

**ENFORCING THE RIGHT OF INFORMATION
VIS-À-VIS PHILIPPINE AUTOMATED ELECTION
SYSTEM**

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Abstract

On May 10, 2010, the Philippines concluded its first automated election of both national and local elective officials. However, there is as yet no known independent, in-depth review of the automated election system (AES).

The right of the people to information on matters of public concern is enshrined in Section 7, Article III of the 1987 Constitution which provides:

“The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, **as well as to government research data used as basis for policy development**, shall be afforded the citizen, subject to such limitations as may be provided by law.”

Valid concerns arise as to the scope of the COMELEC’s and similar agencies’ disclosure of information regarding the AES system.

The May 10, 2010 election is interesting because the technology behind its automation was leased by COMELEC from a private entity.

In this respect, the statement in Section 7, Article III of the 1987 Constitution that the right of information is “subject to such limitations as may be provided by law” is in point.

The policy statement of Republic Act No. 9369 shows that legislature did not intend to put restrictions on the right of the people to be informed on the workings of the new technology. Accordingly, if COMELEC would issue rules implementing RA 9369, it must conform to the standards of transparency, credibility, full disclosure, and public interest as articulated in said law.

By enacting RA 9369, the State deemed it of public necessity not to put the Filipinos in the dark about the intricacies of the automation technology that it adopted for the citizens' exercise of their right of suffrage. Accordingly, regardless of private ownership over the AES system, RA 9369 is deemed written into the Automation Contract. As a result, the Contract can not bargain away COMELEC’s mandate to fully and openly disclose the AES technology to the public.

ENFORCING THE RIGHT TO INFORMATION VIS-A-VIS PHILIPPINE AUTOMATED ELECTION SYSTEM

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In June 2010, the Commission on Elections (COMELEC) Advisory Council (CAC) submitted to the Joint Congressional Oversight Committee on Automated Election System, its Report¹ on the May 2010 automation experience.

Since it is the body tasked by law² to, among others, evaluate the use of an automated election system (AES), its report is notable for its findings that the automation of the May 2010 elections was **“definitely not perfect”**; that **“Smartmatic/TIM committed numerous mistakes throughout the process, some of which nearly derailed the entire automation exercise”**; and that the COMELEC **“also made several questionable decisions that placed the integrity of the AES in jeopardy”**.

The present paper undertakes to outline the nature and extent of the right to information and the scope of allowable State intervention on such sacrosanct right. The paper also endeavors to analyze these general principles in the context of the AES system adopted in the May 10, 2010 elections.

The Right to Information: A Background

The right of the people to information on matters of public concern did not originally enjoy constitutional status. This was confirmed by the Supreme Court in the 1948 case of *Subido vs. Ozaeta*, where it stated that “freedom of information... is **not guaranteed by the constitution**... It expressly held that “the right to examine or inspect public records is **purely a question of statutory construction**.”³

The eminent Dean Joaquin Bernas, however, observed that the 1973 Constitution went beyond *Subido* and **“recognized the right of access to public documents and records as a self-executory constitutional right. The role given to the National Assembly was not to give the right but simply to set limits on the right given by the Constitution.”**⁴ Thus, Section 6, Article IV of the 1973 Constitution provides:

The right of the people to information on matters of public concern shall be recognized. Access to official records and to documents and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law.

On the other hand, as presently enshrined in Section 7 of Article III of the 1987 Constitution, the 1973 text has been broadened by the phrase **“as well as to government research data used as basis for policy development”**. Said Section 7 Article III provides:

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, **as well as to government research data used as basis for policy development**, shall be afforded the citizen, subject to such limitations as may be provided by law.

Automation and the Right to Information: The Interplay

A. Preliminary Considerations

Prior to the May 10, 2010 election automation experiment, the country's (legislative) efforts in promoting automation in domestic elections consist of **Republic Act (RA) Nos. 8046 and 8436**.⁵ However, it was only on January 23, 2007, with the passage of **RA 9369** (amending RA 8436) that automation would gain momentum.

In particular, the effectivity of RA 9369 provided COMELEC with clearer policy and procedural guidelines when it contracted with Smartmatic Tim Corporation for the automation of the 2010 national and local elections.⁶

Given the Supreme Court's effective imprimatur, through *Roque vs. COMELEC*,⁷ of the AES technology contemplated by the 2009 Automation Contract, COMELEC was, and continues to be, the primary government body tasked to provide the people with information about the automation system. However, with the electorate still reeling from the wastage wrought by the Mega Pacific Consortium (MPC) anomaly,⁸ valid concerns arise as to the scope of COMELEC's and similar agencies' authority in providing administrative limitations on the people's right to information regarding the AES system considering that under the constitutional provision, this right is expressly "**subject to such limitations as may be PROVIDED BY LAW**".

The phrase is understood in jurisprudence in two senses: first, as **substantive** limitation, and second, as **procedural or regulatory** limitation.

