



BRIEFING PAPER ON REPUBLIC ACT NO. 9369 AND THE AUTOMATED ELECTION SYSTEM

This paper was prepared by Atty. Luie Tito F. Guia for IFES Philippines.

This paper was prepared and published with funding support from the United States Agency for International Development (USAID)



March 31, 2008

Introduction and Scope of the Paper

On January 23, 2007, less than four months before the May 14, 2007 congressional and local elections, President Gloria Macapagal-Arroyo signed into law Republic Act (RA) No. 9369. This law amended and repealed almost all of RA 8436¹, a 1997 law that authorized the conduct of an automated election. Questions were raised as to whether the May 2007 elections would be automated. But the Commission on Elections (COMELEC) declared that it was not possible to conduct an automated election as there was not enough time to prepare for it.

However, even after it was certain that the May 2007 elections were to be purely manual, a lot of other worrisome issues relating to RA 9369 surfaced. Many, including some COMELEC staff, were apprehensive of the changes introduced by RA 9369 to the counting and canvassing stages of the election under a manual process. The law also amended portions of several laws, like the Omnibus Election Code and its amendatory laws - RA 6646,² RA 7166,³ RA 8045,⁴ and RA 8173,⁵ relating to manual elections. These issues shall be discussed later in this paper.

Nonetheless the issues were rendered moot when none of the new requirements in RA 9369, except the posting of the Election Returns and the Certificates of Canvass,⁶ were implemented.

Recently, COMELEC decided to use automated election system (AES) in the upcoming August 11, 2008 elections in the Autonomous Region in Muslim Mindanao (ARMM) as a way of pilot-testing the use of

new election technologies.⁷ The Commission decided to apply the Direct Recording Electronic (DRE) election system in the whole province of Maguindanao, and the paper based election system using Optical Mark Reader (OMR) in the rest of the region.⁸

This paper hopes to explore the nuances of RA 9369 and anticipate the possible issues that may arise as regards its implementation in actual elections. The law will be analyzed both as a governing statute on election automation, and as a law that introduced several crucial changes to the manual process.

The discussion of the law will be preceded by a brief narration on past efforts to modernize Philippine elections, towards the law's enactment in 2007. RA 9369 will then be explored, in an effort to find answers to the following questions:

- What kind of "automated election system" is provided under the law?
- Does the law allow partial automation?
- Are all "elections" required to be automated?
- What is the geographical coverage of the automated elections as mandated by law?
- What are the mechanisms provided under the law that hopes to ensure the reliability and accuracy of the automated election system?
- What fall back mechanism is available under the law should the automated system fail?
- What does the law say about the procurement of the system's components?
- What are the mechanisms provided under the law allowing stakeholders' participation or involvement in the process?

- What provisions of law are there to address sustainability of the automated election system?
- What are the new features provided by the law as regards manual elections?

Past efforts towards automating Philippine elections

Philippine elections have always been conducted manually. Voters have to write by hand the names of their chosen candidates on the ballots. Counting of votes is done at the polling place with the Board of Election Inspectors (BEI) reading the votes aloud and simultaneously recording them by means of sticks or *taras* on a tally sheet or election return, and on a black board or tally board. The precinct results, as contained in election returns, are sent to the municipal or city Boards of Canvassers (BOC), who would then canvass or tabulate the precinct results by writing them in a document known as statement of votes. The municipal or city results are reflected in a municipal or city Certificate of Canvass (COC), which are sent to higher canvassing levels. The same process is observed as the tabulation goes up to higher stage of canvassing.

These procedures were provided in detail in every election code that the country had. The 1937 Election Code (Commonwealth Act No. [CA] 357) prescribed practically the same procedure. The same is true as regards the Revised Election Code of 1947 (RA 180), which replaced CA 357. The Election Code of 1971 (RA 6388) and the 1978 Election Code (Presidential Decree [PD] No. 1296) also outlined a detailed manual process of voting, counting and canvassing of votes. The Omnibus Election Code of 1985 (Batas Pambansa [BP] Bilang 881) carried on the long tradition of a manual election process.

Out of the highly manualized system of elections came various fraudulent election practices. Substitution of ballots at the precinct level and tampering of election returns and statements of votes at the canvassing stage were easily executed by criminals hired to alter election results. The election adjudication system is grossly inadequate to respond to complaints of election fraud. Most protest cases are resolved near the end of the term of the office contested and almost no one gets convicted and jailed for violating election laws.

The synchronized conduct of the elections mandated by the 1987 Constitution further highlights the weakness of the manual system. Whereas before, national elections and local elections were held separately, now both elections are conducted simultaneously every three years.⁹ There are between 20 to 32 positions contested in every regular electoral exercise, which means, that voters can write up to 20 to 32 names on the ballots. Tabulation of results by hand at the BOC levels is even worse. The manual elections became more tedious and cumbersome not only to the BEIs, the BOCs, and the COMELEC, but also to voters, candidates and watchers. Opportunities for fraud by altering election results through the tampering of documents became greater.

After the 1992 elections, COMELEC commissioners and the agency's senior career officials went on a strategic planning session to assess the existing conduct of elections and to find ways to solve the problems identified. The result was a decision to work for the improvement of the highly manualized and tedious election process by considering the use of an automated election system (AES). Accordingly, COMELEC solicited the help of experts for the evaluation of the existing structure and processes of the

agency. Out of these initiatives came the decision, among others, to modernize elections through the automation of the voting, counting, and canvassing processes, as well as the computerization of the voters list.

However, the statutory regime at that time provided insufficient authority for the COMELEC to implement an AES. All it had was Section 52 (i) of the Omnibus Election Code, which states that COMELEC may prescribe the *use or adoption of the latest technological and electronic devices, taking into account the situation prevailing in the area and the funds available for the purpose*.¹⁰ Thus, for COMELEC to pursue its plans for a modernized election, a law for the purpose needs to be enacted. COMELEC proposed a new Election Code that would provide it with sufficient authority and a flexible legal framework to enable it to modernize the election process and adopt an AES.

