

Marcos v. Robredo: A Tale of Two Shades and the Ramifications of Having Different Thresholds in Discerning the Electorate’s Will in the Automated Elections System

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I. INTRODUCTION

Ballot shading, under the present Automated Election System (AES) in the Philippines, is the means by which the voter expresses his vote by shading the ovals on the ballot. The optical scan machine then reads the shading in favor of the candidates whose names appear beside the shaded ovals.¹ One of

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This Comment was written prior to Resolution No. 16-0600, dated 18 September 2018, of the Presidential Electoral Tribunal (PET), which upheld the use of the 25% shading threshold.

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the reasons why the government has opted to use ballot shading over the manual writing of the candidates' names is that the former obviates subjectivity arising from human intervention in the appreciation of handwriting on ballots that is inherent in the latter.² And yet, the pending election protest case of *Ferdinand "Bongbong" R. Marcos, Jr. v. Maria Leonor "Leni Daang Matuwid" G. Robredo*³ has shown that the same evil lurks in an AES ballot shading mechanism, i.e., the interpretation of an oval that is not fully shaded, or instead of a shade, contains other marks such as crosses or checks, ultimately requiring human appreciation to arrive at the true intent of the voter.⁴ The present issue in said protest probes on the shading threshold or the sufficient degree of shading or marking of an oval to be considered a valid vote.⁵

This Comment will limit itself to the aforementioned issue in *Marcos v. Robredo* particularly concerning the recent Presidential Electoral Tribunal (PET) Resolution dated 10 April 2018 (April 2018 PET Resolution), where the PET disregarded Commission on Elections (COMELEC) Minute Resolution No. 16-0600⁶ setting the shading threshold at 25% and reverted to the previous threshold at 50%.⁷

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1. See Commission on Elections, In Re: COMELEC Rules of Procedure on Disputes in an Automated Election System in Connection with the May 10, 2010 Elections, Resolution No. 8804 [COMELEC Res. No. 8804] (Mar. 22, 2010).
 2. *Loong v. Commission on Elections*, 305 SCRA 832, 880 (1999) (J. Panganiban, dissenting opinion) (citing Regalado E. Maambong, *New Technologies of Modernization in Electoral Administration: The Philippine Experience*, in SYMPOSIUM ON ASIAN ELECTIONS IN THE 21ST CENTURY: A REPORT 30 (1997 ed.)).
 3. Resolution, Apr. 10, 2018 (on file with PET), in *Ferdinand "Bongbong" R. Marcos, Jr. v. Maria Leonor "Leni Daang Matuwid" G. Robredo*, PET Case No. 005 (PET, filed June 29, 2016) (pending). See also Ina Reformina, PET fines Marcos, Robredo P50,000 each for violating gag order on electoral protest, available at <https://news.abs-cbn.com/news/06/26/18/pet-fines-marcos-robredo-p50000-each-for-violating-gag-order-on-electoral-protest> (last accessed Aug. 31, 2018).
 4. *Id.*
 5. *Id.* As of this writing, the case is still ongoing and this is the pivotal issue thus far.
 6. Commission on Elections, In the Matter of the Request of the Presidential Electoral Tribunal for a copy of the COMELEC Guidelines used in the Manual Counting of Ballots Specifically on the type of "Shadings" read by the Vote Counting Machine (VCM), for the Tribunal's Reference in Relation to PET

II. A BRIEF HISTORY OF THE SHADING THRESHOLD

To understand the debate over the two threshold percentages — 50% or 25% — it is necessary to briefly study the history of the shading threshold in the Philippines.

The shading threshold was first applied during the first AES in 2010, through COMELEC Resolution No. 8804. Then, COMELEC Resolution No. 8739,⁸ as amended by Resolution No. 8786,⁹ required that to be counted as valid votes, the shading must fully cover the oval.¹⁰ The full shading of the oval, however, was never strictly implemented.

Months prior to the day of election in May 2010, COMELEC Resolution No. 8804 set the first shading threshold percentage at 50%,¹¹ which, as will be discussed below, was adopted in the PET, House of Representatives Electoral Tribunal (HRET), Regional Trial Courts (RTC), and Municipal Trial Courts (MTC). Almost a year thereafter, and with several election protests pending before various electoral tribunals, Resolution No. 8804 was amended by Resolution No. 9164¹² by removing any shading threshold percentage.¹³ Resolution No. 9164 provided that any shade or mark shall be considered a valid vote based *not* on any threshold but on the “intent of the voter.”¹⁴ The intention of the COMELEC of slowly veering away from setting a high shading threshold towards relying more on

Case No. 005 (Marcos v. Robredo), Minute Resolution No. 16-0600 (Sep. 6, 2016).

7. *Id.*

8. Commission on Elections, General Instructions for the Board of Elections Inspectors (BEI) on the Voting, Counting, and Transmission of Results in Connection with the 10 May 2010, National and Local Elections, Resolution No. 8739 (Mar. 16, 2010).

9. Commission on Elections, Revised General Instructions for the Board of Election Inspectors (BEI) on the Voting, Counting, and Transmission of Results in Connection with the 10 May 2010, National and Local Elections, Resolution No. 8786 (Mar. 4, 2010).

10. COMELEC Res. No. 8739, § 35 (1).

11. COMELEC Res. No. 8804, rule 15, § 6 (l).

12. Commission on Elections, In the Matter of Reinstating and Reimplementing COMELEC Resolution No. 8804 with Amendments, Resolution No. 9164 (Mar. 16, 2011).

