

EN BANC

G.R. No. 246816 – ANG PARTIDO NG MGA MARINONG PILIPINO, INC. (ANGKLA) and SERBISYO SA BAYAN PARTY (SBP), petitioners, versus, COMMISSION ON ELECTIONS (sitting as the National Board of Canvassers, CHAIRMAN SHERIFF M. ABAS, COMMISSIONER AL A. PARREÑO, COMMISSIONER LUIE TITO G. GUIA, COMMISSIONER MA. ROWENA AMELIA V. GUANZON, COMMISSIONER SOCCORRO B. INTING, COMMISSIONER MARLON S. CASQUEJO, AND COMMISSIONER ANTONIO T. KHO, JR.), respondents. AKSYON MAGSASAKA – TINIG PARTIDO NG MASA (AKMA-PTM), petitioner-in-intervention.

Promulgated:

September 15, 2020

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CONCURRING AND DISSENTING OPINION

LOPEZ, J.:

I concur with the *ponencia* to maintain the *BANAT* Formula,¹ which recognizes the prerogative of Congress to formulate the manner of filling-up the party-list system while at the same time ensuring that said prerogative remains within constitutional bounds.

Also, I agree that there is no double-counting of votes because the allocation of seats is determined using different formulas based on substantial distinctions and different levels of proportion. The first round allocating one guaranteed seat requires the determination of proportion of votes obtained by a party in relation to the number of votes cast in the Party-List System (PLS). It refers to the threshold mentioned in Republic Act (RA) No. 7941, Section 11 (b) that parties with at least 2% of the votes will have a guaranteed seat. The second round (first part) refers to the proportion of votes obtained by parties garnering at least 2% of the votes cast in relation to the votes cast for the PLS multiplied by the number of remaining seats. The second round (second part) refers to the proportion of votes obtained by the parties relating to the fractional value of their votes represented by decimal values (*e.g.* 0.78, 0.79, 0.80 *etc.*). The purpose of the second round is to completely fill-up the 20% allocation of seats in the PLS.

However, I submit that the allocation of seats to parties receiving fractional seats (second round, second part) as illustrated in *BANAT* should be modified to conform with the principle of proportionality mandated by the law.

¹ *Barangay Association for National Advancement and Transparency (BANAT) v. COMELEC*, 604 Phil. 131 (2009).

J

I.

RA No. 7941² provides the manner on how seats in the PLS of Representation are allocated:

Section 11. Number of Party-List Representatives. The party-list representatives shall constitute twenty per centum (20%) of the total number of the members of the House of Representatives including those under the party-list.

x x x x

(a) The parties, organizations, and coalitions shall be ranked from the highest to the lowest based on the number of votes they garnered during the elections.

(b) The parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one seat each: Provided, That those garnering more than two percent (2%) of the votes **shall be entitled to additional seats in proportion to their total number of votes**: Provided, finally, That each party, organization, or coalition shall be entitled to not more than three (3) seats. (Emphasis supplied.)

Interpreting the above-quoted provision, *Veterans Federation Party v. Commission on Elections*³ identified four inviolable parameters, which must be observed in the allocation of seats:

To determine the winners in a Philippine-style party-list election, the Constitution and Republic Act (RA) No. 7941 mandate at least four inviolable parameters. These are:

First, the twenty percent allocation — the combined number of *all* party-list congressmen shall not exceed twenty percent of the total membership of the House of Representatives, including those elected under the party list.

Second, the two percent threshold — only those parties garnering a minimum of two percent of the total valid votes cast for the party-list system are “qualified” to have a seat in the House of Representatives;

Third, the three-seat limit — each qualified party, regardless of the number of votes it actually obtained, is entitled to a maximum of three seats; that is, one “qualifying” and two additional seats.

Fourth, proportional representation — the additional seats which a qualified party is entitled to shall be computed “**in proportion to their total number of votes.**”⁴ (Emphasis supplied.)

In determining proportionality for additional seats, *Veterans* introduced the First Party Rule or a form of proportionality in relation to the number of votes obtained by the party garnering the highest number of votes. Later, *BANAT v.*

² An Act Providing for the Election of Party-List Representatives Through the Party-List System, and Appropriating Funds Therefor, Republic Act No. 7941 (1995).

³ 396 Phil. 419 (2000).

⁴ *Id.* at 424.

