

THE JUDICIALLY LEGISLATED CONCEPT OF MARGINALIZATION AND THE DEATH OF PROPORTIONAL REPRESENTATION: THE PARTY LIST SYSTEM AFTER *BANAT* AND *ANG BAGONG BAYAN*^{*}

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"[Gays are] over-represented in the lower house and in the upper house... in the military... in the religious... I know that they're already there. Either those who open their closet or those who keep closing their closet."

- Commission on Elections
Commissioner Nicodemo Ferrer¹

INTRODUCTION

The concept of marginalization is, at least at present, inextricably linked with the entire idea of the party-list system in the Philippines. Election officials, politicians, members of the media, and even representatives from the party-list organizations themselves routinely declare that the party-list system is one intended to promote "marginalized representation," and that party-list groups must "represent the marginalized."

The above quote from Commission on Elections (COMELEC) Commissioner Nicodemo Ferrer² therefore, regardless of how ridiculous it may seem to many of us, is simply the logical and expected consequence of this type of thinking: that if party-list organizations must necessarily represent – or at least, credibly claim to represent – the marginalized, then

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¹ Comm'n on Elections (COMELEC) Resolution of SPP Case No. 09-228 (PL), Nov. 11, 2009 (attempting to justify the decision to disallow the LGBT party *Ang Ladlad* from participating in the 2010 party-list elections).

² Philip Tubeza, *COMELEC: Many gays in Congress; no need for Ang Ladlad*, PHIL. DAILY INQUIRER, Nov. 17, 2009, available at <http://newsinfo.inquirer.net/inquiretheadlines/nation/view/20091117-236714/Comelec-Many-gays-in-Congress-no-need-for-Ang-Ladlad>.

groups that are already “represented” in Congress in particular or in the government more generally³ no longer have a place in the party-list process.

Conversely, for a group to establish entitlement to party-list participation, it must, by the same token, claim that it represents “the marginalized.” But what exactly is “marginalized” in the context of the party-list system?

Most would probably equate the concept of “marginalization” with the idea of “sectors” in Philippine society that have traditionally, due to lack of economic or political clout, been unable to secure significant representation in Congress. Thus in the declaration of policy in the party-list law it is expressly stated that:

The State shall promote proportional representation in the election of representatives to the House of Representatives through a party-list system of registered national, regional and sectoral parties or organizations or coalitions thereof, which will enable **Filipino citizens belonging to marginalized and underrepresented sectors**, x x x to become members of the House of Representatives.⁴ (emphasis supplied)

The statute goes on to enumerate certain sectors “included” in this category of the marginalized and underrepresented, such as “labor, peasant, fisher folk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals.”⁵ The list, however, is by not exhaustive, and thus there is ample leeway in the party-list law for other “marginalized” sectors to be recognized and given the right to participate in the party-list elections. In recent years, this leeway has led to some curious, if not completely absurd, attempts to establish “marginalization,” as in the case of a group claiming to seek representation for the marginalized and underrepresented sector of cockfighting aficionados.⁶

Due to this emphasis on marginalization as the primary requirement for participation in party-list elections, the entire process has, predictably and perhaps unavoidably, degenerated into oddly-skewed game of one-

³ Whether such “representation” actually exists in fact is, of course, another matter.

⁴ Rep. Act No. 7941, § 2 (1995). This is the Party-List System Act of 1995 (hereinafter “Party-List Act”).

⁵ *Cockfighting aficionados eye congressional seat*, GMA NEWS ONLINE, Aug. 17, 2009, available at <http://www.gmanews.tv/story/170042/Cockfighting-aficionados-eye-congressional-seat>.

⁶ *Id.*

upmanship; with groups seeking to participate constantly trying to prove they are more marginalized than the others.

It bears pointing out however, that representation for the marginalized was not the principal objective behind the inclusion of the party-list system in the Constitution. Or, perhaps more accurately, representation for the marginalized was not the sole intention behind the institutionalization of party-list representation in the House of Representatives.

What this article aims to discuss are: the original concept of the party-list system in the 1987 Constitution, the transformation (or perhaps more accurately, the “hijacking”) of this intent by the Supreme Court and its substitution with the idea of “marginalized” representation, and finally, how this judicial reinterpretation of the Constitutional intent, coupled with statutorily and jurisprudentially established process in party-list elections have led the entire party-list system far astray of its original destination.

THE MISPLACED IDEA OF PROPORTIONAL REPRESENTATION

The party-list system was an innovation introduced under the 1987 Constitution, whereby twenty percent (20%) of the seats in the House of Representatives would be filled, not by direct election of individual candidates at the district level, but by representatives/nominees of *parties*; in other words, for the party-list, voters would choose a party as opposed to a specific, individual candidate, and it would be the party that would designate its representatives or nominees to occupy the seats thus obtained in the House. The pertinent provision reads as follows:

The House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law, who shall be elected from legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio, and those who, as provided by law, shall be elected through a party-list system of registered national, regional, and sectoral parties or organizations.

The party-list representatives shall constitute twenty *per centum* of the total number of representatives including those under the party list. x x x⁷ (emphasis supplied)

⁷ CONST. art. VI, § 5, ¶¶ 1-2.

The final form of the above-quoted provision was proposed by Commissioner Christian S. Monsod, as an alternative to an earlier formulation which provided that the House would be composed of those elected from legislative districts and those “who, as provided by law, shall be elected **from the sectors and party-list**.”⁸ His intent in deleting the separate category of “sectors” and emphasizing instead a uniform party-list system where all types of parties could participate, was explained by Commissioner Monsod as follows:

My amendment is that the parties that will be listed may either be national, regional, or sectoral parties or organizations. That means that **any sector or any party may register** provided it meets the criteria of the Commission on Elections and the Constitution on prohibited organizations and the requirements for registration. In other words, the party list system that is being advocated by this amendment is a system that opens up the list to any regional, national or sectoral party. There are no limitations, except the general criteria and requirements for parties or organizations x x x⁹ (emphasis supplied)

Commissioner Monsod actually took pains to clarify that what he envisioned was a party-list system that was not exclusive to, or in fact, even primarily concerned with, sectoral representation. The following exchange makes this clear:

MR. DAVIDE: Another question for clarification, Madam President. The law itself which shall implement the party list system cannot exclude a sector, if the sector would wish to register under the party system.