However, enacting a complete election code was not realizable. Congress opted to pass the electoral reform laws that are contained in the proposed election code on a piecemeal basis.

In 1995, Congress passed RA 8046 authorizing a nationwide demonstration of a “computerized” election system and the pilot-testing of the same in the ARMM for the region’s March 1996 elections. The system that was adopted for the pilot testing involved the use of an optical scanning/mark-sense reading device. Ballots were accomplished at the polling places but they were transported to a central counting center, where the optical scanning counting machines were situated, after the closing of the polls.

In December of 1997, Congress, after much debate, passed RA 8436, a law that authorized the nationwide automation of the voting and counting, as well as the canvassing processes, in the then upcoming May 1998 national and local elections and in subsequent elections. This law adopted the optical scanning technology as the sole automated election system that could be used.¹¹ However, in the said elections the law was applied only to the ARMM region.¹²

Some of the machines used in Sulu in the same elections failed to accurately read the votes on the ballots. The votes of one candidate went to another candidate in the municipality of Pata. The cause was the misalignment of the printing on the ballots. The Supreme Court sustained the COMELEC in the latter’s decision to manually count the votes in Manila as a fallback remedy.¹³

RA 8436 was criticized for being too technology-specific. Some would even accuse the law of being a virtual *technical specification* of counting machines from a particular manufacturer. Nonetheless, all of these accusations were rendered moot as the law was never implemented in any of the subsequent electoral exercises.

Although automation under RA 8436 should have been implemented in the succeeding May 2001 elections, circumstances did not allow it to happen.

The best opportunity for RA 8436 to be implemented nationwide would have been the May 2004 presidential elections.¹⁴ More than a year before COMELEC awarded the contract for the supply of OMR machines to Mega Pacific consortium. But the law was again left unimplemented as the Supreme Court voided the Mega Pacific award on the principal ground that the bidding was

plagued by irregularities.¹⁵ The 2004 presidential elections employed the old manual process instead.

Since 1992, there has been a persistent clamor for the “computerization” of the elections as the scourge of *dagdag-bawas* (vote padding and vote shaving) was gaining widespread condemnation. Even the president was accused of resorting to *dagdag-bawas* to ensure her victory in the May 2004 presidential elections. Not only did this affect public perception of the legitimacy of the president’s election, it put the whole institution of elections at its lowest credibility level. This has provided stronger impetus to the campaign for the automation of the election process in the hope that *dagdag-bawas* would be prevented.

Then came RA 9369.

Exploring Republic Act No. 9369

Brief introductory description of the law.

At first glance, a layman can get easily frustrated at reading and trying to understand the law. It is basically a lengthy statute replacing almost the entire RA 8436. It also amended relevant provisions of the Omnibus Election Code, RA 6646 and RA 7166. However, each of the first 43 sections of the law is styled as an amendment of specific sections of the previous laws mentioned. It was a bit taxing to analyze the law the way it was drafted, because to better understand it, constant reference to the laws it amended has to be resorted to. The style employed in crafting the law would fit a statute that contains fewer amendments. But it definitely is not advisable for statutes that virtually obliterate previous laws, as is the case here.

Secondly, it is obvious that RA 9369 covers two distinct subject matters. Sections 1 to 30 of the law provide the policy and the requirements for an automated election system, while Sections 31 to 40 concern amendments to laws governing manual elections. Sections 28 (penal clause), 29 (applicability clause) and 30 (implementing guideline clause) of RA 9369 are like the usual final provisions of ordinary statutes. Thus, sections 1 to 30 could have very well been a separate statute altogether, in as much as Sections 31 to 40 could likewise have been another.

Combining the two contextually distinct subject matters in one law can potentially result in confusion and misapprehension in the interpretation and application of the law. Nonetheless, for the purpose of analyzing the present state of the law on automated election system, Sections 1 to 30 of RA 9369 will be dealt with separately from the rest of the law.

For facility in understanding the law, there are two attachments to this paper, one, a per provision comparison between RA 9369 with RA 8436, and RA 9369 with the provisions in BP 881, RA 6646, and RA 7166 which it amended.

What kind of “automated election system” is provided for under the law?

RA 9369 defines automated election system (AES) *as the use of an appropriate technology which has been demonstrated in voting, counting, and the consolidation, canvass, and transmission of election results.*¹⁶ It does not include other aspects of election process, such as voter registration, or precinct boundary setting.

Under the law, AES can either be paper-based or a direct recording electronic election system.¹⁷ The law defines paper-based election system as a type of AES that *uses paper ballots, records and counts votes, tabulates, consolidates/canvasses and transmits electronically the results of the vote count.*¹⁸ Direct recording electronic (DRE) election system, on the other hand, is defined as one that uses electronic ballots *by means of a ballot display in a mechanical or electro-optical component that can be activated by the voter.*¹⁹ It must also be able to record voting data and ballot images, and to transmit voting results electronically.²⁰ It can be likened to an Automated Teller Machine (ATM) used in bank transactions.

Whether the AES is paper-based or DRE, the paper ballot, whether printed or generated by the technology applied, is considered as the official ballot.²¹

COMELEC is the agency empowered to prescribe the kind of AES that can be used in elections.²² But whatever AES COMELEC chooses, it should be able to ensure the secrecy and sanctity of the ballot.²³

When DRE is used, electronic displays must be constructed in such a way as to present the names of all candidates for the same position in the same page or screen, or in a series of sequential pages but with the voter being able to see all of the ballot options on all pages before completing his or her vote.²⁴ The DRE display must also allow the voter to review and change all ballot choices prior to completing and casting his or her ballot.²⁵

However, the DRE machine is required to generate a printed copy of the vote, so as to enable the voter to find out whether the machine has correctly registered his choice.²⁶ This printed copy will then have to be

dropped in a ballot box before the voter leaves the polling place. The printed copy may be used for recount purposes.