13. *Id.* § 1.

14. *Id.*

subjective determinants of voter's intent would become more evident in the subsequent elections.

Thus, during the 2013 elections, a shading threshold percentage was again absent in COMELEC Resolution No. 9595,¹⁵ such that any shade or mark will already be considered a vote, subject to claims and objections.¹⁶ Later, Resolution No. 9595 was amended by Resolution No. 9647,¹⁷ stated that the shade or mark should still meet a "threshold percentage" to be a valid vote, but without setting any actual percentage.¹⁸

Finally, in the 2016 elections, COMELEC Resolution No. 10078,¹⁹ as amended by Resolution Nos. 10090²⁰ and 10109,²¹ provided that any shade below the approved "threshold" will not automatically be a valid vote, but will be subject to the guidelines of the Random Manual Audit Committee.²² Again, no threshold percentage was fixed.

At this point, one might conclude that the PET was correct in reinstating the 50% shading threshold on the basis that since the COMELEC failed to specify the actual shading threshold percentage in the 2013 and 2016

15. Commission on Elections, In the Matter of the General Instructions for the Conduct of a Random Manual Audit (RMA) for the 13 May 2013 National, Local & ARMM Elections and Subsequent Elections Thereafter, Resolution No. 9595 (Dec. 21, 2012).

16. *Id.* § 9 (c).

17. Commission on Elections, In the Matter of Amending Commission En Banc Resolution No. 9595, "The General Instructions for the Conduct of a Random Manual Audit (RMA) for the 13 May 2013 National and Local Elections and Subsequent Elections Thereafter", Resolution No. 9647 (Feb. 22, 2013).

18. *Id.* § 9.

19. Commission on Elections, In the Matter of the General Instructions for the Conduct of Random Manual Audit (RMA) for the 9 May 2016 Automated Synchronized National and Local Elections and Subsequent Elections Thereafter, Resolution No. 10078 (Mar. 11, 2016).

20. Commission on Elections, In the Matter of the Amendments to the General Instructions for the Conduct of Random Manual Audit (RMA) for the 9 May 2016 Automated Synchronized National and Local Elections and Subsequent Elections Thereafter, Resolution No. 10090 (Apr. 13, 2016).

21. Commission on Elections, In the Matter of Further Amending Provisions of the General Instructions for the Conduct of Random Manual Audit (RMA) for the 9 May 2016 Automated Synchronized National and Local Elections and Subsequent Elections Thereafter, Resolution No. 10109 (May 3, 2016).

22. COMELEC Res. No. 10078, § 9 (c).

elections, then the original 50% from COMELEC Resolution No. 8804 in 2010 elections should be deemed as still controlling. On the contrary, however, shading thresholds were fixed by the COMELEC in 2013 and 2016. In the 2013 elections, then COMELEC Chairman Sixto S. Brillantes, Jr. revealed that the threshold percentage was set at 20%.²³ COMELEC, he said, chose not to publicize the actual percentage, probably because it might make the voters complacent of not shading the ovals fully.²⁴ Some academicians and legal authors note that the 20% shading threshold was a very low threshold because, if visualized, any shade below 20% is, borrowing the words of former Chairman Brillantes, Jr., the “smallest of dots”²⁵ so that it could be presumed that the shade or mark was accidental or unintended by the voter.²⁶ Thus, rejecting any shade that is less than 20% does not frustrate the intent of the voter. For the 2016 elections, the same thing may be said since the COMELEC similarly did not publicize an actual threshold percentage *prior* to the election. But *after* the 2016 election, the COMELEC formally set a shading threshold at 25% through COMELEC Resolution No. 16-0600.²⁷

III. RELEVANT FACTS IN *MARCOS V. ROBREDO*

After the 16 May 2016 national and local elections, Maria Leonor G. Robredo emerged as the winner in the vice presidential race having garnered the highest votes, with 14,418,817, followed by Ferdinand R. Marcos, Jr. with 14,155,344 votes.²⁸ With a margin of 263,473 votes, Robredo’s claim to

23. Dean Lozarie, How big a dot will PCOS Count, *available at* <https://www.rappler.com/nation/politics/elections-2013/28727-pcos-shading-threshold> (last accessed Aug. 31, 2018).

24. *Id.*

25. *Id.*

26. *See generally* Emil Marañon III, What Bongbong Marcos should understand about ballot images, *available at* <https://www.rappler.com/thought-leaders/194926-ferdinand-bongbong-marcos-ballot-images-protest-vice-president> (last accessed Aug. 31, 2018).

27. COMELEC Minute Res. 16-0600.

28. Patty Pasion, Robredo wins as VP on late husband's birthday, *available at* <https://www.rappler.com/nation/politics/elections/2016/134494-canvassing-last-day-duterte-robredo-win> (last accessed Aug. 31, 2018).

the position was questioned via an election protest by Marcos on the grounds of fraud, anomalies, and irregularities.²⁹

The protest (and counter-protest) proceeded with the revision of the pilot provinces of Camarines Sur, Iloilo, and Negros Occidental chosen by Marcos “due to the unusually high number of undervotes in [these] provinces.”³⁰ During the revision of the ballots from Camarines Sur, in an *ex parte* motion dated 05 April 2018, Robredo sought for the PET to direct the head revisors to apply the 25% shading threshold purportedly set by the COMELEC in the revision, recount, and re-appreciation of ballots.³¹ In the aforementioned 10 April 2018 PET Resolution, the Tribunal denied the motion and ordered the re-application of the 50% shading threshold, to wit