MR. MONSOD: Yes, Madam President.

MR. DAVIDE: But it has to be a sectoral party or organization.

MR. MONSOD: No, it need not be a sectoral party or organization. It can be a political party; it can be a regional party; or it can be a sectoral party or organization. I also would like to manifest that my suggestion is that the detailed implementation of the party list system should be or may be an appended ordinance to this Constitution, so that the Commission on Elections may implement immediately or in the next elections after the ratification of the Constitution the party list system for purposes of the legislature.

⁸ II RECORD OF THE CONSTITUTIONAL COMMISSION 253 (hereinafter RECORD).

⁹ *Id.*

MS. AQUINO: Madam President.

THE PRESIDENT: Commissioner Aquino is recognized.

MS. AQUINO: The Committee would like to be clarified on this. Do we understand the proponent correctly that this party list system is **not necessarily synonymous to sectoral representation?**

MR. MONSOD: **No, it is not necessarily synonymous, but it does include the right of sectoral parties or organizations to register, but it is not exclusive to sectoral parties or organizations.**¹⁰ (emphasis supplied)

Instead of anchoring the party-list system on the idea of sectoral representation, the Monsod proposal instead emphasized its character as a system for promoting “proportional representation.” As he illustrated:

MR. MONSOD: What the voters will vote on is the party, whether it is UNIDO, Christian Democrats, BAYAN, KMU or Federation of Free Farmers, not the individuals. When these parties register with the COMELEC, they would simultaneously submit a list of the people who would sit in case they win the required number of votes in the order in which they place them. Let us say that this Commission decides that of those 50 seats allocated under the party list system, the maximum for any party is 10 seats. At the time of registration of the parties or organizations, each of them submits 10 names. Some may submit five, but they can submit up to 10 names who must meet the qualifications of candidates under the Constitution and the Omnibus Election Code. **If they win the required number of votes, let us say they win 400,000 votes, then they will have one seat. If they win 2 million votes, then they will have five seats.** In the latter case, the party will nominate the first five in its list; and in case there is one seat, the party will nominate the number one on the list.¹¹ (emphasis supplied)

But as far as the voters are concerned, they would be voting for party list or organizations, not for individuals.¹²

And again in a similar vein:

MR. MONSOD: Madam President, I just want to say that we suggested or proposed the party list system because we wanted to open up the political system to a pluralistic society through a

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

multipart system. But we also wanted to avoid the problems of mechanics and operation in the implementation of a concept that has very serious shortcomings of classification and of double or triple votes. We are for opening up the system, and we would like very much for the sectors to be there x x x **Our proposal is that anybody who has two-and-a-half percent of the votes gets a seat. There are about 20 million who cast their votes in the last elections. Two-and-a-half percent would mean 500,000 votes. Anybody who has a constituency of 500,000 votes, nationwide, deserves a seat in the Assembly.** If we bring that down to two percent, we are talking about 400,000 votes. The average vote per family is three. So, here we are talking about 134,000 families. We believe that there are many sectors who will be able to get seats in the Assembly because many of them have memberships of over 10,000. In effect, that is the operational implication of our proposal. What we are trying to avoid is this selection of sectors, the reserve seat system. We believe that it is our job to open up the system and that we should not have within that system a reserve seat. We think that people should organize, should work hard, and should earn their seats within that system.¹³ (emphasis supplied)

“Proportional representation,” it bears noting, is a principle that, in essence, seeks to ensure that “that parties or blocs of like-minded voters should win seats in legislative assemblies in proportion to their share of the popular vote.”¹⁴ It is a principle that is being propounded as an alternative to the “first-past-the-post,” “winner-take-all” system that currently prevails in Philippine¹⁵ elections, where the candidate who acquires a majority (or simply the largest plurality) gets the sole and exclusive privilege of representing her constituency, even if a substantial number of them did not actually vote for her.

As Commissioner Monsod explains, the ultimate intention is to “open up the political system” by allowing parties with a significant national constituency to gain seats in Congress even if they are unable to prevail in head-to-head, first-past-the-post district elections. By allotting seats in the House of Representatives to these groups with “dispersed” constituencies, the idea was that they would be encouraged to participate in the elections, and eventually, strengthen their position as organized political parties. Commissioner was firmly against the idea of having “reserved” seats for sectors, but instead proposed that these sectors, by consolidating their

¹³ *Id.* at 256.

¹⁴ Rob Richie & Steven Hill, *The Case for Proportional Representation*, 26 SOCIAL POLICY 25-37 (1996).

¹⁵ The same system, not surprisingly, also prevails in the United States, from which a substantial portion of the Philippine political system is patterned.

constituencies, could win seats in “open” party-list elections, following the principle of proportional representation.

THE COUNTERPUSH FOR SECTORAL REPRESENTATION

There was, of course, a long and heated debate on the Monsod proposal. The principal opposition came from the ranks of the members of the Constitutional Commission who wanted express sectoral representation in the House of Representatives, either through a party-list system, or through another mechanism.