COMELEC⁵ revisited the determination of proportionality and adopted with modification the Niemeyer Formula earlier proposed by then Justice Mendoza in *Veterans*. In his *Dissenting Opinion* in *Veterans*, Justice Mendoza explained why the Niemeyer Formula may be adopted in the Philippine PLS:

Rep. Tito R. Espinosa, co-sponsor of the bill which became R.A. No. 7941, explained that the system embodied in the law was largely patterned after the mixed party-list system in Germany. Indeed, the decision to use the German model is clear from the exchanges in the Constitutional Commission between Commissioners Blas F. Ople and Christian S. Monsod. The difference between our system and that of Germany is that whereas in Germany half (328) of the seats in the Bundestag are filled by direct vote and the other half (328) are filled through the party-list system, in our case the membership of the House of Representatives is composed of 80 percent district and 20 percent party-list representatives.

The party-list system of proportional representation is based on the Niemeyer formula, embodied in Art. 6(2) of the German Federal Electoral Law, which provides that, in determining the number of seats a party is entitled to have in the Bundestag, seats should be multiplied by the number of votes obtained by each party and then the product should be divided by the sum total of the second votes obtained by all the parties that have polled at least 5 percent of the votes. First, each party receives one seat for each whole number resulting from the calculation. The remaining seats are then allocated in the descending sequence of the decimal fractions. The Niemeyer formula was adopted in R.A. No. 7941, §11. As Representative Espinosa said:

MR. ESPINOSA: [T]his mathematical computation or formula was patterned after that of Niemeyer formula which is being practiced in Germany as formerly stated. As this is the formula or mathematical computation which they have seen most fit to be applied in a party-list system. This is not just a formula arrived at because of suggestions of individual Members of the Committee but rather a pattern which was already used, as I have said, in the assembly of Germany.⁶ (Emphasis supplied.)

Applying the Niemeyer Formula in Section 11 (b) of RA No. 7941 as worded relating to the additional seats should have been mathematically reduced as follows:

$$\text{Additional Seats} = \left(\frac{\text{Total votes of the Party}}{\text{Total Votes of Parties receiving at least 2\%}} \right) * \text{remaining seats}$$

If the formula is reduced into an analogy, it can be likened to a pie to be distributed only to the 2 percenters based on the number of votes they received.⁷ The number of seats to be allocated to the party is proportional to the number of

⁵ *Supra* note 1.

⁶ *Id.* at 474-495.

⁷ *Veterans Federation Party v. Commission on Elections*, *supra* note 3.

votes it received. This is the clear import of the provision worded as follows: “[p]rovided, [t]hat those garnering more than two percent (2%) of the votes shall be entitled to additional seats in proportion to their total number of votes.”

Unlike in *Veterans* wherein the 20% PLS membership was considered merely as a ceiling, *BANAT* held that the 20% must be filled-up. Thus, *BANAT* partly modified Section 11 (b) of RA No. 7941 and removed the limitation that only those satisfying the 2% threshold should be allocated with “additional” seats. *BANAT* observed that the continuous operation of the 2% in the determination of “additional” seats presents a mathematical impossibility to fulfill the 20% membership. This is only true because Section 11 (b) provides that there must be a 3-seat limit. Without the 3-seat limit, the additional seats in the 2019 National and Local Elections (NLE) should have been as follows:

RANK	PARTY-LIST	VOTES GARNERED	% OF TOTAL VOTES IN RELATION TO THE TOTAL VOTES CAST FOR THE PLS	FIRST ROUND OF ALLOCATION (Parties garnering at least 2% is given 1 guaranteed seat)	% OF TOTAL VOTES X 53 REMAINING SEATS (The divisor should be the total number of votes received by those garnering at least 2%)	SECOND ROUND (Integer less the decimal value)	FRACTIONAL SEATS (Remaining decimal value)
1	ANTI-CRIME AND TERRORISM COMMUNITY INVOLVEMENT AND SUPPORT, INC.	2,651,987	9.51	1	16.45	16	0.45
2	BAYAN MUNA	1,117,403	4.01	1	6.93	6	0.93
3	AKO BICOL POLITICAL PARTY	1,049,040	3.76	1	6.50	6	0.50
4	CITIZENS BATTLE AGAINST CORRUPTION	929,718	3.33	1	5.76	5	0.76
5	ALYANSA NG MGA MAMAMAYANG PROBINSIYANO	770,344	2.76	1	4.77	4	0.77
6	ONE PATRIOTIC COALITION OF MARGINALIZED NATIONALS	713,969	2.56	1	4.42	4	0.42
7	MARINO SAMAHAN NG MGA SEAMAN, INC.	681,448	2.44	1	4.22	4	0.22

