

Republic of the Philippines  
**SUPREME COURT**  
Manila

EN BANC

**G.R. No. 188456**                      **September 10, 2009**

**H. HARRY L. ROQUE, JR., JOEL R. BUTUYAN, ROMEL R. BAGARES, ALLAN JONES F. LARDIZABAL, GILBERT T. ANDRES, IMMACULADA D. GARCIA, ERLINDA T. MERCADO, FRANCISCO A. ALCUAZ, MA. AZUCENA P. MACEDA, and ALVIN A. PETERS,** Petitioners,  
vs.

**COMMISSION ON ELECTIONS, Represented by HON. CHAIRMAN JOSE MELO, COMELEC SPECIAL BIDS and AWARDS COMMITTEE, represented by its CHAIRMAN HON. FERDINAND RAFANAN, DEPARTMENT OF BUDGET and MANAGEMENT, represented by HON. ROLANDO ANDAYA, TOTAL INFORMATION MANAGEMENT CORPORATION and SMARTMATIC INTERNATIONAL CORPORATION,** Respondents.

**PETE QUIRINO-QUADRA,** Petitioner-in-Intervention.

**SENATE OF THE PHILIPPINES, represented by its President, JUAN PONCE ENRILE,** Movant-Intervenor.

DECISION

**VELASCO, JR., J.:**

In a democratic system of government, the people's voice is sovereign. Corollarily, choosing through the ballots the men and women who are to govern the country is perhaps the highest exercise of democracy. It is thus the interest of the state to insure honest, credible and peaceful elections, where the sanctity of the votes and the secrecy of the ballots are safeguarded, where the will of the electorate is not frustrated or undermined. For when the popular will itself is subverted by election irregularities, then the insidious seeds of doubt are sown and the ideal of a peaceful and smooth transition of power is placed in jeopardy. To automate, thus breaking away from a manual system of election, has been viewed as a significant step towards clean and credible elections, unfettered by the travails of the long wait and cheating that have marked many of our electoral exercises.

The Commission on Elections (Comelec), private respondents, the National Computer Center and other computer wizards are confident that nationwide automated elections can be successfully implemented. Petitioners and some skeptics in the information technology (IT) industry have, however, their reservations, which is quite understandable. To them, the automated election system and the untested technology Comelec has chosen and set in motion are pregnant with risks and could lead to a disastrous failure of elections. Comelec, they allege, would not be up to the challenge. Cheating on a massive scale, but this time facilitated by a machine, is perceived to be a real possibility.

In this petition for *certiorari*, prohibition and mandamus with prayer for a restraining order and/or preliminary injunction, petitioners H. Harry L. Roque, Jr., *et al.*, suing as taxpayers and concerned citizens, seek to nullify respondent Comelec's award of the 2010 Elections Automation Project (automation project) to the joint venture of Total Information Management Corporation (TIM) and Smartmatic International Corporation (Smartmatic)<sup>1</sup> and to permanently prohibit the Comelec, TIM and Smartmatic from signing and/or implementing the corresponding contract-award.

By Resolution<sup>2</sup> of July 14, 2009, the Court directed the respondents as well as the University of the Philippines (UP) Computer Center, National Computer Center (NCC) and Information Technology Foundation of the Philippines (Infotech, hereinafter) to submit their collective or separate comments to the petition on or before July 24, 2009. Before any of the comments could actually be filed, Atty. Pete Quirino-Quadra sought leave to intervene. In another resolution, the Court allowed the intervention and admitted the corresponding petition-in-intervention.<sup>3</sup>

On July 29, 2009, the Court heard the principal parties in oral arguments which was followed by the submission of their and the resource persons' instructive, albeit clashing, memoranda. The Senate, through the Senate President, would later join the fray via a Motion for Leave to Intervene. In a Resolution of August 25, 2009, the Court admitted the Senate's comment-in-intervention.

From the petition, the separate comments thereon, with their respective annexes, and other pleadings, as well as from admissions during the oral arguments, the Court gathers the following facts:

On December 22, 1997, Congress enacted Republic Act No. (RA) 8436 authorizing the adoption of an automated election system (AES) in the May 11, 1998 national and local elections and onwards. The 1998, 2001, and 2004 national and local polls, however, came and went but purely manual elections were still the order of the day. On January 23, 2007, the amendatory RA 9369<sup>4</sup> was passed authorizing anew the Comelec to use an AES. Of particular relevance are Sections 6 and 10 of RA 9369—originally Secs. 5 and 8, respectively of RA 8436, as amended—each defining Comelec's specific mandates insofar as automated elections are concerned. The AES was not utilized in the May 10, 2000 elections, as funds were not appropriated for that purpose by Congress and due to time constraints.

RA 9369 calls for the creation of the Comelec Advisory Council<sup>5</sup> (CAC). CAC is to recommend, among other functions, the most appropriate, applicable and cost-effective technology to be applied to the AES.<sup>6</sup> To be created by Comelec too is the Technical Evaluation Committee (TEC)<sup>7</sup> which is tasked to certify, through an established international certification committee, not later than three months before the elections, by categorically stating that the AES, inclusive of its hardware and software components, is operating properly and accurately based on defined and documented standards.<sup>8</sup>

In August 2008, Comelec managed to automate the regional polls in the Autonomous Region of Muslim Mindanao<sup>9</sup>(ARMM), using direct recording electronics (DRE) technology<sup>10</sup> in the province of Maguindanao; and the optical mark reader/recording (OMR) system, particularly the Central Count Optical Scan (CCOS),<sup>11</sup> in the rest of ARMM.<sup>12</sup> What scores hailed as successful automated ARMM 2008 elections paved the way for Comelec, with some prodding from senators,<sup>13</sup> to prepare for a nationwide computerized run for the 2010 national/local polls, with the many lessons learned from the ARMM experience influencing, according to the NCC, the technology selection for the 2010 automated elections.<sup>14</sup>

Accordingly, in early March 2009, the Comelec released the *Request for Proposal (RFP)*, also known as *Terms of Reference (TOR)*, for the nationwide automation of the voting, counting, transmission, consolidation and canvassing of votes for the May 10, 2010 Synchronized National and Local Elections. What is referred to also in the RFP and other contract documents as the 2010 Elections Automation Project (Automation Project) consists of three elaborate components, as follows:

**Component 1:** Paper-Based AES.<sup>15</sup> 1-A. Election Management System (EMS); 1-B Precinct-Count Optic Scan (PCOS)<sup>16</sup> System and 1-C. Consolidation/Canvassing System (CCS);

**Component 2:** Provision for Electronic Transmission of Election Results using Public Telecommunications Network; and

**Component 3:** Overall Project Management

And obviously to address the possibility of systems failure, the RFP required interested bidders to submit, among other things: a continuity plan<sup>17</sup> and a back-up plan.<sup>18</sup>

Under the two-envelope system designed under the RFP,<sup>19</sup> each participating bidder shall submit, as part of its bid, an Eligibility Envelope<sup>20</sup> that should inter alia establish the bidder's eligibility to bid. On the other hand, the second envelope, or the Bid Envelope itself, shall contain two envelopes that, in turn, shall contain the technical proposal and the financial proposal, respectively.<sup>21</sup>

Subsequently, the Comelec Special Bids and Awards Committee (SBAC), earlier constituted purposely for the aforesaid project, caused the publication in different newspapers of the *Invitation to Apply for Eligibility and to Bid*<sup>22</sup> for the procurement of goods and services to be used in the automation project.<sup>23</sup> Meanwhile, Congress enacted RA 9525 appropriating some PhP 11.3 billion as supplemental budget for the May 10, 2010 automated national and local elections.

Of the ten (10) invitation-responding consortia which obtained the bid documents, only seven (7) submitted sealed applications for eligibility and bids<sup>24</sup> which, per Bid Bulletin No. 24, were to be opened on a pre-set date, following the convening of the pre-bid conference. Under the RFP,

among those eligible to participate in the bidding are manufacturers, suppliers and/or distributors forming themselves into a joint venture. A joint venture is defined as *a group of two or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract.*<sup>25</sup>

Among the submitted bids was that of the joint venture (JV) of TIM and Smartmatic, the former incorporated under the Corporation Code of the Philippines. Smartmatic, on the other hand, was organized under the laws of Barbados.<sup>26</sup> For a stated amount, said JV proposed to undertake the whole automation project, inclusive of the delivery of 82,200 PCOS machines. After the conclusion of the eligibility evaluation process, only three consortia<sup>27</sup> were found and thus declared as eligible. Further on, following the opening of the passing bidders' Bid Envelope and evaluating the technical and financial proposals therein contained, the SBAC, per its Res. No. 09-001, s.-2009, declared the above-stated bid of the JV of TIM-Smartmatic as the *single complying calculated bid.*<sup>28</sup> As required by the RFP, the bid envelope contained an outline of the joint venture's back-up and continuity or contingency plans,<sup>29</sup> in case of a systems breakdown or any such eventuality which shall result in the delay, obstruction or nonperformance of the electoral process.

After declaring TIM-Smartmatic as the best complying bidder, the SBAC then directed the joint venture to undertake post-qualification screening, and its PCOS prototype machines—the Smartmatic Auditable Electronic System (SAES) 1800—to undergo end-to-end<sup>30</sup> testing to determine compliance with the pre-set criteria.

In its Memorandum of June 01, 2009, on the Subject: *Systems Evaluation Consolidated Report and Status Report on the Post-Qualification Evaluation Procedures*, the SBAC Technical Working Group (TWG) stated that it was undertaking a 4-day (May 27 to May 30, 2009) test evaluation of TIM and Smartmatic's proposed PCOS project machines. Its conclusion: "The demo systems presented PASSED all tests as required in the 26-item criteria specified in the [RFP]" with 100% accuracy rating.<sup>31</sup> The TWG also validated the eligibility, and technical and financial qualifications of the TIM-Smartmatic joint venture.

On June 9, 2009, Comelec, upon the recommendation of its SBAC, the CAC and other stakeholders, issued Resolution No. (Res.) 8608<sup>32</sup> authorizing the SBAC to issue, subject to well-defined conditions, the notice of award and notice to proceed in favor of the winning joint venture.

Soon after, TIM wrote Comelec expressing its desire to quit the JV partnership. In time, however, the parties were able to patch up what TIM earlier described as irreconcilable differences between partners.

What followed was that TIM and Smartmatic, pursuant to the Joint Venture Agreement (JVA),<sup>33</sup> caused the incorporation of a joint venture corporation (JVC) that would enter into a contract with the Comelec. On July 8, 2009, the Securities and Exchange Commission issued a certificate of incorporation in favor of Smartmatic TIM Corporation. Two days after, or on July

10, 2009, Comelec and Smartmatic TIM Corporation, as provider, executed a contract<sup>34</sup> for the lease of goods and services under the contract for the contract amount of PhP 7,191,484,739.48, payable as the "Goods and Services are delivered and/or progress is made in accordance [with pre-set] Schedule of Payments."<sup>35</sup> On the same date, a *Notice to Proceed*<sup>36</sup> was sent to, and received by, Smartmatic TIM Corporation.

Meanwhile, or on July 9, 2009, petitioners interposed the instant recourse which, for all intents and purposes, impugns the validity and seeks to nullify the July 10, 2009 Comelec-Smartmatic-TIM Corporation automation contract adverted to. Among others, petitioners pray that respondents be permanently enjoined from implementing the automation project on the submission that:

PUBLIC RESPONDENTS COMELEC AND COMELEC-SBAC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN AWARDING THE 2010 ELECTIONS AUTOMATION PROJECT TO PRIVATE RESPONDENTS TIM AND SMARTMATIC FOR THE FOLLOWING REASONS:

x x x COMELEC DID NOT CONDUCT ANY PILOT TESTING OF THE x x x PCOS MACHINES OFFERED BY PRIVATE RESPONDENTS SMARTMATIC AND TIM, IN VIOLATION OF [RA] 8436 (AS AMENDED BY [RA] 9369)

THE [PCOS] MACHINES [THUS] OFFERED BY PRIVATE RESPONDENTS x x x DO NOT SATISFY THE MINIMUM SYSTEM CAPABILITIES SET BY [RA] NO. 8436 (AS AMENDED BY [RA] 9369).

PRIVATE RESPONDENTS x x x DID NOT SUBMIT THE REQUIRED DOCUMENTS DURING THE BIDDING PROCESS THAT SHOULD ESTABLISH THE DUE EXISTENCE, COMPOSITION, AND SCOPE OF THEIR JOINT VENTURE, IN VIOLATION OF THE SUPREME COURT'S HOLDING IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES, vs. COMELEC (G.R. No. 159139, Jan. 13, 2004)*.

THERE WAS NO VALID JOINT VENTURE AGREEMENT [JVA] BETWEEN PRIVATE RESPONDENTS SMARTMATIC AND TIM DURING THE BIDDING, IN VIOLATION OF THE SUPREME COURT'S HOLDING IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES vs. COMELEC* x x x WHICH REQUIRES A JOINT VENTURE TO INCLUDE A COPY OF ITS [JVA] DURING THE BIDDING.

THE ALLEGED JOINT VENTURE COMPOSED OF PRIVATE RESPONDENTS SMARTMATIC AND TIM, DOES NOT SATISFY THE SUPREME COURT'S DEFINITION OF A "JOINT VENTURE" IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES vs. COMELEC* x x x WHICH "REQUIRES A COMMUNITY OF INTEREST IN THE PERFORMANCE OF THE SUBJECT MATTER."

Filed as it was before contract signing, the petition understandably did not implead Smartmatic TIM Corporation, doubtless an indispensable party to these proceedings, an incident that did not escape Comelec's notice.<sup>37</sup>

As a preliminary counterpoint, either or both public and private respondents question the legal standing or locus standi of petitioners, noting in this regard that the petition did not even raise an issue of transcendental importance, let alone a constitutional question.

As an additional point, respondents also urge the dismissal of the petition on the ground of prematurity, petitioners having failed to avail themselves of the otherwise mandatory built-in grievance mechanism under Sec. 55 in relation to Sec. 58 of RA 9184, also known as the *Government Procurement Reform Act*, as shall be discussed shortly.

## PROCEDURAL GROUNDS

The Court is not disposed to dismiss the petition on procedural grounds advanced by respondents.

### Locus Standi and Prematurity

It is true, as postulated, that to have standing, one must, as a rule, establish having suffered some actual or threatened injury as a result of the alleged illegal government conduct; that the injury is fairly traceable to the challenged action; and that the injury is likely to be redressed by a favorable action.<sup>38</sup> The prescription on standing, however, is a matter of procedure. Hence, it may be relaxed, as the Court has often relaxed the rule for non-traditional plaintiffs, like ordinary citizens and taxpayers, when the public interest so requires, such as when the matter is of transcendental importance, of overarching significance to society, or of paramount public interest.<sup>39</sup> As we wrote in *Chavez v. PCGG*,<sup>40</sup> where issues of public importance are presented, there is no necessity to show that the suitor has experienced or is in actual danger of suffering direct and personal injury as the requisite injury is assumed.