At least one DRE machine must be available in each of the polling places because voters will directly use the machine in registering their votes. So if there are 225,000 election precincts nationwide, the nationwide use of a DRE system would require the deployment of at least 225,000 voting machines throughout the country.²⁷ If it is determined that there must be at least three DRE machines in each precinct to optimize the benefits of AES, then the number could increase to at least 675,000 units nationwide, not counting the stand-by units.

In a paper-based AES however, what is envisioned by the law is that machine-readable ballots are prepared by voters at the polling places, but said ballots, after the closing of polls, are brought to counting centers for counting. It is in these counting centers that the election returns are printed and electronically transmitted.

Under this system, it is very possible that no precinct results would be available before the ballots are transported from the polling places to the central counting centers. This would make the transport stage very crucial and dangerous. Once the uncounted ballots are stolen or snatched in transit, there would be no precinct result whatsoever, thus a failure in election. The vulnerability of this system is especially true in high security risk areas, like the ARMM region. It would be best to situate the counting centers within the polling centers or school compounds to reduce this risk.

The law also provides that election returns, whether the system is paper-based or DRE, must be generated in both electronic and printed form. The printed form should be directly produced by the counting, or by the

voting machines. The AES should be able to print at least 30 copies of the election returns to be distributed to designated recipients. Each copy of the printed election returns shall bear appropriate control marks to determine the time and place of printing.²⁸ The printing of the 30 copies, however, must precede the electronic transmission of the precinct results.

After electronically transmitting the precinct results, the BEI may also print not more than 30 additional copies of the election returns to provide whoever else would request, at the latter's expense.²⁹ The election returns transmitted electronically and digitally signed shall be considered as official election results and shall be used as the basis for the canvassing of votes and the proclamation of a candidate.³⁰

Some do not agree that the electronic version of the election returns and the certificates of canvass should be the official copy. They prefer that both the printed copies and the electronic copies be equally granted official status. This argument has good basis. The copies officially distributed to the parties, citizen's arms and the media are the printed copies. Should there be discrepancies between a printed copy and an electronic copy, the printed copy should actually be given more weight as it is the one that is published and distributed openly.

Just like in the manual process, canvassing and consolidation of election results is done through the usual canvassing tiers. Precinct results go to the municipalities and cities, then to the districts or provinces, and to Congress or COMELEC. The law does not seem to allow official precinct results to go directly to the provincial or national levels without passing through the intermediate levels. In other words, COMELEC can only canvass provincial certificates of canvass,³¹

and not municipal certificates of canvass. Similarly, provincial boards of canvassers cannot canvass election returns even if they would receive electronically transmitted copies, but can only canvass municipal certificates of canvass.

The municipal and city BOCs canvass election results by consolidating electronically transmitted results contained in the data storage devices used in the printing of the election returns. The higher BOCs, on the other hand, canvass election results by consolidating certificates of canvass electronically transmitted from the city/municipal/provincial consolidating centers or the results contained in the data storage devices submitted by lower canvassing boards. The certificates of canvass transmitted electronically and digitally signed are considered as official election results and shall be used as the basis for the proclamation of a winning candidate.³²

There is one question that can be raised here. The higher level BOCs canvass either the certificates of canvass transmitted electronically from the consolidating centers or those contained in the data storage device submitted by lower canvassing boards. However, what the law consider as official election results are those coming from the electronically transmitted certificates of canvass. What happens now when the higher BOC canvasses results contained in the data storage device submitted by lower BOCs instead? Are the results generated by this process less official than the *electronically transmitted* results? Or does it make sense to make a distinction between the two in the first place?

For the August 11, 2008 regional elections in the ARMM, COMELEC, as stated earlier, has decided to prescribe the use of DRE technology in the whole province of

Maguindanao and the paper-based OMR technology for the rest of the region.³³ In its request for proposal for bidding³⁴ of the AES hardware and software to be used in the elections, COMELEC has allocated 3,002 DRE machines for the 1,783 clustered precincts in Maguindanao, or at the rate of 3 DRE machines per clustered precinct.³⁵ For the OMR technology in the rest of the region, 154 Automated Counting Machines (ACM) were allocated, which is at the rate of 1 ACM per 10,000 registered voters, translating to 1 ACM per municipality for most of the municipalities.³⁶

Thus, in the ARMM elections in Maguindanao, there is going to be 3 DRE machines in each of the polling places or precincts. For every precinct therefore, there would be a need to consolidate the votes recorded on each of the 3 machines for the election returns to be produced. A separate machine or computer may well be used for said purpose and there can be one such machine or computer in each of the polling centers or schools.

For the rest of the ARMM the counting of the ballots will all be done at central counting centers, which is one center per municipality. This would mean that after the closing of the polls, the uncounted ballots would be transported from the polling places or precincts in the villages, to the central counting centers, which would most probably be located in the town centers.

Does the law allow partial automation?

From the language of RA 9369, it is evident that the intention of the law is to automate all stages or phases of election, including the voting, counting, and the canvassing/tabulation stages. It even requires the electronic transmission of election results

from the precinct level or lower canvassing BOCs to the higher canvassing bodies.

However, there are portions of the law indicating that partial automation may be allowed.

First, the law's statement of policy declares that the State should recognize COMELEC's mandate and authority to prescribe the *adoption and use of the most suitable technology of demonstrated capability taking into account the situation prevailing in the area.*³⁷ This may well mean that COMELEC can say that based on its assessment of what the most *suitable technology* is, it can decide to implement automation partially. For instance, if in the assessment of COMELEC, funding is insufficient for a full automation, and considering the underdeveloped condition of the power and communications infrastructure of the country, it may decide to prescribe a manual voting and counting system, but with the transmission of precinct results to be done electronically. Stretching the argument further, COMELEC may even entirely abandon automation in a particular election, or in particular area, as long as it can support the position that there is no suitable technology of demonstrated capability available based on the prevailing situation.

