The Failed Computerization of the National Elections and the Nullification of the Automated Election Contract

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We are thus confronted with the grim prospect of election fraud on a massive scale by means of just a few key strokes. The marvels and woes of the electronic age!

- Justice Artemio Panganiban

I. INTRODUCTION

Information technology is the third wave.[1] Where politics and economics ventured, information technology played a catalytic role. Political

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1. *See* ALVIN TOFFLER AND HEIDI TOFFLER, THE THIRD WAVE (1991). (In this novel, business futurist Alvin Toffler argued that human history, while it is complex and contradictory, can be seen to fit patterns. The pattern he has been seeing in his career takes the shape of three great advances or waves. The first wave of transformation began when some prescient person about 10,000 years ago, probably a woman, planted a seed and nurtured its growth. The age of agriculture began, and its significance was that people moved away from nomadic wandering and hunting and began to cluster into villages and develop culture. The second wave was an expression of machine muscle, the Industrial Revolution that began in the 18th century and gathered steam after America's Civil War. People began to leave the peasant culture of farming to come to work in city factories. It culminated in the Second World War, a clash of smokestack juggernauts, and the explosion of the atomic bombs over Japan. Just as the machine seemed at its most invincible, however, we began to receive intimations of a gathering third wave, based not on muscle but on mind. It is what we variously call the information or the knowledge age, and while it is powerfully driven by information technology, it has co-drivers as well, among them social demands worldwide for greater freedom and individuation.)

movements and legal systems were once purely reliant on traditional methods of political exercise, such as secret balloting and manual elections but together with the coming and going of post-modernity, computers and information technology have fundamentally seeped in and had helped shape the new democratized and globalized world. It has been noted that the exponential growth in the usage of information technology has *revolutionized* the way individuals, and other persons conduct business.[2] The advent of information technology even led many to concoct theories of how regulatory mechanisms should be effectuated to govern the realm of the wired and the wireless with the socio-political environment as the regime of focus.[3] As one writer noted, "...around the world, efforts are being made to create rules of the road for what has been called the information superhighway."[4] The endless promise of information technology is what motivated many to utilize it – even for political processes such as that of the democratic exercise called *election*.

Computers were first utilized in the voting process in 1964 when five counties in the United States of America made use of them in the November

2. *See* Leslie Kurtz, *Copyright and The Internet – Word Without Borders*, 43 WAYNE L. REV. 117 (1996); *see also* Leslie Kurtz, *Copyright and the National Information Infrastructure*, 18 EUR. INTELL. PROP. REV. 120 (1996)

3. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000). (In this article Professor Kang concludes that society need not adopt a single, uniform design strategy for all of cyberspace. Instead, society can embrace a policy of digital diversification, which explicitly zones different cyber spaces according to different socio-political environments, such as in this case, that of the ethnic origin.)

4. Leslie Kurtz, *Copyright and The Internet – Word Without Borders*, 43 WAYNE L. REV. 117, 118-9 (1996).

election of the same year.[5] Since then, the use of computers had grown remarkably. By 1988, 31% of the counties in America were using computer systems to count 55% of the popular vote.[6] By 1992 two-thirds of American voters were using computerized systems to cast their ballots.[7]

Where the United States led, the rest of the democratized world followed.[8] Information technology has taken a new meaning with the rise of the computer network systems and advanced database management systems especially in the field of governance and elections.[9]

Advocates of a modernized bureaucracy noticed this technological fact. Taking advantage of the opportunities promised by advanced technology, a move for the adoption of an automated system, just like those of the more

5. Bob Wilcox & Erik Nilsson, *Computerized Vote Counting: How Safe?* 6 THE CPSR NEWSLETTER No.4 (1988) at 19.

6. Computer Professionals for Social Responsibility, *Vulnerable on All Counts: How Computerized Vote Tabulation Threatens the Integrity of Our Elections*, 6 THE CPSR NEWSLETTER No. 4 (1988) at 12.

7. *See* Sara Harrar, *Fear of Fraud: As Technology Enters Voting Booth, Stakes Rise*, THE RECORD, May 12, 1992. *See also* Bill Boyarsky , *The Revolution of Direct Democracy Via Your TV*, LOS ANGELES TIMES, October 31, 1993, Metro, Part B, at 1.

8. *See* KENNETH HACKER & JAN VAN DIJK, DIGITAL DEMOCRACY: ISSUES OF THEORY AND PRACTICE (2000).

9. Much literature had been written on the matter. Among the noteworthy articles are those written by Roy Saltman who worked for the United States National Institute of Standards and Technology and who made the research studies for the computerization of democratizing countries such as Brazil. *See* Roy G. Saltman,. *Effective Use of Computing Technology in Vote-Tallying*, Report NBSIR 75-687, 3/75, or NBS SP 500-30, 4/78, National Bureau of Standards (NBS), Gaithersburg, MD; Roy G. Saltman, *Accuracy, Integrity, and Security in Computerized Vote-Tallying*, Rpt. SP 500-158, 8/88, NBS, Gaithersburg, MD; Roy G. Saltman, *Assessment of Computerized Voting in Brazil with Recommendations for Nations of the Region*. TRIBUNAL SUPERIOR ELECTORAL (TSE), Brasilia, Brazil, (October 1996), available from INTER-NATIONAL FOUNDATION FOR ELECTION SYSTEMS (IFES), Washington, DC.; Roy G. Saltman, "Computerized Voting," in Advances in Computers, Volume 32, ed. M.C. Yovits, Academic Press, 1991; Federal Election Commission, *Performance and Test Standards for Punchcard, Marksense, and Direct Recording Electronic Voting Systems*, 1/90, Washington, DC.; Roy G. Saltman, *Issues in National Planning for the Computerization of Elections*, presentation in Brasilia, Brazil, 10/96 – documents available from IFES, Washington, DC. *at* http://www.itl.nist.gov (last accessed September 11, 2004).

advanced countries,[10] was initiated for the Philippine electoral system.[11] Philippine Congressional debates included the conceptualization of an automated election system.[12]

It seemed that with these Congressional debates, the manual system of casting and counting of votes and election returns and certificates of canvass as idealized by Articles XVII to XIX of the Omnibus Election Code[13] has reached a point of *inadequacy*, or rather, a point of obsolescence. Like every other conceptualized processes of the democratic world, there are inadequacies found in the manual system of counting and canvassing. Foremost among these is what Commissioner Regalado Maambong pointed out as the staggering delay or "lag-time" from the time the votes are cast to

10. Roy Saltman, *Adopting Computerized Voting in Developing Countries: Comparisons with the US Experience*, 16 CPSR NEWSLETTER no. 1, (1998) (pp. 10-16). In the United States, the use of computers to process paper ballots that are computer-readable has a history of more than 30 years (Saltman at 10). Computers also have been widely used in the US over many years to maintain databases on registered voters. Computers with touchscreen inputs have also been employed to record voters' choices directly without the use of paper ballots, and a new application is the use of personal identification technology for voter sign-in on election day.

11. In a Mandatory Continuing Legal Education (MCLE) Seminar held at the Valle Verde Country Club, Pasig City (May 3, 2004), Justice Regalado Maambong explained that for ten (10) years during his stint as a Commissioner for the COMELEC, they have studied the varying forms of modern electoral system and noted that most developing countries have already shifted to the automated election system used by first-world countries. Some of the developing countries he cited were countries like Kenya, Zambia, Romania, Mexico and Argentina. Most European Countries and the United States have been using automated election systems for decades now.

12. In JOURNAL OF THE HOUSE (12TH CONGRESS) NO. 1 (22 July 2002) *available at* http://www.congress.gov.ph/download/journals_12/12_2rs_1.pdf (last accessed 11 Sept. 2004) it was recorded that part of the debates included the urging by the Speaker to use computers to eliminate fraud pervasive in manual elections:

> Speaker De Venecia also cited the computerization of the electoral process to eliminate voting fraud. He urged the Members to appropriate P2 billion to P3 billion to augment the funds of the Commission on Elections and to finance the computerization of the 2004 elections. He observed that while the counting in the national elections held in countries like Canada and France is usually completed in 30 minutes, in the Philippines, the winning president is not proclaimed until after three weeks or a month.