The **substantive** nature of the limitation was first explained in 1987 in *Legaspi vs. CSC*⁹ as follows:

[T]he constitutional guarantee... does not open every door to any and all information... The law may... exempt certain types of information from public scrutiny, such as those affecting national security... It follows that, in every case, **the availability of access to a particular public record must be circumscribed by the nature of the information sought, i.e., (a) being of public concern or one that involves public interest, and, (b) not being exempted BY LAW from the operation of the constitutional guarantee.**¹⁰

Long before the 2010 elections, the Court, in *Chavez vs. PCGG*,¹¹ identified the following as some of the recognized restrictions to the right to information: (1) national security matters and intelligence information, (2) trade secrets and banking transactions, (3) criminal matters, and (4) other confidential information.

On the other hand, the *Subido* case explains the **regulatory** limitation to the right of information. Thus:

Except, perhaps when it is clear that the purpose of the examination is unlawful, or sheer, idle curiosity, we do not believe it is the duty under the law of [custodians of official records] to concern themselves with the motives, reasons, and objects of the person seeking access to the records. It is not their prerogative to see that the information which the records contain is not flaunted before public gaze, or that scandal is not made of it. **If it be wrong to publish the contents of the records, it is the legislature and not the officials having custody thereof which is called upon to devise a remedy.** As to the moral or material injury which the

publication might inflict on other parties, that is the publisher's responsibility and lookout. The publication is made subject to the consequences of the law.¹²

Accordingly, the regulation that may be issued is limited to merely “**prescribing the manner and hours of examination** to the end that damage to, or loss of, the records may be avoided, that undue interference with the duties of the custodian of the books and documents and other employees may be prevented, that the right of other persons entitled to make inspection may be insured, and the like.”¹³ However, in *Lantaco vs. Llamas*,¹⁴ the Court emphasized that “[w]hile the public officers in custody or control of public records **have the discretion to regulate the manner in** which such records may be inspected, examined or copied by interested persons, **such discretion does not carry with it the authority to prohibit such access, inspection, examination or copying.**”

B. The Policy Framework of RA 9369

When the constitutional framers allowed **limitations** to be imposed on the people’s right to information and expressly delegated that authority to the Legislature, **it did so, precisely, to preclude its exercise by mere agencies such as the COMELEC.**

In order to determine the nature of COMELEC’s rule-making power, it is necessary to look into the State declaration of policy under RA 8436 (Section 1) and RA 9369 (Section 1).

A comparison of the two shows that RA 9369 improves on the earlier law by stating that the State shall ensure that the electoral activities be not only "free, orderly, **honest**, peaceful **and credible**" but also "**informed**". Furthermore, in the adoption of an automated system, the State has declared as duty to safeguard that the system shall "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 policy statement of RA 9369 is reflective of the legislative intent to safeguard the people’s constitutional right to information. It can be deduced from the foregoing that the State, through Congress, intended that the AES system be **fully transparent, openly available and fully disclosed** to the public.

When Congress enacted Republic Act No. (RA) 9369 to govern the automated election system, it is clearly provided in Sec. 12 thereof that:

“Once an AES technology is selected for implementation, the Commission shall promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review thereof.”

Indeed, in enacting RA 9369, the legislature could not have intended that the implementing agency may impose restrictions on the right of the people to be informed on the workings of the new technology. Accordingly, if COMELEC would issue rules implementing RA 9369, it must conform to the standards of **transparency, credibility, full disclosure, and public interest** as articulated in said law.

C. The 2009 Automation Contract: Proprietary Rights vs. The Right To Information

The May 10, 2010 elections is interesting because the technology behind its automation was merely leased by COMELEC from a private entity. To see how the proprietary rights of the lessor to its system could impact on the people's right to information, it is instructive to delve into the deliberations of the framers of the 1987 Constitution. Thus:

MR. VILLACORTA. Should not the popular sovereignty and popular interest prevail over proprietary rights of research?

FR. BERNAS. They should.

xxx

MS. QUESADA. Just to follow up the inquiry about the right of the people to information on matters of public concern, would this particular instance be covered by this particular section? The University of the Philippines was commissioned by one ministry of the government to conduct a research on the nationwide implementation of primary health care... [N]o amount of request or appeal to this research body would make it reveal the results of such study because this body said the study was commissioned by a government agency. **Will the research group violate any rule if it revealed the results of its study?**

FR. BERNAS. In my judgment, **no, because this is a matter of public concern.** Precisely, it was commissioned by the government to discover what was good for the nation, and I think it is something about which the public has a right to know.¹⁵

The aforesaid discussion shows that purported private property rights over the AES system cannot be relied upon as basis for denying access to information on said system. The State, through RA 9369, has characterized the AES system and its components, including software, as imbued with public interest, and in the process gave the green signal for full dissemination of information concerning the technology. All private persons who executed contracts with COMELEC with regard to the AES are deemed to have bound themselves with this open-AES feature of the law.

