclaimed Vice-Mayor as the rightful successor to the resulting permanent vacancy. I submit that the ponencia made an erroneous ruling: Penera should remain as Mayor of Sta. Monica, Surigao del Norte and the charge against Penera should be dismissed.

Edgar T. Andanar (Andanar) filed a Petition for Disqualification against Penera, as well as the candidates for Vice-Mayor and Sangguniang Bayan who belonged to her political party, for unlawfully engaging in election campaigning and partisan political activity prior to the start of the campaign period. Penera expressly admitted that after filing her certificate of candidacy with the COMELEC office on 29 March 2007, she and her co-respondents had a motorcade of two jeepneys and two motorcycles. The motorcade proceeded to three barangays while Penera's supporters threw candies to the crowd. The COMELEC Second Division disqualified Penera for violation of Sections 80 and 68 of the Omnibus Election Code, and the COMELEC En Banc denied Penera's motion for reconsideration. The ponencia affirms the COMELEC's rulings.

I submit that the ponencia's application of Sections 80 and 68 of the Omnibus Election Code and of our ruling in Lanot is erroneous.

The President signed Republic Act 9369 (R.A. 9369) on 23 January 2007. Two newspapers of general circulation, Malaya and Business Mirror, published R.A. 9369 on 26 January 2007. R.A. 9369 thus took effect on 10 February 2007, or long before the filing of Penera's certificate of candidacy on 29 March 2007. The third paragraph of Section 15 of R.A. 8436, as amended by Section 13 of R.A. 9369, now reads, thus:

Sec. 15. Official Ballot. — The Commission shall prescribe the format of the electronic display and/or the size and form of the official ballot, which shall contain the titles of the positions to be filled and/or the propositions to be voted upon in an initiative, referendum or plebiscite. Where practicable, electronic displays must be constructed to present the names of all candidates for the same position in the same page or screen, otherwise, the electronic displays must be constructed to present the entire ballot to the voter, in a series of sequential pages, and to ensure that the voter sees all of the ballot options on all pages before completing his or her vote and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot. Under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size. The maiden or married name shall be listed in the official ballot, as preferred by the female candidate. Under each proposition to be voted upon, the choices should be uniformly indicated using the same font and size.

A fixed space where the chairman of the board of election inspectors shall affix his/her signature to authenticate the official ballot shall be provided.

For this purpose, the Commission shall set the deadline for the filing of certificate of candidacy/petition for registration/manifestation to participate in the election. Any person who files his certificate of candidacy within this period shall only be considered as a candidate at the start of the campaign period for which he filed his certificate of candidacy: Provided, That, unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period: Provided, finally, That any person holding a public appointive office or position, including active members of the armed forces, and officers and employees in government-owned or controlled corporations, shall be considered ipso facto resigned from his/her office and must vacate the same at the start of the day of the filing of his/her certificate of candidacy.

Political parties may hold political conventions to nominate their official candidates within thirty (30) days before the start of the period for filing a certificate of candidacy.

With respect to a paper-based election system, the official ballots shall be printed by the National Printing Office and/or the Bangko Sentral ng Pilipinas at the price comparable with that of private printers under proper security measures which the Commission shall adopt. The Commission may contract the services of private printers upon certification by the National Printing Office/Bangko Sentral ng Pilipinas that it cannot meet the printing requirements. Accredited political parties and deputized citizen's arms of the Commission shall assign watchers in the printing, storage and distribution of official ballots.

To prevent the use of fake ballots, the Commission through the Committee shall ensure that the necessary safeguards, such as, but not limited to, bar codes, holograms, color shifting ink, microprinting, are provided on the ballot.

The official ballots shall be printed and distributed to each city/municipality at the rate of one ballot for every registered voter with a provision of additional three ballots per precinct. (Boldfacing and underscoring supplied)

The only purpose for the early filing of certificates of candidacy is to give ample time to COMELEC for the printing of the ballots. Because of our 2006 decision in *Lanot v. Commission on Elections*,<sup>1</sup> our lawmakers deemed it necessary to further specify in R.A. 9369 that "**any person who files his certificate of candidacy within [the filing] period shall only be considered a candidate at the start of the campaign period for which he filed his certificate of candidacy.**" This sentence was not in R.A. 8436.

The ponencia relies on Sections 80 and 68 of the Omnibus Election Code. Section 80 states that "[i]t shall be unlawful for any person x x x to engage in an election campaign or partisan political activity except during the campaign period: x x x." Section 68 states that violators of Section 80

"shall be disqualified from continuing as a candidate, or if he has been elected, from holding the office."