13. Omnibus Election Code of the Philippines [Omnibus Election Code] Batas Pambansa Blg. 881 (enacted December 2, 1985).

the day of proclamation. Like what the poetic statement, "justice delayed, justice denied," implies the hopes of many are measured not only by standards of truth or falsity, but also by elements of time.

In 1995, Congress passed Republic Act No. 8046,[14] which authorized the Commission on Elections (COMELEC) to conduct a nationwide demonstration of a computerized election system and allowed the poll body to pilot-test the system in the March, 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM).

In 1997, Congress enacted Republic Act No. 8436[15] authorizing COMELEC to use an automated election system (AES) for the process of voting, counting votes and canvassing/consolidating the results of the national and local elections. It mandated the poll body to acquire automated counting machines (ACMs), computer equipment, devices and materials, and to adopt new electoral forms and printing materials. It also authorized the COMELEC to adopt an automated method of election system "to ensure free, orderly, honest, peaceful and credible elections, and assure the secrecy and sanctity of the ballot [so] that the results of elections, plebiscites, referenda, and other electoral exercises shall be *fast, accurate and reflective* of the genuine will of the people."[16] The law ultimately sought to minimize the costs of election and to solve the demoralizing delay ensuing from the casting, counting and canvassing of the votes until proclamation.

Initially intending to implement the automation during the May, 1998 presidential elections, the COMELEC – in its Resolution No. 2985[17] -

14. An act Authorizing the Commission on Elections to Conduct a Nationwide Demonstration of a Computerized Election System and Pilot-test it in the March 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM) and for Other Purposes, Republic Act No. 8046, (enacted Jun. 7, 1995).

15. An Act Authorizing the Commission on Elections to use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, Providing Funds Therefor and for Other Purposes, Republic Act No. 8436, (enacted Dec. 22, 1997).

16. §1, R.A. No. 8436, 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, enacted December 22, 1997 (emphasis supplied).

17. § 6 of RA 8436 provides: "[i]f in spite 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

eventually decided against full national implementation and limited the automation to the Autonomous Region in Muslim Mindanao (ARMM). However, due to the failure of the machines to correctly read some automated ballots in one town, COMELEC later ordered *manual* count for the entire Province of Sulu.[18]

In the May 2001 elections, the counting and canvassing of votes for both national and local positions were also done manually, as no additional ACMs have been acquired for that electoral exercise allegedly because of time constraints.

In the May 2004 elections, though ACMs have been acquired for that electoral exercise, the automated election system was not implemented because the Automated Election Contract entered into by COMELEC was nullified by the Supreme Court.

The law was enacted in 1997 for the May 1998 National Elections. However, despite the enabling law, the 1998 and the 2001 elections still used the manual system of voting provided for in the Omnibus Election Code. The AES was not implemented because of feasibility reasons. It was also not implemented in the May, 2004 National Elections due to reasons which will be subsequently discussed in this Comment.

This comment will focus on the decision of the Supreme Court in nullifying the Automated Election Contract awarded by the COMELEC to the Mega-Pacific Consortium.[19]

II. THE FACTS OF THE CASE

Pursuant to R.A. No. 8436 the COMELEC invited interested offerors, vendors, suppliers or lessors to apply for eligibility and to bid for the procurement of supplies, equipment, materials and services needed for a comprehensive Automated Election System (AES), consisting of three (3) phases, namely: Phase I) registration/verification of voters, Phase II) automated counting and consolidation of votes, and Phase III) electronic transmission of election results, with an approved budget of Two Billion Five Hundred Million Pesos (P2,500,000,000).

Autonomous Region in Muslim Mindanao (ARMM) where the automated election system shall be used for all positions."

18. *See* Loong v. COMELEC, 365 Phil. 386 (1999); *see also* ARTEMIO PANGANIBAN, LEADERSHIP BY EXAMPLE 201-249 (1999 ed.).

19. Information Technology Foundation of the Philippines et al. v. Commission on Elections et al., G.R. No. 159139, Jan. 13, 2004. The facts of the case were printed and published in a pamphlet format of which pagination this comment refers to. The facts were discussed from pages 2-9 of the decision.

Several interested parties submitted their bids. The public bidding was to be conducted under a *two-envelope/two-stage system*. The bidder's first envelope (Eligibility Envelope) should establish the bidder's eligibility to bid and its qualifications to perform the acts if accepted while the second envelope would be the Bid Envelope itself. Out of 57 bidders, the Bids and Awards Committee (BAC) of the COMELEC found only two bidders eligible: Mega-Pacific Consortium (MPC) and Total Information Management Corporation (TIMC). For technical evaluation, they were referred to the BAC's Technical Working Group (TWG) and the Department of Science and Technology (DOST).

In its report on the evaluation of the technical proposals on Phase II, DOST said that both MPC and TIMC had obtained a number of failed marks in the technical evaluation. Notwithstanding these failures, COMELEC *en banc* promulgated, on 15 April 2003, Resolution No. 6074 awarding the project to MPC.

On 29 May 2003, five individuals and entities (including the petitioners Information Technology Foundation of the Philippines, represented by its president, Alfredo M. Torres and Ma. Corazon Akol) wrote a letter to COMELEC Chairman Benjamin Abalos Sr. They protested the award of the Contract to Respondent MPC due to glaring irregularities in the manner in which the bidding process had been conducted. Citing therein the noncompliance with eligibility as well as technical and procedural requirements – many of which have been discussed at length in the Petition – they sought a re-bidding.

Because the letter remained unacted upon, petitioners, as taxpayers and concerned citizens, filed a petition for *prohibition*, and questioned the validity of the award to MPC on the grounds that: (1) MPC had no identity and (2) that the award was in violation of the bidding process, and (3) the failure of the machines to meet the DOST evaluation and other technical arguments. They argued that the same acts showed that the COMELEC gravely abused its discretion in awarding the said Contract.

Respondents raised the issue of exhaustion of remedies and argued that MPC had capacity as shown by several communication documents between MPC and COMELEC. It also argued that as regards the technical requirement, as COMELEC assured, the elections can be automated as they are "fully prepared."

III. THE ISSUES

The Supreme Court had to discuss the procedural and the substantive issues. As to the procedural, the Court had to determine: (1) whether or not there was *locus standi* on the part of the petitioners; and (2) whether or not there has been an exhaustion of administrative remedies. Assuming the procedural

aspects were complied with, the substantive issue that had to be resolved was whether or not the award of the Contract was in grave abuse of discretion.[20] After reviewing the "slew" of pleadings as well as the matters raised during the oral argument, the Court deemed it sufficient to focus discussion on the following "*major areas of concern* that impinge on the issue of grave abuse of discretion:"[21] matters pertaining to the identity, existence and eligibility of MPC as a bidder; failure of the automated counting machines (ACMs) to pass the DOST technical tests; remedial measures and re-testings undertaken by COMELEC and DOST after the award, and their effect on the present controversy.

IV. THE RULING

Voting 9-5,[22] the Supreme Court found the petition meritorious and nullified the Automated Election Contract, because it had been awarded in violation of law and jurisprudence; in "reckless disregard" of COMELEC's bidding rules and procedure; and "in inexplicable haste, without adequately checking and observing mandatory financial, technical and legal requirements."[23]

A. On the Procedural Issues

1. Locus Standi

Discussing the procedural issues, Mr. Justice Artemio Panganiban, writing for the majority, ruled on the acceptability of the *locus standi* of the petitioners.[24] The Supreme Court agreed with the stand taken by the petitioners that the issue was "of transcendental importance and of national interest."[25] COMELEC's allegedly flawed bidding and questionable award of

20. During the Oral Argument on October 7, 2003, the Supreme Court limited the issues to the following: (1) locus standi of petitioners; (2) prematurity of the Petition because of non-exhaustion of administrative remedies for failure to avail of protest mechanisms; and (3) validity of the award and the Contract being challenged in the Petition.

21. *Information Technology Foundation of the Phils.* at 15-16.