Petitioners' counsel, when queried, hedged on what specific constitutional proscriptions or concepts had been infringed by the award of the subject automation project to Smartmatic TIM Corporation, although he was heard to say that "our objection to the system is anchored on the Constitution itself a violation [sic] of secrecy of voting and the sanctity of the ballot."<sup>41</sup> Petitioners also depicted the covering automation contract as constituting an abdication by the Comelec of its election-related mandate under the Constitution, which is to enforce and administer all laws relative to the conduct of elections. Worse still, according to the petitioners, the abdication, with its anti-dummy dimension, is in favor of a foreign corporation that will be providing the hardware and software requirements.<sup>42</sup> And when pressed further, petitioners came out with the observation that, owing in part to the sheer length of the ballot, the PCOS would not comply with Art. V, Sec. 2 of the Constitution<sup>43</sup> prescribing secrecy of voting and sanctity of the ballot.<sup>44</sup>

There is no doubt in our mind, however, about the compelling significance and the transcending public importance of the one issue underpinning this petition: the success—and the far-reaching grim implications of the failure—of the nationwide automation project that will be implemented via the challenged automation contract.

The doctrinal formulation may vary, but the bottom line is that the Court may except a particular case from the operations of its rules when the demands of justice so require.<sup>45</sup> Put a bit differently, rules of procedure are merely tools designed to facilitate the attainment of justice.<sup>46</sup> Accordingly, technicalities and procedural barriers should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid adherence to the rules of procedure.<sup>47</sup> This postulate on procedural technicalities applies to matters of *locus standi* and the presently invoked principle of hierarchy of courts, which discourages direct resort to the Court if the desired redress is within the competence of lower courts to grant. The policy on the hierarchy of courts, which petitioners indeed failed to observe, is not an iron-clad rule. For indeed the Court has full discretionary power to take cognizance and assume jurisdiction of special civil actions for certiorari and mandamus filed directly with it for exceptionally compelling reasons<sup>48</sup> or if warranted by the nature of the issues clearly and specifically raised in the petition.<sup>49</sup>

The exceptions that justify a deviation from the policy on hierarchy appear to obtain under the premises. The Court will for the nonce thus turn a blind eye to the judicial structure intended, first and foremost, to provide an orderly dispensation of justice.

#### Hierarchy of Courts

At this stage, we shall dispose of another peripheral issue before plunging into the core substantive issues tendered in this petition.

Respondents contend that petitioners should have availed themselves of the otherwise mandatory protest mechanism set forth in Sections 55 and 58 of the procurement law (RA 9184) and the counterpart provisions found in its Implementing Rules and Regulations (IRR)-A before seeking judicial remedy. Insofar as relevant, Sec. 55 of RA 9184 provides that decisions of the bids and awards committee (BAC) in all stages of procurement may be protested, via a "verified position paper," to the head of the procuring agency. On the other hand, the succeeding Sec. 58 states that court action may be resorted to only after the protest contemplated in Sec. 55 shall have been completed. Petitioners except. As argued, the requirement to comply with the protest mechanism, contrary to what may have been suggested in Infotech, is imposed on the bidders.<sup>50</sup>

Petitioners' position is correct. As a matter of common sense, only a bidder is entitled to receive a notice of the protested BAC action. Only a losing bidder would be aggrieved by, and ergo would have the personality to challenge, such action. This conclusion finds adequate support from the ensuing provisions of the aforesaid IRR-A:

55.2. The verified position paper shall contain the following documents:

- a) The name of bidder;
- b) The office address of the bidder x x x.

## SUBSTANTIVE ISSUES

We now turn to the central issues tendered in the petition which, in terms of subject matter, revolved around two concerns, viz: (1) the Joint Venture Agreement (JVA) of Smartmatic and TIM; and (2) the PCOS machines to be used. Petitioners veritably introduced another issue during the oral arguments, as amplified in their memorandum, i.e. the constitutionality and statutory flaw of the automation contract itself. The petition-in-intervention confined itself to certain features of the PCOS machines.

### **The Joint Venture Agreement: Its Existence and Submission**

The issue respecting the existence and submission of the TIM-Smartmatic JVA does not require an extended disquisition, as repairing to the records would readily provide a satisfactory answer. We note in fact that the petitioners do not appear to be earnestly pressing the said issue anymore, as demonstrated by their counsel's practically cavalier discussion thereof during the oral argument. When reminded, for instance, of private respondents' insistence on having in fact submitted their JVA dated April 23, 2009, petitioners' counsel responded as follows: "We knew your honor that there was, in fact, a joint venture agreement filed. However, because of the belated discovery that [there] were irreconcilable differences, we then made a view that this joint venture agreement was a sham, at best pro forma because it did not contain all the required stipulations in order to evidence unity of interest x x x."<sup>51</sup>

Indeed, the records belie petitioners' initial posture that TIM and Smartmatic, as joint venture partners, did not include in their submitted eligibility envelope a copy of their JVA. The SBAC's *Post Qualification Evaluation Report (Eligibility)* on TIM-Smartmatic, on page 10, shows the following entry: "*Valid Joint Venture Agreement, stating among things, that the members are jointly and severally liable for the whole obligation, in case of joint venture – Documents verified compliance.*"<sup>52</sup>

Contrary to what the petitioners posit, the duly notarized JVA, as couched, explained the nature and the limited purpose<sup>53</sup> of the joint venture and expressly defined, among other things, the composition, scope, and the 60-40 capital structure of the aggroupment.<sup>54</sup> The JVA also contains provisions on the management<sup>55</sup> and division of profits.<sup>56</sup> Article 3<sup>57</sup> of the JVA delineates the respective participations and responsibilities of the joint venture partners in the automation project.

Given the foregoing perspective, the Court is at a loss to understand how petitioners can assert that the Smartmatic-TIM consortium has failed to prove its joint venture existence and/or to submit evidence as would enable the Comelec to know such items as who it is dealing with, which between the partners has control over the decision-making process, the amount of investment to be contributed by each partner, the parties' shares in the profits and like details. Had petitioners only bothered to undertake the usual due diligence that comes with good judgment and examined the eligibility envelope of the Smartmatic-TIM joint venture, they

would have discovered that their challenge to and arguments against the joint venture and its JVA have really no factual basis.

It may be, as petitioners observed, that the TIM-Smartmatic joint venture remained an unincorporated aggroupment during the bid-opening and evaluation stages. It ought to be stressed, however, that the fact of non-incorporation was without a vitiating effect on the validity of the tender offers. For the bidding ground rules, as spelled out primarily in the RFP and the clarificatory bid bulletins, does not require, for bidding purposes, that there be an incorporation of the bidding joint ventures or consortiums. In fact, Bid Bulletin Nos. 19 and 20 recognize the existence and the acceptability of proposals of unincorporated joint ventures. In response to a poser, for example, regarding the 60% Filipino ownership requirement in a joint venture arrangement, the SBAC, in its Bid Bulletin No. 22, stated: "In an **unincorporated joint venture**, determination of the required Filipino participation may be made by examining the terms and conditions of the [JVA] and other supporting financial documents submitted by the joint venture." (Emphasis ours.) Petitioners, to be sure, have not shown that incorporation is part of the pass/fail criteria used in determining eligibility.

Petitioners have made much of the Court's ruling in *Information Technology Foundation of the Philippines [Infotech] v. Comelec*,<sup>58</sup> arguing in relation thereto that the partnership of Smartmatic and TIM does not meet the Court's definition of a joint venture which requires "community of interest in the performance of the subject matter."

Petitioners' invocation of Infotech is utterly misplaced. Albeit Infotech and this case are both about modernizing the election process and bidding joint ventures, the relevant parallelism ends there. Cast as they are against dissimilar factual milieu, one cannot plausibly set *Infotech* side with and contextually apply to this case the ratio of Infotech. Suffice it to delve on the most glaring of differences. In Infotech, the winning bid pertained to the consortium of Mega Pacific, a purported joint venture. Extant records, however, do not show the formation of such joint venture, let alone its composition. To borrow from the *ponencia* of then Justice, later Chief Justice, Artemio Panganiban, "there is no sign whatsoever of any [JVA], consortium agreement [or] memorandum agreement x x x executed among the members of the purported consortium."<sup>59</sup> There was in fine no evidence to show that the alleged joint venture partners agreed to constitute themselves into a single entity solidarily responsible for the entirety of the automation contract. Unlike the purported Mega Pacific consortium in *Infotech*, the existence in this case of the bidding joint venture of Smartmatic and TIM is properly documented and spread all over the bid documents. And to stress, TIM and Smartmatic, in their JVA, unequivocally agreed between themselves to perform their respective undertakings. And over and beyond their commitments to each other, they undertook to incorporate, if called for by the bidding results, a JVC that shall be solidarily liable with them for any actionable breach of the automation contract.

In Infotech, the Court chastised the Comelec for dealing with an entity, the full identity of which the poll body knew nothing about. Taking a cue from this holding, petitioners tag the TIM-Smartmatic JVA as flawed and as one that would leave the Comelec "hanging" for the non-

inclusion, as members of the joint venture, of three IT providers. The three referred to are Jarltech International, Inc. (Jarltech), a subsidiary of Smartmatic that manufactures the Smartmatic voting machines; Dominion Voting Systems (Domino), the inventor of said PCOS machines; and 2GO Transportation System Corporation (2GO), the subcontractor responsible for the distribution of the PCOS machines throughout the country.

Petitioners' beef against the TIM-Smartmatic JVA is untenable. First off, the Comelec knows the very entities whom they are dealing with, which it can hold solidary liable under the automation contract, should there be contract violation. Secondly, there is no requirement under either RA 8436, as amended, or the RFP, that all the suppliers, manufacturers or distributors involved in the transaction should be part of the joint venture. On the contrary, the Instruction to Bidders—as petitioners themselves admit<sup>60</sup>—allows the bidder to subcontract portions of the goods or services under the automation project.<sup>61</sup>

To digress a bit, petitioners have insisted on the non-existence of a bona fide JVA between TIM and Smartmatic. Failing to gain traction for their indefensible posture, they would thrust on the Court the notion of an invalid joint venture due to the non-inclusion of more companies in the existing TIM-Smartmatic joint venture. The irony is not lost on the Court.

This brings us to the twin technical issues tendered herein bearing on the PCOS machines of Smartmatic.

At its most basic, the petition ascribes grave abuse of discretion to the Comelec for, among other things, awarding the automation project in violation of RA 8436, as amended. Following their line, no pilot test of the PCOS technology Smartmatic-TIM offered has been undertaken; hence, the Comelec cannot conduct a nationwide automation of the 2010 polls using the machines thus offered. Hence, the contract award to Smartmatic-TIM with their untested PCOS machines violated RA 8436, as amended by RA 9369, which mandates that with respect to the May 2010 elections and onwards, the system procured must have been piloted in at least 12 areas referred to in Sec. 6 of RA 8436, as amended. What is more, petitioners assert, private respondents' PCOS machines do not satisfy the minimum system capabilities set by the same law envisaged to ensure transparent and credible voting, counting and canvassing of votes. And as earlier narrated, petitioners would subsequently add the abdication angle in their bid to nullify the automation contract.

#### Pilot Testing Not Necessary

Disagreeing, as to be expected, private respondents maintain that there is nothing in the applicable law requiring, as a pre-requisite for the 2010 election automation project award, that the prevailing bidder's automation system, the PCOS in this case, be subjected to pilot testing. Comelec echoes its co-respondents' stance on pilot testing, with the added observation that nowhere in the statutory provision relied upon are the words "pilot testing" used.<sup>62</sup> The Senate's position and its supporting arguments match those of private respondents.

The respondents' thesis on pilot testing and the logic holding it together are well taken. There can be no argument about the phrase "pilot test" not being found in the law. But does it necessarily follow that a pilot test is absolutely not contemplated in the law? We repair to the statutory provision petitioners cited as requiring a pilot run, referring to Sec. 6 of RA 8436, as amended by RA 9369, reading as follows:

*Sec. 5. Authority to use an Automated Election System.- To carry out the above stated-policy, the [Comelec], x x x is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: *Provided*, that for the regular national and local elections, which shall be held immediately after the effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas, and Mindanao to be chosen by the [Comelec]: *Provided, further*, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 elections shall not be chosen. *Provided, finally*, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. In succeeding regular national or local elections, the AES shall be implemented. (Emphasis and underscoring added.)*

RA 9369, which envisages an AES, be it paper-based or direct-recording electronic, took effect in the second week of February 2007 or thereabout.<sup>63</sup> The "regular national and local elections" referred to after the "effectivity of this Act" can be no other than the May 2007 regular elections, during which time the AES shall, as the law is worded, be used in at least two highly urbanized cities and provinces in Luzon, Visayas and Mindanao. The Court takes judicial notice that the May 2007 elections did not deploy AES, evidently due to the mix of time and funding constraints.

To the petitioners, the underscored portion of the aforequoted Sec. 6 of RA 8436 is the pilot-testing provision that Comelec failed to observe.

We are not persuaded.

From the practical viewpoint, the pilot testing of the technology in question in an actual, scheduled electoral exercise under harsh conditions would have been the ideal norm in computerized system implementation. The underscored proviso of Sec. 6 of RA 8436 is not, however, an authority for the proposition that the pilot testing of the PCOS in the 2007 national elections in the areas thus specified is an absolute must for the machines' use in the 2010 national/local elections. The Court can concede that said proviso, with respect to the May 2007 elections, commands the Comelec to automate in at least 12 defined areas of the country. But the bottom line is that the required 2007 automation, be it viewed in the concept of a pilot test or not, is not a mandatory requirement for the choice of system in, or a prerequisite for, the full automation of the May 2010 elections.

As may be noted, Sec. 6 of RA 8436 may be broken into three essential parts, the first partaking of the nature of a general policy declaration: that Comelec is authorized to automate the entire elections. The second part states that for the regular national and local elections that shall be held in May 2007, Comelec shall use the AES, with an option, however, to undertake automation, regardless of the technology to be selected, in a limited area or, to be more precise, in at least two highly urbanized cities and two provinces each in Luzon, Visayas, and Mindanao to be chosen by the Comelec. On the other hand, the last part, phrased sans reference to the May 2007 elections, commands thus: "[I]n succeeding regular national or local elections, the [automated election system] shall be implemented." Taken in its proper context, the last part is indicative of the legislative intent for the May 2010 electoral exercise to be fully automated, regardless of whether or not pilot testing was run in the 2007 polls.

To argue that pilot testing is a condition precedent to a full automation in 2010 would doubtless undermine the purpose of RA 9369. For, as aptly observed during the oral arguments, if there was no political exercise in May 2007, the country would theoretically be barred forever from having full automation.