One of those opposed to the Monsod proposal, Commissioner Wilfrido V. Villacorta, expounded on this position as follows:

MR. VILLACORTA: We already have an Upper House which will likely be dominated by charismatic nationally known political figures. We have allocated 80 percent of the Lower House for district representatives who will most likely win on the basis of economic and political power. We are purportedly allowing 20 percent of the Lower House seats to be allocated to representatives of parties and organizations who are not traditional politicians. And yet, because we subject the sectoral candidates to the rough-and-tumble of party politics and pit them against veteran politicians, the framers of the Constitution are actually predetermining their political massacre.

Madam President, the party list system in the form that it is being proposed will only exacerbate the frustrations of the marginalized sectors. In this our reborn democracy, I think we should turn the political revolution of February into a veritable social revolution by enshrining people's power in the legislature. x x x

For too long since our people attained a semblance of self-government at the start of this century, our legislators were elected based on their promise that they would represent the little people of our land. With the exception of a few patriotic legislators, some of whom are in our Commission today, members of the National Assemblies, the Congresses, and the Batasans of the past did not devote themselves enough to the alleviation of the dismal condition of our country's poor and lower classes.

The authors of the book, *Bureaucracy and the Poor*, could not have described the situation more aptly, and I quote:

For most of human history the plight of the poor has been easily excluded from the consciousness of those with the power to act. Inaction was justified by elaborate theories that the poor were by

nature inferior or happy in their condition or both. Most government contact with the poor has been limited to collecting their taxes, insuring a modicum of law and order, and providing some limited welfare service.

These realities convince us that there are no spokesmen and legislators who can best represent the poor, the underprivileged, the marginalized than those coming from within their ranks.¹⁶ (emphasis supplied)

As an alternative to the Monsod proposal, Commissioner Villacorta suggested that the party-list system be reserved *only* for sectoral candidates, to the exclusion of mainstream, traditional politicians. Although he agreed that traditional parties could participate in this system, they could only do so if they fielded "candidates who come from the different marginalized sectors" to be defined under the Constitution.¹⁷

The view that an "open" party-list system would subject marginalized and traditionally underrepresented sectors to a "political massacre" was shared by Commissioner Jaime S.L. Tadeo, who likewise pushed for a system of reserved seats in the lower house for "marginalized" sectors. When asked to explain how he defined "marginalized" he stated that:

MR. TADEO: In deciding which sectors should be represented, the criteria should adhere to the principle of social justice and popular representation. On this basis, the criteria have to include:

1. The number of people belonging to the sector,
2. The extent of "marginalization," exploitation and deprivation of social and economic rights suffered by the sector;
3. The absence of representation in the government, particularly in the legislature, through the years;
4. The sector's decisive role in production and in bringing about the basic social services needed by the people.¹⁸

He then proceeded to enumerate the marginalized sectors he was referring to: peasants, labor, urban poor, teachers, health workers, professional artists and cultural workers, youth, women, and indigenous communities.¹⁹

¹⁶ *Id.* at 254-55.

¹⁷ *Id.*

¹⁸ *Id.* at 255.

¹⁹ *Id.*

This debate on an “open” party-list system as against a “closed” system eventually led to a compromise formulation of the constitutional provision in question. The formulation provided that:

The party-list representatives shall constitute twenty percent of the total members of the House of Representatives provided that for two terms after the ratification of this Constitution twenty-five of the seats allocated to party-list representatives shall be filled by selection or election, as provided by law, from the labor, peasant, urban poor and youth sectors.²⁰

This compromise attempted to bridge the divide between the two opposing positions by basically providing for an “open” party-list system but with a “transition period” of two congressional terms within which half the seats allocated for the party-list, or 25 seats, would be reserved for sectoral representatives. A fully open party-list system, therefore, would only be implemented after this transition.

Despite this compromise, proponents of the “reserved” system, made a last ditch effort to institutionalize perpetual sectoral representation through the party-list system. Commissioner Felicitas S. Aquino proposed that the two-term transition period be eliminated and instead, perpetual sectoral representation be institutionalized for 25, or half, the seats allocated for the party-list.²¹ A long debate followed, and ultimately, the proposal for perpetual sectoral representation was defeated only in a close vote of 22 to 19.²²

A further amendment from Commissioner Rene V. Sarmiento would extend the transition period from two to three terms,²³ but in the end, the idea of perpetual sectoral representation was discarded in favor of the eventual full adoption of the open party-list system as originally conceived by Commissioner Monsod.

In the arena of the 1986 Constitutional Commission, it was clear that the proponents of “proportional representation” had won a clear, if closely-contested, victory against the proponents of sectoral or “marginalized representation.”

²⁰ II RECORD 561.

²¹ *Id.* at 556.

²² *Id.* at 584.

²³ *Id.* at 579.

IMPLEMENTATION BY CONGRESS

The conceptual divide between the party-list as being primarily a means for promoting “proportional representation” and the party-list as a means for institutionalizing “marginalized representation” was very clearly established in the deliberations of the 1986 Constitutional Commission. And the Commission, albeit by a narrow margin of three votes, decided to emphasize the character of the party-list system as a mechanism for promoting proportional representation.

This characterization of the party-list system continued to be observed in the deliberations in Congress for the enactment of the party-list law. In his sponsorship speech for the bill that would eventually become the party-list law,²⁴ Representative Tito R. Espinosa declared that:

In keeping with the policy of the State to evolve a **full and open party system** in order to attain the broadest possible representation of group interest in the government’s lawmaking body, the Committee on Suffrage and Electoral Reforms submits before you today House Bill No. 3043 which provides for the election of party-list representatives through the party-list system.

House Bill No. 3043 if enacted, will broaden the horizons for the institutionalization of democracy in Philippine politics. For one, this vital legislative measure **strengthens democratic pluralism** that gives premium on true grassroots representation. **It encourages the free battle and market of ideas regardless of race, creed or ideology which in the process would pave the way to the transformation of our electoral and party system into one that is based on issues and platforms and programs of actions not of personalities and platitudes.**

Eventually, the integration of the party-list system or the **active participation of political parties, coalitions and sectoral organizations in the mainstream of the Philippine political arena will significantly aid the political maturity of the Filipino people.**²⁵ (emphasis supplied)

The “open” nature of the party-list system envisioned by Congress, where all parties and just marginalized groups could freely participate, is further underscored by the following exchange during the deliberations:

²⁴ Rep. Act No. 7941 (1995).