22. Those voting to invalidate were Justices Puno, Panganiban (*ponente*), Quisumbing, Santiago, Gutierrez, Carpio, Martinez, Morales and Callejo. Those in favor of upholding the Contract were Chief Justice Davide and Justices Vitug, Corona, Azcuna and Tinga.

23. *Information Technology Foundation of the Phils.*at 2.

24. *Id.* at 9.

25. *Id.* at 10.

the Contract to an unqualified entity would have had made "an impact directly on the success or the failure of the electoral process."[26] Arguing that there is a *transcendental cause* as reason enough to recognize the legal standing of the petitioners to sue, Mr. Justice Panganiban decided that:

> Our nation's political and economic future virtually hangs in the balance, pending the outcome of the 2004 elections. Hence, there can be no serious doubt that the subject matter of this case is 'a matter of public concern and imbued with public interest;' in other words, it is of 'paramount public interest' and 'transcendental importance.' This fact alone would justify relaxing the rule on legal standing, following the liberal policy of this Court whenever a case involves 'an issue of overarching significance to our society.' Petitioners' legal standing should therefore be recognized and upheld.[27]

2. Exhaustion of Remedies

Respondent Commission claims that petitioners acted prematurely, since they had not first utilized the protest mechanism available to them under Republic Act No. 9184,[28] the Government Procurement Reform Act, for the settlement of disputes pertaining to procurement contracts.

Section 55 of R.A. No. 9184 states that protests against decisions of the Bidding and Awards Committee in all stages of procurement may be lodged with the head of the procuring entity by filing a verified position paper and paying a protest fee. Section 57 of the same law mandates that in no case shall any such protest stay or delay the bidding process, but it must first be resolved before any award is made.

On the other hand, Section 58 provides that court action may be resorted to only after the protests contemplated by the statute shall have been completed. Cases filed in violation of this process are to be dismissed for lack of jurisdiction. Regional trial courts shall have jurisdiction over final

26. *Id.* at 10. It must be noted that the Supreme Court made it explicit in this remark that they were conscious of the fact that their decision would be defining the electoral process for the next election and would directly decide upon the manner by which elections would be held.

27. *Id.* (citing Chavez v. Presidential Commission on Good Government, 360 Phil. 133, December 9, 1998; Kilosbayan, Inc. v. Morato, 320 Phil. 171 (1995); Tatad v. Secretary of the Department of Energy, 346 Phil. 321, November 5, 1997; Del Mar v. Philippine Amusement and Gaming Corporation, 346 SCRA 485 (2000))

28. An Act Granting for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes, Republic Act No. 9184, enacted (Jan. 10, 2003).

decisions of the head of the procuring entity, and court actions shall be instituted pursuant to Rule 65 of the 1997 Rules of Civil Procedure.

Respondents assert that throughout the bidding process, petitioners never questioned the BAC Report finding MPC eligible to bid and recommending the award of the Contract to it. According to respondents, the Report should have been appealed to the COMELEC *en banc* pursuant to R.A. No. 9184. In the absence of such appeal, the determination and recommendation of the BAC had become final.

The Supreme Court cited the case of *Paat v. CA*[29] which enumerated the instances when the rule on exhaustion of administrative remedies may be disregarded:

1. when there is a violation of due process,
2. when the issue involved is purely a legal question,
3. when the administrative action is patently illegal amounting to lack or excess of jurisdiction,
4. when there is estoppel on the part of the administrative agency concerned,
5. when there is irreparable injury,
6. when the respondent is a department secretary whose acts as an *alter ego* of the President bears the implied and assumed approval of the latter,
7. when to require exhaustion of administrative remedies would be unreasonable,
8. when it would amount to a nullification of a claim,
9. when the subject matter is a private land in land case proceedings,
10. when the rule does not provide a plain, speedy and adequate remedy, and
11. when there are circumstances indicating the urgency of judicial intervention.[30]

The Court found the present controversy precisely falling within the exceptions: "when to require exhaustion of administrative remedies would be unreasonable;" "when the rule does not provide a plain, speedy and adequate remedy," and "when there are circumstances indicating the urgency of judicial intervention."[31]

29. 334 Phil. 146, 153 (1997).

30. *Paat*, 334 Phil. at 153.

31. *Information Technology Foundation of the Phils.* at 12.

The Court remarked that COMELEC itself made the exhaustion of administrative remedies legally impossible or, at the very least, "unreasonable." And that in any case, "the peculiar circumstances surrounding the unconventional rendition of the BAC Report and the precipitate awarding of the Contract by the COMELEC en banc – plus the fact that it was racing to have its Contract with MPC implemented in time for the elections in May 2004 – have combined to bring about the urgent need for judicial intervention, thus prompting this Court to dispense with the procedural exhaustion of administrative remedies in this case."[32]

It must be noted that the procedural issues themselves could have been enough a ground for the dismissal of the case.[33]

B. On the Substantive Issues

The Court noted three major issues to determine whether the COMELEC committed acts in grave abuse of its discretion. Firstly, the Court found that the Consortium never existed and was therefore a non-entity with which the COMELEC cannot transact with.[34] Secondly, the machines failed the DOST tests.[35] Thirdly, there were no post facto remedial measures and the assurances of the COMELEC that they are fully prepared to conduct an automated election were "unpersuasive."[36]

1. Identity and Existence of MPC as a Bidder

> The Supreme Court found that no document establishing neither the identity nor the entity-ship of the MPC was submitted. COMELEC was thus unable to prove the identity, the existence and the eligibility of the alleged consortium as the bidder. There was strictly no "eligibility envelope" submitted before the bidding process, only a two-inch thick "Eligibility Requirements" file.[37] However, the file which COMELEC submitted to the Court merely purported to replicate the eligibility documents originally submitted to the COMELEC by MPEI allegedly on behalf of MPC. Included in the file are the incorporation papers and financial statements of the members of the supposed consortium and certain certificates, licenses and permits issued to them. The Court dismissed the same as non-supportive of the identity of the Consortium.

32. *Id.* at 12-13.

33. Chief Justice Davide in his dissenting opinion (concurring with Mr. Justice Vitug) expressed strong sentiments on the procedural issue of the court deciding to take cognizance of the case, much less voiding the contract merely because of transcendental reasons. See discussion *infra*.

34. *Information Technology Foundation of the Phils.* at 16-30.

35. *Id.* at 30-40.

36. *Information Technology Foundation of the Phils.* at 40-50. The eligibity envelope should have contained: *legal documents* such as articles of incorporation, business registrations, licenses and permits, mayor's permit, VAT certification, and so forth; *technical documents* containing documentary evidence to establish the track record of the bidder and its technical and production capabilities to perform the contract; and *financial documents*, including audited financial statements for the last three years, to establish the bidder's financial capacity.

After finding that the Consortium failed to submit an eligibility envelope that would convince the Supreme Court of its existence, the Supreme Court also noted that the Commissioners themselves were not aware that such a consortium did in fact exist. The Court took notice of the statement of a commissioner[38] when he reported that he had never seen an agreement that would support the contention that there existed a consortium.[39]

The two-inch thick file submitted turned out to be copies of financial statements and incorporation papers of the alleged consortium members. The Court found that these documents cannot prove the existence of a consortium.

> But these papers did not establish the existence of a consortium, as they could have been provided by the companies concerned for purposes other than to prove that they were part of a consortium or joint venture. For instance, the papers may have been intended to show that those companies were each qualified to be a sub-contractor (and nothing more) in a major project. Those documents did not by themselves support the assumption that a consortium or joint venture existed among the companies.[40]

The COMELEC submitted four agreements to try and prove the existence of the Consortium but the Court regarded the same as "separate and distinct bilateral agreements."[41] Being bilateral in nature, they could not have had been intended to bind the whole group collectively. The Court

37. COMELEC submitted the same in October 9, 2003, in partial compliance with the Court's instructions given during the Oral Argument of October 7, 2003.

38. *See Id.* at 20 ("Commissioner Tuason...tried to justify his position by claiming that he was not a member of the BAC. Neither was he the commissioner-in-charge of the Phase II Modernization project (the automated election system); but that, in any case, the BAC and the Phase II Modernization Project Team did look into the aspect of the composition of the consortium x x x It seems to the Court, though, that even if the BAC or the Phase II Team had taken charge of evaluating the eligibility, qualifications and credentials of the consortium-bidder, still, in all probability, the former would have referred the task to Commissioner Tuason, head of COMELEC's Legal Department.")