The Court is not aware of any COMELEC Resolution that states the applicability of a 25% threshold; and the Tribunal cannot treat the Random Manual Audit Guidelines and Report as proof of the threshold used by the COMELEC. In fact, COMELEC Resolution No. 8804, as amended by COMELEC Resolution No. 9164, which is COMELEC’s procedure for the recount of ballots in election protests within its jurisdiction, does not mention a 25% threshold. Prior to the amendment in Resolution No. 9164, Rule 15, Section 6 of Resolution No. 8804 states that any shading less than 50% shall not be considered a valid vote. The wording is[,] in fact[,] the same as Section 43 (1) of the 2010 PET Rules. COMELEC Resolution No. 9164, however, removed the 50% threshold[,] but did not impose a new threshold.³²

The 10 April 2018 PET Resolution is presently the subject of Robredo’s Urgent Motion for Reconsideration wherein she alleged that, as early as 6

29. CNN Philippines Staff, *Losing VP bet Marcos files electoral protest vs. VP-elect Robredo*, available at <http://cnnphilippines.com/news/2016/06/29/marcos-electoral-protest.html> (last accessed Aug. 31, 2018).

30. Ver Marcelo, *Marcos camp looking at 290,000 undervotes in pilot provinces for ballot recount*, available at <http://cnnphilippines.com/news/2018/04/02/bongbong-marcos-leni-robredo-undervotes-ballot-recount.html> (last accessed Aug. 31, 2018).

31. *Protестee’s Urgent Ex Parte Motion to Direct the Head Revisors to Apply the Correct Threshold Percentage as Set by the Commission on Elections in the Revision, Recount and Re-Appreciation of the Ballots, in Order to Expedite the Proceedings* dated April 5, 2018 (Ex Parte Motion), April 10, 2018, at 1 (on file with the PET), *in* Ferdinand “Bongbong” R. Marcos, Jr. v. Maria Leonor “Leni Daang Matuwid” G. Robredo, PET Case No. 005 (PET 2018) (pending).

32. *Id.* at 2 (emphases supplied).

September 2016, the PET was informed by COMELEC, by way of a Letter to the then clerk of the tribunal, Atty. Felipa B. Anama, of the 25% threshold used in the 9 May 2016 National and Local Elections.³³ The said adoption of the 25% shading threshold was adopted by COMELEC in Minute Resolution No. 16-0600.³⁴ Robredo argues that both factual circumstances give PET a legal basis to “impose a 25% threshold percentage in determining whether a vote is valid.”³⁵

A. Statement of the Issue

An analysis of the 10 April 2018 PET Resolution shows that the PET does not question the authority of the COMELEC to set the shading threshold percentage. Instead, the said Resolution is anchored on (a) the purported absence of any action of COMELEC in setting a new threshold percentage in lieu of the 50% threshold percentage, and (b) the insufficiency as evidence of the Random Manual Audit Guidelines and Report to prove that the 25% threshold was in fact used by the COMELEC.³⁶

B. Discussion

Arguing that the 10 April 2018 PET Resolution will be setting an unstable and potentially disenfranchising precedent, the Author will explain that the said PET Resolution constitutes an *ultra vires* act that encroaches on the authority of the COMELEC, which violates the equal protection clause under the Constitution and is poised to massively disenfranchise voters.

I. The 10 April 2018 PET Resolution is an *Ultra Vires* Act

If affirmed, the 10 April 2018 PET resolution, by refusing to acknowledge that the COMELEC has set 25% as the new shading threshold percentage,

33. Urgent Motion for Reconsideration (of the Resolution Dated 10 April 2018) with Reiterative Prayer to Immediately Direct the Head Revisors to use the Twenty Five (25%) Threshold Percentage in the Revision, Recount and Re-Appreciation of Ballots, April 18, 2018, at 1 (on file with the PET), *in* Ferdinand “Bongbong” R. Marcos, Jr. v. Maria Leonor “Leni Daang Matuwid” G. Robredo, PET Case No. 005 (PET 2018) (pending) & Lian Buan, Robredo appeals to PET to apply 25% shading threshold, *available at* <https://www.rappler.com/nation/200578-robredo-urgent-motion-shading-threshold-vp-ballot-recount> (last accessed Aug. 31, 2018).

34. COMELEC Minute Res. No. 16-0600.

35. Urgent Motion for Reconsideration, *supra* note 33, at 3.

36. Protestee’s Urgent Ex Parte Motion, *supra* note 31, at 2-4.

will constitute an *ultra vires* act because it encroaches on the authority of the COMELEC not only to promulgate rules, but also on the manner to promulgate such rules.

a. Setting Shading Threshold is a Quasi-Legislative Function

The COMELEC is a constitutional body charged with the duty to enforce all laws “relative to the conduct of elections;” it is duty-bound to see to it that the board of canvassers perform its proper functions.³⁷ The primary grant of power to the COMELEC is found in Section 2, Article IX-C of the Constitution, thus —

Sec[ti]on] 2. The [COMELEC] shall exercise the following powers and functions:

- (1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall.
- (2) Exercise exclusive original jurisdiction over all contests relating to the elections, returns, and qualifications of all elective regional, provincial, and city officials, and appellate jurisdiction over all contests involving elective municipal officials decided by trial courts of general jurisdiction, or involving elective barangay officials decided by trial courts of limited jurisdiction.

Decisions, final orders, or rulings of the [COMELEC] on election contests involving elective municipal and barangay offices shall be final, executory, and not appealable.