Sec. 6 of the amended RA 8436, as couched, therefore, unmistakably conveys the idea of unconditional full automation in the 2010 elections. A construal making pilot testing of the AES a prerequisite or condition sine qua non to putting the system in operation in the 2010 elections is tantamount to reading into said section something beyond the clear intention of Congress, as expressed in the provision itself. We reproduce with approval the following excerpts from the comment of the Senate itself:

The plain wordings of RA 9369 (that amended RA 8436) commands that the 2010 elections shall be fully automated, and such full automation is not conditioned on "pilot testing" in the May 2007 elections. Congress merely gave COMELEC the flexibility to partially use the AES in some parts of the country for the May 2007 elections.<sup>64</sup>

Lest it be overlooked, an AES is not synonymous to and ought not to be confused with the PCOS. Sec. 2(a) of RA 8436, as amended, defines an AES as "a system using appropriate technology which has been demonstrated in the voting, counting, consolidating, canvassing and transmission of election results, and other electoral processes." On the other hand, PCOS refers to a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted.<sup>65</sup> What may reasonably be deduced from these definitions is that PCOS is merely one of several automated voting, counting or canvassing technologies coming within the term AES, implying in turn that the automated election system or technology that the Comelec shall adopt in future elections need not, as a matter of mandatory arrangement, be piloted in the adverted two highly urbanized cities and provinces.

In perspective, what may be taken as mandatory prerequisite for the full automation of the 2010 regular national/ local elections is that the system to be procured for that exercise be a

technology tested either here or abroad. The ensuing Section 8 of RA 8436, as amended, says so.

*SEC 12. Procurement of Equipment and Materials.*— To achieve the purpose of this Act, the Commission is authorized to procure, xxx, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from local or foreign sources xxx. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness. (Emphasis supplied).

While the underscored portion makes reference to a "2007 pilot exercise," what it really exacts is that, for the automation of the May 2010 and subsequent elections, the PCOS or any AES to be procured must have demonstrated its capability and success in either a local or a foreign electoral exercise. And as expressly declared by the provision, participation in the 2007 electoral exercise is not a guarantee nor is it conclusive of the system's fitness. In this regard, the Court is inclined to agree with private respondents' interpretation of the underscored portion in question: "The provision clearly conveys that the [AES] to be used in the 2010 elections need not have been used in the 2007 elections, and that the demonstration of its capability need not be in a previous Philippine election. Demonstration of the success and capability of the PCOS may be in an electoral exercise in a foreign jurisdiction."<sup>66</sup> As determined by the Comelec, the PCOS system had been successfully deployed in previous electoral exercises in foreign countries, such as Ontario, Canada; and New York, USA,<sup>67</sup> albeit Smartmatic was not necessarily the system provider. But then, RA 9369 does not call for the winning bidder of the 2010 automation project and the deploying entity/provider in the foreign electoral exercise to be one and the same entity. Neither does the law incidentally require that the system be first used in an archipelagic country or with a topography or a voting population similar to or approximating that of the Philippines.

At any event, any lingering doubt on the issue of whether or not full automation of the 2010 regular elections can validly proceed without a pilot run of the AES should be put to rest with the enactment in March 2009 of RA 9525,<sup>68</sup> in which Congress appropriated PhP 11.301 billion to automate the 2010 elections, subject to compliance with the transparency and accuracy requirements in selecting the relevant technology of the machines, thus:

*Sec. 2. Use of Funds.*— x x x *Provided, however,* That disbursement of the amounts herein appropriated or any part thereof shall be authorized only in strict compliance with the Constitution, the provisions of [RA] No. 9369 and other election laws incorporated in said Act as to ensure the conduct of a free, orderly, clean, honest and credible election and shall adopt such measures that will guaranty transparency and accuracy in the selection of the relevant technology of the machines to be used on May 10, 2010 automated national and local elections. (Emphasis added.)

It may safely be assumed that Congress approved the bill that eventually became RA 9525, fully aware that the system using the PCOS machines were not piloted in the 2007 electoral exercise. The enactment of RA 9525 is to us a compelling indication that it was never Congress' intent to make the pilot testing of a particular automated election system in the 2007 elections a condition precedent to its use or award of the 2010 Automation Project. The comment-in-intervention of the Senate says as much.

Further, the highly charged issue of whether or not the 2008 ARMM elections—covering, as NCC observed, three conflict-ridden island provinces—may be treated as substantial compliance with the "pilot test" requirement must be answered in the affirmative. No less than Senator Richard J. Gordon himself, the author of the law, said that "the system has been tried and tested in the ARMM elections last year, so we have to proceed with the total implementation of the law."<sup>69</sup>

We note, though, the conflicting views of the NCC<sup>70</sup> and ITFP<sup>71</sup> on the matter. Suffice it to state at this juncture that the system used in the 2008 ARMM election exercise bears, as petitioners to an extent grudgingly admit,<sup>72</sup> a similarity with the PCOS. The following, lifted from the Comelec's comment, is to us a fair description of how the two systems (PCOS and CCOS) work and where the difference lies:

xxx the elections in the [ARMM] utilized the Counting Center Optical Scan (CCOS), a system which uses the Optical Mark Reader (OMR), the same technology as the PCOS.

Under the CCOS, the voters cast their votes by shading or marking the circles in the paper ballots which corresponded to the names of their chosen candidates [like in PCOS]. Thereafter, the ballot boxes were brought to the counting centers where they were scanned, counted and canvassed.

xxx Under the PCOS, the counting, consolidation and canvassing of the votes are done at the precinct level. The election results at the precincts are then electronically transmitted to the next level, and so on. xxx PCOS dispenses with the physical transportation of ballot boxes from the precincts to the counting centers.<sup>73</sup>

Moreover, it has been proposed that a partial automation be implemented for the May 2010 elections in accordance with Section 5 of RA 8436, as amended by RA 9369 instead of full automation. The Court cannot agree as such proposition has no basis in law. Section 5, as worded, does not allow for partial automation. In fact, Section 5 clearly states that "the AES shall be implemented nationwide."<sup>74</sup> It behooves this Court to follow the letter and intent of the law for full automation in the May 2010 elections.

#### PCOS Meets Minimum Capabilities Standards

As another ground for the nullification of the automation contract, petitioners posit the view that the PCOS machines do not satisfy the minimum system capabilities prescribed by RA 8436,

as amended. To a specific point, they suggest that the PCOS system offered and accepted lacks the features that would assure accuracy in the recording and reading of votes, as well as in the tabulation, consolidation/canvassing, electronic transmission, storage results and accurate ballot counting.<sup>75</sup> In this particular regard, petitioners allege that, based on Smartmatic's website, the PCOS has a margin of error of from 2% to 10%, way beyond that of the required 99.99% accuracy in the counting of votes.<sup>76</sup>

The minimum system capabilities provision cited is Sec. 7 of RA 8436, as amended, and the missing features referred to by petitioners are pars. (b) and (j). In full, Sec. 7 of RA 8436, as amended, reads:

SEC. 6. Minimum System Capabilities. - The automated election system must at least have the following functional capabilities:

- (a) Adequate security against unauthorized access;
- (b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;
- (c) Error recovery in case of non-catastrophic failure of device;
- (d) System integrity which ensures physical stability and functioning of the vote recording and counting process;
- (e) Provision for voter verified paper audit trail;
- (f) System auditability which provides supporting documentation for verifying the correctness of reported election results;
- (g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election result in the shortest time possible;
- (h) Accessibility to illiterates and disabled voters;
- (i) Vote tabulating program for election, referendum or plebiscite;
- (j) Accurate ballot counters;
- (k) Data retention provision;
- (l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;

(m) Utilize or generate official ballots as herein defined;

(a) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and

(o) Configure access control for sensitive system data and function.

In the procurement of this system, the Commission shall develop and adopt an evaluation system to ascertain that the above minimum system capabilities are met. The evaluation system shall be developed with the assistance of an advisory council.

From the records before us, the Court is fairly satisfied that the Comelec has adopted a rigid technical evaluation mechanism, a set of 26-item/check list criteria, as will be enumerated shortly, to ensure compliance with the above minimum systems capabilities.

The SBAC Memorandum<sup>77</sup> of June 03, 2009, as approved by Comelec Res. 8608,<sup>78</sup> categorically stated that the SBAC-TWG submitted its report that TIM/Smartmatic's proposed systems and machines PASSED all the end-to-end demo tests using the aforementioned 26-item criteria, inclusive of the accuracy rating test of at least 99.955%. As appearing in the SBAC-TWG report, the corresponding answers/remarks to each of the 26 individual items are as herein indicated.<sup>79</sup>

ITEM	REQUIREMENT	REMARK/DESCRIPTION
1	Does the system allow manual feeding of a ballot into the PCOS machine?	Yes. The proposed PCOS machine accepted the test ballots which were manually fed one at a time.
2	Does the system scan a ballot sheet at the speed of at least 2.75 inches per second?	Yes. A 30-inch ballot was used in this test. Scanning the 30-inch ballot took 2.7 seconds, which translated to 11.11inches per second.
3	Is the system able to capture and store in an encrypted format the digital images of the ballot for at least 2,000 ballot sides (1,000 ballots, with back to back printing)?	Yes the system captured the images of the 1,000 ballots in encrypted format. Each of the 1,000 images files contained the images of the front and back sides of the ballot, totaling to 2,000 ballot side.  To verify the captured ballot images, decrypted copies of the encrypted files were also provided. The same were found to be digitized representations of the ballots cast.
4	Is the system a fully integrated single	Yes. The proposed PCOS is a fully

- device as described in item no. 4 of Component 1-B? integrated single device, with built-in printer and built-in data communications ports (Ethernet and USB).
- 5 Does the system have a scanning resolution of at least 200 dpi? Yes. A portion of a filled up marked oval was blown up using image editor software to reveal the number of dots per inch. The sample image showed 200 dpi.
- File properties of the decrypted image file also revealed 200 dpi.
- 6 Does the system scan in grayscale? Yes. 30 shades of gray were scanned in the test PCOS machine, 20 of which were required, exceeding the required 4-bit/16 levels of gray as specified in the Bid Bulletin No. 19.
- 7 Does the system require authorization and authentication of all operators, such as, but not limited to, usernames and passwords, with multiple user access levels? Yes. The system required the use of a security key with different sets of passwords/PINs for Administrator and Operator users.
- 8 Does the system have an electronic display? Yes. The PCOS machine makes use of an LCD display to show information:
- if a ballot may be inserted into the machine;
  - if a ballot is being processed; if a ballot is being rejected;
  - on other instructions and information to the voter/operator.
- 9 Does the system employ error handling procedures, including, but not limited to, the use of error prompts and other related instructions? Yes. The PCOS showed error messages on its screen whenever a ballot is rejected by the machine and gives instructions to the voter on what to do next, or when there was a ballot jam error.
- 10 Does the system count the voter's vote as marked on the ballot with an accuracy rating of at least 99.995%? Yes. The two rounds of tests were conducted for this test using only valid marks/shades on the ballots. 20,000 marks were required to complete this test, with

only one (1) allowable reading error.

625 ballots with 32 marks each were used for this test. During the comparison of the PCOS-generated results with the manually prepared/predetermined results, it was found out that there were seven (7) marks which were inadvertently missed out during ballot preparation by the TWG. Although the PCOS-generated results turned out to be 100% accurate, the 20,000-mark was not met thereby requiring the test to be repeated.

To prepare for other possible missed out marks, 650 ballots with (20,800 marks) were used for the next round of test, which also yielded 100% accuracy.

- |    |   |   |
|----|---|---|
| 11 | Does the system detect and reject fake or spurious, and previously scanned ballots?   | Yes. This test made use of one (1) photocopied ballot and one (1) "re-created" ballot. Both were rejected by the PCOS.  |
| 12 | Does the system scan both sides of a ballot and in any orientation in one pass?   | Yes. Four (4) ballots with valid marks were fed into the PCOS machine in the four (4) portrait orientations specified in Bid Bulletin No. 4 (either back or front, upside down or right side up), and all were accurately captured.   |
| 13 | Does the system have necessary safeguards to determine the authenticity of a ballot, such as, but not limited to, the use of bar codes, holograms, color shifting ink, micro printing, to be provided on the ballot, which can be recognized by the system? | <p>Yes. The system was able to recognize if the security features on the ballot are "missing".</p> <p>Aside from the test on the fake or spurious ballots (Item No. 11), three (3) test ballots with tampered bar codes and timing marks were used and were all rejected by the PCOS machine.</p> |

The photocopied ballot in the test for Item No. 11 was not able to replicate the UV ink pattern on top portion of the ballot causing the rejection of the ballot.

- 14 Are the names of the candidates pre-printed on the ballot? Yes. The Two sample test ballots of different lengths were provided: one (1) was 14 inches long while the other was 30 inches long. Both were 8.5 inches wide.
- The first showed 108 pre-printed candidate names for the fourteen (14) contests/positions, including two (2) survey questions on gender and age group, and a plebiscite question.
- The other showed 609 pre-printed candidate names, also for fourteen (14) positions including three (3) survey questions.
- 15 Does each side of the ballot sheet accommodate at least 300 names of candidates with a minimum font size of 10, in addition to other mandatory information required by law? Yes. The 30-inch ballot, which was used to test Item No. 2, contained 309 names for the national positions and 300 names for local positions. The total pre-printed names on the ballot totaled 609.
- This type of test ballot was also used for test voting by the public, including members of the media.
- Arial Narrow, font size 10, was used in the printing of the candidate names.
- 16 Does the system recognize full shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. The ballots used for the accuracy test (Item No. 10), which made use of full shade marks, were also used in this test and were accurately recognized by the PCOS machine.
- 17 Does the system recognize partial shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. Four (4) test ballots were used with one (1) mark each per ballot showing the following pencil marks:
- top half shade;
  - bottom half shade;
  - left half shade; and

☐ right half shade

These partial shade marks were all recognized by the PCOS machine

- 18 Does the system recognize check (ü)marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. One (1) test ballot with one check (ü) mark, using a pencil, was used for this test. The mark was recognized successfully.
- 19 Does the system recognize x marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. One (1) test ballot with one x mark, using a pencil, was used for this test. The mark was recognized successfully.
- 20 Does the system recognize both pencil and ink marks on the ballot? Yes. The 1000 ballots used in the accuracy test (Item No. 10) were marked using the proposed marking pen by the bidder. A separate ballot with one (1) pencil mark was also tested. This mark was also recognized by the PCOS machine. Moreover, the tests for Items No. 17, 18 and 19 were made using pencil marks on the ballots.
- 21 In a simulation of a system shut down, does the system have error recovery features? Yes. Five (5) ballots were used in this test. The power cord was pulled from the PCOS while the 3rd ballot was in the middle of the scanning procedure, such that it was left "hanging" in the ballot reader. After resumption of regular power supply, the PCOS machine was able to restart successfully with notification to the operator that there were two (2) ballots already cast in the machine. The "hanging" 3rd ballot was returned to the operator and was able to be re-fed into the PCOS machine. The marks on all five (5) were all accurately recognized.
- 22 Does the system have transmission and consolidation/canvassing capabilities? Yes. The PCOS was able to transmit to the CCS during the end-to-end demonstration using GLOBE prepaid Internet kit.