39. *Information Technology Foundation* at 19-21.

40. *Id.* at 21.

41. *Id.* at 21.

further noted that those agreements were submitted only *after* the bidding process.[42]

The Court also found that there are *deficiencies* in the AEC itself. The COMELEC pointed to several provisions in the Contract to show the existence of the Consortium.[43] The Court reversed the argument and used the Contract to show that there was, in actuality, a conflict in the logic propounded by the COMELEC.

COMELEC argued that the Contract incorporated all documents executed by the consortium members even if they were not referred to therein.[44] The Court however, noted that the Contract did not have the effect of curing the deficiencies in the bilateral agreements entered into by the members with respect to their *joint and several liabilities*. The Court noted that: "*Nowhere in that Contract is there any mention of a consortium or joint venture, of members thereof, much less of joint and several liability.*"[45]

The Court further noted that the members were placed at different levels of liability: MPEI was given the role as the independent contractor, the other members were merely subcontractors.[46] Hence, it seemed that the

42. *Id.* at 21.

43. *Id.* at 22-23.

44. *Id.* at 22. § 1.4 of the Contract provided:

> "All Contract Documents shall form part of the Contract even if they or any one of them is not referred to or mentioned in the Contract as forming a part thereof. Each of the Contract Documents shall be mutually complementary and explanatory of each other such that what is noted in one although not shown in the other shall be considered contained in all, and what is required by any one shall be as binding as if required by all, unless one item is a correction of the other.
>
> "The intent of the Contract Documents is the proper, satisfactory and timely execution and completion of the Project, in accordance with the Contract Documents. Consequently, all items necessary for the proper and timely execution and completion of the Project shall be deemed included in the Contract."

45. *Id.* at 23.

46. *Id.* at 22.

Court saw as a focal point that there would be a problematic enforcement of liabilities with the given terms of the Contract.[47]

On this score, the COMELEC claimed that it may still enforce the liability of the consortium members under the Civil Code provisions on *partnership*, reasoning that MPEI and the other members of the consortium represented themselves as partners and members of MPC for purposes of bidding for the Project. They are, therefore, liable to the COMELEC to the extent that the latter relied upon such representation. Their liability as partners[48] is solidary with respect to everything chargeable to the partnership under certain conditions.[49]

The COMELEC further claimed that for purposes of assessing the eligibility of the bidder, the members of MPC should be evaluated on a *collective basis*. For the COMELEC, the collective nature of the undertaking of the members of MPC, their contribution of assets and sharing of risks, and the community of their interest in the performance of the Contract lead to these reasonable conclusions: (1) that their *collective qualifications* should be the basis for evaluating their eligibility; (2) that the sheer enormity of the project renders it improbable to expect any single entity to be able to comply with all the eligibility requirements and undertake the project by itself; and (3) that the rules allow bids from manufacturers, suppliers and/or distributors that have formed themselves into a *joint venture*, in recognition of the virtual impossibility of a single entity's ability to respond to the Invitation to Bid.[50]

The Court dismissed the conclusion of COMELEC on this argumentation and noted that:

> [T]his argument seems to assume that the "collective" nature of the undertaking of the members of MPC, their contribution of assets and sharing of risks, and the "community" of their interest in the performance of the Contract entitle MPC to be treated as a joint venture or consortium; and to be evaluated accordingly on the basis of the members' collective

47. This argument was answered by Justice Tinga in his dissent where the latter argued that because of the several bilateral contracts, MPEI was authorized as the representative of the other members under the laws on partnership and agency under the Civil Code. *See* discussion *infra* at 282-4.

48. Under art. 1767 of the Civil Code, by the contract of partnership two or more persons bind themselves to contribute money, property, or industry to a common fund, with the intention of dividing profits among themselves. It is also required that the articles of partnership must not be kept secret among the members; otherwise the association shall be governed by the provisions of the Civil Code relating to co-ownership (art.1775).

49. *Information Technology Foundation of the Phils.* at 25.

50. *Information Technology Foundation of the Phils.* at 26-27.

> qualifications when, in fact, the evidence before the Court suggest otherwise.[51]

The Court ruled that there was no joint venture in this case. Relying on a previous definition in *Kilosbayan v. Guingona,*[52] that defined *joint venture* as "an association of persons or companies jointly undertaking some commercial enterprise; generally, all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and [a] duty, which may be altered by *agreement* to share both in profit and losses."[53] The Court noted that as a premise, there should be an *agreement.* The Court noted that:

> The bilateral agreements entered into by the members of the Consortium were held to be wanting in charging the members of solidary liability. Not only were they entered into separately and distinctly; they also limited the liabilities that each company would shoulder or be made to bear.
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>
> It is difficult to imagine how these bare Agreements – especially the first two -- could be implemented in practice; and how a dispute between the parties or a claim by COMELEC against them, for instance, could be resolved without lengthy and debilitating litigations. Absent any clear-cut statement as to the exact nature and scope of the parties' respective undertakings, commitments, deliverables and covenants, one party or another can easily dodge its obligation and deny or contest its liability under the Agreement; or claim that it is the other party that should have delivered but failed to.[54]

Precipitating any issue on the matter, the Court held that in the absence of definite indicators as to the amount of investments to be contributed by each party, disbursements for expenses, the parties' respective shares in the profits and the like, "this situation could readily give rise to all kinds of misunderstandings and disagreements over money matters."[55]

Under such a scenario, it will be extremely difficult for COMELEC to enforce the supposed joint and several liabilities of the members of the "consortium."

With the following premises, the Court remarked that "it is clear that *COMELEC gravely abused its discretion* in arbitrarily failing to observe its own

51. *Id.* at 27.

52. 232 SCRA 110 (1994) (emphasis supplied).

53. *Kilosbayan,* 110 SCRA at 144.

54. *Information Technology Foundation of the Phils.* at 29.

55. *Id.* at 30.

rules, policies and guidelines with respect to the bidding process, thereby negating a fair, honest and competitive bidding."[56]

2. Failure of the ACMs to Pass the DOST Tests

The Court also looked into the results of the testing done by the DOST. After scrutinizing and presenting the findings in a matrix, the Court held that the award should never have been issued in the first place because MPC and its competitor, TIM, did not pass the standards test conducted by the DOST. The Court found it to be unfair and illegal for the COMELEC to proceed with a transaction with an entity that did not pass the governmental tests. Some of the faults found were: (1) the machines failed to provide the required accuracy rating of at least 99.9995 percent at *cold* environmental condition, and at *harsh* environmental conditions; (2) the software used was a "demo" and the writing of the source code was doubtful in nature, as examined by experts; (3) and other technical insufficiencies.

The Court held that the award should never have been made where it was clear that the bidders failed to meet the standards, which were actually set by the COMELEC itself in the Request for Proposal (RFP).

Aside from this failure to meet the technical requirements, there was also a failure of the software to be used to perform the program "to detect previously downloaded data."[57] One of the requirements set by the RFP was that the software program be able to "detect previously downloaded precinct results and to prevent these from being entered into the counting machine again," however the Court found that the failure of the software to detect previous inputs would be catastrophic.[58]

In the words of the *ponencia,* "*We are thus confronted with the grim prospect of election fraud on a massive scale by means of just a few key strokes. The marvels and woes of the electronic age!*"[59]

Further, there was also an "inability to print audit trail" because the same system was not yet incorporated into the machines.[60] An audit trail is required by the RFP and the same was deemed by the Court as an integral requirement that was not complied with.

56. *Id.* at 19, reiterated at 21 & 22.

57. *Id.* at 38-39.

58. *Id.* at 38.

59. *Id.* at 39 (boldface removed).

60. *Id.* at 39.