8	PROBINSYA NO AKO	630,435	2.26	1	3.91	3	0.91
				8		48	
TOTAL VOTES OF 2 PERCENTERS		8,544,344					

Either the removal of the 2% threshold or the 3 seat-limit could have served the purpose of filling-up the 20% membership. Instead, *BANAT* held that Section 11 (b) should include the non-two percenters in the equation of allocating “additional” seats otherwise it is mathematically impossible to fill-up the 20% membership. Mathematically, the modification is reflected as follows:

$$\text{Additional Seats} = \left(\frac{\text{Total votes of the Party}}{\text{Total Votes of all Parties}} \right) * \text{remaining seats}$$

Going back to the analogy of a pie and the illustration above, all parties may now share the remaining number of seats after the first round by adjusting the divisor. Applying this adjustment and going back to the previous illustration, the divisor is no longer 8,544,344 but is now 27,884,890 (total votes cast for the PLS) because all parties will now share the pie of additional seats subject only to the number of remaining seats. The inclusion of the non-two percenters is not to put them on equal footing with the 2 percenters and not to remove the distinction that RA No. 7941 accorded to it but simply a way to fulfill the constitutional provision that the 20% membership should be filled-up.

On this score, I submit that the equal protection clause is not violated because there is no double-counting of votes. The first and second rounds of allocation of seats serve different purposes and involve different formulas involving different levels of proportions. The petitioners’ claim of “double counting” presupposes that there is singularity in the formula used in allocating seats.

The first round gives flesh to the threshold requirement and in consonance with Section 11 (b) – “[t]he parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one seat each,” which is mathematically determined by dividing the total votes of a party and the total votes received by all of the parties without regard to the available seats. The second round is for fulfilling the constitutional provision of 20% membership determined proportionally and mathematically in the formula described above. Accordingly, petitioners cannot simply claim that there is double-counting of votes without taking into consideration how seats are allocated. The petitioners’ framework presupposes that the seats are allocated using the same formula and level of proportionality. A quick comparison of the number of votes needed to obtain a seat (first round and second round) will readily show that they are not equal. More votes are needed to garner a seat in the first round than in the second round. As discussed in the *ponencia*, petitioners’ framework put the 2 percenters at a serious disadvantage. The difference can be seen by comparing the formulas between the first and second round:

FIRST ROUND (1 guaranteed seat is given if 2% threshold is satisfied)	SECOND ROUND (Additional seats are given depending on the product of the variables involved)
$\left(\frac{\text{Total votes of the Party}}{\text{Total Votes of all Parties}} \right)$	$\left(\frac{\text{Total votes of the Party}}{\text{Total Votes of all Parties}} \right) * \text{remaining seats}$

Be that as it may, the proper treatment of fractional seats should be modified.

II.

The *ponencia* summarized the *BANAT* Formula as follows:

Round 1:

- a. The participating parties, organizations or coalitions shall be ranked from highest to lowest based on the number of votes they each garnered in the party-list election.
- b. Each of those receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to and guaranteed one seat each.

x x x x

Round 2, Part 1:

- a. The percentage of votes garnered by each of the parties, organizations and coalitions is multiplied by the remaining available seats after Round 1. All party-list participants shall participate in this round *regardless of the percentage of votes they garnered.*
- b. The party-list participants shall be entitled to additional seats based on the product arrived at in (a). The whole integer of the product corresponds to a party's share in the remaining available seats. Fractional seats shall not be awarded.

x x x x

- c. A Party-list shall be awarded no more than two (2) additional seats.

x x x x

Round 2, Part 2:

- a. The party-list party, organization or coalition next in rank shall be allocated one additional seat each until all available seats are completely distributed.

x x x x⁸

BANAT correctly applied the Niemeyer Formula to determine proportionality in the remaining seats after the first round. However, it is silent on how fractional seats represented by decimal values are to be treated. As held in *VETERANS* and *BANAT*, the fractional seats should not be rounded-off in the absence of an enabling law. *BANAT* recognized that there will be fractional seats

⁸ *Ponencia*, pp. 18-19.

and introduced the second round (second part) and assigned one seat each to the parties based on their rankings until the seats are exhausted.

However, as can be implied in the illustration in *BANAT*, it completely disregarded the 2 percenters' fractional seats in the second round (second part) and failed to address the question why some 2 percenters, which received a large fractional seat but did not reach the three-seat limit, were not awarded further additional seat. In footnote 31, *BANAT* merely stated that “[t]he product of the percentage and the remaining available seats of all parties ranked nine and below is less than one.”

As can be implied from the illustration in *BANAT*, the second round is based on two different formulas of proportionality. The second round (first part) used the Niemeyer Formula while the second round (second part) used the formula used in the first round to rank the non-two percenters including parties, which did not receive a seat during the second round (first part). This made it appear that the “fractional seats” of the non-two percenters are automatically larger than those of the 2 percenters, which justify the exclusion of the 2 percenters in the allocation of seats in the second part.