²⁵ TRANSCRIPT OF PROCEEDINGS OF HOUSE COMMITTEE ON SUFFRAGE AND ELECTORAL REFORMS, Cejes-2, at 45 (Nov. 8, 1994).

MR. MENZON²⁶: Assuming that this coalition of LAKAS, LABAN, NPC and LP is accredited by the COMELEC, would they be entitled to a party-list?

MR. ESPINOSA: To a party-list? Yes, Your Honor.

MR. MENZON: Even if they also field candidates for the regular legislative districts?

MR. ESPINOSA: Yes, Your Honor.

MR. MENZON: Would you not say, Your Honor, that that would be undue advantage for these giant political parties depriving the small sectoral groups like labor unions of, more or less, equal footing in the political arena?

MR. ESPINOSA: That may appear so, Your Honor, but our Constitution says proportional representation of political parties. Therefore, we cannot exclude these as what you call giant political parties. Because if we do that, that would be a violation of the Constitution since the Constitution says that it is a proportional representation, the point of reckoning is the political parties existing and registered.²⁷

It must be pointed out that the “open” party-list system was not intended to *prevent* marginalized sectors from obtaining representation. The idea, instead, was to give these groups the opportunity to consolidate – through the three-term transition period where they would be entitled to reserved seats as sectoral representatives – so that they could freely and effectively compete in the open party-list system that would be introduced after. As explained by Representative Pablo P. Garcia in the deliberations:

In the debates in the Constitutional Commission, there was a protracted debate on whether to include sectoral representation in Congress or not. Afterwards, a compromise was reached, and it is that we shall provide for sectoral representation only during the transition – three elections. The reasoning was that during this period the so-called sectoral or marginalized groupings will already acquire strength or will already be incorporated or integrated in the mainstream of organized political parties. So after three elections, there will no longer be sectoral representatives in Congress, there will be party-list

²⁶ Paterno Menzon, Sectoral Representative for Labor.

²⁷ TRANSCRIPT OF PROCEEDINGS OF HOUSE COMMITTEE ON SUFFRAGE AND ELECTORAL REFORMS, Abad-3, at 74-75 (Nov. 8, 1994).

representatives but no longer a sectoral representation. However, the political parties in submitting the list in the party-list may include members who come from various sectors, but they are elected under the party-list system.²⁸ (emphasis supplied)

Thus, representation for the marginalized was to be achieved by giving them the opportunity to participate in party-list elections, where even a dispersed national constituency, if numerous enough, would allow them to gain seats in Congress. This is reflected in the declaration of policy in what would eventually become the party-list law, Republic Act No. 7941:

The State shall promote **proportional representation** in the election of representatives to the House of Representatives through a party-list system of **registered national, regional and sectoral parties or organizations or coalitions** thereof, **which will enable Filipino citizens belonging to marginalized and underrepresented sectors, organizations and parties, and who lack well-defined political constituencies** but who could contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole, to become members of the House of Representatives. Towards this end, the State shall develop and guarantee a **full, free and open party system in order to attain the broadest possible representation of party, sectoral or group interests** in the House of Representatives **by enhancing their chances to compete for and win seats in the legislature**, and shall provided the simplest scheme possible.²⁹ (emphasis supplied)

Eventually, however, this reference to “marginalized and underrepresented sectors” in RA 7941, taken out of context from the rest of the provision and the Constitutional framework on which the entire law was based, would be used by the Supreme Court to pave the way for a virtual reinstatement of the concept of perpetual marginalized and sectoral representation.

THE RETURN OF MARGINALIZED REPRESENTATION

In 2001, just before the second open party-list elections³⁰ to be held on May 14 of that year, several petitions were filed before the Supreme Court challenging COMELEC Resolution No. 3785, which approved the participation of 154 parties in the party-list elections, including several

²⁸ TRANSCRIPT OF PROCEEDINGS OF HOUSE COMMITTEE ON SUFFRAGE AND ELECTORAL REFORMS, Tabligan-2, at 54-55 (Nov. 22, 1994).

²⁹ Party-List Act of 1995, § 2.

³⁰ The first was conducted on May 11, 1998, after the end of the “transition period.”

mainstream political parties.³¹ These petitions gave rise to the cases of *Ang Bagong Bayani-OFW Labor Party v. Ang Bagong Bayani-OFW Labor Party Go! Go! Philippines et al.*³² and *Bayan Muna v. COMELEC*.³³

The ruling in these two cases would radically alter the framework and fundamental principle underlying the party-list system and effect a resurrection of the idea of perpetual marginalized representation long laid to rest during the proceedings in the 1986 Constitutional Commission.

Petitioners in these cases argued for the disqualification of “major political parties,” rehashing the old argument that the party-list system should be reserved for the marginalized. The COMELEC, for its part, noted “that as defined, the ‘party-list system’ is a ‘mechanism of proportional representation’ in the election of representatives to the House of Representatives from national, regional, and sectoral parties or organizations or coalitions thereof registered with the Commission on Elections,” which was not exclusive to marginalized groups. In the same vein, the Solicitor General argued “that the Constitution and RA No. 7941 allow political parties to participate in the party-list elections” and “that the party-list system is, in fact, open to all ‘registered national, regional and sectoral parties or organizations.’”³⁴

In resolving these petitions, the *ponente*, then Justice, later Chief Justice, Artemio V. Panganiban, while conceding that “political parties—even the major ones—may participate in the party-list elections” nonetheless went on to declare that any “political party, sector, organization or coalition” seeking to participate in party-list elections “must represent the marginalized and underrepresented groups identified in Section 5 of RA 7941.”³⁵

His explanation begins as follows—

That political parties may participate in the party-list elections does not mean, however, that any political party—or any organization or group for that matter—may do so. The requisite character of these parties or organizations must be consistent with the purpose of the party-list system, as laid down in the Constitution and RA 7941. Section 5, Article VI of the Constitution x x x

³¹ Lakas-NUCD, LDP, NPC, PMP, LP, to name a few.