3. Inadequacy of Post Facto Remedial Measures

Respondents argued that the deficiencies relating to the detection of previously downloaded data, as well as provisions for audit trails, were mere shortcomings or minor deficiencies in software or programming, which can be rectified. Relying on the BAC report, COMELEC argued that the deficiencies were "mostly on the software which can be corrected by re-programming...and therefore can be readily corrected."[61]

Mr. Justice Panganiban, reiterating the questions he propounded during the Oral Argument, pointed out that there were serious flaws and oversight in the technical aspect of the implementation of the automation. Incorporating his questions in the Decision, Mr. Justice Panganiban noted that there can be no certainty that the failures were because of the software and not the results of machine defects. And assuming the failures were because of inadequately programmed software; then there are more dangers that may result.

Mr. Justice Panganiban pointed out that there was no expert testimony that would support the view that the failures in the software could easily be rectified before the elections. The software was a "demo version" as admitted by one of the commissioners. The final version was not yet prepared and had no particular date for testing and development. The counting machines as well as the canvassing system would fail in the absence of correct software programs. Lamenting the technical failures in hand, Mr. Justice Panganiban wrote:

> The counting machines, as well as the canvassing system, will never work properly *without the correct software programs*. There is an old adage that is still valid to this day: "Garbage in, garbage out." No matter how powerful, advanced and sophisticated the computers and the servers are, if the software being utilized is defective or has been compromised, the results will be no better than garbage. And to think that what is at stake here is the 2004 national elections -- the very basis of our democratic life.[62]

In response to the queries posted by the Court per Mr. Justice Panganiban, the COMELEC submitted pleadings reassuring the Court that the COMELEC has ample time to finalize the requirements and to implement the same for the May elections. The Court, however, took it differently and ruled that COMELEC's latest assurances are "unpersuasive."[63] The different types of software that were needed were all put into question. The Court noted that the purchase of the *First Type* of

61. *Id.* at 40.

62. *Id.* at 42.

63. *Id.* at 43.

software was without evaluation;[64] that there was no explanation for the lapses in the *second type* of software;[65] and that the rationale of public bidding was negated by the third type of software which must be purchased from the same contractor.[66] The Court concluded that the acts done by COMELEC were contrary to *public policy*.

> At the very outset, the Court has explained that COMELEC flagrantly violated the public policy on public biddings (1) by allowing MPC/MPEI to participate in the bidding even though it was not qualified to do so; and (2) by eventually awarding the Contract to MPC/MPEI. Now, with the latest explanation given by COMELEC, it is clear that the Commission further desecrated the law on public bidding by permitting the winning bidder to change and alter the subject of the Contract (the software), in effect allowing a substantive amendment without public bidding.
>
> This stance is contrary to settled jurisprudence requiring the strict application of pertinent rules, regulations and guidelines for public bidding for the purpose of *placing each bidder, actual or potential, on the same footing*. The essence of public bidding is, after all, an opportunity for fair competition, and a fair basis for the precise comparison of bids. In common parlance, public bidding aims to "level the playing field." That means each bidder must bid under the same conditions; and be subject to the same guidelines, requirements and limitations, so that the best offer or lowest bid may be determined, *all other things being equal*.
>
> Thus, it is contrary to the very concept of public bidding to permit a variance between the conditions under which bids are invited and those under which proposals are submitted and approved; or, as in this case, the conditions under which the bid is won and those under which the awarded Contract will be complied with. The substantive amendment of the contract bidded out, without any public bidding – *after* the bidding process had been concluded – is violative of the public policy on public biddings, as well as the spirit and intent of RA 8436. *The whole point in going through the public bidding exercise was completely lost. The very rationale of public bidding was totally subverted by the Commission.*[67]

The Supreme Court, based on the aforementioned ratiocination, thus ruled that the COMELEC has gravely abused its discretion in awarding the contract for the automation of the counting and canvassing of the ballots to the Mega-Pacific Consortium. The Court found it "totally unacceptable and unconscionable to place its imprimatur on this void and illegal

64. *Id.* at 44.

65. *Id.* at 45.

66. *Id.* at 47-48.

67. *Id.* at 48.

transaction that seriously endangers the breakdown of our electoral system."[68]

The Court further held that as a necessary consequence of the "nullity and illegality," of the award of the Contract, the purchase of the machines and all appurtenances thereto including the still-to-be-produced (or in COMELEC's words, to be "reprogrammed") software, as well as all the payments made therefor, have no basis whatsoever in law. The public funds expended pursuant to the void Resolution and Contract must therefore be recovered from the payees and/or from the persons who made possible the illegal disbursements, without prejudice to possible criminal prosecutions against them.[69]

Justice Panganiban, in his *epilogue* to the decision wrote that:

> At bottom, before the country can hope to have a speedy and fraud-free automated election, it must first be able to procure the proper computerized hardware and software legally, based on a transparent and valid system of public bidding. As in any democratic system, the ultimate *goal* of automating elections must be achieved by a legal, valid and above-board *process* of acquiring the necessary tools and skills therefor. Though the Philippines needs an automated electoral process, it cannot accept just any system shoved into its bosom through improper and illegal methods. As the saying goes, the end never justifies the means. Penumbral contracting will not produce enlightened results.[70]

V. ANALYSIS

A. On the Locus Standi of Petitioners

Justice Panganiban, penning for the majority, accepted the stand of the petitioners that as taxpayers, the petitioners had a right to assail the contract because it will involve disbursement of public funds for an invalid contract. It may be poignant to note that on 24 January 2003, President Gloria Macapagal-Arroyo issued Executive Order No. 172, which allocated the sum of P2.5 billion to fund the AES for the 10 May 2004 elections. Upon the request of COMELEC, she authorized the release of an additional P500 million. In previous cases, this issue was always a point of contention, as for example in *Philippine Constitution Association v. Enriquez*,[71] where legislative allocations of public funds, namely that of the Countrywide Development

68. *Id.* at 51.

69. *Id.* at 51-52.

70. *Id.* at 53.

71. 235 SCRA 506, 521-523 (1994).

Fund of 1994, or the legislative "pork barrels" were at stake – the Supreme Court held the law as valid and recognized that the powers delegated to the Executive was merely recommendatory.

In *ITFP*, the taxpayer's money has already been disbursed by the Legislature and has been left to the discretion of COMELEC. The act in question was not the enactment of the law[72] *per se* but the act in pursuance of the law – the award of the Contract. The *locus standi* therefore, of the petitioners rested on the *usage* of the public fund, and not its disbursement. Hence, when the Supreme Court recognized the standing of the petitioners as taxpayers to sue upon the illegality of the Contract in this case it was not just the disbursement of the public funds that was in question, but the actual usage of it.

B. Petitions for Certiorari and Grave Abuse of Discretion

The petition initially was labeled as a petition for prohibition.[73] It was accepted and treated by the Court as one for *certiorari* falling under Rule 65 of the Rules of Court.[74] As Justice Tinga noted in his dissenting opinion:

> The instant original petition is one for prohibition and *mandamus* under Rule 65 of the 1997 Rules of Civil Procedure. Prohibition is an extraordinary writ directed against any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial or ministerial functions, commanding the respondent to desist from further proceedings when said proceedings are without or in excess of the respondent's jurisdiction or are attended with grave abuse of discretion amounting to lack or excess of jurisdiction and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law. Mandamus, on the other hand, is an extraordinary writ commanding a tribunal, corporation, board, officer or person, immediately or at some other specified time, to do the act required to be done, when the respondent unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or when the respondent excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law.[75]

72. For a study on the constitutionality of the law, *see* Janssen L. Tan, *A Critique of the Computerization Election Law* (2003) (JD thesis submitted to the Ateneo de Manila University School of Law).

73 *See* footnote 1 of the decision.

74. *Information Technology Foundation of the Phils.* at 2.

75. *Id.* at 80-81.

The Supreme Court, of course, has the authority to disregard the nomenclature given on a pleading submitted before it and rename the same into what the body of the pleading actually prays for.[76] Hence, the Court may deem a petition as one for certiorari.