- (3) Decide, except those involving the right to vote, all questions affecting elections, including determination of the number and location of polling places, appointment of election officials and inspectors, and registration of voters.
- (4) Deputize, with the concurrence of the President, law enforcement agencies and instrumentalities of the Government, including the Armed Forces of the Philippines, for the exclusive purpose of ensuring free, orderly, honest, peaceful, and credible elections.
- (5) Register, after sufficient publication, political parties, organizations, or coalitions which, in addition to other requirements, must present their platform or program of government; and accredit citizens’ arms of the [COMELEC]. Religious denominations and sects shall not be registered. Those which seek to achieve their goals through violence or unlawful means, or refuse to uphold and adhere to this

37. *Cauton v. Commission on Elections*, 19 SCRA 911, 920 (1967) (citing *The Revised Election Code* [REVISED ELECTION CODE], Republic Act No. 180, § 3 (1947)).

Constitution, or which are supported by any foreign government shall likewise be refused registration.

Financial contributions from foreign governments and their agencies to political parties, organizations, coalitions, or candidates related to elections, constitute interference in national affairs, and, when accepted, shall be an additional ground for the cancellation of their registration with the [COMELEC], in addition to other penalties that may be prescribed by law.

- (6) File, upon a verified complaint, or on its own initiative, petitions in court for inclusion or exclusion of voters; investigate and, where appropriate, prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offenses, and malpractices.
- (7) Recommend to the Congress effective measures to minimize election spending, including limitation of places where propaganda materials shall be posted, and to prevent and penalize all forms of election frauds, offenses, malpractices, and nuisance candidacies.
- (8) Recommend to the President the removal of any officer or employee it has deputized, or the imposition of any other disciplinary action, for violation or disregard of, or disobedience to, its directive, order, or decision.
- (9) Submit to the President and the Congress, a comprehensive report on the conduct of each election, plebiscite, initiative, referendum, or recall.³⁸

It is well-established in jurisprudence that there are three classifications of the powers of the COMELEC: administrative, quasi-legislative, and quasi-judicial.³⁹ The quasi-judicial power of the COMELEC embraces the power to “resolve controversies arising from the enforcement of election laws, and to be the sole judge of all pre-proclamation controversies[] and all contests relating to the elections, returns, and qualifications.”⁴⁰ The Commission’s quasi-legislative power “refers to the issuance of rules and regulations to implement the election laws and to exercise such legislative functions as may expressly be delegated to it by Congress.”⁴¹ Meanwhile, the administrative function points “to the enforcement and administration of election laws. In the exercise of such power, the Constitution (Section 6, Article IX-A) and the Omnibus Election Code (Section 52 [(c)]) authorize the COMELEC to

38. PHIL. CONST. art. IX-C, § 2.

39. *Bedol v. Commission on Elections*, 606 SCRA 554, 568 (2009).

40. *Id.* at 568-69.

41. *Id.* at 569.

issue rules and regulations to implement the provisions of the 1987 Constitution and the Omnibus Election Code.”⁴²

Of relevance in the discussion is the quasi-legislative or the rule-making powers of the COMELEC originally emanating from Batas Pambansa (BP) Blg. 881,⁴³ and later on, in relation to the AES, Republic Act No. 8436,⁴⁴ as amended by Republic Act No. 9369.⁴⁵

42. *Id.*

43. Omnibus Election Code of the Philippines [OMN. ELECTION CODE], Batas Pambansa Blg. 881, § 52 (c). (1985). The cited Section provides that the COMELEC may

[p]romulgate rules and regulations implementing the provisions of this Code or other laws which the Commission is required to enforce and administer, and require the payment of legal fees and collect the same in payment of any business done in the Commission, at rates that it may provide and fix in its rules and regulations.

Rules and regulations promulgated by the Commission to implement the provisions of this Code shall take effect on the sixteenth day after publication in the Official Gazette or in at least daily newspapers of general circulation. Orders and directives issued by the Commission pursuant to said rules and regulations shall be furnished by personal delivery to accredited political parties within [48] hours of issuance and shall take effect immediately upon receipt.

In case of conflict between rules, regulations, orders[,] or directives of the Commission in the exercise of its constitutional powers and those issued by any other administrative office or agency of the government concerning the same matter relative to elections, the former shall prevail.

Id.

44. 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, Republic Act No. 8436, § 31 (1997). Section 31 provides that the COMELEC shall “promulgate rules and regulations for the implementation and enforcement of this Act including such measures that will address possible difficulties and confusions brought about by the two-ballot system. The Commission may consult its accredited citizens’ arm for this purpose.” *Id.*

45. 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

On the other hand, the jurisdiction of the PET and of other electoral tribunals, for that matter, is confined only to contests relating to the election, returns, and qualifications of candidates.⁴⁶ The PET was created under Article VII, Section 4 (7) of the 1987 Constitution⁴⁷ and was considered as an innovation. Prior to such express constitutional decree, there was

Accuracy of Elections, Amending for the Purpose Batas Pambansa Blg. 881, as Amended, Republic Act No. 7166 and Other Related Election Laws, Providing Funds Therefor and for Other Purposes, Republic Act No. 9369, §§ 30 & 10 (2007). Section 30 empowers the COMELEC to

promulgate rules and regulation for the implementation and enforcement of this Act. Notwithstanding the foregoing canvassing procedure, the Commission is authorized to prescribe other manner or procedure for the canvassing and consolidation of votes as technology evolves, subject to the provisions of Section 7 hereof on the minimum capabilities of the AES and other pertinent laws.