Second, the Advisory Council, which is a body created by the law to recommend the *most appropriate, secure, applicable and cost-effective technology* to be applied in the AES,³⁸ theoretically, may recommend to COMELEC an election technology that is only partially automated because it sees it as most appropriate, secure, applicable and cost-effective for a particular election.

The bottom line of course is the question of how COMELEC would exercise its discretion in prescribing the adoption of what it may deem as the most suitable technology.. The

power of COMELEC to exercise discretion in election administration matters has been recognized by the Supreme Court in numerous instances.

In the case of *Loong vs. COMELEC, et. al.*,³⁹, which involves the resolution of an issue relating to the inaccurate count of the OMR machines used in the ARMM during the 1998 national elections, the Supreme Court declared:

"Eighth. In enacting R.A. No. 8436, Congress obviously failed to provide a remedy where the error in counting is not machine-related for human foresight is not all-seeing. We hold, however, that the vacuum in the law cannot prevent the COMELEC from levitating above the problem. Section 2(1) of Article IX(C) of the Constitution gives the COMELEC the broad power "to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall." Undoubtedly, the text and intent of this provision is to have COMELEC all the necessary and incidental powers for it to achieve the objective of holding free, orderly, honest, peaceful, and credible elections. Congruent to this intent, this Court has not been niggardly in defining the parameters of powers of COMELEC in the conduct of our elections. Thus, we held in *Sumulong v. COMELEC*:

"Politics is a practical matter, and political questions must be dealt with realistically - not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions x x x. There

are no ready made formulas for solving public problems. Time and experience are necessary to evolve patterns that will serve the ends of good government. In the matter of the administration of laws relative to the conduct of election, x x x we must not by any excessive zeal take away from the Commission on Elections the initiative which by constitutional and legal mandates properly belongs to it."
xxx xxx xxx

Ninth. Our elections are not conducted under laboratory conditions. In running for public offices, candidates do not follow the rules of Emily Post. Too often, COMELEC has to make snap judgments to meet unforeseen circumstances that threaten to subvert the will of our voters. In the process, the actions of COMELEC may not be impeccable, indeed, may even be debatable. We cannot, however, engage in a swivel chair criticism of these actions often taken under very difficult circumstances."

Are all "elections" required to be automated?

Looking at Section 6, in relation to Section 1, of RA 9369, it seems to be the intention of the law to authorize COMELEC to prescribe the adoption of an automated election system or systems in **all electoral exercises**, including plebiscites, referenda, and recall. In fact the law was very definite in stating that AES must be implemented in the succeeding regular national or local elections after the 2007 elections.⁴⁰

However, pursuant to COMELEC's constitutional mandate to enforce all laws relative to the conduct of elections, as well as the State's recognition of its exercise of judgment on the suitability of the use of technology, COMELEC may decide to adopt a

manual process in some particular future elections. In fact, it can be argued that the reason why RA 9369 contained sections dealing with manual elections, namely its sections 31 to 40, is to make the manual process still available as an option, in case COMELEC finds that no technology would be appropriate.

Thus, it can be said that while the State prefers an automated election system, as it would most likely ensure fast and accurate results, manual elections may be adopted should COMELEC determine that the holding of an automated election would defeat the *objective of free, orderly, honest, peaceful, credible and informed elections and of ensuring that the results would be fast, accurate and reflective of the genuine will of the people.*⁴¹

The matter of the ARMM elections on August 11, 2008, however, is different. In Section 6 of RA 9369, there was no reference as to the adoption of an AES in said elections. After mandating where AES was to be adopted and used in the 2007 elections, that is, in two highly urbanized cities and in two provinces each in Luzon, Visayas, and Mindanao, it declared that the nationwide implementation of the law will be in the succeeding regular national and local elections,⁴² which obviously refers to the 2010 elections. There was no mention of the 2008 ARMM elections. Similarly, in reference to the procurement of AES which should have *demonstrated capability and have been successfully used in a prior electoral exercise here or abroad*, the election referred to, for which this requirement is applicable, is the 2010 elections, not the ARMM elections.

Clearly therefore, there is no legal mandate that the ARMM elections in August 2008 must by default be automated. RA 9369 does not make any such directive. The first

election that by default should be automated is the 2010 national and local elections, not the 2008 elections.

This is not to say however that automation of the ARMM elections is not sanctioned by law. It may be justified under the plenary power of COMELEC to *prescribe the use of suitable technology* in elections, especially as COMELEC's declared objective in automating the ARMM election is *to evaluate the suitability of the two different technologies in the Philippine setting preparatory to designing an AES for the 2010 elections.*⁴³ In fact, the Advisory Council itself recommended the full automation of the ARMM, although the recommendation was that the DRE is to be used only in two cities or municipalities.

In the exercise of its discretionary authority however, COMELEC stated that the Advisory Council's *recommended scope of the DRE is too insignificant to be a sound basis for a proper evaluation for that technology's suitability for use in Philippine elections.*⁴⁴ It chose to adopt the DRE system for the whole of Maguindanao instead. It rationalized its decision by saying that *the level of development in Maguindanao in particular with regard to the stability of the electric power supply, the reliability of its telecommunication infrastructure, as well as the contiguous nature of its geography, makes the entire province a viable implementation area for a DRE-based solution.*⁴⁵

What is the geographical coverage of the automated elections as mandated by law?

Again, it may be said that the AES's intended geographical coverage as contemplated under the law is nationwide. But RA 9369 also allows some flexibility in this regard when the situation prevailing in the area is taken into

account⁴⁶ and when COMELEC makes a determination that AES cannot be successfully conducted in particular areas. The law also expressly allows COMELEC to adopt different AES in different provinces⁴⁷ depending on its assessment of the prevailing situation in each place.

What are the mechanisms provided under the law that hopes to ensure the reliability and accuracy of the automated election system?

In hoping to ensure a reliable and accurate AES, the law requires that it should have “demonstrated capability,” meaning, it must have been successfully used in previous elections, here or abroad.⁴⁸ Untested system and machines are, therefore, not allowed.