However, grave abuse of discretion as basis for the issuance of the writ of certiorari is a well-defined concept. By "grave abuse of discretion" is meant such capricious and whimsical exercise of the judgment as is equivalent to lack of jurisdiction.[77] It has been held that the abuse of discretion alone is not sufficient to warrant the issuance of the writ but that the abuse must be so grave, as where the power is exercised in the arbitrary or despotic manner by reasons of passion, prejudice or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined or to act at all, in contemplation of law.[78]

In *ITFP v. COMELEC,* Chief Justice Davide pointed out that: "there is no suggestion that graft and corruption attended the bidding process, or that the contract price is excessive or unreasonable. All that the petitioners claim is that 'the bidding and the award process was fatally flawed. The public respondents acted without or excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction when it [sic] awarded the project.'"[79] Perhaps it was "precipitate for this Court to declare void the contract in question."[80]

As a matter of fact, as the Chief Justice noted:

> The Court did not issue a Temporary Restraining Order in this case. This showed an initial finding that on its face the allegations in the petition were insufficient to justify or warrant the grant of a temporary restraining order. In the meantime then the parties were not barred from performing their respective obligations under the contract.

Furthermore, as Chief Justice Davide recognized, the act of COMELEC was done pursuant to a law, the law on Automated Election System (R.A. 8436) and Executive Order No. 172[81] which allocated the sum of P2.5 Billion, and Executive Order No. 175[82] which allocated the additional sum of P500 Million for the implementation in the May 2004 elections of the Automated Election System.

Because of the Decision, the *ratio* of these laws, in the words of the Chief Justice, "would be put to naught as there is absolutely no more time to conduct a re-bidding."[83] The remarks of Justice Vitug was concurred with by Chief Justice Davide. In his single paged opinion, the Chief Justice deemed it both *impractical* and *unsettling* for the Court to discard the Contract in question. There was, in his words, "insufficient time to prepare for a non-automated electoral process, *i.e.*, the manual process, which would necessarily include the acquisition of the security paper and the purchase of a "dandy roll" to watermark the ballot paper, printing of other election forms, as well as the bidding and acquisition of the ballot boxes."[84]

C. The Supreme Court as a Fact-Finding Body

It has been held that while the Supreme Court exercises original jurisdiction over petitions for *certiorari* and prohibition (along with petitions for prohibition, *mandamus, quo warranto, habeas corpus* and injunction), that jurisdiction, however, is not exclusive.[85] A direct recourse to the Supreme Court, for the issuance of these writs, in disregard of the rule on hierarchy, should be appropriate only when, besides the attendance of clearly exceptional and compelling reasons clearly set out in the petition,[86] there are no contentious factual assertions of the parties that need to be threshed out before any objective and definitive conclusion can be reached.[87]

In *ITFP v. COMELEC,* for the Supreme Court to be able to rule upon the legal issues presented, it had to receive evidence by itself. There were Oral Arguments conducted and the "slew of pleadings" had to be threshed out by the Justices themselves.[88]

The Supreme Court had to rule on questions of facts and had to consolidate the arguments of both sides. There is previous jurisprudence that indicates that this act is not prudent for the Court to have done.[89] The

76. Francisco v. HRET, G.R. No. 160261, November 10, 2003.

77. Liwanag, et al. v. Castillo, 106 Phil. 375 (1959) citing Abad Santos vs. Province of Tarlac, 67 Phil. 480 (1951); Tan v. People, 88 Phil. 609 (1938); and Rueda v. Court of Agrarian Relations, 106 Phil. 301 (1959).

78. *Id.*, citing, Talavera, Luna Inc. v. Noble 67 Phil. 340 (1939); Alafriz v. Noble, 72 Phil. 278 (1941).

79. *Information Technology Foundation of the Phils.* at 77.

80. *Id.* at 77.

81. Promulgated January 24, 2003.

82. Promulgated February 10, 2003.

83. *Information Technology Foundation of the Phils.* at 77.

84. *Information Technology Foundation of the Phils.* at 77.

85. People v. Cuaresma, 172 SCRA 415 (1989).

86. Santiago v. Vasquez, 217 SCRA 633 (1993).

87. *Information Technology Foundation of the Phils.* at 78 (Vitug, J., dissenting).

88. *Id.* at 15.

89. People v. Chavez, 358 SCRA 810 (2001).

proper office of a petition for *certiorari*, prohibition or *mandamus* is not to review evidence, much less for the Supreme Court to receive them as a trier of facts. It is only the *undisputed facts* which may be ruled upon by the Court in *certiorari*, especially where the jurisdiction of a tribunal, board, and officers (more so in this case, an independent Constitutional Commission) is in question.[90] As Justice Vitug explained in his dissenting opinion:

> What appears to be a significant issue in the instant petition is the legality of respondent COMELEC's award of the contract relative to the procurement of automated counting machines to respondent Mega Pacific under alleged questionable circumstances. The Supreme Court is not a trier of facts; indeed, a review of the evidence is not the proper office of a petition for *certiorari*, prohibition or *mandamus*. These proceedings are availed of only when there can be no other plain, adequate and speedy remedy in the ordinary course of law.
>
> In *certiorari* or prohibition, issues affecting the jurisdiction of the tribunal, board and officers involved may be resolved solely on the basis of undisputed facts. The enormity of the factual disputes in the instant petition, among which include the eligibility of Mega Pacific to participate in the bidding process, the veracity and effectivity of the testing, and the technical evaluation conducted by the Department of Science and Technology (DOST) on the automated counting machine of the bidders, would essentially require an extensive inquiry into the facts. An insistence that it be resolved despite unsettled factual points would be inadequate to allow an intrusion by the Court.[91]

The Court decided to wade through the facts to determine the issues in this case. The Court had to make an "extensive inquiry" in respite of what Justice Vitug noted as an "enormity of factual disputes." Mr. Justice Panganiban even had to make personal inquiries as to the presence of a qualified expert to testify on the software and for the lack of the latter, the good justice had to define technical computer terms such as *source codes*.[92]

D. On Exhaustion of Remedies

The general rule that has been upheld by jurisprudence is that the acts of administrative agencies are granted a presumption of regularity. There must

90. *See* Matuguina Integrated Wood Products, Inc. vs. Court of Appeals, 263 SCRA 490 (1996); *see also* Mafinco Trading Corp. vs. Ople, et al., 70 SCRA 139 (1976).

91. *Information Technology Foundation of the Phils.* at 78-79.

92. *Id.* at note 49. This factual determination should have been better ruled upon with expert testimonies from Computer technicians. The absence of the same in the proceedings and the Oral Arguments before the Court left the field of discussion to the arguments of lawyers that rested on questionable facts.

first be an exhaustion of administrative remedies. However, the recent list of jurisprudence on exhaustion of administrative remedies suggests that there are more exceptions to the rule than its application.

In a long line of cases, it has been consistently held that if a remedy within the administrative machinery can still be resorted to by giving the administrative officer or agency concerned every opportunity to decide on a matter that comes within his or its jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought.[93]

The underlying principle of the rule rests on the presumption that the administrative agency, if afforded a complete chance to pass upon the matter will decide the same correctly.[94]

Some of the recognized exceptions to the doctrine of exhaustion of administrative remedies, are the following:[95]

1. when there is a violation of due process;
2. when the issue involved is a purely legal question;
3. when the administrative action is patently illegal amounting to lack or excess of jurisdiction;
4. when there is estoppel on the part of the administrative agency concerned;
5. when there is irreparable injury;
6. when the respondent is a Department Secretary whose acts as an alter ego of the President bears the implied and assumed approval of the latter;
7. when to require exhaustion of administrative remedies would be unreasonable;
8. when it would amount to a nullification of a claim;
9. when the subject matter is a private land in land case proceedings;
10. when the rule does not provide a plain, speedy, adequate remedy;
11. when there are circumstances indicating the urgency of judicial intervention;

93. Province of Zamboanga del Norte v. Court of Appeals, 342 SCRA 549, 557 (2000); Zabat *vs.* Court of Appeals, 338 SCRA 551, 560 (2000); Diamonon *vs.* Department of Labor and Employment, 327 SCRA 283, 291 (2000); Social Security System Employees Association v. Bathan-Velasco, 313 SCRA 250, 252 (1999); Paat *vs.* Court of Appeals, 266 SCRA 167, 175 (1997).