- 23 Does the system generate a backup copy of the generated reports, in a removable data storage device? Yes. The PCOS saves a backup copy of the ERs, ballot images, statistical report and audit log into a Compact Flash (CF) Card.
- 24 Does the system have alternative power sources, which will enable it to fully operate for at least 12 hours? Yes. A 12 bolt 18AH battery lead acid was used in this test. The initial test had to be repeated due to a short circuit, after seven (7) hours from start-up without ballot scanning. This was explained by TIM-Smartmatic to be caused by non-compatible wiring of the battery to the PCOS. A smaller wire than what is required was inadvertently used, likening the situation to incorrect wiring of a car battery. Two (2) COMELEC electricians were called to confirm TIM-Smartmatic's explanation. The PCOS machine was connected to regular power and started successfully. The following day, the "re-test" was completed in 12 hours and 40 minutes xxx 984 ballots were fed into the machine. The ER, as generated by the PCOS was compared with predetermined result, showed 100% accuracy.
- 25 Is the system capable of generating and printing reports? Yes. The PCOS prints reports via its built-in printer which includes:
1. Initialization Report;
  2. Election Returns (ER);
  3. PCOS Statistical Report;
  4. Audit Log.
- 26 Did the bidder successfully demonstrate EMS, voting counting, consolidation/canvassing and transmission? Yes. An end-to-end demonstration of all proposed systems was presented covering: importing of election data into the EMS; creation of election configuration data for the PCOS and the CCS using EMS; creation of ballot faces using EMS; configuring the PCOS and the CCS using the EMS-generated election configuration file; initialization, operation, generation of reports and backup using the PCOS; electronic transmission of results to the: [1] from the PCOS to city/municipal CCS and the central server. [2] from the city/municipal CCS to

the provincial CCS. [3] from the provincial CCS to the national CCS; receipt and canvass of transmitted results: [1] by the city/municipal CCS from the PCOS. [2] by the provincial CCS from the city/municipal CCS. [3] by the national CCS from the provincial CCS; receipt of the transmittal results by the central server from the PCOS.

Given the foregoing and absent empirical evidence to the contrary, the Court, presuming regularity in the performance of regular duties, takes the demo-testing thus conducted by SBAC-TWG as a reflection of the capability of the PCOS machines, although the tests, as Comelec admits,<sup>80</sup> were done literally in the *Palacio del Gobernador* building, where a room therein simulated a town, the adjoining room a city, etc. Perusing the RFP, however, the real worth of the PCOS system and the machines will of course come after they shall have been subjected to the gamut of acceptance tests expressly specified in the RFP, namely, the lab test, field test, mock election test, transmission test and, lastly, the final test and sealing procedure of all PCOS and CCS units using the actual Election Day machine configuration.<sup>81</sup> *1avvph!1*

Apropos the counting-accuracy feature of the PCOS machines, petitioners no less impliedly admit that the web page they appended to their petition, showing a 2% to 10% failing rate, is no longer current.<sup>82</sup> And if they bothered to examine the current website of Smartmatic specifically dealing with its SAES 1800, the PCOS system it offered, they would have readily seen that the advertised accuracy rating is over "99.99999%."<sup>83</sup> Moreover, a careful scrutiny of the old webpage of Smartmatic reveals that the 2% to 10% failure rate applied to "optical scanners" and not to SAES. Yet the same page discloses that the SAES has "100%" accuracy. Clearly, the alleged 2% to 10% failing rate is now irrelevant and the Court need not belabor this and the equally irrelevant estoppel principle petitioners impose on us.

Intervenor Cuadra's concern relates to the auditability of the election results. In this regard, it may suffice to point out that PCOS, being a paper-based technology, affords audit since the voter would be able, if need be, to verify if the machine had scanned, recorded and counted his vote properly. Moreover, it should also be noted that the PCOS machine contains an LCD screen, one that can be programmed or configured to display to the voter his votes as read by the machine.<sup>84</sup>

#### No Abdication of Comelec's Mandate and Responsibility

As a final main point, petitioners would have the Comelec-Smartmatic-TIM Corporation automation contract nullified since, in violation of the Constitution, it constitutes a wholesale abdication of the poll body's constitutional mandate for election law enforcement. On top of this perceived aberration, the mechanism of the PCOS machines would infringe the

constitutional right of the people to the secrecy of the ballot which, according to the petitioners, is provided in Sec. 2, Art. V of the Constitution.<sup>85</sup>

The above contention is not well taken.

The first function of the Comelec under the Constitution<sup>86</sup>—and the Omnibus Election Code for that matter—relates to the enforcement and administration of all laws and regulations relating to the conduct of elections to public office to ensure a free, orderly and honest electoral exercise. And how did petitioners come to their conclusion about their abdication theory? By acceding to Art. 3.3 of the automation contract, Comelec relinquished, so petitioners claim, supervision and control of the system to be used for the automated elections. To a more specific point, the loss of control, as may be deduced from the ensuing exchanges, arose from the fact that Comelec would not be holding possession of what in IT jargon are the public and private keys pair.

CHIEF JUSTICE: Well, more specifically are you saying that the main course of this lost of control is the fact that SMARTMATIC holds the public and private keys to the sanctity of this system?

ATTY. ROQUE: Yes, Your Honor, as well as the fact that they control the program embedded in the key cost that will read their votes by which the electorate may verify that their votes were counted.

CHIEF JUSTICE: You are saying that SMARTMATIC and not its partner TIM who hold these public and private keys?

ATTY. ROQUE: Yes, Your Honor.

The Court is not convinced. There is to us nothing in Art 3.3 of the automation contract, even if read separately from other stipulations and the provisions of the bid documents and the Constitution itself, to support the simplistic conclusion of abdication of control pressed on the Court. Insofar as pertinent, Art 3.3 reads:

3.3 The PROVIDER shall be liable for all its obligations under this Project and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

**SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware**, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the elections. (Emphasis added.)

The proviso designating Smartmatic as the joint venture partner in charge of the technical aspect of the counting and canvassing wares does not to us translate, without more, to ceding

control of the electoral process to Smartmatic. It bears to stress that the aforesaid designation of Smartmatic was not plucked from thin air, as it was in fact an eligibility requirement imposed, should the bidder be a joint venture. Part 5, par. 5.4 (e) of the Instruction to Bidders on the subject Eligible Bidders, whence the second paragraph of aforementioned Art. 3.3 came from, reads:

5.4 A JV of two or more firms as partners shall comply with the following requirements.

x x x x

(e) The JV member with a greater track record in automated elections, shall be in-charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration

And lest it be overlooked, the RFP, which forms an integral part of the automation contract,<sup>87</sup> has put all prospective bidders on notice of Comelec's intent to automate and to accept bids that would meet several needs, among which is "a complete solutions provider... which can provide... effective overall nationwide project management service... under COMELEC supervision and control, to ensure effective and successful implementation of the [automation] Project."<sup>88</sup> Complementing this RFP advisory as to control of the election process is Art. 6.7 of the automation contract, providing:

6.7 Subject to the provisions of the General Instructions to be issued by the Commission En Banc, the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials, and their performance, completion and final results according to specifications and within the specified periods shall be the shared responsibility of COMELEC and the PROVIDER. (Emphasis added.)

But not one to let an opportunity to score points pass by, petitioners rhetorically ask: "Where does Public Respondent Comelec intend to get this large number of professionals, many of whom are already gainfully employed abroad?"<sup>89</sup> The Comelec, citing Sec. 3<sup>90</sup> and Sec. 5 of RA 8436,<sup>91</sup> as amended, aptly answered this poser in the following wise:

x x x [P]ublic respondent COMELEC, in the implementation of the automated project, will forge partnerships with various entities in different fields to bring about the success of the 2010 automated elections.

Public respondent COMELEC will partner with Smartmatic TIM Corporation for the training and hiring of the IT personnel as well as for the massive voter-education campaign. There is in fact a budget allocation x x x for these undertakings. x x x

As regards the requirement of RA 9369 that IT-capable personnel shall be deputized as a member of the BEI and that another IT-capable person shall assist the BOC, public respondent COMELEC shall partner with DOST and other agencies and instrumentalities of the government.

In not so many words during the oral arguments and in their respective Memoranda, public and private respondents categorically rejected outright allegations of abdication by the Comelec of its constitutional duty. The petitioners, to stress, are strangers to the automation contract. Not one participated in the bidding conference or the bidding proper or even perhaps examined the bidding documents and, therefore, none really knows the real intention of the parties. As case law tells us, the court has to ferret out the real intent of the parties. What is fairly clear in this case, however, is that petitioners who are not even privy to the bidding process foist upon the Court their own view on the stipulations of the automation contract and present to the Court what they think are the parties' true intention. It is a study of outsiders appearing to know more than the parties do, but actually speculating what the parties intended. The following is self-explanatory:

CHIEF JUSTICE: Why did you say that it did not, did you talk with the Chairman and Commissioners of COMELEC that they failed to perform this duty, they did not exercise this power of control?

ATTY. ROQUE : Your Honor, I based it on the fact that it was the COMELEC in fact that entered into this contract ....

CHIEF JUSTICE : Yes, but my question is – did you confront the COMELEC officials that they forfeited their power of control in over our election process?

ATTY. ROQUE : We did not confront, your Honor. We impugned their acts, Your Honor.<sup>92</sup>

Just as they do on the issue of control over the electoral process, petitioners also anchor on speculative reasoning their claim that Smartmatic has possession and control over the public and private keys pair that will operate the PCOS machines. Consider: Petitioners' counsel was at the start cocksure about Smartmatic's control of these keys and, with its control, of the electoral process.<sup>93</sup>

Several questions later, his answers had a qualifying tone:

JUSTICE NACHURA: And can COMELEC under the contract not demand that it have access, that it be given access to and in fact generate its own keys independently with SMARTMATIC so that it would be COMELEC and not SMARTMATIC that would have full control of the technology insofar as the keys are concerned xxx?

ATTY. ROQUE: I do not know if COMELEC will be in a position to generate these keys, xxx.<sup>94</sup>

And subsequently, the speculative nature of petitioners' position as to who would have possession and control of the keys became apparent.

CHIEF JUSTICE: Yes, but did you check with the COMELEC who will be holding these two keys x x x did you check with COMELEC whether this system is correct?

ATTY.ROQUE: We have not had occasion to do so, x x x Your Honor.

x x x x

CHIEF JUSTICE: Why do you make that poor conclusion against the COMELEC x x x May not the COMELEC hire the services of experts in order for the institution to be able to discharge its constitutional functions?

ATTY. ROQUE: That is true, but x x x there is too much reliance on individuals who do not have the same kind of accountability as public officers x x x

CHIEF JUSTICE: Are you saying that the COMELEC did not consult with available I.T. experts in the country before it made the bidding rules before it conducted the bidding and make the other policy judgments?

ATTY. ROQUE: Your Honor, what I am sure is that they did not confer with the I.T. Foundation x x x.

CHIEF JUSTICE: But is that foundation the only expert, does it have a monopoly of knowledge?<sup>95</sup>

The Court, to be sure, recognizes the importance of the vote-security issue revolving around the issuance of the public and private keys pair to the Board of Election Inspectors, including the digital signatures. The NCC comment on the matter deserves mention, appearing to hew as it does to what appear on the records. The NCC wrote:

The RFP/TOR used in the recent bidding for the AES to be used in the 2010 elections specifically mandated the use of public key cryptography. However, it was left to the discretion of the bidder to propose an acceptable manner of utilization for approval/acceptance of the Comelec. Nowhere in the RFP/TOR was it indicated that COMELEC would delegate to the winning bidder the full discretion, supervision and control over the manner of PKI [Public Key Infrastructure] utilization.

With the view we take of the automation contract, the role of Smartmatic TIM Corporation is basically to supply the goods necessary for the automation project, such as but not limited to the PCOS machines, PCs, electronic transmission devices and related equipment, both hardware and software, and the technical services pertaining to their operation. As lessees of the goods and the back-up equipment, the corporation and its operators would provide assistance with respect to the machines to be used by the Comelec which, at the end of the day, will be conducting the election thru its personnel and whoever it deputizes.

And if only to emphasize a point, Comelec's contract is with Smartmatic TIM Corporation of which Smartmatic is a 40% minority owner, per the JVA of TIM and Smartmatic and the Articles of Incorporation of Smartmatic TIM Corporation. Accordingly, any decision on the part or on behalf of Smartmatic will not be binding on Comelec. As a necessary corollary, the board room

voting arrangement that Smartmatic and TIM may have agreed upon as joint venture partners, inclusive of the veto vote that one may have power over the other, should really be the least concern of the Comelec.

Parenthetically, the contention that the PCOS would infringe on the secrecy and sanctity of the ballot because, as petitioners would put it, the voter would be confronted with a "three feet" long ballot,<sup>96</sup> does not commend itself for concurrence. Surely, the Comelec can put up such infrastructure as to insure that the voter can write his preference in relative privacy. And as demonstrated during the oral arguments, the voter himself will personally feed the ballot into the machine. A voter, if so minded to preserve the secrecy of his ballot, will always devise a way to do so. By the same token, one with least regard for secrecy will likewise have a way to make his vote known.

During the oral arguments, the notion of a possible violation of the Anti-Dummy Law cropped up, given the RFP requirement of a joint venture bidder to be at least be 60% Filipino. On the other hand, the winning bidder, TIM-Smartmatic joint venture, has Smartmatic, a foreign corporation, owning 40% of the equity in, first, the joint venture partnership, and then in Smartmatic TIM Corporation.

The Anti-Dummy Law<sup>97</sup> pertinently states:

Section 1. Penalty. In all cases in which any constitutional or legal provision requires Philippine or any other specific citizenship as a requisite for the exercise or enjoyment of a right, franchise or privilege, any citizen of the Philippines or of any other specific country who allows his name or citizenship to be used for the purpose of evading such provision, and any alien or foreigner profiting thereby, shall be punished by imprisonment xxx and by a fine xxx.

SECTION 2. Simulation of minimum capital stock – In all cases in which a constitutional or legal provision requires that a corporation or association may exercise or enjoy a right, franchise or privilege, not less than a certain per centum of its capital must be owned by citizens of the Philippines or any other specific country, it shall be unlawful to falsely simulate the existence of such minimum stock or capital as owned by such citizen for the purpose of evading such provision. xxx

SECTION 2-A. Unlawful use, Exploitation or Enjoyment. Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation, or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution xxx shall be punished by imprisonment xxx (Emphasis added.)

The Anti-Dummy Law has been enacted to limit the enjoyment of certain economic activities to Filipino citizens or corporations. For liability for violation of the law to attach, it must be established that there is a law limiting or reserving the enjoyment or exercise of a right, franchise, privilege, or business to citizens of the Philippines or to corporations or associations at least 60 per centum of the capital of which is owned by such citizens. In the case at bench, the Court is not aware of any constitutional or statutory provision classifying as a nationalized activity the lease or provision of goods and technical services for the automation of an election. In fact, Sec. 8 of RA 8436, as amended, vests the Comelec with specific authority to acquire AES from foreign sources, thus:

*SEC 12. Procurement of Equipment and Materials.*— To achieve the purpose of this Act, the Commission is authorized to procure, xxx, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from local or foreign sources xxx. (Emphasis added.)