³² G.R. No. 147589, 359 SCRA 698, Jun. 26, 2001.

³³ G.R. No. 147613, 359 SCRA 698, Jun. 26, 2001.

³⁴ See *Ang Bagong Bayani - OFW Labor Party*, 359 SCRA at 715.

³⁵ *Id.*

Notwithstanding the sparse language of the provision, a distinguished member of the Constitutional Commission declared that the purpose of the party-list provision was to give “genuine power to our people” in Congress. Hence, when the provision was discussed, he exultantly announced: “On this first day of August 1986, we shall, hopefully, usher in a new chapter to our national history, by giving genuine power to our people in the legislature.”

x x x

The intent of the Constitution is clear: to give genuine power to the people, not only by giving more law to those who have less in life, but more so by enabling them to become veritable lawmakers themselves.³⁶

The first leg, therefore, on which Justice Panganiban stands his argument, is the supposed Constitutional intent that the party-list system should “give genuine power to our people.” Without even discounting the interpretative value of the quoted statement – after all, it is a considerable stretch to say that “genuine power to the people” should necessarily translate to a party-list system exclusive to the marginalized – the significance of the quotation is already seriously compromised if its utterance is taken in context. The statement was made by Commissioner Villacorta,³⁷ one of the leading proponents for a “reserved” system, *before* the decisive 22-19 vote that ended the debate on the proposal to have a system of reserved seats. It is thus not a comment on the intent of the provision *as finally adopted* but on the provision *as proposed by the advocates for a reserved system*.

Nonetheless, Justice Panganiban uses this selective, if not utterly erroneous, citation of the Commission Record as the springboard for the rest of his conclusion. He proceeds by going into an interpretation of the Declaration of Policy in R.A. 7941.³⁸

The foregoing provision mandates a state policy of promoting proportional representation by means of the Filipino-style party-list system, which will “enable” the election to the House of Representatives of Filipino citizens, (1) who belong to marginalized and underrepresented sectors, organizations and parties; and (2) who lack well-defined constituencies; but (3) who could contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole. x x x

³⁶ *Id.* at 717-19.

³⁷ See *supra* note 20.

³⁸ See *supra* note 29.

Proportional representation” here **does not refer to the number of people in a particular district**, because the party-list election is national in scope. **Neither does it allude to numerical strength** in a distressed or oppressed group. Rather, **it refers to the representation of the “marginalized and underrepresented”** as exemplified by the enumeration in Section 5 of the law; namely, “labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals.”³⁹

Justice Panganiban argues, in effect, for a definition of “proportional representation” that eschews proportionality vis-à-vis “numerical share in the popular vote,”⁴⁰ but is instead anchored on representation on simple *identity* – that is, a proportional share in Congressional seats for members of marginalized sectors, based solely on the fact that they are marginalized, and regardless of whether or not they are able to muster a significant electoral constituency. Stripped of the wordplay, this is nothing more or less than the proposal to have perpetual reserved seats for marginalized sectors.

But Justice Panganiban goes further than simply reviving the old call for a system of reserved seats. He declares that:

However, it is not enough for the candidate to claim representation of the marginalized and underrepresented, because representation is easy to claim and to feign. The party-list organization or party must factually and truly represent the marginalized and underrepresented constituencies mentioned in Section 5. Concurrently, **the persons nominated by the party-list candidate-organization must be “Filipino citizens belonging to marginalized and underrepresented sectors, organizations and parties.”** x x x

In the end, the role of the COMELEC is to see to it that **only those Filipinos who are “marginalized and underrepresented” become members of Congress under the party-list system, Filipino-style.**⁴¹ (emphasis supplied)

In one stroke, he expands (or perhaps narrows) the generally stated policy in R.A. 7941 to prescribe a new, previously unstated, requirement: that the nominees of party-list groups must likewise belong to marginalized sectors. Again, the basis for this rather restrictive rule – which has the effect

³⁹ See Ang Bagong Bayani - OFW Labor Party, 359 SCRA 718-19.

⁴⁰ See Richie & Hill, *supra* note 14.

⁴¹ See Ang Bagong Bayani - OFW Labor Party, 359 SCRA at 719.

of imposing an additional requirement not found in the general requirements for membership in the House of Representatives in the Constitution⁴² – is Justice Panganiban's position that the fundamental purpose of the party-list system is to promote "representation of the marginalized and underrepresented," and that this should be taken literally to mean a that the persons actually elected should not simply *represent* the interests of the marginalized, but should actually *belong* to a marginalized group.

Ang Bagong Bayani was adopted by an 8-5 majority, with one Justice concurring in the result. There were strongly worded dissenting opinions from two Justices, Jose C. Vitug and Vicente V. Mendoza, both of whom cited the deliberations in the 1986 Constitutional Commission, particularly the 22-19 vote which rejected the proposal on perpetual reserved representation for marginalized sectors, as an indicator of the Constitutional intent for the party-list system. In the words of Justice Mendoza:

Thus, the deliberations of the Constitutional Commission show that the party-list system is **not limited to the "marginalized and underrepresented" sectors** referred to by petitioners, *i.e.*, labor, peasants, urban poor, indigenous cultural communities, women, and the youth, but that it is a **type of proportional representation intended to give voice to those who may not have the necessary number to win a seat in a district but are sufficiently numerous to give them a seat nationwide**. It, therefore, misreads the debates on Art. VI, §5(1)(2) to say that "Although Commissioners Villacorta and Monsod differed in their proposals as to the details of the party-list system, both proponents worked within the framework that the party-list system is for the 'marginalized' as termed by Comm. Villacorta and the 'underrepresented' as termed by Comm. Monsod, which he defined as those which are 'always third or fourth place in each of the districts.'"