Id. § 30.

Section 10 provides —

To achieve the purpose of this Act, the Commission i[s] authorized to procure, in accordance with existing laws, by purchase, lease, rent[,] or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or board. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.

In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid.

Id. § 10.

46. THE 2010 RULES OF THE PRESIDENTIAL ELECTORAL TRIBUNAL, A.M. No. 10-4-29-SC, rule 13 (May 4, 2010).
47. PHIL. CONST. art. VII, § 4 (7). It states that “[t]he Supreme Court, sitting *en banc*, shall be the sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President, and may promulgate its rules for the purpose.” PHIL. CONST. art. VII, § 4 (7).

Republic Act No. 1793⁴⁸ and BP Blg. 884.⁴⁹ The precursors of the present Constitution, on the one hand, did not contain similar provisions and, instead, vested upon the legislature all phases of presidential and vice-presidential elections — from the canvassing of election returns, to the proclamation of the president-elect and the vice-president elect, and even the determination, by ordinary legislation, of whether such proclamations may be contested.⁵⁰ The Senate Electoral Tribunal (SET) and HRET, on the other hand, were created under Article VI, Section 17, of the 1987 Constitution.⁵¹ The MTCs and RTCs, acting as electoral tribunals, also receive their authority from Sections 251 and 252 of the BP Blg. 881.⁵²

The Supreme Court, in its 2010 decision for *Macalintal v. Presidential Electoral Tribunal*,⁵³ recognized that the PET, the SET, and HRET are electoral tribunals and are each specifically and exclusively clothed with jurisdiction by the Constitution to act respectively as the “sole judge of all contests relating to the election, returns, and qualifications’ of the President and Vice-President, Senators, and Representatives.”⁵⁴

Likewise, the Supreme Court in *Buac v. Commission on Elections*⁵⁵ peripherally declared that “contests involving the President and the Vice-President fall within the exclusive original jurisdiction of the [PET], [] in the exercise of [its] quasi-judicial power.”⁵⁶ In fulfilling this mandate of the PET as “sole judge of all contests relating to the election, returns, and qualifications” of the President and Vice-President, the tribunal is essentially

48. An Act Constituting an Independent Presidential Electoral Tribunal to Try, Hear and Decide Protests Contesting the Election of the President-Elect and the Vice-President-Elect of the Philippines and Providing for the Manner of Hearing the Same, Republic Act No. 1793 (1957).

49. An Act Constituting an Independent Presidential Electoral Tribunal to Try, Hear and Decide Election Contests in the Office of President and Vice-President of the Philippines, Appropriating Funds Therefor and for Other Purposes, Batas Pambansa Blg. 884 (1985).

50. See Republic Act No. 1793 & Batas Pambansa Blg. 884.

51. PHIL. CONST. art. VI, § 17.

52. OMN. ELECTION CODE, § 138.

53. *Macalintal v. Presidential Electoral Tribunal*, 635 SCRA 783 (2010).

54. *Id.* at 796.

55. *Buac v. Commission on Elections*, 421 SCRA 92 (2004).

56. *Id.* at 104.

considered as a quasi-judicial entity.⁵⁷ As a quasi-judicial agency, the tribunal is

empowered to promulgate rules for the conduct of its proceedings. It [is] mandated to sit *en banc* in deciding presidential and vice-presidential contests and authorized to exercise powers similar to those conferred upon courts of justice, including the issuance of subpoena, taking of depositions, arrest of witnesses to compel their appearance, production of documents and other evidence, and the power to punish contemptuous acts and bearings. The tribunal [is] assigned a Clerk, subordinate officers, and employees necessary for the efficient performance of its functions.⁵⁸

Ultimately, while the PET may promulgate its own rules and regulations, the same are only internal and procedural in nature.⁵⁹

As applied here, the above distinction between the powers of the COMELEC and the electoral tribunals will support the assertion that it is the former which has the power to set the shading threshold. *First*, setting a shading threshold is a quasi-legislative function. *Second* and intimately related to the first, setting a shading percentage is still part of the conduct of the elections, and does not pertain to any contest or protest relating to an election. Indeed, when setting a shading threshold for an upcoming election, there is yet no controversy on which an electoral tribunal may decide. *Third*, the COMELEC is the agency vested with authority to have, as it has, technical expertise over election and whose rules must prevail over those of other agencies in case of conflict.⁶⁰

57. *Id.*

58. *Macalintal*, 635 SCRA at 806.

59. In the case of the PET, Section 3 of Batas Pambansa Blg. 884 provides —

Section 3. Five members of the Tribunal shall constitute a quorum to do business. *Unless otherwise specifically provided herein, it may provide its own rules and regulations concerning the procedure in the filing and hearing of such contests filed before it.* The Tribunal shall hear and decide *en banc* all presidential and vice-presidential election contests brought under this Act, and the concurrence of at least five members of the Tribunal shall be necessary for a final decision thereon.

Batas Pambansa Blg. 884, § 3 (emphasis supplied).

60. Article VII, Section 52 (c) (3) of Batas Pambansa Blg. 881 provides that “[i]n case of conflict between rules, regulations, orders[,] or directives of the Commission in the exercise of its constitutional powers[,] and those issued by any other administrative office or agency of the government concerning the same matter relative to elections, the former shall prevail.” OMN. ELECTION CODE, art. VII, § 52 (c), para. 3.