Likewise, the law set, as minimum requirements, certain characteristics for the AES to be adopted and used, among which are, systems auditability, meaning the capability to provide supporting documentation for verifying the correctness of reported election result; voter verified paper audit trail (VVPAT); data retention provision; capability for safekeeping, storing and archiving of physical or paper resource used in the election process; and capability to provide the voter a system of verification to find out whether or not the machine has registered his choice.⁴⁹

Also, in order to assure that information technology expertise is utilized in the process of choosing the particular AES technology to be adopted in an electoral exercise, the composition of the Advisory Council, which is tasked to recommend the most suitable AES to COMELEC, includes the Chairman of the Commission on Information and Communication Technology (CICT) as the Council chair, three representatives from Information and Communication Technology

(ICT) professional organizations in the country.⁵⁰

The AES system also needs to undergo field testing and it should likewise be tested in a mock election in one or more cities and municipalities⁵¹ to guarantee that it will work in actual elections. An audit on the accuracy, functionally and security controls of the AES software should also be undertaken, as well as the review of the source code,⁵² which is defined in the law as human readable instructions that define what the computer equipment will do.⁵³

To ensure that all the safeguards are present, a Technical Evaluation Committee composed of representatives from the COMELEC, the CICT and the Department of Science and Technology (DOST), with the latter as chair, was created by the law to certify and categorically state that the AES, including its hardware and software components, is operating properly, securely, and accurately.⁵⁴ As additional safeguards, political parties and citizens’ arms are given the opportunity to test the AES right before elections⁵⁵

On the actual conduct of the AES elections, the law requires that at least one member of the BEI shall be an *information technology-capable person* who is *trained or certified* by the DOST to use the AES.⁵⁶ It is also required that each BOC must be assisted by an *information technology-capable person* authorized to operate the equipment adopted for the elections.⁵⁷ Furthermore, electronic Election Returns and Certificates of Canvass are required to be authenticated by an appropriate authentication and certification procedure for electronic signatures⁵⁸ as provided in the E-Commerce Law⁵⁹ and in the rules of procedure governing introduction of electronic evidence.⁶⁰

After the election, the law mandates the conduct of a *manual audit* in one precinct per congressional district, which precinct would be randomly chosen by the COMELEC in each province and city. Any difference between the automated and manual count will result in the determination of the root cause and initiate a manual count for those precincts affected by the computer or procedural error.⁶¹

What fall back mechanism is available under the law should the automated system fail?

As a fallback mechanism, the law requires a *continuity plan* in case of a systems breakdown or any such eventuality which will result in the delay, obstruction or nonperformance of the electoral process.⁶² It includes a list of contingency measures, and the policies for activation of such, that are put in place to ensure continuous operation of the AES.⁶³ The Technical Evaluation Committee is also mandated to certify as to the development, provisioning, and operationalization of the continuity plan to cover risks to the AES at all points in the process.⁶⁴

It must be stated again that the COMELEC is, anyway, given much leeway in addressing unforeseen problems that may come about similar to the situation addressed by the Loong case cited above.

What does the law say about the procurement of the system's components?

The law authorizes COMELEC 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.*⁶⁵ 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.⁶⁶

For May 10, 2010 election and succeeding electoral exercises, the system that will be procured should have “demonstrated capability” and have been successfully used in a prior electoral exercise here or abroad.⁶⁷ In the upcoming ARMM elections, COMELEC chose a *lease with option to purchase* scheme.⁶⁸

What are the mechanisms provided under the law allowing stakeholders' participation or involvement in the process?

Recognizing the need for the AES to gain public acceptability, the law provides several avenues where election stakeholders, electoral reform and other civil society groups, and the general public may be involved in the process.

The composition of the Advisory Councils includes representatives from two civil society electoral reform groups in the country.⁶⁹ These representatives will also have the opportunity to sit as *non-voting members* of the Bids and Awards Committee that would manage the procurement of the AES.⁷⁰ They are also to sit as *non-voting members* of the Steering Committee, which is tasked with the implementation of the AES.⁷¹

The conduct of the field testing and the mock election event,⁷² as well as the stakeholders' education and training program required to be undertaken not later than six months before the elections,⁷³ would necessarily involve political parties, civil society groups, and the general public.

In addition, COMELEC is required to 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 as early as when an AES technology has been selected for implementation.⁷⁴

Prior to voting, parties and the citizens' arms of the COMELEC or their representatives must be allowed to examine and test the equipment or device to be used in the voting and counting on the day of the electoral exercise, before voting start.⁷⁵

The dominant majority and minority parties, the citizens' arm of the COMELEC, and the *Kapisanan ng mga Broadcaster sa Pilipinas* are among those to whom the BEIs must electronically transmit precinct results.⁷⁶

Moreover, more political parties, to include local parties; national and local media; and citizens' arms, are among the mandatory recipients of the certified printed copies of the election returns. Thirty additional printed copies of the election returns are available to any requesting party.⁷⁷ Political parties, national and local, media, national and local, and accredited citizen's arm groups, are also given the right to obtain printed copies of the certificates of canvass at all the canvassing levels.⁷⁸

What provisions of law are there to address sustainability of the automated election system?

To address the matter of whether the AES chosen is sustainable for the succeeding elections or not, RA 9369 provided some procedures that would allow the evaluation of the use of a system in an actual election. The Advisory Council is required to submit a

report on the conduct of the automated elections six months after the election to the Senate and House of Representatives. The law also created a Joint Congressional Oversight Committee tasked to review the implementation of the law every twelve (12) months from the date of the last regular national or local elections by conducting a comprehensive assessment and evaluation of the performance of the different AES technologies implemented and making appropriate recommendations to Congress.⁷⁹

What are the new features provided by the law as regards manual conduct of elections?

As pointed out earlier, a lot of issues are being raised in regards to the new requirements in RA 9369 for the manual process of election.