Indeed, the two proposals put forth by them are basically different, and they do not have the same basis. What the advocates of sectoral representation wanted was permanent reserved seats for **"marginalized sectors"** by which they mean the labor, peasant, urban poor, indigenous cultural communities, women, and youth sectors. Under Art. VI, §5(2), these sectors were given only one-half of the seats in the House of Representatives and only for three terms. **On the other hand, the "third or fourth place(rs)" in district elections, for whom the party-list system was intended, refer to those who may not win seats in the districts but**

⁴² CONST. art. VI, § 6.

nationwide may be sufficiently strong to enable them to be represented in the House. They may include Villacorta's "marginalized" or "underprivileged" sectors, but they are not limited to them. There would have been no need to give the "marginalized sectors" one-half of the seats for the party-list system for three terms if the two systems are identical.

The objections raised against the accreditation of private respondents are the same ones raised by Commissioners Villacorta, Tadeo, and Lerum, among others, to the Monsod proposal which became the present Art. VI, §5(1)-(2), namely, that certain sectors, like labor, may not win seats in the House under the party-list system; that the big parties might gobble up the sectoral parties; that the party-list system will not solve the problem of ineffective representation of the "underprivileged sectors." These objections, however, did not carry the day, as the members of the Constitutional Commission voted 32-0 in favor of the Monsod proposal. It is noteworthy that even those who spoke against the Monsod proposal did not vote against it. **To uphold these objections now would be to overrule the Constitutional Commission and in effect amend the Constitution.**

In sum, a problem was placed before the Constitutional Commission that the existing "winner-take-all" one-seat district system of election leaves blocks of voters underrepresented. To this problem of underrepresentation two solutions were proposed: sectoral representation and party-list system or proportional representation. **The Constitutional Commission chose the party-list system. This Court cannot hold that the party-list system is reserved for the labor, peasants, urban poor, indigenous cultural communities, women, and youth as petitioners contend without changing entirely the meaning of the Constitution which in fact mandates exactly the opposite of the reserved seats system when it provides in Art. IX, C, §6 that "A free and open party system shall be allowed to evolve according to the free choice of the people, subject to the provisions of this Article."**

Thus, neither textual nor historical consideration yields support for the view that the party-list system is designed exclusively for labor, peasant, urban poor, indigenous cultural communities, women, and youth sectors.⁴³ (emphasis supplied)

Justice Vitug, for his part, went so far as to warn that "the *ponencia* itself, in ruling as it does, may unwittingly, be crossing the limits of judicial

⁴³ Ang Bagong Bayani - OFW Labor Party, 359 SCRA at 754-56 (Mendoza, J., *dissenting*).

review and treading the dangerous waters of judicial legislation, and more importantly, of a constitutional amendment.”⁴⁴

The *ponencia* of Justice Panganiban dismissed these concerns by saying that the deliberations in the 1986 Constitutional Commission were not controlling insofar as the process of constitutional interpretation was concerned. He stated that since the Constitution stated that mechanics of the party-list system were to be provided “by law,” and that the intention of the law in question – RA 7941 – was “obvious and clear from its plain words” then there was no need to refer to the Commission’s deliberations.⁴⁵

Oddly enough, despite this claim, Justice Panganiban himself cited in his *ponencia*, on two occasions, the proceedings in the Commission to justify his interpretation.⁴⁶ Similarly the “obvious and clear” Declaration of Policy in Section 2 of RA 7941 expressly states that it shall guarantee “a full, free and open party system in order to attain the broadest possible representation of party, sectoral or group interests” – a feature that Justice Panganiban conveniently neglected to emphasize, and in fact completely ignored, in putting forward his interpretation of the law’s intent.

By a margin of three votes, therefore, Justice Panganiban’s majority was able to trump both Congress and the 1986 Constitutional Commission, and enshrine “marginalized representation” as the principal purpose behind the party-list system, setting aside in the process the original idea of “proportional representation.” In lieu of pushing for the “transformation of our electoral and party system into one that is based on issues and platforms and programs of actions,” therefore, the party-list system became principally concerned with ensuring perpetual representation for groups of the traditionally marginalized.

FURTHER DEVELOPMENTS

In 2009, the Supreme Court in the case of *Barangay Association for National Advancement and Transparency (BANAT) v. COMELEC*⁴⁷ had

⁴⁴ *Id.*, at 740 (Vitug, J., *dissenting*).

⁴⁵ *Id.*, at 725.

⁴⁶ The first was to quote Commissioner Villacorta’s statement that the purpose of the party-list was to “give genuine power to the people.” The second was to quote Commissioners Monsod, Tadeo, and Ople to establish that the party-list was intended to be open to all parties. Strangely enough, in this second instance, Justice Panganiban failed to acknowledge that the statement from Commissioner Monsod he was quoting was made precisely in defense of an open “proportional” party-list as opposed to the reserved “marginalized” system others were pushing for.

⁴⁷ G.R. No. 179271, 586 SCRA 210, Apr. 21, 2009.

occasion to revisit the portion of *Ang Bagong Bayani* that disallowed major political parties from participating in the party-list elections if they did not represent the “marginalized and underrepresented.” By a close vote of 8-7, the Court chose to uphold the Panganiban *ponencia* in *Ang Bagong Bayani*.