The ponencia also relies on this Court's enumeration in Lanot of the elements of premature campaigning under Section 80 of the Omnibus Election Code: (1) a person engages in an election campaign or partisan political activity; (2) the act is designed to promote the election or defeat of a particular candidate or candidates; and (3) the act is done outside the campaign period. However, in her reply to this dissent, the ponente quoted from Lanot, "[w]hat Section 80 of the Omnibus Election Code prohibits is 'an election campaign or partisan political activity' by a 'candidate' outside of the campaign period," and stated that the quoted portion was erroneous. I submit, however, that the quote was taken out of context. The ponente merely quoted in isolation and conveniently ignored the succeeding paragraph enumerating the elements of premature campaigning which she also quoted in her ponencia. The ponencia pointed out that a private person, not just a candidate, can commit the crime of premature campaigning. True, but before a private person can commit the crime, there must first be another person who is already considered by law a "candidate." Section 79(b) of the Omnibus Election Code provides that "the term 'election campaign' or 'partisan political activity' refers to an act designed to promote the election or defeat of a particular candidate or candidates to public office." Thus, there can be no premature "election campaign" or "partisan political activity" unless there is a "candidate."

Section 80 of the Omnibus Election Code is not applicable to the present case because the second element requires the existence of a "candidate." The definition of a "candidate" in Section 79(a) of the Omnibus Election Code should be read together with the amended Section 15 of R.A. 8436. A "'candidate' refers to any person aspiring for or seeking an elective public office, who has filed a certificate of candidacy by himself or through an accredited political party, aggroupment or coalition of parties." However, it is no longer enough to merely file a certificate of candidacy for a person to be considered a candidate because "any person who files his

certificate of candidacy within [the filing] period shall only be considered a candidate at the start of the campaign period for which he filed his certificate of candidacy." Any person may thus file a certificate of candidacy on any day within the prescribed period for filing a certificate of candidacy yet that person shall be considered a candidate, for purposes of determining one's possible violations of election laws, only during the campaign period. Indeed, there is no "election campaign" or "partisan political activity"<sup>2</sup> designed to promote the election or defeat of a particular candidate or candidates to public office simply because there is no "candidate" to speak of prior to the start of the campaign period. Therefore, despite the filing of her certificate of candidacy, the law does not consider Penera a candidate at the time of the questioned motorcade which was conducted a day before the start of the campaign period. In the same manner, when the law states that one is a candidate only at the start of the campaign period, determining whether any private person committed premature campaigning for a particular candidate can only be made once that prospective candidate actually files a certificate of candidacy.

The campaign period for local officials began on 30 March 2007 and ended on 12 May 2007. Penera filed her certificate of candidacy on 29 March 2007. Penera was thus a candidate on 29 March 2009 only for purposes of printing the ballots. On 29 March 2007, the law still did not consider Penera a candidate for purposes other than the printing of ballots. Acts committed by Penera prior to 30 March 2007, the date when she became a "candidate," even if constituting election campaigning or partisan political activities, are not punishable under Section 80 of the Omnibus Election Code. Such acts are within the realm of a citizen's protected freedom of expression. Acts committed by Penera within the campaign period are not covered by Section 80 as Section 80 punishes only acts outside the campaign period.

Because of the third paragraph of Section 15 of R.A. 8436, as amended by Section 13 of R.A. 9369, the election offense in Section 80 of the Omnibus Election Code is practically impossible to commit at any time. This flaw in the law, which defines a criminal act, cannot be construed against Penera but must be interpreted in her favor.

The ponente insists on using a technical rule of statutory construction. The ponente relies on the rule against implied repeals. However, the amendment by R.A. 9369 of Section 15 of R.A. 8436 is not a case of implied repeal but of express repeal. The title of R.A. 9369 expressly mentioned the amendment of the Omnibus Election Code: "An Act Authorizing the Commission on Elections to Use an Automated Election System x x x, Amending for the Purpose Batas Pambansa Blg. 881, x x x."<sup>3</sup> Section 47, the repealing clause of R.A. 9369, states that "All laws, presidential decrees, executive orders, rules and regulations or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly."

The amendment by R.A. 9369 of Section 15 of R.A. 8436 expressly declares that "unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period." This amendment expressly repeals Section 80 of the Omnibus Election Code which states that "it shall be unlawful for any person x x x to engage in an election campaign or partisan political activity except during the campaign period." In any event, even assuming that there is no express repeal, there is absolute and irreconcilable incompatibility between Section 15 of R.A. 8436, as amended, and Section 80 of the Omnibus Election Code. One provision states that campaigning before the start of the campaign period is lawful while the other provision states that campaigning before such period is unlawful. In such a case, the later law, which is R.A. 9369, shall prevail.

There is certainly no room for statutory construction in this case. Section 15 of R.A. 8436, as amended by R.A. 9369, is crystal clear and requires no statutory construction. Section 15, as amended, expressly provides, "Any person who files his certificate of candidacy within this period shall only be considered as a candidate at the start of the campaign period for which he filed his certificate of candidacy: Provided, That, unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period." This amendment expressly provides that a person becomes a candidate only at the start of the campaign period. This amendment further expressly provides that unlawful acts or omissions applicable to a candidate take effect only at the start of the campaign period. Nothing can be

clearer that any act or omission done before the start of the campaign period, such as campaigning, is not punishable. Where the law is clear and leaves no room for interpretation, resort to statutory construction is not allowed.