The same concern highlights the motion for reconsideration in *BANAT*.⁹ In dealing with this issue, *BANAT* (MR) explained:

In the table above, CIBAC cannot claim a third seat from the seat allocated to TUCP, the last ranked party allocated with a seat. CIBAC's 2.81% (from the percentage of 4.81% less the 2% for its guaranteed seat) has a lower fractional seat value after the allocation of its second seat compared to TUCP's 1.03%. CIBAC's fractional seat after receiving two seats is only 0.03 compared to TUCP's 0.38 fractional seat. Multiplying CIBAC's 2.81% by 37, the additional seats for distribution in the second round, gives 1.03 seat, leaving 0.03 fractional seat. Multiplying TUCP's 1.03% by 37 gives a fractional seat of 0.38, higher than CIBAC's fractional seat of 0.03. The fractional seats become material only in the second step of the second round of seat allocation to determine the ranking of parties. Thus, for purposes of the second step in the second round of seat allocation, TUCP has a higher rank than CIBAC.

BANAT (MR) explained this by stating that 2% is deducted from parties qualified to garner a “guaranteed” seat in determining whether they are still qualified to obtain a seat in the second round (second part). The *ponencia* adopted this explanation:

Surely, *BANAT* instructs that 2% shall be deducted from the percentage votes of party-lists that obtained a guaranteed seat. This deduction, however, is done in the second step of the second round of seat allocation, not in the first step of the second round as petitioners would have the Court believe. Hence, the application of *BANAT*, as earlier outlined in this Decision, stands.¹⁰

I disagree on this point. The second round (second part) should still consider the fractional value of seats obtained by the 2 percenters by simply

⁹ 604 Phil. 131 (2009) & 609 Phil. 751 (2009).

¹⁰ *Ponencia*, p. 31.

removing the integer representing the credited seats. The absurdity of disregarding the fractional seats of the 2 percenters is adequately illustrated by simply looking at parties ranked 3 and 51:

RA NK	PARTY	VOTES GARNERED	% OF TOTAL VOTES	FIRST ROUND	% OF VOTES X 53 REMAINING SEATS	SECOND ROUND (FIRST PART)	SECOND ROUND (SECOND PART)	TOTAL NUMBER OF SEATS
3	AKO BICOL POLITICAL PARTY	1,049,040	3.76	1	1.9928 (Note: 0.9928 fractional seat should still be considered in the second round, second part)	1	0	2
51	KABATAAN PARTY LIST	195,837	0.70	0	Not specified but using the Niemeyer Formula (0.371)	0	1	1

It would be clear that AKO BICOL still has 0.9928 fractional seat, which is higher than the 0.371 of KABATAAN. However, it was no longer considered in the second round, second part. This amply demonstrates why AKO BICOL was not awarded a seat even if it has not yet reached the three-seat limit. The seat was instead given to a party receiving a lower number of votes because the fractional seat of 0.9928 was no longer considered. This is contrary to the principle of proportionality. This could have been avoided if the Niemeyer Formula was applied to all parties to determine the proportion of their votes in relation to the votes cast for the PLS in allocating the “additional” seats.

I submit that the second round, second part of allocation of seats discussed in BANAT should be understood as the distribution of remaining seats to parties receiving seats with fractional value. In order to determine each of the parties’ proportional share, the Niemeyer Formula should be uniformly applied to all parties in the second round. After the additional seats represented by whole integers have been distributed in the second round (first part), the parties should then be ranked again in a descending order based on their fractional seats to determine which of them will receive the remaining seats until they are exhausted. This is the more logical approach in treating fractional seats without resorting to rounding-off by recognizing the proportion of votes received by the parties. BANAT already implemented this in the second round (second part) but erred not to consider the fractional seats of the 2 percenters.

This adequately explains why some 2 percenters cannot have the maximum 3 seats because the size of their fractional seats may be lower than some of the non-two percenters.

III.

The 2019 NLE have long been concluded, the winning party-list groups have already been declared, and their respective nominees have already taken an oath of and assumed office before the House of Representatives. No restraining order was issued to prevent the National Board of Canvassers from executing its Resolution No. 004-19. Accordingly, the grant of this petition would necessarily alter the current composition of membership in the House of Representatives, which the Court must carefully consider.