In his concurring and dissenting opinion, Chief Justice Reynato S. Puno, who was part of the majority in *Ang Bagong Bayani*, declared that:

Today, less than a decade after, there is an attempt to undo the democratic victory achieved by the marginalized in the political arena in *Ang Bagong Bayani*. In permitting the major political parties to participate in the party-list system, Mr. Justice Carpio relies on the deliberations of the Constitutional Commission. Allegedly, the said deliberations indicate that the party-list system is open to all political parties, as long as they field candidates who come from the different marginalized sectors. Buttressing his view, Mr. Justice Carpio notes that the major political parties also fall within the term “political parties” in the Definition of Terms in Republic Act 7941, otherwise known as the Party-List System Act. Likewise, he holds that the qualifications of a party-list nominee as prescribed in Section 9 of the said law do not specify any financial status or educational requirement, hence, it is not necessary for the party-list nominee to “wallow in poverty, destitution and infirmity”. It is then concluded that major political parties may now participate in the party-list system.

With all due respect, I cannot join this submission. We stand on solid grounds when we interpret the Constitution to give utmost deference to the democratic sympathies, ideals and aspirations of the people. More than the deliberations in the Constitutional Commission, these are expressed in the text of the Constitution which the people ratified. Indeed, it is the intent of the sovereign people that matters in interpreting the Constitution. x x x

Everybody agrees that the best way to interpret the Constitution is to harmonize the whole instrument, its every section and clause. We should strive to make every word of the fundamental law operative and avoid rendering some words idle and nugatory. The harmonization of Article VI, Section 5 with related constitutional provisions will better reveal the intent of the people as regards the party-list system. Thus, under Section 7 of the Transitory Provisions, the President was permitted to fill by appointment the seats reserved for sectoral representation under the party-list system from a list of nominees submitted by the respective sectors. This was the result of historical precedents that saw how the elected Members of the interim Batasang Pambansa and the regular Batasang Pambansa tried to torpedo sectoral representation and delay the seating of sectoral representatives on the ground that they could not rise to the same

levelled status of dignity as those elected by the people. To avoid this bias against sectoral representatives, the President was given all the leeway to "break new ground and precisely plant the seeds for sectoral representation so that the sectoral representatives will take roots and be part and parcel exactly of the process of drafting the law which will stipulate and provide for the concept of sectoral representation". Similarly, limiting the party-list system to the marginalized and excluding the major political parties from participating in the election of their representatives is aligned with the constitutional mandate to "reduce social, economic, and political inequalities, and remove cultural inequalities by equitably diffusing wealth and political power for the common good"; the right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making; the right of women to opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation; the right of labor to participate in policy and decision-making processes affecting their rights and benefits in keeping with its role as a primary social economic force; the right of teachers to professional advancement; the rights of indigenous cultural communities to the consideration of their cultures, traditions and institutions in the formulation of national plans and policies, and the indispensable role of the private sector in the national economy.

There is no gainsaying the fact that the party-list parties are no match to our traditional political parties in the political arena. This is borne out in the party-list elections held in 2001 where major political parties were initially allowed to campaign and be voted for. The results confirmed the fear expressed by some commissioners in the Constitutional Commission that major political parties would figure in the disproportionate distribution of votes: of the 162 parties which participated, the seven major political parties made it to the top 50. These seven parties garnered an accumulated 9.54% of the total number of votes counted, yielding an average of 1.36% each, while the remaining 155 parties (including those whose qualifications were contested) only obtained 90.45% or an average of 0.58% each. Of these seven, three parties or 42.8% of the total number of the major parties garnered more than 2% of the total number of votes each, a feat that would have entitled them to seat their members as party-list representatives. In contrast, only about 4% of the total number of the remaining parties, or only 8 out of the 155 parties garnered more than 2%

In sum, the evils that faced our marginalized and underrepresented people at the time of the framing of the 1987 Constitution still haunt them today. It is through the party-list system that the Constitution sought to address this systemic dilemma. In ratifying the Constitution, our people recognized how the interests of our poor and powerless sectoral groups can be frustrated by the

traditional political parties who have the machinery and chicanery to dominate our political institutions. If we allow major political parties to participate in the party-list system electoral process, we will surely suffocate the voice of the marginalized, frustrate their sovereignty and betray the democratic spirit of the Constitution. That opinion will serve as the graveyard of the party-list system.⁴⁸

Apart from upholding the “marginalized” rule in *Ang Bagong Bayani*, *BANAT* revised the formula for computing the allocation of party-list seats. It ruled that it should be mandatory that the twenty percent allocation for the party-list be filled, and for this purpose, it declared that the two percent threshold established in RA 7941 was unconstitutional. However, it upheld the three seat cap prescribed in the same law.⁴⁹

CONCLUSION

While on the face of it, “reserving” the party-list system for marginalized sectors may seem a viable way of opening up Congress to groups which have traditionally been deprived of representation, the manner in which this has been achieved gravely imperils the long term political prospects of these selfsame marginalized groups.

To begin with, the rule on “marginalization” is a two-edged sword. While *Ang Bagong Bayani* has limited participation in the party-list system to only those parties representing the marginalized, thus effectively excluding major political parties and, in effect, creating a space within the House of Representatives exclusive to these marginalized groups, the flip side of this doctrine is that to take advantage of this space, these groups must *remain* marginalized. The reason is simple, as soon as a party-list group grows in strength, membership, and electoral capability – ultimately becoming a “major” political party – it ceases to be marginalized, and hence ineligible to participate in the party-list, following the logic of *Ang Bagong Bayani*.

To hark back to Commissioner Tadeo’s criteria for determining marginalization,⁵⁰ one of the factors considered is “absence in representation in government.” If a party-list group starts winning district seats in Congress, starts gaining seats in local governments, starts obtaining representation in the Senate, by this standard, it ceases to be marginalized,

⁴⁸ *Id.*, at 256-60 (Puno, CJ., *concurring and dissenting*).