94. Carale v. Abarintos, 269 SCRA 132, 141 (1997).

95. Laguna CATV Network v. Maraan, 392 SCRA 221 (2002).

12. when no administrative review is provided by law;
13. where the rule of qualified political agency applies; and
14. when the issue of non-exhaustion of administrative remedies has been rendered moot

The Court in *ITFP v. COMELEC,* ruled on the *transcendentality* of the issue. Justice Panganiban in his *ponencia* argued that the case would have a bearing on the political stability of the society and that: "[the] nation's political and economic future virtually hangs in the balance, pending the outcome of the 2004 elections. Hence, there can be no serious doubt that the subject matter of this case is a matter of public concern and imbued with public interest"[96]

The Court in this case made a prima facie determination of the importance of ruling on the issue merely because of the transcendental nature of elections, thereby showing a presupposition that the issue will have to be adjudged for the coming elections to be successful so as to protect the interest of the general public. Because of the transcendentality of the issue the Court disregard the presumption of regularity of the acts of the COMELEC the latter's argument that there are still administrative remedies available for the petitioners.

E. On the Issue of Non-Existence of the Entity and on the issue of Liability

The non-existence of the contractor appeared to be the most affecting substantive argument raised by the majority decision. The Court found that Mega-Pacific as a consortium never existed prior to the contract nor after its execution. Mr. Justice Tinga, in his dissenting opinion, vehemently argued against this point. His dissenting opinion cited in full the resolutions of the COMELEC that showed that the Mega Pacific Consortium was recognized by the COMELEC prior to the Contract.[97] The said resolution supported Mr. Justice Tinga's appreciation of the fact that the Consortium participated as an entity in the bidding process and that the entity was recognized by COMELEC. Justice Tinga also quoted the four bilateral agreements supposedly entered into by the members.[98] Justice Tinga's view was that these agreements were in actuality, authorization contracts that gave MPEI the authority to enter into an agreement for and in behalf of every member. Hence, there is imposed solidary liability between MPEI and the rest of the members.

96. *Information Technology Foundation of the Phils.* at 10.
97. Commission on Elections Resolution No. 6074 (dated April 15, 2003).
98. *Information Technology Foundation of the Phils.* at 86-89.

> The majority opinion, nonetheless, insinuates that it is not sufficient that a joint venture be formed, but that the members of the joint venture all bind themselves jointly and severally liable for the performance of the Contract. It asserts that there was no joint venture agreement, much less a joint and several undertaking, among the members of the alleged consortium. Thus, the BAC should not have found *MPC* eligible to bid.
>
> I cannot subscribe to this position. The RFP specifically defines a joint venture as a group of two (2) or more manufacturers, suppliers and/or distributors *that intend to be jointly and severally responsible or liable for the contract.* Nowhere in the RFP is it required that the members of the joint venture execute a single written agreement to prove the existence of a joint venture. Indeed, the intention to be jointly and severally liable may be evidenced not only by a single joint venture agreement but by supplementary documents executed by the parties signifying such intention.
>
> As the respondents pointed out, separate agreements were entered into by and between *MPEI* on the one hand and *We Solv, SK C&C, Election.Com,* and *ePLDT* on the other. The *Memorandum of Agreement* between *MPEI* and *We Solv* and *MPEI* and *SK C&C* set forth the joint and several undertakings among the parties. On the other hand, the *Teaming Agreements* between *MPEI* and *Election.Com* and *MPEI* and *ePLDT* clarified their respective roles with regard to the Project, with *MPEI* being the 'independent contractor' and *Election.Com* and *ePLDT* the 'subcontractor.'
>
> The *ponencia* mistakenly attributes to the respondents the argument that the phrase 'particular contrac' in the RFP should be taken to mean that all the members of the joint venture need not be solidarily liable for the entire project, it being sufficient that the lead company and the member in charge of a 'particular contract' or aspect of the joint venture agree to be solidarily liable. Nowhere in any of the respondents' pleadings was this argument ever raised. If it was, inestimable gain goes to the respondents because this contention is ultimately logical and coherent.
>
> The RFP itself lays down the organizational structure of the joint venture and the liability dynamics of the members thereof.[99]

The dissent of Justice Tinga rested on logic that would have had been acceptable. The joint venture agreement that was required by the RFP laid down the organizational structure of the joint venture and the liability dynamics of the members thereof.[100] The RFP merely provided for a joint venture. It did not refer to one that was formed by a single contract involving every member. The RFP merely required that the members

99. *Id.* at 93.
100. *Id.* at 94.

intended to jointly and severally bind themselves liable for the project or for a "particular contract."[101] As Justice Tinga pointed out:

> [T]he RFP adverts to 'particular contract.' It does not speak of 'entire Project' or 'joint venture,' from which the phrase 'particular contract' should be distinguished. The clear signification is that all the members of the joint venture need not be solidarily liable for the entire Project or joint venture; it is sufficient that the lead company and the member in charge of a particular contract or aspect of the joint venture agree to be solidarily liable.
>
> In any case, the Contract incorporates all documents executed by the consortium members even if the same are not referred to therein.

Had the Court appreciated the facts as Mr. Justice Tinga had, the logical conclusion would be that the Consortium was indeed set up and that liabilities were imposed based from the four bilateral agreements.

This brings to mind the argument raised by Mr. Justice Vitug that the Supreme Court cannot be a fact-finding body. The Court should limit its discussion with "undisputed facts." Otherwise, two (or more) conclusions would be reached depending on the appreciation of the facts giving cause to situations like that in *ITFP v. COMELEC*. As Mr. Justice Tinga concluded:

> In deciding the instant case, the Court shall consider only the undisputed or admitted facts and resolve only the specific questions raised by the parties. The Court is not a repository of remedies or a 'super-legal-aid bureau.' We cannot grant relief for every perceived violation of the law or worse, on the basis of prophetic wisdom. Paraphrasing an old decision, Mr. Justice Felix Frankfurter wrote: 'Judicial power, however large, has an orbit more or less strictly defined by well-recognized presuppositions regarding the kind of business that properly belongs to courts. Their business is adjudication, not speculation. They are concerned with actual, living controversies, and not abstract disputation.'[102]

F. On the Independence of COMELEC

The question on entity-ship aside, the Supreme Court in this case made a digression from the common rules on judicial nullification of governmental acts. The Constitution provided the Supreme Court with the power to review the acts of the other branches and departments of the government. There is however no Constitutional provision violated here in this case. As Justice Tinga[103] in his strong dissent argued, the Supreme Court ruled on an

101. *Id.* at 94.

102. *Id.* at 95.

103. *Id.* at 80.

issue not within its competence to rule upon. Chief Justice Davide,[104] in a more balanced perspective argued that there should be granted the COMELEC a certain leeway in the exercise of its mandates. After all, it is in pursuance of a law that the COMELEC entered into the Automated Election Contract.

In interpreting Section 1, Article X of the 1935 Constitution providing that there shall be an *independent* COMELEC, the Court has held that "[w]hatever may be the nature of the functions of the Commission on Elections, the fact is that the framers of the Constitution wanted it to be independent from the other departments of the Government."[105]

In *Macalintal v. COMELEC,*[106] the Supreme Court granted the COMELEC a certain degree of latitude to perform its functions. Tracing the institutional evolution of the COMELEC as an independent body, the Court respected the role that COMELEC plays – namely, the administration of the conduct of the elections.

In *Macalintal*, the issue presented was whether or not R.A. No. 9189,[107] violated the Constitutional proscription on the separation of powers when Congress left for itself some exercise of authority over the disbursement of funds to be used for the administration of the Overseas Absentee Voting system.

It was poignantly held that: the Court has no general powers of supervision over COMELEC which is an independent body "except those specifically granted by the Constitution," that is, to review its decisions, orders and rulings. In the same vein, it is not correct to hold that because of its recognized extensive legislative power to enact election laws, Congress may intrude into the independence of the COMELEC by exercising supervisory powers over its rule-making authority."

Once a law is enacted and approved, the legislative function is deemed accomplished and complete. The legislative function may spring back to Congress relative to the same law only if that body deems it proper to review, amend and revise the law, but certainly not to approve, review, revise and amend the IRR of the COMELEC.