One issue relates to the provision that the votes for the national position must be read ahead of the votes for the local position.⁸⁰ This seems to give the impression that counting of the votes for the national position must be done ahead of the counting of the votes for the local position. There is only one ballot for both national and local candidates. Should this be the interpretation, it would mean that ballots would be read twice. This would prolong the counting and provide opportunity for ballot switching.

Another interpretation, which makes better sense, would be that the law merely emphasized that in the sequence of the reading of the votes on the ballots, the votes for the national positions should be read first. This is to address the practice in some areas where, upon prodding of local candidates, the votes for local position are read ahead of the national positions. This means that when the reading of the votes for the local positions would be completed, there would be no one left to watch and monitor the

counting of the votes for the national candidates. Party watchers, although expected to monitor the vote count for national as well as local positions, are usually assigned and paid for by local candidates. In the last 2007 elections BEIs and the BOCs followed this interpretation as what they have been doing in the previous elections.

Seemingly similar provision do exist as regards the reading and tabulation of the election returns at the first level municipal or city canvass, and of the certificates of canvass at the other canvassing levels.

Another modification introduced in the law is the requirement that poll clerks should *secure an image of the election return using a secured data capturing device and immediately thereafter, while in the premises of the polling place or counting center, directly print thirty (30) copies of the election return.*⁸¹ Similarly, the chairman of the various BOCs are required to *capture images of the certificate of canvass and supporting statements of votes using a secured data capturing device and thereafter, while in the premises of the canvassing center, immediately print the data so captured in thirty (30) copies.*⁸² These requirements mean that each BEI (there were about 225,000 of them all over the country in the last elections) are to be provided with *secured data capturing device* and a printer. As regards the BOCs, this would require that there be a *secured data capturing device* and a printer in each of the more than 1,500 cities and municipalities.

This would definitely be costly and unreasonable. The implementation would be an operational nightmare, if not downright impossible. After administering a tedious manual voting and counting process from the opening of polls at seven in the morning up to 12 to 15 hours later, the BEI members would definitely be over-burdened with

having to capture the image, print, and then certify each of the 30 copies required to be printed. Authenticating seven copies is taxing enough for the BEI members, what more if they are required to do the same with 30 copies? The practical absurdity of the requirement far outweighs the nobility of the intention the law.

In RA 9369, the number of copies of the election returns was increased from the previous 7⁸³ to 8 copies. This is to accommodate another new requirement under the law of posting the second copy of the election returns *on a wall with sufficient lighting within the premises of the polling place or counting center*, which copy should remain posted for the next 48 hours.⁸⁴ The posting requirement is also required of the BOCs, who are mandated to post the *second copy*⁸⁵ of the certificates of canvass and its supporting statement of votes *on a wall with sufficient lighting within the premises of the canvassing center.*

As to the canvass of votes by Congress for presidential and vice presidential elections, and by the COMELEC for the senatorial elections, pre-proclamation controversy proceedings have been allowed.⁸⁶ This means that the pre-proclamation controversies previously applicable only for local contests⁸⁷ are now made applicable in presidential, vice-presidential, and senatorial elections.⁸⁸

Apparently, this new requirement was enacted as a reaction to what was perceived as railroading of the presidential canvass in previous elections. The former rule was that when the provincial certificates of canvass, or the certificates of canvass from the highly urbanized cities and the accompanying statement of votes, appear to have been properly authenticated and there are no erasures or any sign of tampering thereon, or there are no discrepancies among their copies, said certificates should be canvassed

and the results therein tabulated as a matter of course.⁸⁹ All extraneous objections can simply be noted.

Under RA 9369, however, the BOC is required to set aside the questioned certificates, and proceed to consider the other certificates that are not questioned. Meanwhile, a pre-proclamation proceeding is conducted, meaning evidence is received, on the questioned certificates. Proclamation of winners can only be had after all unquestioned certificates are canvassed and the remaining questioned certificates would no longer affect the results of the election.

Although this new requirement would make presidential and senatorial canvass more transparent, this is a sure formula for delay. Any candidate can just raise any issue, whether meritorious or not, and cause a suspension of the canvass of the questioned certificate. This new requirement would not have been necessary if presidential and senatorial candidates have the capability to organize a massive network of watchers or monitors down to the precinct level. The watchers must have the ability to gather information in the field and to aggregate the information gathered for purposes of manifesting observations, if need be, in each of the canvassing levels. This would also give the candidates the opportunity to question fraud at the appropriate levels of canvassing and they do not have to wait for the national canvass proceedings to raise their complaints. Unfortunately, organizing such a massive network would require massive resources, which most candidates do not have, or are not willing to spend for.

One commendable contribution of RA 9369 is its having defined the crime of *Electoral Sabotage*. Section 42 of RA 9369 defines electoral sabotage as tampering, increasing or decreasing the votes received by a candidate in any election, or refusing, after

proper verification and hearing, to credit the correct votes or deduct such tampered votes on large scale or in substantial numbers. The crime is punishable by life imprisonment. This crime includes tampering, etc. with the votes of national candidates and the election results are affected, or when the tampering, etc. of votes of is done on a single document and the votes affected are more than 5,000, or in any other instance when the votes affected exceed 10,000. This amendment is a positive development, as it highlights the seriousness of the problem of election fraud, especially those involving tampering of election documents. This is a departure to the across the board one to six year imprisonment imposed by existing laws for all election offenses.⁹⁰ Moreover, this law can serve as a deterrent to the commission of election anomalies.

Finally, RA 9369 made prosecution of election offenses easier when it provided that the function of conducting preliminary investigation and prosecuting the same in concurrently shared by COMELEC and the other prosecution arms of the government.⁹¹ The previous rule limits the authority to investigate and prosecute election offenses to COMELEC.⁹² Spreading the responsibility for investigating and prosecuting election offenses is a likewise a welcome development.