In fact, the authority of the COMELEC to set the shading threshold has been recognized by the electoral tribunals. Any time that the COMELEC would set and re-set the shading threshold, the electoral tribunals would follow suit. During the first automated election in 2010, COMELEC Resolution No. 8804 set the shading threshold percentage at 50%.⁶¹ Following suit, the Supreme Court for PET,⁶² the MTC/RTC,⁶³ and HRET⁶⁴ likewise adopted the 50% shading threshold in its rules. During the 2013 elections, COMELEC Resolution No. 9595, as amended, removed any shading threshold percentage.⁶⁵ The SET also removed the shading threshold percentage in its rules.⁶⁶

a. PET's Refusal to Acknowledge COMELEC Minutes Resolution No. 16-0600 Setting a New Shading Threshold is an Ultra Vires Act

By feigning ignorance of COMELEC Minutes Resolution No. 16-0600, which set a new shading threshold at 25%, and by reinstating the old 50%, PET is encroaching upon the jurisdiction of the COMELEC. Considering that the COMELEC, through said Minute Resolution No. 16-0600, has already admitted to setting a threshold percentage of 25%, the PET should have taken cognizance thereof and granted Robredo's *ex parte* motion to apply the 25%.

Marcos counters that the 25% threshold was never mentioned in COMELEC Minutes Resolution No. 16-0600.⁶⁷ There is, however, no need to mention the 25% within the body itself of the Minute Resolution because it already adopted *in toto* the Memorandum of Commissioner Luie

61. COMELEC Res. No. 8804, § 6 (l).

62. THE 2010 RULES OF THE PRESIDENTIAL ELECTORAL TRIBUNAL, rule 43 (l).

63. 2010 RULES OF PROCEDURE IN ELECTION CONTESTS BEFORE THE COURTS INVOLVING ELECTIVE MUNICIPAL OFFICIALS, A.M. No. 10-4-I-SC, rule 10, § 6 (h) (Apr. 27, 2010).

64. House of Representatives Electoral Tribunal, Guidelines on the Revision of Ballots, § 10 (e) (Jan. 19, 2011).

65. See COMELEC Res. No. 9595 & COMELEC Res. No. 9647.

66. See Senate Electoral Tribunal, Rules and Procedures Governing the Revision of Ballots Under the Automated Election System, rule 64 (Nov. 28, 2013).

67. Tetch Torres-Tupas, Bongbong Marcos: Leni's claim on Comelec threshold for shading of ballots 'misleading', PHIL. DAILY INQ., May 28, 2018, available at <http://newsinfo.inquirer.net/994952/bongbong-marcos-lenis-claim-on-comelec-threshold-for-shading-of-ballots-misleading> (last accessed Aug. 31, 2018).

Tito F. Guia to Atty. Felipa B. Anama (Guia Memorandum) which stated that the shading threshold was set at 25% and was attached to the Minute Resolution.⁶⁸ In other words, the Guia Memorandum is an integral part of the Minute Resolution already.

That the COMELEC Minute Resolution was issued post-election is of no moment as long as it can be proven that the 25% was in fact used during the election day itself, which can be verified by simply checking the programming of the Precinct Count Optical Scan (PCOS) machines.

b. The 25% Shading Threshold Percentage as Used in the Random Manual Audit was Adopted for the 2016 Elections

The 10 April 2018 PET Resolution also ruled that the Random Manual Audit (RMA) was not sufficient proof that the 25% was used in the 2016 elections.⁶⁹ Unfortunately, the PET failed to take cognizance of the first paragraph in the Guia Memorandum, an integral part of COMELEC Minutes Resolution No. 16-0600, categorically stating the RAM Guidelines indicating the 25% threshold was adopted for the 2016 elections —

We address your request for a ‘copy of the *Smartmatic Guidelines*’ for vote appreciation which was used in the Random Manual Audit. *Said ‘Guideline’ is actually an illustration of the different types of marks or shadings that would be read either as votes or non-votes by the optical scan counting system adopted for the 2016 elections.*

The system adopted is designed to scan every oval on the ballot and count as vote those that contain appropriate marks based on pre-determined shading threshold. Although the voters are told through the voter information efforts of the Commission to shade the ballots *fully*, the shading threshold was set *at about 25%* of the oval space.⁷⁰

Moreover, it is incorrect to state that the RMA Guidelines and Report are not sufficient evidence to prove any official action on the part of the COMELEC. This is because, at least as far as the RMA Guidelines is concerned, they are promulgated by the COMELEC *en banc* itself. For instance, in the 2013 elections, the RMA Guidelines were already embodied

68. See Mara Cepeda, Comelec Resolution disproves SC claim on ballot shading, available at <https://www.rappler.com/nation/200293-comelec-resolution-disproves-supreme-court-ruling-ballot-shading-vp-protest> (last accessed Aug. 31, 2018).

69. *Ferdinand “Bongbong” R. Marcos, Jr.*, PET Case No. 005, at 2.