104. *Id.* at 77.

105. Nacionalista Party vs. Bautista, 85 Phil. 101, 107 (1949).

106. G.R. No. 157013, July 10, 2003.

107. An Act Providing for A System of Overseas Absentee Voting by Qualified Citizens of the Philippines Abroad, Appropriating Funds Therefor, and for Other Purposes (approved 13 February 2003).

By vesting itself with the powers to approve, review, amend, and revise the IRR for *The Overseas Absentee Voting Act of 2003*, the Court found that Congress went beyond the scope of its constitutional authority. Congress trampled upon the constitutional mandate of independence of the COMELEC. Hence the Court deemed the said provisions unconstitutional while leaving the other portions of the law as valid.

Congress had no right to interfere with COMELEC as much as the Court had none.

The wisdom of the decision of the Supreme Court in *ITFP* may be criticized for a usurpation of jurisdiction because there was no constitutional provision violated but merely an invocation of the authority to declare an act of a Constitutional Commission as one in *grave abuse of discretion.*[108] But under the Constitution it is the Supreme Court who has a call on the definition of its own jurisdiction – even over acts of independent Constitutional Commissions.

In *Macalintal* the Court held that:

> The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. *It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created – free, orderly and honest elections.* We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere. 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.[109]

But why should the Court deny the same latitude given in *Macalintal v. COMELEC* in *ITFP v. COMELEC*?

In *Macalintal* the Court cautioned COMELEC not to overstep its authority and to divest COMELEC of its authority to administer elections. In *ITFP*, the Court asserted its constitutional mandate to nullify acts in grave abuse of discretion, in disregard of the *independence* of COMELEC.

108. *Information Technology* at 80 (Tinga, J. dissenting).

109. *Id.* citing Sumulong v. COMELEC, 73 Phil. 288, 294-295 (1941), *as cited in* Espino vs. Zaldivar, 129 Phil. 451, 474 (1967).

What Congress cannot do, it may be argued, the Supreme Court can do.[110] The determination of both what the Supreme Court can do and when it can depends on the interpretation of the Court of an act in grave abuse of discretion.

The Court has previously underscored the importance of giving the COMELEC considerable latitude in adopting means and methods that will insure the accomplishment of the objective for which it was created — to promote free, orderly, honest, peaceful and credible elections.[111] Thus, in the past we have prudently declined to interfere with the COMELEC's exercise of its administrative functions absent any showing of grave abuse of discretion.[112] As previously held in *Sumulong v. COMELEC*,[113]

> I]n the matter of the administration of the laws relative to the conduct of elections, as well as in the appointment of election inspectors, we must not by any excessive zeal take away from the Commission on Elections the

110. This Decision was, in fact, criticized by members of the House of Representatives such as in the plenary session of 27-28 January 2004 – for being an encroachment on the integrity of the Commission on Electoins. As recorded in the JOURNAL OF THE HOUSE (12TH CONGRESS) VOL. 42 (Jan. 27. 2004) *available at* http://www.congress.gov.ph/download/journals_12/12_3rs_42.pdf (last accessed September 11, 2004):

> Whereupon, Rep. Macarambon delved on the decision issued by the Supreme Court on January 13, 2004 declaring null and void the COMELEC's contract with the supplier of its counting machines. These machines, he said, would have been used to revolutionalize the traditionally cumbersome and fraud-prone manner of counting votes. He subsequently adverted to the 'strongly-worded' decision written by Justice Artemio Panganiban that the Commission 'awarded the billion-peso undertaking with inexplicable haste...and accepted the proferred computer hardware and software even if, at the time of the award, they had undeniably failed to pass eight critical requirements.' He continued that the Supreme Court decision likewise claimed that 'the illegal, imprudent and hasty actions of the Commission have not only desecrated legal and jurisprudential norms, but have also cast serious doubts upon the poll body's ability and capacity to conduct automated elections."
>
> Rep. Macarambon thereafter underscored that it is easy to be misled by the harsh diction of the Supreme Court decision and quite easily forget that foremost, the decision was not unanimous and number two, the opinion of the dissenting justices make for very insightful and worthwhile reading.

111. Macalintal v. COMELEC, G.R. No. 157013, July 10, 2003.

112. Cauton v. COMELEC, 19 SCRA 911 (1967).

113. 73 Phil. 288 (1942).

> initiative which by constitutional and legal mandates properly belongs to it. Due regard to the independent character of the Commission, as ordained in the Constitution, requires that the power of this court to review the acts of that body should, as a general proposition, be used sparingly, but firmly in appropriate cases.[114]

As Mr. Justice Tinga cautiously pointed out, the Supreme Court cannot guarantee the success of the automation or the integrity of the elections. It is not the Court's function to make a proactive stand to presuppose and ensure that "the automation is successfully implemented or that the elections are made free of fraud, violence, terrorism and other threats to the sanctity of the ballot."[115] This mandate rests with COMELEC.

G. On the Pragmatic Consequences of the Decision

Mr. Chief Justice Davide also pointed out several pragmatic consequences of voiding the Contract. In his dissent, the Chief Justice related that:

> As of today, the COMELEC has already paid a large portion of its contracted obligation and the private respondent has delivered the contracted equipment for automation. It is to be reasonably presumed that during the same period the COMELEC focused its attention, time and resources toward the full and successful implementation of the comprehensive Automated Election System for the May 2004 elections. Setting aside the contract in question at this late hour may have unsettling, disturbing and even destabilizing effect. For one, it will leave the COMELEC insufficient time to prepare for a non-automated electoral process, *i.e.*, the manual process, which would necessarily include the acquisition of the security paper and the purchase of a 'dandy roll' to watermark the ballot paper, printing of other election forms, as well as the bidding and acquisition of the ballot boxes. For another, the law on Automated Election System (R.A. 8436) and Executive Order No. 172 (24 January 2003) which allocated the sum of P2.5 Billion, and Executive Order No. 175 (10 February 2003) which allocated the additional sum of P500 Million for the implementation in the May 2004 elections of the Automated Election System would be put to naught as there is absolutely no more time to conduct a re-bidding.[116]

To void the Contract would be to leave the country with the manual process. The nullification of the Contract left the country in a position worse than it was previously in. Not only was the purpose of the law not fulfilled, the government spent money on a project and equipments it would not be able to use. The repercussions of the nullification ought to be given full discussio, but not in this Comment.

114. *Id.* at 295-296.

115. *Information Technology Foundation of the Phils.* at 82.

116. *Id.* at 77.

VI. GENERALIZATION

The National Elections of 2004 was meant to be another nail in the sepulcher of arbitrariness, and another laurel leaf for democracy. Like every election before and after it, the "standards must be as high as the stakes." It has been said that all of democracy is founded on the idea that when one gets voted into office, it is because the will of the people so determines.[117] Consequently, when a candidate in a majoritarian election loses – it is understood that he lost because it was not the will of the people that he or she be elected. It is in this context that the electoral process itself becomes the subject of scrutiny. The entire procedure and the rules governing the election should have, at the least, the appearance of fairness and veracity.

If the electorate does not think well of the procedure and the security of the process, and that its methodology may be of doubtful integrity – then it is but proper to re-examine and to modify. If possible, to advance and to modernize.

Republic Act No. 8436 was enacted from such premise. The said act authorized the Commission on Elections (COMELEC) to adopt an automated method of election system to ensure free, orderly, honest, peaceful and credible elections, and assure the secrecy and sanctity of the ballot in order that the results of elections, plebiscites, referenda, and other electoral exercises shall be *fast, accurate and reflective* of the genuine will of the people.[118] The law allowed and mandated the use of computers and technological advancements in information technology, such as satellite relays and management information systems, to help conduct a more efficient election.

The law also sought to minimize the costs of election and to solve the demoralizing delay suffered from the lag time from the casting of votes, to the counting and canvassing stage until proclamation. With the help of computers and information technology, the Legislature hoped that the Philippine elections would be as modernized and as advanced as that of other democratic counterparts. However, such hope never materialized.

In the words of Justice Tinga:

117. JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT 22 (1860).

118. §1, RA 8436, 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, enacted December 22. 1997