Petitioners cite Executive Order No. (EO) 584,<sup>98</sup> Series of 2006, purportedly limiting "contracts for the supply of materials, goods and commodities to government-owned or controlled corporation, company, agency or municipal corporation" to corporations that are 60% Filipino. We do not quite see the governing relevance of EO 584. For let alone the fact that RA 9369 is, in relation to EO 584, a subsequent enactment and, therefore, enjoys primacy over the executive issuance, the Comelec does fall under the category of a government-owned and controlled corporation, an agency or a municipal corporation contemplated in the executive order.

A view has been advanced regarding the susceptibility of the AES to hacking, just like the voting machines used in certain precincts in Florida, USA in the Gore-Bush presidential contests. However, an analysis of post-election reports on the voting system thus used in the US during the period material and the AES to be utilized in the 2010 automation project seems to suggest stark differences between the two systems. The first relates to the Source Code, defined in RA 9369 as "human readable instructions that define what the computer equipment will do."<sup>99</sup>The Source Code for the 2010 AES shall be available and opened for review by political parties, candidates and the citizens' arms or their representatives;<sup>100</sup> whereas in the US precincts aforementioned, the Source Code was alleged to have been kept secret by the machine manufacture company, thus keeping the American public in the dark as to how exactly the machines counted their votes. And secondly, in the AES, the PCOS machines found in the precincts will also be the same device that would tabulate and canvass the votes; whereas in the US, the machines in the precincts did not count the votes. Instead the votes cast appeared to have been stored in a memory card that was brought to a counting center at the end of the day. As a result, the hacking and cheating may have possibly occurred at the counting center.

Additionally, with the AES, the possibility of system hacking is very slim. The PCOS machines are only online when they transmit the results, which would only take around one to two minutes. In order to hack the system during this tiny span of vulnerability, a super computer would be required. Noteworthy also is the fact that the memory card to be used during the elections is

encrypted and read-only—meaning no illicit program can be executed or introduced into the memory card.

Therefore, even though the AES has its flaws, Comelec and Smartmatic have seen to it that the system is well-protected with sufficient security measures in order to ensure honest elections.

And as indicated earlier, the joint venture provider has formulated and put in place a continuity and back-up plans that would address the understandable apprehension of a failure of elections in case the machines falter during the actual election. This over-all fall-back strategy includes the provisions for 2,000 spare PCOS machines on top of the 80,000 units assigned to an equal number precincts throughout the country. The continuity and back-up plans seek to address the following eventualities: **(1)** The PCOS fails to scan ballots; **(2)** The PCOS scans the ballots, but fails to print election returns (ERs); and/or **(3)** The PCOS prints but fails to transmit the ERs. In the event item #1 occurs, a spare PCOS, if available, will be brought in or, if not available, the PCOS of another precinct (PCOS 2 for clarity), after observing certain defined requirements,<sup>101</sup> shall be used. Should all the PCOS machines in the entire municipality/city fail, manual counting of the paper ballots and the manual accomplishment of ERs shall be resorted to in accordance with Comelec promulgated rules on appreciation of automated ballots.<sup>102</sup> In the event item #2 occurs where the PCOS machines fail to print ERs, the use of spare PCOS and the transfer of PCOS-2 shall be effected. Manual counting of ERs shall be resorted to also if all PCOS fails in the entire municipality. And should eventuality #3 transpire, the following back-up options, among others, may be availed of: bringing PCOS-1 to the nearest precinct or polling center which has a functioning transmission facility; inserting transmission cable of functioning transmission line to PCOS-1 and transmitting stored data from PCOS-1 using functioning transmission facility.

The disruption of the election process due to machine breakdown or malfunction may be limited to a precinct only or could affect an entire municipal/city. The worst case scenario of course would be the wholesale breakdown of the 82,000 PCOS machines. Nonetheless, even in this most extreme case, failure of all the machines would not necessarily translate into failure of elections. Manual count tabulation and transmission, as earlier stated, can be done, PCOS being a paper-ballot technology. If the machine fails for whatever reason, the paper ballots would still be there for the hand counting of the votes, manual tabulation and transmission of the ERs. Failure of elections consequent to voting machines failure would, in fine, be a very remote possibility.

A final consideration.

The first step is always difficult. Hardly anything works, let alone ends up perfectly the first time around. As has often been said, if one looks hard enough, he will in all likelihood find a glitch in any new system. It is no wonder some IT specialists and practitioners have considered the PCOS as unsafe, not the most appropriate technology for Philippine elections, and "easily hackable," even. And the worst fear expressed is that disaster is just waiting to happen, that PCOS would not work on election day.

Congress has chosen the May 2010 elections to be the maiden run for full automation. And judging from what the Court has heard and read in the course of these proceedings, the choice of PCOS by Comelec was not a spur-of-the-moment affair, but the product of honest-to-goodness studies, consultations with CAC, and lessons learned from the ARMM 2008 automated elections. With the backing of Congress by way of budgetary support, the poll body has taken this historic, if not ambitious, first step. It started with the preparation of the RFP/TOR, with a list of voluminous annexes embodying in specific detail the bidding rules and expectations from the bidders. And after a hotly contested and, by most accounts, a highly transparent public bidding exercise, the joint venture of a Filipino and foreign corporation won and, after its machine hurdled the end-to-end demonstration test, was eventually awarded the contract to undertake the automation project. Not one of the losing or disqualified bidders questioned, at least not before the courts, the bona fides of the bidding procedures and the outcome of the bidding itself.

Assayed against the provisions of the Constitution, the enabling automation law, RA 8436, as amended by RA 9369, the RFP and even the Anti-Dummy Law, which petitioners invoked as an afterthought, the Court finds the project award to have complied with legal prescriptions, and the terms and conditions of the corresponding automation contract in question to be valid. No grave abuse of discretion, therefore, can be laid on the doorsteps of respondent Comelec. And surely, the winning joint venture should not be faulted for having a foreign company as partner.

The Comelec is an independent constitutional body with a distinct and pivotal role in our scheme of government. In the discharge of its awesome functions as overseer of fair elections, administrator and lead implementor of laws relative to the conduct of elections, it should not be stymied with restrictions that would perhaps be justified in the case of an organization of lesser responsibility.<sup>103</sup> It should be afforded ample elbow room and enough wherewithal in devising means and initiatives that would enable it to accomplish the great objective for which it was created—to promote free, orderly, honest and peaceful elections. This is as it should be for, too often, Comelec has to make decisions under difficult conditions to address unforeseen events to preserve the integrity of the election and in the process the voice of the people. Thus, in the past, the Court has steered away from interfering with the Comelec's exercise of its power which, by law and by the nature of its office properly pertain to it. Absent, therefore, a clear showing of grave abuse of discretion on Comelec's part, as here, the Court should refrain from utilizing the corrective hand of *certiorari* to review, let alone nullify, the acts of that body. This gem, while not on all fours with, is lifted from, the Court's holding in an old but oft-cited case:

x x x We may not agree fully with [the Comelec's] 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 [or speculation]. x x x

x x x x

There are no ready-made formulas for solving public problems. Time and experience are necessary to evolve patterns that will serve the ends of good government. In the matter of the administration of the laws relative to the conduct of elections, x x x we must not by any excessive zeal take away from the [Comelec] the initiative which by constitutional and legal mandates properly belongs to it. Due regard to the independent character of the Commission x x x 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.<sup>104</sup> x x x

The Court, however, will not indulge in the presumption that nothing would go wrong, that a successful automation election unmarred by fraud, violence, and like irregularities would be the order of the moment on May 10, 2010. Neither will it guarantee, as it cannot guarantee, the effectiveness of the voting machines and the integrity of the counting and consolidation software embedded in them. That task belongs at the first instance to Comelec, as part of its mandate to ensure clean and peaceful elections. This independent constitutional commission, it is true, possesses extraordinary powers and enjoys a considerable latitude in the discharge of its functions. The road, however, towards successful 2010 automation elections would certainly be rough and bumpy. The Comelec is laboring under very tight timelines. It would accordingly need the help of all advocates of orderly and honest elections, of all men and women of goodwill, to smoothen the way and assist Comelec personnel address the fears expressed about the integrity of the system. Like anyone else, the Court would like and wish automated elections to succeed, credibly.

**WHEREFORE**, the instant petition is hereby **DENIED**.

**SO ORDERED.**

**PRESBITERO J. VELASCO, JR.**

Associate Justice

**WE CONCUR:**

**REYNATO S. PUNO**

Chief Justice

(On official leave)

**LEONARDO A. QUISUMBING**

Associate Justice

**CONSUELO YNARES-SANTIAGO**

Associate Justice

**ANTONIO T. CARPIO**

Associate Justice

**RENATO C. CORONA**

Associate Justice

**CONCHITA CARPIO MORALES**

Associate Justice

**MINITA V. CHICO-NAZARIO**

Associate Justice

**ANTONIO EDUARDO B. NACHURA**  
Associate Justice

**TERESITA J. LEONARDO-DE CASTRO**  
Associate Justice

**ARTURO D. BRION**  
Associate Justice

**DIOSDADO M. PERALTA**  
Associate Justice

**LUCAS P. BERSAMIN**  
Associate Justice

**MARIANO C. DEL CASTILLO**  
Associate Justice

**ROBERTO A. ABAD**  
Associate Justice

### CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

**REYNATO S. PUNO**  
Chief Justice

#### Footnotes

\* On official leave.

<sup>1</sup> Both corporations are also referred to in the petition and other pleadings as Total Information Management, Inc. and Smartmatic International, Inc.

<sup>2</sup> Rollo, pp. 87-A and 87-B.

<sup>3</sup> Id. at 576-A. Dated July 28, 2009.

<sup>4</sup> An Act Amending [RA] 8436, entitled "An Act Authorizing the [Comelec] to Use Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National or Local Electoral Exercises, to Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pambansa Blg. 881, as Amended, [RA] 7166 and Other Related Election Laws, Providing Funds Therefor and For Other Purposes."

<sup>5</sup> Composed of, among others, the Chairperson of the Commission on Information and Communications Technology (CICT), one member each from the Dept. of Education and the Dept. of Science and Technology and three members representing ICT professional organizations.

<sup>6</sup> Sec. 9.

<sup>7</sup> It shall be composed of a representative each from the Commission, CITC and DOST.

<sup>8</sup> Sec. 11.

<sup>9</sup> Composed of the cities and municipalities in the provinces of Isabela (except Isabela City), Sulu, Tawi-Tawi, Maguindanao (except Cotabato City) and Lanao del Sur.

<sup>10</sup> DRE is a technology wherein a vote is cast directly on a machine by the use of a touch screen, touchpad, keypad or other device and the machine records the individual votes and calculates the total votes electronically.

<sup>11</sup> CCOS means a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted, is located in every voting center.

<sup>12</sup> Rollo, p. 874. Public Respondents' Memorandum.

<sup>13</sup> Senate Resolutions 96 and 567, s. of 2008, authored by Senators Gordon and Villar, respectively; see Annexes 8 and 9 of private respondents' Memorandum.

<sup>14</sup> Memorandum of the NCC, p. 23.

<sup>15</sup> Sec. 2 of RA 9369 defines "paper-based election system" as a type of automated election system that uses paper ballots; records and counts votes; and tabulates, consolidates/canvasses and transmits electronically the results of the vote counts.

<sup>16</sup> The Glossary of Terms of the RFP defines PCOS as referring to a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted, is located in every precinct.

<sup>17</sup> Sec. 2 (10) of RA 8436, as amended, defines "continuity plan" as a "list of contingency measures and the policies for activation of such, that are put in place to ensure continuous operation of the AES."

<sup>18</sup> The formulation of a continuity plan is a requirement under Sec. 9 of RA 8436, the activation of which shall be undertaken in the presence of political parties' representatives and the citizens arm of the Comelec.

<sup>19</sup> Terms, Conditions and Instruction to Bidders, pp. 45-50 of the RFP.

<sup>20</sup> Contains what the RFP refers to as Class "A" documents, referring to legal, technical and financial documents; and Class "B" documents, among which is a valid JVA, in case of joint venture.

<sup>21</sup> Item IX, par. 3.3 of the RFP.

<sup>22</sup> Rollo, p. 399. Per Certification of the Director of the Comelec's Education & Information Department, Annex "4" of public respondents' Comment.

<sup>23</sup> Published on March 14-16, 2009.

- <sup>24</sup> Rollo, p. 295. Public respondents' Comment on the Petition, p. 7.
- <sup>25</sup> Par. 2.2.4. of Part IX (B) of the RFP.
- <sup>26</sup> Smartmatic is a subsidiary of Smartmatic International Holding, B.V. of Netherlands.
- <sup>27</sup> TIM-Smartmatic, Indra Consortium and Gilat Consortium.
- <sup>28</sup> Rollo, pp. 417-431. Omnibus SBAC Res. 09-001, Annex "6," public respondents' Comment.
- <sup>29</sup> Id. at 844-848. Annex "10" of private respondents' Memorandum.
- <sup>30</sup> Testing of the entire system in an actual simulated election.
- <sup>31</sup> Annex "3," TIM-Smartmatic Comment.
- <sup>32</sup> Rollo, p. 468. Annex "10," public respondents' Comment.
- <sup>33</sup> Id. at 263-281. Annex "2," Smartmatic TIM Corp.'s Comment.
- <sup>34</sup> Denominated as the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections.
- <sup>35</sup> Par. 4.1.
- <sup>36</sup> Rollo, p. 548. Annex "14," public respondents' Comment.
- <sup>37</sup> Id. at 887. Memorandum of public respondents, p. 23.
- <sup>38</sup> *Gonzales v. Narvasa*, G.R. No. 140835, August 14, 2000, 337 SCRA 733, 740.
- <sup>39</sup> *Tatad v. Secretary of the Department of Energy*, G.R. Nos. 124360 & 127867, November 5, 1997, 281 SCRA 330, 349; *De Guia v. COMELEC*, G.R. No. 104712, May 6, 1992, 208 SCRA 420, 422.
- <sup>40</sup> G.R. No. 130716, December 9, 1998, 299 SCRA 744, cited in *Chavez v. NHA*, *infra*.
- <sup>41</sup> TSN of the oral arguments, p. 202.
- <sup>42</sup> Id. at 209.
- <sup>43</sup> Sec. 2. The Congress shall provide a system for securing the secrecy and sanctity of the ballot x x x.
- <sup>44</sup> TSN of the oral arguments, p. 76.
- <sup>45</sup> *Chuidian v. Sandiganbayan*, G.R. Nos. 156383 & 160723, July 31, 2006, 497 SCRA 327; citing *Ginete v. CA*, G.R. No. 127596, September 24, 1998, 296 SCRA 38.
- <sup>46</sup> *Redeña v. Court of Appeals*, G.R. No. 146611, February 6, 2007, 514 SCRA 389.