70. Memorandum by Commissioner Luie Tito F. Guia (on file with PET), Sep. 6, 2016, at 1, *in* Minute Resolution No. 16-0600 (emphases supplied).

in Resolution No. 9595, as amended by Resolution No. 9647. In the 2016 elections, the RMA Guidelines were ratified by Minute Resolution No. 16-0600, to wit —

The Commission RESOLVED, as it hereby RESOLVES, to adopt and confirm the attached Memorandum of Commissioner Louie Tito F. Guia, Oversight Commissioner for the Random Manual Audit 2016, addressed to Atty. Felipa B. Anama, Clerk of the Tribunal, Presidential Electoral Tribunal, *together with the Random Manual Audit guidelines on the appreciation of markings* for the [9 May 2016] National and Local Elections, as the position of the Commission specifically on the type of marks or shadings that would be read either as votes or non-votes by the optical scan counting system for the [9 May 2016] [National and Local Elections].⁷¹

Thus, read in its entirety, the Minute Resolution No. 16-0600, including the Guia Memorandum adopted in *toto*, is sufficient proof that the 25% threshold under the RAM Guidelines was officially “adopted for the 2016 elections.”

2. The 10 April 2018 PET Resolution Violates Equal Protection Clause

The equal protection clause guarantees that “no person or class of persons shall be deprived of the same protection of laws which is enjoyed by other persons or other classes in the same place and in like circumstances.”⁷² It is settled in constitutional law that the “equal protection clause does not prevent the Legislature from establishing classes of individuals or objects upon which different rules shall operate — so long as the classification is not unreasonable.”⁷³

The 10 April 2018 PET Resolution risks setting a dangerous precedent where every electoral tribunal will set its own shading threshold in total disregard of the pre-established threshold of COMELEC.

There have been reports that the HRET and SET have already adopted the 25% threshold of the COMELEC.⁷⁴ The assailed PET Resolution

71. COMELEC Minute Res. No. 16-0600, at 2 (emphasis supplied).

72. *Abakada Guro Party List v. Ermita*, 469 SCRA 14, 139 (2005) (citing *Philippine Rural Electric Cooperatives Association, Inc. (PHILRECA) v. The Secretary, Department of Interior and Local Government*, 403 SCRA 558, 565 (2003)).

73. *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*, 446 SCRA 299, 343 (2004).

74. Edu Punay, *Leni Robredo may lose votes due to shading limit*, PHIL. STAR, Apr. 17, 2018, *available at*

therefore will result in a situation where the 50% applies to the vice presidential race, while the 25% applies to congressional and senatorial seats. Illustratively, an innocent voter who either fully or partially shades the ovals at 50% will be enfranchised on all his votes. Meanwhile, another equally innocent voter who partially shaded all of the ovals at 25% will be disenfranchised on his votes for the vice president although his votes will be recognized for all the other elective positions. The disparity in the treatment of votes of these otherwise equally situated voters entirely rests on the almost accidental, unintentional act of shading. It is submitted that the mere difference in partial shading, when intent of voter is clear, is not a substantial difference to justify deviation from the mandate of the equal protection clause.

The application of equal protection clause in relation to a technical aspect of an AES has been done before, albeit in a different, but otherwise persuasively applicable, jurisdiction. In the United States (US) case of *Bush v. Gore*,⁷⁵ a recount dispute in the state of Florida during the 2000 presidential elections arose due to confusion in the interpretation of punched holes (as opposed to shaded ovals in the Philippines) to signify a vote.⁷⁶ The US Supreme Court was presented with the question of whether the recount procedures the Florida Supreme Court adopted were “consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate”⁷⁷ as there was no statewide standard to govern the recount in each county in Florida because each county was on its own to determine the validity of ambiguous holes, e.g., a “hanging chad” (incompletely pierced ballots) and “pregnant chad” (ballots that were dimpled, but not pierced).⁷⁸ The case has showed that punch-card balloting machines “can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter.”⁷⁹

The US Supreme Court held that standardless manual recounts violate the Fourteenth Amendment’s Equal Protection Clause and ratiocinated such a finding in this manner —

<https://www.philstar.com/headlines/2018/04/17/1806726/leni-robredo-may-lose-votes-due-shading-limit> (last accessed Aug. 31, 2018).

75. *Bush v. Gore*, 531 U.S. 98 (2000).

76. *Id.* at 101.

77. *Id.* at 105.

78. *Id.* at 105-08.

79. *Id.* at 104.

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. *Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. ... It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'*⁸⁰

To borrow the US Supreme Court's words here, the 10 April 2018 PET Resolution is a "later arbitrary and disparate treatment."⁸¹ It is "late" because setting the 50% threshold was made after the conduct of the election; it is "arbitrary" because of the PET's refusal to recognize the COMELEC Minute Resolution No. 16-0600 based on no reason other than that it is "not aware" of such; and it is "disparate" because it opens the door to various electoral tribunals setting its own shading threshold.

Finally, to emphasize the belatedness and arbitrariness of returning to the 50% threshold at this late a stage, during the actual election day in 2010, the ballot of a voter who shades less than 50% was allowed a second chance to re-shade because the PCOS machine would return the ballot until the shade is at least 50%.⁸² Here, to revert to the 50% becomes prejudicial to the voter because obviously, the voter can no longer be given a second chance to re-shade.

3. The 10 April 2018 PET Resolution will Result in Massive Disenfranchisement

The right to suffrage is an important political right in our jurisdiction; a right given or withheld at the exercise of the lawmaking power of the sovereignty. It is not a natural right of the citizen but a franchise dependent upon law and which must be conferred to permit its exercise.⁸³ It is predicated upon the theory that the "people who bear the burden of government should share in the privilege of choosing the officials of that government. [This] is the theory of a representative form of government."⁸⁴

80. *Id.* at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) & *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)) (emphasis supplied).

81. *Bush*, 531 U.S. at 104.

82. Lozarie, *supra* note 23.

83. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008).

84. *Macolor v. Amores*, 94 Phil. 1, 7 (1953).