Similarly, by enacting RA 9369, the State, through Congress, deemed it **of public necessity and protection** not to put the Filipinos in the dark about the intricacies and components of the automation technology that COMELEC adopted for the citizens' exercise of their right of suffrage. RA 9369 is, therefore, an **exercise of police power by the state.**

It can be said, therefore, that, regardless of private ownership over the AES system, RA 9369 is deemed written into the 2009 Automation Contract between COMELEC and Smartmatic. As such, COMELEC can NOT bargain away its mandate to fully and openly disclose the AES technology to the public. *Apropos* is the following pronouncement in *Pangasinan Transportation, Co. vs. Public Service Commission*:

"When private property is "**affected with a public interest it ceased to be *juris privati* only.**" When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."¹⁶

Final Word

The foregoing discussion shows that the people have every right to demand access to, and to be provided with, full information regarding the AES technology. As settled by jurisprudence, COMELEC's role with regard to information is only to regulate the manner of, **but never to control or prohibit**, examination and dissemination of the same: What the law requires from the agency is **“the exercise of an unbiased and impartial judgment, by which all persons resorting to the office... shall be permitted to obtain all the information either by searches, abstracts, or copies, that the law has entitled it to obtain.”**¹⁷

Indeed, government agencies, including COMELEC, should always be guided by the significance of Section 7, Article III of the present Constitution since the incorporation of this provision is :

“a recognition of the fundamental role of free exchange of information in a democracy. There can be no realistic perception by the public of the nation's problems, nor a meaningful democratic decision making if they are denied access to information of general interest.”¹⁸

The right to information is further enhanced in Section 28, Article II of the 1987 Constitution which **“adopts and implements a policy of full public disclosure of all its transactions involving public interest.”**

Nowhere is this State duty toward the citizenry more pronounced than in the Omnibus Election Code itself, which spells out COMELEC's duty to “[c]arry out a continuing and systematic campaign... **to educate the public and fully inform the electorate** about... xxx the necessity of clean, free, orderly and honest electoral processes.”¹⁹

The duty to disclose information of public concern, and to afford access to public records, not being discretionary, its performance may be compelled by a writ of *mandamus* in a proper case.²⁰ Indeed, the people have petitioned post-RA 9369, through *Guingona vs. COMELEC and Cenpeg vs. COMELEC*, which the Supreme Court had felicitously granted.²¹

As the last bulwark of democracy in this country, the Court should spare nothing in its constitutionally-mandated duty to ensure that the fundamental right of the people to information on matters of public concern, especially on matters that directly affect our democratic processes, is fully guaranteed, protected, and implemented.²²

FOOTNOTES

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¹ See CAC, *Post-Election Report on the Use of the Automated Election System (AES) in the 2010 National and Local Elections*, June 2010,

http://www.cenpeg.org/2011pages/political_parties_and_elections/APRIL%202011/CAC_REPORT.pdf (Accessible as of June 8, 2011), or

<http://www.namfrel.com.ph/news/bulletin/CAC%20REPORT%20on%20the%20Use%20of%20the%20AES%20in%20May%202010%20Elections.pdf> (Accessible as of June 8, 2011)

² RA 9369, Section 9

³ 80 PHIL 383. 386 (1948), emphasis supplied

⁴ Bernas, Joaquin G., S.J., *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 2003 ed., p. 371

⁵ RA 8046 was enacted authorizing COMELEC to conduct a nationwide demonstration of a computerized election system and pilot-test it in the 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM). On the other hand, RA 8436 was passed, authorizing COMELEC to use an AES in the May 11, 1998 national and local elections and subsequent similar electoral exercises.

⁶ See *Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections*, dated July 10, 2009 (hereafter, “2009 Automation Contract”),

http://www.comelec.gov.ph/modernization/2010_natl_local/SBAC/contract/contract_toc.html (Accessible as of June 7, 2011)

⁷ G.R. No. 188456, September 10, 2009. Also see February 10, 2010 Resolution in said case.

⁸ In *Information Technology Foundation of the Philippines vs. COMELEC* [419 SCRA 141 (2004)], the Court declared null and void the contract of COMELEC with MPC, for the automation of the counting and canvassing of the ballots in said elections.

⁹ 150 SCRA 530 (1987)

¹⁰ *Id.* at 540, citations omitted

¹¹ 299 SCRA 744 (1998)

¹² 80 PHIL 388

¹³ *Id.* at 387

¹⁴ 108 SCRA 502, 508 (1981)

¹⁵ Bernas, Joaquin G., S.J., *The Intent of the 1986 Constitution Writers* (1995), pp. 185-188, emphases supplied

¹⁶ 70 *Phil.* 221 (1940)

¹⁷ *Subido vs. Ozaeta, supra*, at 388

¹⁸ *Baldoza vs. Dimaano*, 71 SCRA 14, 19 (1976)

¹⁹ BP 881, Section 52(j)

²⁰ Cf *Legaspi vs. CSC, supra*, at 539

²¹ See *Guingona vs. COMELEC*, G.R. No. 191846, May 6, 2010; *CENPEG vs. COMELEC*, G.R. No. 189546, September 21, 2010.

²² *Guingona vs. COMELEC, supra*