<sup>47</sup> Marabur v. Comelec, G.R. No. 169513, February 26, 2007, 516 SCRA 696.

<sup>48</sup> Chavez v. National Housing Authority, G.R. No. 164527, August 15, 2007, 530 SCRA 235.

<sup>49</sup> Cabarles v. Maceda, G.R. No. 161330, February 20, 2007, 516 SCRA 303.

<sup>50</sup> TSN, p. 38.

<sup>51</sup> TSN of Oral Arguments, Vol. I, p. 64.

<sup>52</sup> Rollo, pp. 436-467. Annex "8," public respondents' Comment.

<sup>53</sup> The 5th and 6th preambulatory clauses of the JVA respectively provide:

WHEREAS, Tim and Smartmatic have agreed to jointly and severally submit, as an incorporated joint venture, a bid to the COMELEC for the automation Project pursuant to the rules and terms set forth in the Request for Proposal;

WHEREAS, in the event that the bid submitted by TIM and SMARTMATIC is declared to be the winning bid, TIM and SMARTMATIC have agreed to cause the incorporation of a joint venture corporation (the "JVC") which will enter into a contract with the COMELEC for the Automation Project.

<sup>54</sup> 2.1 In the event that COMELEC declares the bid tendered by TIM and SMARTMATIC to be the winning bid for the Automation Project, the parties hereto shall incorporate or cause to be incorporated, the JVC which shall be named "TIM SMARTMATIC CORPORATION" or any other acceptable name ... which may be allowed by the SEC.

2.2. The JVC shall be the corporate vehicle through which the joint venture ... shall be carried out xxx. The JVC shall be the entity which shall enter into a contract with the COMELEC for the Automation Project of the 2010 National Elections.

2.3 The purpose of the JVC shall be to carry out and perform jointly, severally and solidarily the obligations of TIM and SMARTMATIC arising from being declared the winning bidder in the public bidding for the Automation Project which obligations are spelled out in the [RFP] xxx

2.4 The authorized capital stock of the JVC is initially fixed herein at xxx PHP1,300,000,000.00 divided into Pesos: One Billion and Three Hundred Million shares xxx; Provided that the authorized capital stock of the JVC may be increased when so warranted xxx. 2.5 The capital contributions of the parties hereto to the JVC shall be as follows: a. TIM by itself or through its Philippine subsidiary – sixty percent (60%) of the shares to be issued by the JVC; b. SMARTMATIC, by itself or through its Philippine subsidiary – forty percent (40%) of the shares to be issued by the JVC. xxx

<sup>55</sup> 4.1 For as long as TIM, either by itself or through its subsidiary, owns and holds 60% of the outstanding capital stock of the JVC and entitled to vote, TIM shall be entitled to nominate and elect 60% of the Board of Directors of the JVC. For as long as SMARTMATIC, either by itself or through its Philippine subsidiary, owns and holds 40% of the outstanding capital stock of the JVC and entitled to vote, SMARTMATIC shall be entitled to nominate and elect 40% of the Board of Directors of the JVC

<sup>56</sup> 7.1 The JVC will distribute its profits to the Shareholders to the extent determined by the Board of Directors xxx after taking into account the financial requirements of the JVC with respect to the working capital. xxx

<sup>57</sup> 3.1 For purposes of the Automation Project, TIM may contribute to the JVC and shall be responsible for the following: a. the value-added services pertaining or related to canvassing units, systems integration, transmission and such other services as required by the Automation Project and as indicated in the [RFP]; b. services pertaining or related to logistics, deployment and manpower; c. hardware, software, ballot paper, consumables and such other services as may be requested by SMARTMATIC; and d. local support staff as may be required under the circumstances;

3.2 For purposes of the Automation Project, SMARTMATIC shall contribute to the JVC and shall be responsible for the following: a. the development, manufacture and/or supply of EVMs, other machines and equipment, software, technology and systems; b. overall project management as required by the Automation Project and as indicated in the [RFP] and c. any other activity not expressly written in this Agreement or assigned to TIM;

x x x x

3.4 In the event the [financial and capital contribution] sources mentioned in the preceding Article 3,3 (b) or (c) are insufficient to meet the financial requirements of the JVC, the parties shall bear the responsibility of supporting or securing such financial requirements in proportion to their respective shareholdings xxx.

<sup>58</sup> G.R. No. 159139, January 13, 2004, 419 SCRA 146.

<sup>59</sup> Id. at 167.

<sup>60</sup> TSN of the oral arguments, p. 119.

<sup>61</sup> Sec. 7.1 of the ITB reads: "The bidder shall specify in its Bid all portions of the Goods and Services that will be subcontracted, if any, including the entities to whom each portion will be subcontracted to xxx. Subcontracting of any portion shall not relieve the Bidder from any liability or obligation that may arise from its performance."

<sup>62</sup> Rollo, p. 310. Public respondents' Comment, p. 22.

<sup>63</sup> Approved on January 23, 2007, RA 9369 provides in its Sec. 47 that it shall take effect 15 days after its publication in a newspaper of general circulation.

<sup>64</sup> The Senate's Comment-in-Intervention, p. 4.

<sup>65</sup> Annex "A" [Glossary of Terms] of the RFP.

<sup>66</sup> Rollo, 174-175. Private respondents' Comment on Petition, pp. 27-28.

<sup>67</sup> Memorandum, Report/Recommendation on the 2010 Automation Election Project Procurement, Annex "9," Comment on Petition of Public Respondents.

<sup>68</sup> Entitled "An Act Appropriating the Sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (P11,301,790,000.00) as Supplemental Budget for an [AES] and for Other Purposes."

<sup>69</sup> Rollo, p. 1341.

<sup>70</sup> On page 3 of its Comment, NCC, thru its Dir. Gen. Angelo Timoteo M. Diaz de Rivera, states: "We believe that the successful deployment of the paper-based election system in 5 of the 6 provinces of ARMM and the concurrent deployment of the direct-recording-electronic election system in Maguindanao province, is substantial compliance of the spirit of this law, given the underlying circumstances."

<sup>71</sup> Mr. Amado A. Malacaman, signing as secretary of the ITPF, states: "The ARMM election in August 2008 was not a valid pilot run for two reasons: (1) It did not cover two highly urbanized cities and two provinces each in Luzon, Visayas, and Mindanao, and (2) PCOS was not used in that electoral exercise."

<sup>72</sup> Atty. Roque said: "The PCOS stage is similar to OMR because they also have to shade the oval for the candidate that they want to vote. The difference is that in the OMR they collate all the ballots xxx where in PCOS you don't put it in a ballot, you feed it into the machines."

<sup>73</sup> Public respondents' Comment, pp. 27-28.

<sup>74</sup> Section 5, RA 8436, as amended.

<sup>75</sup> Petition, p. 30.

<sup>76</sup> Id. at 31.

<sup>77</sup> Annex "9," public respondents' Comment.

<sup>78</sup> See Note No. 33.

<sup>79</sup> Annex "8," Comment of public respondents.

<sup>80</sup> TSN, pp. 315-316

<sup>81</sup> The final test shall be conducted at least three days before election after which the PCOS and CCS shall be sealed for election day use (Part V, item no. 13, RFP).

<sup>82</sup> TSN, p. 89.

<sup>83</sup> [http:// www. com/solutions/automated-elections-system-view/article/voting machine.](http://www.com/solutions/automated-elections-system-view/article/voting-machine)

<sup>84</sup> TSN, Oral Arguments, pp. 455-456, 490.

<sup>85</sup> Rollo, pp. 1062-1063. Petitioners' Memorandum, pp. 12-13.

<sup>86</sup> Sec. 2, Art. IX-C; SECTION 2. The [Comelec] shall exercise the following powers and functions: (1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall; xxx (4) Deputize xxx law enforcement agencies xxx for the exclusive purpose of ensuring free, orderly, honest peaceful and credible elections.

<sup>87</sup> 21.1. "Contract documents" refers to the following documents and they are hereby incorporated and made an integral part of this Contract: x x x Annex "O" Request for Proposal/Terms of Reference.

<sup>88</sup> Part II, RFP.

<sup>89</sup> Rollo, p. 1094. Petitioners' Memorandum, p. 44.

<sup>90</sup> SECTION 3. Section 3 of [RA] 8436 is hereby amended to read as follows: "SEC. 3 Board of *Election of Inspectors*. – Where AES shall be adopted, at least one member of the Board of Election Inspectors shall be an [IT]-capable person, who is trained or certified by the DOST to use such AES. Such certification shall be issued by the DOST, free of charge."

<sup>91</sup> SECTION 5. Section 5 of [RA] 8436 is hereby amended to read as follows: "SEC. 4 *Information Technology Support for the Board of Canvassers*.- To implement the AES, each board of canvasser shall be assisted by an [IT]-capable person authorized to operate the equipment adopted for the elections. The Commission shall deputize [IT] personnel from among agencies and instrumentalities of the government, including government-owned and controlled corporations. x x x"

<sup>92</sup> TSN, Oral Arguments, pp. 203-206.

<sup>93</sup> Id. at 50-51.

<sup>94</sup> Id. at 158-59.

<sup>95</sup> Id. at 195-200.

<sup>96</sup> Id. at 17.

<sup>97</sup> CA 108, as amended by PD 715.

<sup>98</sup> Promulgating the 7th Regular Foreign Investment Negative List.

<sup>99</sup> Sec. 2. of RA 9369.

<sup>100</sup> Sec. 10 of RA 8436, as amended, states that "once an AES technology is selected for implementation, the Commission shall promptly make the source code available and open to any interested party or groups which may conduct their own review thereof."

<sup>101</sup> These include bringing PCOS-2 to the precinct assigned to PCOS-1; breaking seal of PCOS-1 to get precinct configuration; and breaking seal of PCOS-2 to remove precinct configuration card.

<sup>102</sup> Rollo, p. 845.

<sup>103</sup> Leyaley v. Comelec, G.R. No. 160061, October 11, 2006, 504 SCRA 217.

<sup>104</sup> Sumulong v. Comelec, 73 Phil. 288, 294-296 (1941).

## SEPARATE CONCURRING OPINION

**PUNO, C.J.:**

### Prefatory Statement

The broad power to determine whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government<sup>1</sup> is exercised with full appreciation by the judiciary of the proper limits of its role in our tripartite form of government. We should take care that this expanded power is not used as a license for courts to intervene in cases involving matters of policy woven with constitutional and legal questions. Since time immemorial, courts have deferred to the wisdom or logic of legislative choices and technical determinations. It is as it should be.

By this paradigm, we do not abdicate our fundamental responsibility in annulling an act of grave abuse of discretion in the guise of judicial restraint, but neither do we permit the overarching use of judicial power as to amount to judicial tyranny.

### A. The Case

The petitioners brought this case for Certiorari, Prohibition and Mandamus to declare that public respondents Commission on Elections (COMELEC), and the COMELEC-Special Bids and Awards Committee (COMELEC-SBAC), committed grave abuse of discretion amounting to lack or excess of jurisdiction when it awarded the 2010 Automated Elections Project to private respondents Total Information Management, Inc. (TIM) and Smartmatic International, Inc. (Smartmatic). Petitioners ask the Court to strike down as null and void the July 10, 2009 contract between public respondent COMELEC and private respondents for being contrary to the Constitution, statutes, and established jurisprudence.

On June 7, 1995, Congress passed Republic Act No. 8046 adopting an Automated Election System (AES) in the Philippines. RA 8046 authorized 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).

On December 22, 1997, Congress enacted Republic Act No. 8436<sup>2</sup> (RA 8436), otherwise known as the "Election Modernization Act" authorizing COMELEC to use an AES for the process of voting, counting votes and canvassing or consolidating the results of the national and local elections. It also mandated the poll body to acquire automated counting machines (ACMs), computer equipment, devices and materials, and adopt new electoral forms and printing materials.

The COMELEC, however, was not able to implement the AES for the positions of President, Vice President, senators and parties, organizations or coalitions participating under the party-list system throughout the entire country, as provided in RA 8436. The automation was limited to the provinces of Lanao del Sur, Maguindanao, Sulu, and Tawi-tawi due to lack of material time and funding.

The COMELEC was not also able to implement an AES in the May 2001 elections due to time constraints. But on October 29, 2002, the COMELEC adopted Resolution 02-0170, which resolved to conduct biddings for the three phases of the AES: Phase I, voter registration and validation system; Phase II, automated counting and canvassing system; and Phase III, electronic transmission. The COMELEC awarded Phase II for the provision of the ACMs to the Mega Pacific Consortium (MP Consortium). The Information Technology Foundation of the Philippines (ITFP), among others, petitioned this Court to declare null and void the award of the contract to the MP Consortium. In *Information Technology Foundation of the Philippines v. COMELEC*,<sup>3</sup> this Court held that the contract was void for failure to establish the identity, existence and eligibility of the alleged consortium as a bidder; the ACM's failure to pass the tests of the Department of Science and Technology (DOST); and the ACM's failure to meet the required accuracy rating as well as safeguards for the prevention of double counting of precinct results.

On January 23, 2007, Congress passed Republic Act No. 9369 (RA 9369), amending RA 8436. It specified the modes of implementing the AES, i.e., either paper-based or a direct recording electronic (DRE) system, for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises. It also provided that for the next election, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao.<sup>4</sup> In addition, it provided that with respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. However, participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.<sup>5</sup>

Again, the AES was not implemented in the May 2007 elections due to lack of funds and time constraints. But the AES was used in the August 11, 2008 ARMM elections, where both DRE and the paper-based Central Count Optical Scan (CCOS) machines were used.

On March 5, 2009, Republic Act No. 9525 (RA 9525)<sup>6</sup> was passed by the House of Representatives and the Senate, appropriating the sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (₱11,301,790,000.00) for an AES to be used in the May 10, 2010 automated national and local elections.

From March 13 to 16, 2009, the COMELEC published and posted an invitation for vendors to apply for eligibility and to bid for the procurement of counting machines, including the supply of ballot paper; electronic transmission services using public telecommunications networks; training; technical support; warehousing; deployment; installation; pull-out; systems integration; and overall project management to be used in the automation of the counting,

transmission and canvassing of the votes for the May 10, 2010 synchronized national and local elections.

On March 18, 2009, the COMELEC issued the Terms of Reference/Request for Proposal for Solutions, Terms & Conditions for the Automation of the May 10, 2010 Synchronized National and Local Elections (TOR/RFP), as promulgated in COMELEC Resolution 8591, dated March 11, 2009, with the following components:

a. Component 1: Paper-Based Automated Election System

1-A. Election Management System (EMS)

1-B. Precinct-Count Optical Scan (PCOS) System

1-C. Consolidated/Canvassing System (CCS)

b. Component 2: Provision for Electronic Transmission of Electronic Results using Public Telecommunications Networks

c. Component 3: Overall Project Management

On March 19, 2009, eleven prospective bidders obtained bid documents from the COMELEC for the automation of the 2010 elections.

On March 23, 2009, RA 9525 was signed by President Gloria Macapagal-Arroyo appropriating P11,301,790,000.00 as supplemental appropriation for an automated elections system and other purposes.