⁴⁹ Party-List Act of 1995, § 11(b).

⁵⁰ See *supra* note 18.

regardless of whether or not its membership remains largely composed of a particular sector that is *traditionally* marginalized.

Limiting party-list participation to marginalized parties, therefore, serves as a built-in disincentive for these parties to grow, develop, and broaden their participation in other electoral arenas for fear that it will cause them to lose their seats in the party-list. The party-list system, therefore, becomes a perpetual “kid’s table” for the marginalized, where those who are unable, or unwilling, to compete in open, regular elections are afforded the chance to enjoy limited, perhaps even token, participation in governance.

The decision in *Ang Bagong Bayani* hampers the development of these parties in another way – by denying them the lessons they would otherwise learn from open engagement with mainstream parties. Party-list groups compete only with other, equally small, equally weak (at least relative to mainstream parties) parties. There is thus little opportunity for them to gain strength vis-à-vis the mainstream parties, since *they never actually run against each other*.

This would perhaps be acceptable if party-list groups enjoyed a substantial share of the total representation in Congress, but they do not. They are confined to twenty percent of the seats *in the lower house*. By any reckoning, that number will never be sufficient to effectively push a particular legislative agenda without significant support from the district representatives, as well as members of the Senate, all of whom will come from mainstream political parties. Thus, the only way for party-list groups representing the marginalized to gain significant political power in Congress, is for them to go beyond the party-list and run for district seats and for the Senate against candidates from mainstream parties. But as stated, the “reserved” system that currently prevails in the party-list hampers the development of these parties’ ability to compete openly with mainstream parties.

Besides which, the fear that opening up the party-list system to mainstream parties will somehow overwhelm these smaller parties, is largely unfounded. Even based on the statistics for 2001 elections cited by Chief Justice Puno in his dissent in *BANAT*⁵¹ the mainstream parties hardly got away with a “political massacre.” The seven parties received an average of 1.36% of the total vote, which is below the 2% threshold set under RA 7941. Only three of the seven received more than 2% of the vote – NPC,

⁵¹ See *supra* note 48.

Lakas-NUCD-UMDP, and LDP – as compared to eight non-mainstream parties who made it past the threshold.⁵² The mainstream party that received the highest percentage, NPC at 2.5475%, was bested by five other non-mainstream parties,⁵³ and received only 7,000 more votes than the party next in rank, Akbayan, another non-mainstream party.⁵⁴

The revision of the formula for allocating seats in *BANAT* has further exacerbated matters. In removing the 2% threshold set in RA 7941 while retaining the three seat cap set in the same law, the Court effectively made it easier for party-list groups with smaller constituencies to gain seats, while keeping in place the disincentive for party-list groups to expand their vote base.

In the deliberations before the 1986 Constitutional Commission, Commissioner Monsod envisioned that the party-list system would encourage sectors to work hard, organize, and earn their seats within the system.⁵⁵ He pointed out as an example that organized labor, which at that time had around 4.5-4.8 million members, if consolidated to participate in the party-list, could easily get 4 million votes which, from his estimate, would be enough to win 10 seats in Congress.⁵⁶

However, with the introduction of the three seat cap under RA 7941, expansion of party-list groups hit a logical limit, beyond which additional votes would provide no further benefit, in terms of seats gained, to the party concerned, contrary to the idea envisioned by Commissioner Monsod. There is instead a disincentive for a single party-list group to focus on expanding its voter base.

With *BANAT*'s lifting of the threshold, the problem was made worse from the other end – parties were no longer obliged to develop a voter base sufficient to meet the 2% threshold, as it no longer existed. Thus, with these two principles governing, the tendency is not for party-list groups to develop into large organizations with a substantial national constituency, but the exact opposite: to split up into numerous smaller parties.

⁵² Commission on Elections, *Nov. 26, 2001 ARMM Elections Party List Canvass Report No. 26*, at http://www.comelec.gov.ph/results/2001/2001partylist_ranked.html.

⁵³ *Id.* These parties were Bayan Muna (11.2989%), MAD (10.0252%), APEC (5.3050%), Veterans Freedom Party (3.8414%), and Abag Promdi (2.7941%).

⁵⁴ *Id.* NPC received 385,151 votes while Akbayan received 377,852.

⁵⁵ *See supra* note 8.

⁵⁶ *Id.*

This is borne out by the fact that in the 2007 Elections, only 93 parties were accredited by the COMELEC, a number which has more than doubled for the 2010 Elections, where so far, the COMELEC has accredited 187 party-list groups, out of more than 250 applications.⁵⁷

Ultimately, the biggest casualty of the “realignment” inflicted by *Ang Bagong Bayani* and *BANAT* on the party-list system is the principle of proportional representation. These two decisions have reoriented the party-list system from its original trajectory of promoting an alternative to the first-past-the-post, winner-take-all election system that the Philippines has implemented since the inception of the Republic. Instead of becoming a system primarily concerned with addressing the unfortunate emphasis on personalities and patronage that prevails during Philippine elections, it has become a system for institutionalizing token representation for the perpetually marginalized. It has become a venue for smaller and smaller groups, all loudly proclaiming their “marginalized” identity, to vie for the scraps of legislative representation that the dominant, traditional parties have condescended to permit them.

If the party-list is to truly become an instrument for sowing the seeds of a political transformation, then it must be shifted, anew, from the doomed, and self-defeating, course it currently follows.

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⁵⁷ Commission on Elections, *May 10, 2010 National and Local Elections: Certified List of Candidates for Party List*, at http://www.comelec.gov.ph/2010%20National_Local/2010%20candidates%20pdf%20files/PARTY%20LIST.pdf.