The ponente also conveniently ignored that penal laws are liberally construed in favor of the offender. The Omnibus Election Code is an example of a penal law since it imposes penalties for violation of its provisions. The ponencia's strained interpretation of the application of Section 80 of the Omnibus Election Code to the present case is egregiously unnecessary. The facts of the case are clear: Penera committed acts for which there are no penalties.

We apply the theory of the majority to the 2010 elections. Under the theory of the majority, a person who files his certificate of candidacy between 20-30 November 2009 cannot say anything about his candidacy until 9 February 2010, the start of the campaign period. Any act of such person, including all political advertisements in all media, can be interpreted as premature campaigning. Worse, even acts done before the filing of the certificate of candidacy will be covered by the majority's prohibition on premature campaigning. All candidates who aired "infomercials" prior to the filing of their certificates of candidacy will be subject to disqualification the moment they file their certificates of candidacy. This will disqualify practically all the prospective presidential candidates who are now leading in the surveys.

The factual circumstances and consequent ruling in *Chavez v. Commission on Elections*<sup>4</sup> differ from the present case precisely because of R.A. 9369. Petitioner Francisco I. Chavez entered into a number of agreements for product endorsements a few months before he filed his certificate of candidacy for Senator on 30 December 2003. On 6 January 2004, COMELEC issued Resolution No. 6520, Section 32 of which reads:

Section 32. All propaganda materials such as posters, streamers, stickers or paintings on walls and other materials showing the picture, image, or name of a person, and all advertisements shown in print, in radio or on television showing the image or mentioning the name of a person, who subsequent to the placement or display thereof becomes a candidate for public office shall be immediately removed by said candidate and radio station, print media or television station within 3 days after the effectivity of these implementing rules; otherwise, he and said radio station, print media or television station shall be presumed to have conducted premature campaigning in violation of Section 80 of the Omnibus Election Code.

Chavez asked for exemption from Section 32 because the billboards are mere product endorsement and cannot be construed as election paraphernalia. The COMELEC, however, ordered Chavez to remove or cause the removal of the billboards, or to cover them from public view during the pendency of his request for approval. Chavez asked this Court to declare Section 32 unconstitutional.

This Court upheld the validity of Section 32. Chavez's possible offense is the non-removal of the described propaganda materials three days after the effectivity of COMELEC Resolution No. 6520. Failure to remove the propaganda materials will put Chavez under the presumption of

conducting premature campaigning in violation of Section 80 of the Omnibus Election Code. The Chavez ruling declared that Chavez's billboards featuring his name and image for product endorsements assumed partisan political character because the same indirectly promoted his candidacy. The Court further held that the COMELEC merely exercised its duty to regulate the use of election propaganda materials, and upheld the validity of disallowance of the continued display of a person's propaganda materials and advertisements after he has filed a certificate of candidacy and before the start of the campaign period.

At the time Chavez was decided by this Court, R.A. 9369 was not yet enacted into law. We cannot stress enough that when Section 13 of R.A. 9369 amended the third paragraph of Section 15 of R.A. 8436, it added "any person who files his certificate of candidacy within [the filing] period shall only be considered a candidate at the start of the campaign period for which he filed his certificate of candidacy."

The effects brought about by premature campaigning as enunciated in Chavez are real. However, with the enactment of R.A. 9369, our lawmakers have decided to do away with the imposition of a penalty on premature campaigning. It is not for this Court to question the wisdom of the policy behind legislative enactments.

I vote to GRANT the petition. The Resolutions dated 24 July 2007 and 30 January 2008 of the COMELEC Second Division and the COMELEC En Banc, respectively, in SPA No. 07-224, should be SET ASIDE. Rosalinda A. Penera should still be the Mayor of Sta. Monica, Surigao del Norte.

**ANTONIO T. CARPIO**

Associate Justice

## Footnotes

<sup>1</sup> G.R. No. 164858, 16 November 2006, 507 SCRA 114.

<sup>2</sup> Section 79(b) of the Omnibus Election Code reads in part:

Section 79. Definitions. — (a) x x x;

(b) The term "election campaign" or "partisan political activity" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office which shall include:

(1) Forming organizations, associations, clubs, committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate;

(2) Holding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate;

(3) Making speeches, announcements or commentaries, or holding interviews for or against the election of any candidate for public office;

(4) Publishing or distributing campaign literature or materials designed to support or oppose the election of any candidate; or

(5) Directly or indirectly soliciting votes, pledges or support for or against a candidate.

<sup>3</sup> Batas Pambansa Blg. 881 is the Omnibus Election Code.

<sup>4</sup> 480 Phil. 915 (2004).