Suffrage is a citizen's right to exercise his or her part of sovereignty in common with his fellow citizens.⁸⁵

In the Philippines, the sovereignty of the Filipino people is expressed through the ballot. In the case of *Malabaguio v. Commission on Elections*,⁸⁶ the High Tribunal emphasized the following, to wit —

This Court has repeatedly stressed that the importance of giving effect to the sovereign will of the people as expressed through the ballot must be given fullest effect. In case of doubt, political laws must be interpreted to give life and spirit to the popular mandate. ... [U]pholding the sovereignty of the people is what democracy is all about. When the sovereignty of the people expressed [through] the ballot is at stake, it is not enough for this Court to make a statement but it should do everything to have that sovereignty obeyed by all. Well done is always better than well said. *Corollarily, laws and statutes governing election contests[,] especially the appreciation of ballots[,] must be liberally construed to the end that the will of the electorate in the choice of public officials may not be defeated by technical infirmities.*⁸⁷

In the case of *Bush*, the US Supreme Court recognized the difficulty of ascertaining the intent of the voter when faced with a myriad of contradicting and unclear facts —

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and[,] in some cases[,] the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment. The want of those rules here has led to unequal evaluation of ballots in various respects.⁸⁸

As a device used to convey the electorate's will, the cardinal objective in the appreciation of ballots is to discover and give effect to the intention of

85. See Ida Husted Harper, *Suffrage: A Right*, 183 N.A.M. REV. 599 (1906).

86. *Malabaguio v. Commission on Elections*, 346 SCRA 699 (2000).

87. *Id.* at 701 (citing *Torayno, Sr. v. Commission on Elections*, 337 SCRA 574, 588 (citing *Garay v. Commission on Elections*, 261 SCRA 222, 234 (1996)) & *Pangandaman v. Commission on Elections*, 319 SCRA 283, 287 (1999) (citing *Loong v. Commission on Elections*, 305 SCRA 832, 871 (1999) & *Punzalan v. COMELEC*, 289 SCRA 702, 720 (1998))) (emphasis supplied).

88. *Bush*, 531 U.S. at 106.

the voters⁸⁹ such that extreme caution should be observed before any ballot is invalidated and that doubts are resolved in favor of the ballot's validity. The Supreme Court held that

[t]he cardinal objective in ballot appreciation is to discover and give effect to, rather than frustrate, the intention of the voter. Extreme caution is observed before any ballot is invalidated and doubts are resolved in favor of the ballot's validity. Public respondent HRET was guided by this principle and the existing rules and rulings in its appreciation of the contested ballots.⁹⁰

Additionally, the Court has also held that “[a] citizen cannot be disenfranchised for the flimsiest of reasons. Only on the most serious grounds, and upon clear and convincing proof, may a citizen be deemed to have forfeited this precious heritage of freedom.”⁹¹

Here, indeed, is a case of doubt as to which of the threshold of 50% or 25% should be applied, and such doubt, applying the doctrine, should be decided in favor of the validity of that threshold which will give effect to more votes. The degree of caution, i.e., extreme, should have behooved the PET to more carefully consider COMELEC Minute Resolution No. 16-0600, instead of brushing it off as sadly not being in the realm of its “awareness.” Moreover, casting aside those below 25% — without looking at the intent of the voters — is a nonchalant derogation of voters’ right in disregard of the requisite degree of caution.

Neither should innocent voters be disenfranchised for any mistake arising from an act or omission of the COMELEC. It has been held that where an election official commits a non-feasance affecting the ballot, such act or omission “should not penalize [an innocent] voter with disenfranchisement, thereby frustrating the will of the people.”⁹² Applied here, the failure of COMELEC to clarify the shading threshold prior to election should not penalize innocent voters who shaded less than 25%.

There is an argument that it is still premature to question the 10 April 2018 PET Resolution. Those votes with less than 25% will not automatically be disenfranchised because the decision of the Recount Committee to

89. OMN. ELECTION CODE, § 211.

90. *Locsin v. House of Representatives Electoral Tribunal*, 693 SCRA 635, 648 (2013) (citing *Torres v. House of Representative Electoral Tribunal*, 351 SCRA 312, 327 (2001) & *Silverio v. Castro*, 19 SCRA 520, 528 (1967)).

91. *Asistio v. Aguirre*, 619 SCRA 518 (2010).

92. *Locsin*, 693 SCRA at 650.

“shelve” them is only temporary. The final decision to include or exclude them rests on the PET. While this is true, an important fact is omitted. When the Recount Committee temporarily “shelves” a ballot, Robredo’s revisors have to promptly claim such ballot as hers so that it may be forwarded to the PET for final decision.⁹³ Otherwise, failure to claim will permanently exclude the ballot from the recount. In which case, the voter of that ballot will suffer from disenfranchisement because of the failure or negligence of Robredo’s revisors to claim.

IV. CONCLUSION

As a final note, the lessons to be drawn from *Marcos v. Robredo* not only apply to the parties thereto. They affect the integrity and credibility of the promises of AES to bring forth an efficient and objective manner of voting and counting. The issue presented in this case may have a major impact and significance for its future trajectory in the political landscape and electoral processes of the Philippines. Regardless of the ultimate outcome of the case, it is still incumbent upon the COMELEC to adopt a uniform shading threshold or other measures to determine the validity of such impartial shades and ambiguous marks that will uphold the sanctity of the ballot and comply with the equal protection clause.

93. COMELEC Res. No. 8804, rule 15, § 6.