Conclusion

At the Electoral Modernization Summit last December 2007,⁹³ congressional staff members who had a hand in crafting RA 9369 defended the passage of the law. They revealed that the law went through rough sailing before both houses of Congress and in the bicameral conference committee. The passage of the law was seen by them as an achievement by itself. To them, the enactment of the law - despite its defects - was better than having no law at all.

Many however do not subscribe to this view. The law was obviously poorly crafted. Instead of clarifying, it tends to confuse. Two distinct subject matters were combined in a single statute, making the law prone to misinterpretation. One may be confused as to whether a provision is applicable to a manual election or to an automated election.

The law would have been better had it not been presented as just an amendment of RA 8436, but rather a new law, since in actuality it was a new law. The law would have been stronger had the AES portion of the law (Sections 1 to 30) been separated from the rest, and made a statute by itself.

In terms of substance, the default bias of RA 9369 is to automate all the phases of elections, either paper-based, or through a DRE system, and to cover all electoral exercises and the entire country. All the other alternatives can only be chosen if the default option is found to be inappropriate. This should not be the case. AES is not a *cure all* for all electoral ills. In certain cases, the manual process may still be the more appropriate option. Thus, the law should not give any default preference to any particular technology. It should also give equal preference to the option of partial automation, or of not automating at all.

What is needed by the COMELEC is an enabling statute that would provide a legal framework flexible enough to allow COMELEC to exercise its constitutional discretion but is definite enough in terms of broad standards and parameters in the exercise of this discretion. This would suffice to enable COMELEC to exercise its discretion of prescribing *the adoption and use of appropriate technology* in elections.

The legal framework should also be able to provide support for COMELEC to enable it to

modernize as an institution. As it is right now, COMELEC is being asked to employ modern technology in elections, while ironically it still works under an environment and paradigm of a manual process. Electronic transmission of election results seems not to be in synch with the fact that the COMELEC head office does not even have a centralized wireless internet network, or even a wired local area network. It does even not have a developed data management system for its day to day administrative processes.

It would be most ideal that there be a **new election code** that would not only provide a flexible legal framework for COMELEC, but which would harmonize and update all the existing laws.

One last note about the automation of the ARMM elections.

Regarding the automation of the ARMM elections, using the ARMM elections to test a new AES is not really advisable. For one, said elections do not represent the kind of election that happens in other parts of the country. In fact, elections in ARMM are unique and atypical from the rest of the country. Unique circumstances prevail in ARMM. There are a lot of controlled areas dominated by warlords, making security a real problem. It is where widespread cheating said to affect presidential and senatorial elections have allegedly been executed. Moreover, the volume and number of elective positions is hardly representative of the regular elections in the country. Only 5 positions are voted for in each of the precincts in the ARMM elections - governor, vice-governor, and three district assemblymen, compared to up to 30 positions during regular elections. If an automation system fails in the ARMM elections, it can not be safely assumed that it will also fail in rest of the country. Similarly, the success of an automated system in the

ARMM will not necessarily mean that the same system can also be successful in other areas of country. The ARMM region and the ARMM election are characterized by unique circumstances that any election experiment or experience in this area cannot count as a significant factor for applying the experience in other areas of the country.⁹⁴

Finally, it is a fact that COMELEC plays a very important role in the success or failure of any electoral exercise. Although the success of an election should really come as a result of the collaborative efforts of all election stakeholders, including voters, candidates, the political leadership, the media, the military, and the civil society, it is COMELEC which should provide the leadership and the direction towards clean, honest and credible elections. It is therefore important that alongside legal reforms, institutional development initiatives must be undertaken in the agency to enable it to adopt a truly modernized election system for our country.

¹ 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

² The Electoral Reforms Law of 1987

³ An Act Providing For Synchronized National and Local Elections and for Electoral Reforms, Authorizing Appropriations Therefor, and for Other Purposes (1991)

⁴ An Act Amending Section 27 of Republic Act No. 7166, Entitled "An Act Providing For Synchronized National and Local Elections and for Electoral Reforms, Authorizing Appropriations Therefor, and for Other Purposes" (1995)

⁵ An Act Granting All Citizens' Arms Equal Opportunity to be Accredited by the Commission on Elections, Amending for the Purpose Republic Act Numbered Seventy-One Hundred and Sixty-Six, as amended.

⁶ Section 32, RA 9369, amending Section 212 of BP 881

⁷ COMELEC Resolution No. 8415, February 6, 2008.

⁸ Ibid.

⁹ RA 7056 which called for separate national and local elections was declared by the Supreme Court in the case of *Osmena vs. COMELEC*, G.R. No. 100318, July 31 1991, to be unconstitutional.

¹⁰ The 1978 Election Code also contained as similar provision in its Section 185 (j).

¹¹ The old Section 7 RA 8436.

¹² See the old section 6 of RA 8436, which provides in part that "if, inspite of its diligent efforts to implement this mandate in the exercise of this authority, it becomes evident by February 9, 1998 that the Commission cannot fully implement the automated election system for national positions in the May 11, 1998 elections, the elections for both national and local positions shall be done manually except in the Autonomous Region in Muslim Mindanao (ARMM) where the automated election system shall be used for all positions.

¹³ *Loong vs. COMELEC*, G.R. No. 133676 [April 19, 1999].

¹⁴ After the 2001 elections, COMELEC had planned for a three-phased modernization program. The first phase involves an attempt to improve the system of registration of voters, the second, the automation of the voting and counting stage, and the third, the electronic transmission of election results. The second and third phases were not implemented because of Supreme Court rulings, while the first phase did not really take off as planned and have no significant impact in the 2004 and 2007 elections

¹⁵ *Information Technology Foundation of the Philippines, et. al. vs. COMELEC, et. al.*, GR No. 159139 [January 13, 2004]

¹⁶ Section 2 of RA 9369, amending Section 2 of RA 8436

¹⁷ Section 5 of RA 9369, amending Section 6 of RA 8436.