Section 17, Article VI of the Constitution clearly provides that the House of Representatives shall have an electoral tribunal “which shall be the **sole judge** of all contests relating to the election, returns, and qualifications of their respective Members.” The importance of observing the delineation of jurisdiction in election contests is recently highlighted in the case of *Reyes v. COMELEC, et al.*¹¹ where the Court had to clarify when the jurisdiction of the House of Representatives Electoral Tribunal (HRET) begins. According to *Reyes*, a candidate becomes a member of the house if the following requisites are met: (1) proclamation; (2) oath of office; and (3) assumption to office.¹²

The HRET’s jurisdiction was recognized in *Rivera, et al. v. Commission on Elections, et al.*¹³ relating to a petition for *quo warranto* against a Member of the House of Representatives:

Concerning now the *quo warranto* petition, G.R. No. 213069, of CIBAC Foundation, the Court reminds the petitioners that under Section 17 of Article IV of the 1987 Constitution, the sole judge of all contests relating to the election, returns and qualifications of the Members of the House of Representatives is the House of Representatives Electoral Tribunal (HRET). Section 17 reads:

Section 17. The Senate and the House of Representatives shall each have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications of their respective Members, x x x

Because the nominees of CIBAC National Council, Tugna and Gonzales, assumed their seats in Congress on June 26, 2013 and July 22, 2013, respectively, G.R. No. 213069 should be dismissed for lack of jurisdiction. It should be noted that since they had been already proclaimed, the jurisdiction to resolve all election contests lies with the HRET as it is the sole judge of all contests relating to the election, returns, and qualifications of its Members.

In a long line of cases and more recently in *Reyes v. COMELEC, et al.*, the Court has held that once a winning candidate has been proclaimed, taken his oath, and assumed office as Member of the House of Representatives, the COMELEC’s jurisdiction over election contests relating to his election, returns, and qualifications ends, and the HRET’s own jurisdiction begins. Since the nominees of CIBAC National Council have already assumed their seats in

¹¹ 712 Phil. 192 (2013) & 720 Phil. 174 (2013).

¹² *Id.* at 212.

¹³ 785 Phil. 176 (2016).

Congress, the *quo warranto* petition should be dismissed for lack of jurisdiction.¹⁴ (Emphasis supplied; citations omitted.)

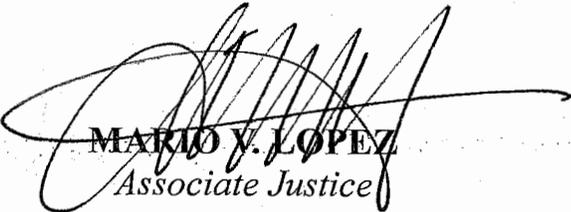
Here, the adoption of petitioners' framework and the grant of their prayer would mean that the proclamation of some party-list nominees will be voided. In *ABC (Alliance for Barangay Concerns) Party List v. COMELEC, et al.*,¹⁵ the Court reiterated that party-list nominees are the "elected members" of the House of Representatives, and thus covered by HRET's jurisdiction. Curiously, the issue of jurisdiction was not encountered in the cases of *Veterans v. COMELEC*¹⁶ and *BANAT v. COMELEC*.¹⁷ In *Veterans*, the Court issued a *Status Quo Ante Order* to restrain the Commission on Elections in executing its Resolution of proclaiming the remaining party-list groups, to wit:

On January 12, 1999, this Court issued a Status Quo Order directing the Comelec "to CEASE and DESIST from constituting itself as a National Board of Canvassers on 13 January 1999 or on any other date and proclaiming as winners the nominees of the parties, organizations and coalitions enumerated in the dispositive portions at its 15 October 1998 Resolution or its 7 January 1999 Resolution, until further orders from this Court."¹⁸

In *BANAT*, the seats reserved for party-list members were not completely filled-up because *Veterans* held that the 20% membership was merely a ceiling and because the *Veterans Formula* inherently prevented the completion of the 20% membership. Thus, HRET's jurisdiction was again not an essential issue.

However, we must be circumspect in deciding the instant case. While the Court has jurisdiction to pass upon the constitutionality of Section 11 (b) of RA No. 7941, it is the HRET that should pass upon the possible divestment of seats of Members of the House of Representatives. To reiterate, we did not issue a temporary restraining order or a *status quo ante order*. As a result, the nominees of the winning party-list became Members of the House of Representatives. Accordingly, I submit that any discussion on the alternative formula to allocate the seats should be applied prospectively.

FOR THESE REASONS, I vote to **DISMISS** the petition for lack of merit. Insofar as my discussion on how fractional seats are allocated, this should be applied prospectively.


MARIO V. LOPEZ
Associate Justice

¹⁴ *Id.* at 193-194.

¹⁵ 661 Phil. 452 (2011).

¹⁶ *Supra* note 3.

¹⁷ *Supra* note 1.

¹⁸ *Supra* note 3 at 434.

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court