On March 27, 2009, the COMELEC conducted a Pre-Bid Conference for the automation of the counting, transmission and canvassing of votes for the May 10, 2010 elections.

On April 23, 2009, TIM and Smartmatic entered into a Joint Venture Agreement (JVA) to form the joint venture known as Smartmatic TIM Corporation.

On May 4, 2009, seven suppliers submitted their formal bids. The COMELEC-SBAC declared all the seven bidders ineligible for failure to comply with the pass/fail criteria of the COMELEC. Upon motion for reconsideration of the suppliers, three consortiums were reconsidered by the COMELEC-SBAC, namely Indra Consortium, Smartmatic-TIM, AMA-ESS and the Gilat Consortium. After evaluation of their technical proposals, the COMELEC-SBAC declared Indra Consortium and Smartmatic-TIM to have passed.

The COMELEC-SBAC then proceeded with the opening of the financial proposals. The Technical Working Group (TWG) evaluated and reviewed the financial proposals of Indra Consortium and Smartmatic-TIM. On June 3, 2009, the COMELEC-SBAC recommended to the COMELEC en banc

the award of the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (Automation Contract) to the joint venture of Smartmatic-TIM. Smartmatic-TIM was found to have the lowest calculated responsive bid (LCRB); and to have passed all the eligibility, technical, and financial requirements. The COMELEC-SBAC noted that Smartmatic-TIM's machines passed all the tests and systems evaluation with an accuracy rating of 100%. This finding was verified and validated in the post-qualification proceedings. The total bid of Smartmatic-TIM amounting to Seven Billion One Hundred Ninety-one Million Four Hundred Eighty-four Thousand Seven Hundred Thirty-nine and 48/100 Philippine pesos (₱7,191,484,739.48) was found by the COMELEC to be within the approved budget for the contract of Eleven Billion Two Hundred Twenty-three Million Six Hundred Eighteen Thousand Four Hundred and 0/100 Philippine pesos (₱11,223,618,400.00).<sup>7</sup>

On June 8, 2009, the COMELEC Advisory Council<sup>8</sup> submitted its observations on the procurement proceedings of the SBAC, with the conclusion that these were transparent and in conformity with the law and the TOR/RFP. It noted that Smartmatic-TIM had a 100% accuracy rating. The Advisory Council has the mandate to participate as non-voting members of the COMELEC-SBAC in the conduct of the bidding process for the AES.

On the same date, June 8, 2009, the Office of the Ombudsman, which had previously created Task Force "Poll Automation",<sup>9</sup> submitted its "Process Audit Observation Report." The Ombudsman Task Force also found the above proceedings and systems to be consonant with the Constitution, procurement laws, and RA 9369.

The Parish Pastoral Council for Responsible Voting (PPCRV) representative likewise submitted a report, which concurred with the final report of the COMELEC-SBAC.

On June 9, 2009, the COMELEC en banc promulgated Resolution No. 8608, confirming Smartmatic-TIM as the bidder with the LCRB and awarding the contract for the automation of the elections on May 10, 2010 to the joint venture.

On June 10, 2009, the COMELEC awarded the contract to Smartmatic-TIM to supply 82,000 Precinct Count Optical Scan (PCOS) machines to be used in the 2010 elections. Subsequently, Jose Mari Antuñez, the President of TIM, informed COMELEC Chairperson Jose Melo that TIM was withdrawing from the partnership with Smartmatic, due to irreconcilable differences and loss of confidence. The scheduled signing on June 30, 2009 of the Automation Contract between COMELEC, Smartmatic and TIM did not take place. Following a series of discussions, Smartmatic and TIM were able to settle their internal dispute.

Smartmatic and TIM then caused the incorporation of their joint venture, pursuant to the JVA. On July 8, 2009, the Securities and Exchange Commission (SEC) issued a Certificate of Incorporation to Smartmatic TIM Corporation.

On July 10, 2009, the Smartmatic TIM Corporation entered into the Automation Contract with the COMELEC. The contract price was ₱7,191,484,739.48.

The petition at bar raises the following --

#### B. Issues

1. Whether RA 8436, as amended by RA 9369, requires the conduct of a pilot exercise as a condition precedent to the full nationwide automation of the election.
2. Whether RA 9525 has impliedly repealed the pilot testing requirement.
3. Whether Smartmatic and TIM entered into a valid joint venture agreement.
4. Whether any nationality requirement is applicable.
5. Whether the AES chosen by the COMELEC complies with the "prior successful use" qualification set forth in Section 12 of RA 8436, as amended.
6. Whether the PCOS machines offered by the Smartmatic-TIM Consortium satisfy the minimum system capabilities mandated by Section 6 of RA 8436, as amended.

#### C. Discussion

A touchstone of our Constitution is that critical public policy judgments belong to the legislative branch, and the Court must not unduly intrude into this exclusive domain.

In enacting RA 8436 (Election Modernization Act) on December 22, 1997, the legislature has clearly chosen the policy that an AES shall be used by the COMELEC for the process of voting, counting of votes and canvassing/consolidation of results of the national and local elections.<sup>10</sup> It decided to put an end to the manual conduct of our elections that has frustrated the honest casting of votes by our sovereign people.

In the pursuit of its objective, the legislature defined what it considered an AES and provided the standards for its implementation. It further determined the minimum functional capabilities of the system and delegated to the COMELEC the development and adoption of a system of evaluation to ascertain that the minimum system capabilities would be met.

The policy decision of Congress to adopt an AES is not under question. It is the manner the COMELEC is implementing the AES that is assailed by the petitioners. The first issue is whether the conduct of an AES in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao is a condition precedent to the nationwide implementation of the AES.

- c.1 The conduct of the pilot exercise of the AES is a condition precedent to its nationwide implementation

Whether the conduct of the pilot exercise of the AES is a condition precedent to its nationwide implementation involves the correct interpretation of Section 5 of RA 8436. The interpretation of Section 5, RA 8436, as amended, is nothing less than a brain twister. It appears like a Rorschach inkblot test, in which petitioners and respondents assign meaning to certain words as though they were deciphering images formed by inkblots. Using the same word of the law, they arrive at different conclusions.

Thus, the petitioners interpret the word shall in the first proviso of Section 5, RA 8436, as amended, to support their thesis that the pilot exercise of the AES is a condition precedent prior to its full implementation. The proviso states that "the [automated election system] shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao."<sup>11</sup>

Similarly, the respondents interpret the word shall in the last sentence of the provision, which states that "in succeeding regular national or local elections, the [automated election system] shall be implemented nationwide,"<sup>12</sup> and submit that the pilot exercise of the AES is not a condition precedent. Further, they contend that the use of the AES in at least two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao refers only to the national and local elections immediately following the passage of RA 9369, i.e., the May 2007 national and local elections. They argue that this was just an acknowledgment by Congress that there was not enough time or funds to conduct a full nationwide automation of the May 2007 election.

The respondents' reading of Section 5 disregards the tenor of the entire provision. A rational reading of the entire provision will show that the different parts isolated and then interpreted by the respondents are connected by the conjunctions provided, that and provided, further that and provided, finally that. These conjunctions signify that the clauses that follow the conjunction are a pre-requisite or a condition to the fulfillment of the previous clause. The words provided, that mean the same as "as long as," "in order that," and "if only." Thus, the provision should be read and understood as follows:

Part 1: To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises:<sup>13</sup>

Provided, That

Part 2: for the regular national and local elections, which shall be held immediately after the effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission:

Provided, further,

Part 3: That local government units whose officials have been the subject of administrative charges within sixteen (16) months prior to the May 14, 2007 elections shall not be chosen:

Provided finally,

Part 4: That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province.

Part 5: In succeeding regular national or local elections, the AES shall be implemented nationwide.<sup>14</sup>

In this light, Section 5 should be interpreted to mean that the COMELEC is authorized to use an AES as long as the following requisites are complied with: (1) for the regular national and local elections, which shall be held immediately after the effectivity of the Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao; (2) that local government units whose officials have been the subject of administrative charges within sixteen months prior to the May 14, 2007 elections shall not be chosen; and (3) that no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. And, when the above conditions are complied with, the AES shall be implemented nationwide in succeeding regular national and local elections.

The last sentence of the provision which provides that "[i]n succeeding regular national or local elections, the AES shall be implemented nationwide" may appear as not connected to the enumeration of requirements for the use of an AES. But this does not mean that it can be read in isolation and independently from the rest of the provision. Section 5 expressly declares that the COMELEC's authority to use the AES on a nationwide scale is contingent on the prior conduct of partial automation in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao.

Likewise, the word "pilot testing" may not have been used in the provision, but the intent to test the use of an AES is evident in its text. The mandatory nature of the initial conduct of an automated election in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao is highlighted by the use of the word shall. That this is a condition precedent before a full nationwide automated election can be used in the succeeding elections is buttressed by the use of the words provided, that. Thus, the COMELEC is authorized to use an AES, provided that the AES is first used in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao, after which, in the following regular national and local elections, the AES shall be implemented nationwide.

Pushing to the limit their argument that pilot testing is not a condition precedent to the conduct of an AES, the respondents rely on Section 12 of RA 8436, as amended, which provides thus:

SEC. 12. Procurement of Equipment and Materials. – To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness. (Emphasis supplied)

The respondents press the point that Section 12, *supra*, indicates that pilot testing in the May 2007 elections is not a mandatory requirement for the choice of an AES to be used in the May 2010 elections, nor is it a prerequisite for the full automation of the May 2010 elections, since the system's capability may have been used in an electoral exercise abroad. Respondents also contend that since participation in the 2007 pilot exercise is expressly declared as inconclusive of the system's fitness, then the non-use of the PCOS machines in the 2007 electoral exercise is not a bar to the implementation of a full nationwide automation in the 2010 elections.

With due respect, the respondents have a murky understanding of the last sentence of Section 12. It merely states that "[p]articipation in the 2007 pilot exercise shall not be conclusive of the system's fitness." It does not say that participation of the procured system in the 2007 pilot exercise is not a condition precedent to the full nationwide implementation of the AES. The section says in unadorned language that as long as the system procured –presumably for the May 2007 elections – has been shown to have demonstrated capability and has been successfully used in a prior electoral exercise here in the Philippines or abroad, the system may also be used in the May 2010 and succeeding elections. In fine, the subject of the section is the fitness of the system procured for the May 2007 automated pilot exercise; it has no relation to the issue of whether the pilot exercise is a condition precedent to the implementation of full nationwide automated elections.

The deliberations of the Joint Congressional Oversight Committee on [the] Automated Election System (Joint Committee on AES)<sup>15</sup> should further enlighten us on the purpose of the last sentence in Section 12 of RA 8436, as amended: that "[p]articipation in the 2007 pilot exercise shall not be conclusive of the system's fitness." They reveal that the purpose is simply to avoid a situation in which the choices of machines and the kind of AES to be used in the 2010 elections would be limited to those that were piloted in the 2007 elections.

Thus, Senator Richard Gordon explained that the purpose behind the statement that participation in the 2007 pilot exercises was not conclusive of the system's fitness was to ensure that newly developed technology may still be considered for the 2010 elections, even though it was not tested in the 2007 pilot exercise. Representative Teodoro Locsin concurred in the same view. Thus:

THE CHAIRMAN (SEN. GORDON). Precisely that was placed there so that you can get newly discovered machines or newly invented machines that can be utilized so that in the 2010 elections it would have been tried in an example here in our country.

THE CHAIRMAN (REP. LOCSIN). I think the purpose of this was any bidder who can prove and who has already carried out an electoral exercise- sure, of course, he has a leg up of all other but that's not conclusive which assumes that others who have not the same experience will be allowed to also bid. (Emphasis supplied.)<sup>16</sup>

Representative Locsin elucidated that participation in the pilot-exercise was not conclusive of the system's fitness, because pilots were easier to do than national exercises. This was also to emphasize that those who participated in the pilot exercise were not to be preferred over those who were not able to participate in the pilot exercise. Thus:

THE CHAIRMAN (REP. LOCSIN). Although this is a detail, if I may 'no, I think you are just doing your best that you just read what it says. It simply says that, I think, everyone is entitled to put their bid. Your (sic) have the discretion to decide whether or not they have the capability. A company may have had many exercises in Latin America but for this particular exercise they may not be prepared to deploy the best then we just forget it. But when it says "participation in 2007 pilot exercise shall not be conclusive," that does not mean to exclude anyone who did not participate in 2007. It was only meant to say our fear is that somebody may be so good in the pilot but then he'll say, "Hey, I won the pilot therefore you have to give me the national election." That's all it meant because pilots are always easier to do than national exercises. (Emphasis supplied.)<sup>17</sup>

The respondents also have an erroneous reading of the use of the word "pilot exercise" instead of "pilot testing." They claim that the use of the word "pilot exercise" instead of "pilot testing" is indicative of the intention to only initially use or employ the AES in the 2007 elections rather than make it a condition precedent. Again, this submission is not sustained by the deliberations of the Senate. "Pilot-exercise" was used in the law instead of "pilot-test" to avoid the notion that a test must first be passed in the 2007 elections in order to continue with the use of the AES as a mode of conducting the succeeding elections. The lawmakers wanted to avoid the use of the word "test," so that in case the AES to be used in the 2007 elections did not well perform as planned, still, the automation of the elections in the next elections would proceed. This intent is reflected in the debate between Senator Richard J. Gordon (Senator Gordon) and Senator Manuel A. Roxas II (Senator Roxas) over an amendment to Section 5 of RA 8436, proposed by the latter. Senator Roxas proposed to add the words "on a test basis" to refer to the use of an AES. The amendment is as follows:

Section 5. Authority to Use an Automated Election System. – To carry out the above-stated policy, the Commission on Elections, herein referred to as the COMELEC is hereby authorized to use ON A TEST BASIS AN automated election system x x x.<sup>18</sup> (capitalization in the original.)

Senator Roxas wanted to use the word "test," so that after a "test" of the AES in the 2007 elections, Congress would know whether the implementation of the 2007 national and local AES was successful. Thereafter, Congress would decide whether the AES – as a mode of conducting elections – should still be used for the successive elections. This is clear from the following exchange of remarks between Senator Roxas and Senator Gordon:

SENATOR ROXAS. In any event, Mr. President, I would like now to go to line 18 and read into the Record the proposed amendment. Again, as I said earlier, so as not to confuse those who are following the language, I will deliberately not read the word "test" subject to whatever happens to that word in subsequent debate and dialogue.