¹⁸ Section 2 of RA 9369, amending Section 2 of RA 8436

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid

²² Section 1 of RA 9369, amending Section 1 of RA 8436

²³ Ibid.

²⁴ Section 13 of RA 9369, amending Section 15 of RA 8436

²⁵ Ibid.

²⁶ Section 7 of RA 9369, amending Section 6 of RA 8436

²⁷ It is possible though that the number of precincts may be reduced due to the supposedly more efficient voting process.

²⁸ Section 19 of RA 9369, amending Section 22 of RA 8436

²⁹ Ibid.

³⁰ Ibid.

³¹ Certificates of Canvass from Highly Urbanized Cities of Metro Manila, the cities of Baguio, Cebu, Bacolod, Davao, Iloilo, Cagayan de Oro, Zamboanga etc are also canvassed by the COMELEC or Congress acting as the National Board of Canvassers

³² Section 20 of RA 9369, amending Section 25 of RA 8436

³³ COMELEC Resolution No. 8415, February 6, 2008

³⁴ Request for Proposals (RFP) for Specifications, Terms and Conditions, etc. of COMELEC dated 6 February 2008

³⁵ Annex A to the RFP.

³⁶ Ibid.

³⁷ Section 1 of RA 9369, amending Section 1 of RA 8436

³⁸ Section 8 of RA 9369, amending Section 9 of RA 8436

³⁹ G.R. No. 133676, April 14, 1999.

⁴⁰ Section 6 of RA 9369, amending Section 5 of RA 8436

⁴¹ Section 1 of RA 9369, amending Section 1 of RA 8436

⁴² Section 6 of RA 9369, amending Section 5 of RA 8436

⁴³ COMELEC Resolution No. 8415, February 6, 2008

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Section 1 of RA 9369, amending Section 1 of RA 8436

⁴⁷ Section 6 of RA 9369, amending Section 5 of RA 8436

⁴⁸ Section 10 of RA 9369, amending Section 12 of RA 8436

⁴⁹ Section 6 of RA 9369, amending Section 5 of RA 8436

⁵⁰ Section 9 of RA 9369, amending Section 8 of RA 8436

⁵¹ Section 9 of RA 9369, amending Section 11 of RA 8436

⁵² Ibid.

⁵³ Section 2 of RA 9369, amending Section 2 of RA 8436

⁵⁴ Section 9 of RA 9369, amending Section 10 of RA 8436

⁵⁵ Section 12 of RA 9369, amending Section 14 of RA 8436

⁵⁶ Section 3 of RA 9369, amending Section 3 of RA 8436

⁵⁷ Section 5 of RA 9369, amending Section 4 of RA 8436

⁵⁸ Section 25 of RA 9369, amending Section 30 of RA 8436

⁵⁹ Republic Act No. 8792

⁶⁰ AM 01-7-01-SC

⁶¹ Section 24 of RA 9369, amending Section 29 of RA 8436

⁶² Section 11 of RA 9369, amending Section 13 of RA 8436

⁶³ Section 2 of RA 9369, amending Section 30 of RA 8436

⁶⁴ Section 9 of RA 9369, amending Section 11 of RA 8436

⁶⁵ Section 10 of RA 9369, amending Section 12 of RA 8436

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ RFP of COMELEC, Page 6

⁶⁹ Section 9 of RA 9369, amending Section 8 of RA 8436

⁷⁰ Section 9 of RA 9369, amending Section 9 of RA 8436

⁷¹ Ibid.

⁷² Section 11 of RA 8436 as amended by Section 9 of RA 9369

⁷³ Section 26 of RA 9369, amending Section 31 of RA 8436

⁷⁴ Section 12 RA 9369.

⁷⁵ Ibid. This requirement however, is applicable only to testing counting machines at the counting centers. It is impractical to test the DREs, which are to be used directly for voting, on the day of the elections right before voting starts. The reference to the election officer as the one tasked to keep minutes of the testing, indicates that

what is being referred to in this section is a counting machine in a central counting center.

⁷⁶ Section 19 of RA 9369, amending Section 22 of RA 8436

⁷⁷ Ibid.

⁷⁸ Section 20 of RA 9369, amending Section 25 of RA 8436

⁷⁹ Section 27 of RA 9369, amending Section 33 of RA 8436

⁸⁰ Section 31 of RA 9369, amending Section 25 of RA 7166

⁸¹ Section 32 of RA 9369, amending Section 212 of the Omnibus Election Code

⁸² Section 39 of RA 9369, amending Section 28 of RA 7166

⁸³ There is an apparent inconsistency in the law in this regard as Section 32, which amended Section 212 of the Omnibus Code, still speaks of 6 copies of election returns. This provision had already been earlier modified by Section 27 of the RA 7166, which was passed in 1992. Section 27 of RA 7166 is amended by Section 33 of RA 9369

⁸⁴ Section 33 of RA 9369, amending Section 27 of RA 7166

⁸⁵ Again, this is not consistent with Section 40 of RA 9369, which speaks of the posting of the **third copy, not the second copy**, of the certificates of canvass.

⁸⁶ Section 37 of RA 9369, amending Section 30 of RA 7166.

⁸⁷ Section 15 RA 7166

⁸⁸ See also Section 37 RA 9369.

⁸⁹ The old Section 30 of RA 7166

⁹⁰ Section 264, BP 881

⁹¹ Section 43 of RA 9369, amending Section 265 of BP 881.

⁹² The COMELEC however may deputize the prosecution arms of government to conduct preliminary investigation and prosecute election offense cases.

⁹³ Organized by the Consortium on Electoral Reforms, with funding support from USAID through IFES, Philippines. The seminar workshop was participated in by representatives from COMELEC, both Houses of Congress, and civil society electoral reforms group

⁹⁴ With the proximity of the ARMM elections, there might not be enough time to introduce the new system to voters. Public acceptance is vital to assuring credibility of the AES process and the

election result that will come out of it. Section 72 of RA 9369 provides for public information and voter education activities to be undertaken not later than six months before election day.