The proposed amendment reads:

THE FURTHER IMPLEMENTATION OF AN AES OR AES TECHNOLOGY SHALL BE DECIDED UPON BY CONGRESS, THROUGH A JOINT RESOLUTION, UPON RECOMMENDATION OF THE OVERSIGHT COMMITTEE. FOR THIS PURPOSE, THE OVERSIGHT COMMITTEE SHALL CONDUCT COMPREHENSIVE EVALUATION PERFORMANCE OF SAID AES OR AES TECHNOLOGY DURING INITIAL IMPLEMENTATION OF RESULTS WITH MANUAL TABULATION. IT SHALL THEN MAKE APPROPRIATE RECOMMENDATIONS TO CONGRESS ON WHETHER ANY FURTHER IMPLEMENTATION SHALL BE CONDUCTED OR OTHERWISE. IN CASE OF FURTHER IMPLEMENTATION AND THE INCREMENTAL COVERAGE BY ALL AES SHALL NOT BE MORE THAN TEN PERCENT (10%) OF THE TOTAL COVERAGE IN TERMS OF NUMBER OF DISTRICTS.

That is the proposed amendment, Mr. President. The proposed amendment, first, from a comprehensive perspective seeks to revert back to Congress the judgment whether the implementation of the AES in 2007 national and local elections was successful or not.

As envisaged in the bill, Mr. President, we are leaving to the Comelec the decision to choose the appropriate technology that will be implemented. There will be a series of advisory or a number of advisory and TAHEC bodies that will hopefully inform that decision.

x x x x

SENATOR GORDON. I thank the distinguished gentleman from Capiz, Mr. President. I know he tried to amend this with sincerity, but I also would like to maintain that this is not a test, first and foremost, because he speaks of a test, and I know he has already stated what word to use. As I pointed out, the words to be used should be: The Automated Election System will be implemented in the province he has already spoken about.

But, upon the other hand, I am concerned about "shall be decided upon by Congress through a joint resolution," referring to line 18,--before the implementation of an AES. I am removing the word "test", --"before the implementation of AES technology shall be decided upon by Congress."

Mr. President, that line speaks volumes. The mother bill that we are amending which is enacted in 1987 decided a policy that we are going to go on an automated election. In other words, if we follow the logic here, we are practically saying: "Well, we may be changing our mind. Maybe we are not in automation mode again." This very line suggests and clearly states that: "Hey, it is going to go back to Congress." And, in fact, through a joint resolution, which I think cannot even be done because Congress amends even without this suggestion. It can amend even without these lines. It can amend the law if it chooses to do so. Which means that after the Automated Election System, if we feel that we no longer want to have an automated election system, Congress cannot at anytime say: "No, we are no longer in that mode."

What our bill provides is that we are already on this heuristic notion, if I may use a word I learned in school a long time ago, which is a trajectory that is headed towards a particular direction aimed at modernizing the election by way of AES. And we have put in the safeguards the minimum requirements and by so doing, after the election has been conducted, the Comelec which is the agency, whether we like it or not, that has been mandated by the Constitution to run our elections simply goes on and says: "All right, we will expand upon the recommendation of the AES, along with the oversight committee."

Now, if that is the case, Mr. President, there is no need to go back to Congress. But if Congress sees it fit, as I pointed out, we are not obviating that possibility. If Congress sees it fit, they can amend it.

But as far as I am concerned, I think the rule should be that we are on an automated rule should be that we are on an automated election mode and we should not say continue on with it.

But as far as I am concerned, I think the rule should be that we are on an automated election mode and we are on an automated election more and we should continue on with it. But we should not say after the exercise, parang lumalabas na test, we will now go back and decide whether we are still on an automated election mode and say we might be going back to manual. x x x We have debated on the automated, we passed this on the past period of debate and we have already decided that we are continuing with the trajectory of automated election. I would not want to go back again to a situation where Congress will say, "We are changing his (sic) mind." Although, it is within its prerogative anyway at any time. (Emphasis supplied; capitalization in the original.)<sup>19</sup>

Senator Roxas' amendment which contained the word "test," was rejected. The reason is not because the partial use of the AES in the 2007 election was not considered as a condition precedent to its full implementation in the 2010 elections. Rather, it was because the use of the word "test" would have implied that Congress would still have to decide whether the conduct of the AES had passed its requirements; whether an AES should still be continued in the succeeding elections; or whether, based on the "test," the conduct of the elections should revert to manual.

Senator Gordon further made it clear that the reason why the AES should first be implemented in certain parts of the country – and not immediately throughout the entire country – was that "a big bite must not be taken right away."<sup>20</sup> The implementation of the system must be done in phases: first, it must be piloted in parts of the Philippines, and only then can it be implemented nationwide. This is reflected in the following statement of Senator Gordon:

SENATOR GORDON. x x x x

Mr. President, this is precisely why we are starting the automation in two provinces and two cities so that we do not take a big bite right away. And I accepted the amendment of the Minority Leader precisely because we want to make sure that the bite is sufficiently enough for us to be able to run the automation. x x x We trust the Comelec but we verify the system because we are hamstrung by the constitutional provision that the Comelec is the one that is principally in charge of running the elections, but at the same time, we have an Advisory Council, composed of our experts, to guide them. (Emphasis supplied)<sup>21</sup>

x x x x

Now, the sample is only two provinces and two cities, Mr. President, so that we would be able to get a gauge. x x x (Emphasis supplied)<sup>22</sup>

x x x So, it is really an automated system that we advocate and, obviously, the two provinces and two cities for Luzon, Visayas and Mindanao will be the initial approach towards this effort. So that when we go and expand in the next elections in 2010, based on the Oversight Committee and based on the Congress itself, if we want to amend it again, we can do so. (Emphasis supplied)<sup>23</sup>

In sum, both from the words of RA 8436, as amended by RA 9369, and its legislative intent, it is clear that an AES shall be conducted; and that the COMELEC is authorized to implement the AES, provided that it is initially piloted in two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao.

c.2 Be that as it may, the enactment of RA 9525 has impliedly repealed the Pilot Exercise Requirement

In a shift in stance, it is argued by the respondents that RA 8436, which requires that a piloting of the AES be used in at least two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao before a full nationwide automation of the elections can be conducted, has been impliedly repealed by the enactment of a later law, RA 9525. They proffer the view that RA 9525,<sup>24</sup> appropriating ₱11,301,790,000.00 for the conduct of an AES in the May 10, 2010, is for the full implementation of automated elections in 2010. They argue that when RA 9525 was enacted on March 5, 2009, Congress was aware that there was no pilot exercise conducted in two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao; and despite this failure, Congress still appropriated the entire amount

of ₱11,301,790,000.00 for the full nationwide implementation of the AES in the May 2010 elections. By the enactment of the ₱11,301,790,000.00 supplemental appropriation, the respondents claim that Congress conveyed the intention to proceed with full nationwide automation and do away with the requirement of conducting a pilot exercise. The respondents also rely on the deliberations of the Senate and the House of Representatives to support their thesis.

On the other hand, the petitioners counter that there was no implied repeal of the requirement of pilot testing of the AES in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao. They cite Section 2 of RA 9525, viz.:

Section 2. *Use of Funds.* - The amounts herein appropriated shall be used for the purposes indicated and subject to: (i) the relevant special and general provisions of Republic Act No. 9498, or the FY 2008 General Appropriations Act, as reenacted, and subsequent General Appropriations Acts, and (ii) the applicable provisions of Republic Act No. 8436, entitled: "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in subsequent National and Local Electoral Exercises, Providing Funds Therefor and for Other Purposes", as amended by Republic Act No. 9369: *Provided, however,* That disbursement of the amounts herein appropriated or any part thereof shall be authorized only in strict compliance with the Constitution, the provisions of Republic Act No. 9369 and other election laws incorporated in said Act so as to ensure the conduct of a free, orderly, clean, honest and credible election and shall adopt such measures that will guaranty transparency and accuracy in the selection of the relevant technology of the machines to be used on May 10, 2010 automated national and local election. (Emphasis supplied.)

The petitioners stress that Section 2 provides that the amount appropriated shall be used for the implementation of the May 2010 automated elections, subject to the applicable provisions of RA 8436, as amended. They further emphasize that Section 2 states that the disbursement of the amount appropriated or any part thereof shall be done only in strict compliance with the Constitution, and the provisions of RA 9369 and other election laws. Thus, the petitioners conclude that the mandatory requirement of pilot testing was not repealed but reiterated by Congress in said section.

The petitioners further argue that implied repeals are not favored, and two laws must be absolutely incompatible before an inference of implied repeal may be drawn. They contend that RA 9525 is not totally inconsistent with the requirement of pilot testing in Section 5 of RA 8436, as amended, such that the provisions of RA 9525 must be interpreted and brought into accord with the old law.

To resolve this issue of implied repeal, the Court must first determine whether it was the intent of Congress to push through with full nationwide automation of the elections in May 2010. RA 9525 is unclear whether Congress appropriated ₱11,301,790,000.00 for the conduct of full or partial automated elections, or whether it intended the automated elections to be conducted

nationwide or only in the pilot areas. To clear this uncertainty, the Court should resort to the deliberations of the Senate and the House of Representatives, as well as the hearings of the Joint Committee on AES.

Let us first look at the deliberations of the House of Representatives when it considered House Bill 5715 (HB 5715), entitled "An Act Appropriating the Sum of Eleven Billion, Three Hundred One Million, Seven Hundred Ninety Thousand Pesos as Supplemental Appropriations for an Automated Election System and for Other Purposes. From the deliberations, the assumption of the members of the House of Representatives who engaged in the debate was that the appropriation was for a full nationwide implementation of the AES in the May 2010 elections.

Thus, in the sponsorship speech of Representative Junie Cua of the Lone District of Quirino, he stated that the appropriation was for the full nationwide automation of the May 2010 elections, viz.:

REP. CUA. x x x x

For your consideration, my dear esteemed colleagues, I have the privilege of submitting the budget of the Commission on Elections for the automation of the 2010 national and local elections.

Out of the budget proposal of P11.3B, the COMELEC is proposing to spend about P8.2B for the lease of election automation equipment. This will cover the cost of 80,000 Precinct Count Optical Scanners or PCOS that will be deployed throughout the country. These devices will count hand-marked ballots that will be printed on ballot paper costing a total of P1B. We will be spending about P78B on ballot boxes. Once the ballots are so counted, the results will then be electronically transmitted to the public quicker than any quick count in our election history and for this, we need P400M.

And finally P1.7B, more or less, will then be spent to ensure that everything goes smoothly through the strong project management and associated services that the COMELEC will put in place. (Emphasis supplied.)<sup>25</sup>

x x x x

As AKBAYAN Party-list Representative Risa Hontiveros-Baraquel (Representative Hontiveros-Baraquel) was asking clarificatory questions to Representative Junie Cua, she also stated that the appropriation was for the conduct of the automated elections of the entire country and not merely a region therein, viz.:

REP. HONTIVEROS-BARAQUEL. x x x x

In the budget breakdown presented by the COMELEC in our committee hearing, the amount for operating expenses was P50 million, which is only equal to the operating expenses for the

ARMM elections. And, since this would be a national elections, not just in one region of our country, I asked then, "Shouldn't the amount be more in the vicinity of one or one-and-a-half billion pesos?" There is – part of the response was in the remarks column of the COMELEC, where they noted that some of the operating expenses, the transmission costs, would be carried by public TELCOS. (Emphasis supplied.) x x x

x x x x

REP. CUA. Yes, Mr. Speaker, after consulting with the technical people of the commission, I understand that the Lady is correct that what was originally allocated for operating cost or transmission cost was 50 million. But after reevaluating the cost breakdown, they have increased this to 200 million, Mr. Speaker, Your Honor. Yes, 200 million, Mr. Speaker.<sup>26</sup> (Emphasis supplied)

HB 5715 was approved on the third reading, with 193 members of the House of Representatives voting in the affirmative, one voting in the negative, and one abstention.

We have also examined the deliberations of the Senate which constituted itself into a Committee of the Whole to consider HB 5715. The debates confirmed that the senators were also of the understanding that the appropriation of ₱11.3 billion was for the full nationwide automation of the May 2010 elections.

In the same vein, the members of the Joint Committee on AES took it as a given that the May 2010 elections would be implemented throughout the entire country. The September 1, 2008 hearing of the Joint Committee on AES took up the COMELEC evaluation report on the automated elections held in the ARMM. Senator Loren Legarda asked the Chairperson of the COMELEC Advisory Council, Mr. Ray Anthony Roxas-Chua III, regarding the cleansing of the list of voters; in the process of doing so, she assumed that the 2010 elections were to be full automated. Thus:

SEN. LEGARDA. x x x x

So therefore, if I understand correctly, the cleansing of the voters list through the enactment of a new law and the funding from Congress is essential because it is a partner towards the automation, complete automation, by 2010. Is that correct? (Emphasis supplied.)<sup>27</sup>

Representative Edcel Lagman held the same assumption, as he asked the following question:

REP. LAGMAN. Mr. Chairman, how many machines and allied equipment do you need for the nationwide implementation of the automation by 2010? (Emphasis supplied.)<sup>28</sup>

During the September 9, 2008 hearing of the Joint Committee on AES, Senator Edgardo Angara had an exchange with Chairman Melo. It was unmistakable from the exchange that not only did the Congress contemplate a full nationwide automation of the May 2010 elections, but also

that the approval of a budget of ₱11.3 billion was meant for the conduct of a full nationwide automation of the 2010 elections, and not a partial or a pilot of the AES in selected areas.

SEN. ANGARA. Mr. Chairman, yesterday the Finance Committee of the Senate started the budget hearing. So, in the Senate we are already beginning to do that.

Now let me just ask before I say something more. Has the budget of the Comelec been heard in the House?

MR. MELO. Not yet.

SEN. ANGARA. Good! Good, good, because that is your window of opportunity. You've got to catch the House hearing on the budget because it's better that your proposed budget for the elections of 2010 are incorporated in the House itself. Of course, we can supplement it in the Senate but, as you know, the Senate cannot tap the President's Budget. So it's better that we negotiate it in the House.

The presentation yesterday by the Budget Secretary is you will have about 3.8B for 2010. And the 3.8B, billion (sic), also includes registration, etcetera, etcetera so it does not exclusively...And when we asked, "Is this enough for full automation?" Secretary Andaya was frank enough. "No, no. This is the figure that they submitted to us four years ago and we are really expecting a submission of a revised cost of computerization."

This is why I think you must seize the opportunity. And I would suggest very strongly that the advisory committee sit down with potential bidders and really go over every single figure in that costing because it's going to be unfortunate that this will not push through. Automation will not push through simply because it's so expensive that there'll be such a huge public outcry against it. Whereas, you and I know that this may be one good way to have clean elections and speedier results announced in our country. That's why I think it's very important that you bargain hard and I hope that the suppliers will see also the public service element in this experiment; that I hope they won't even cut a profit out of this transaction because if you are successful, I think this will be one of the biggest use of their technology at 45 million or 35 million voters. I don't know if there's any other country who has that number of voters using this particular technology.

So, in terms of selling point, this will be one of their strongest selling points. So I urge the representatives of the vendors to consider that very strongly even if they have to donate a substantial portion of that cost for the sake of democracy, 'di ba?<sup>29</sup> (Emphasis supplied.)

Indeed, several times during the hearings of the Joint Committee on AES, the members pointed out that full nationwide elections would be conducted on May 10, 2010, viz.:

MR. TOLENTINO.<sup>30</sup> Yes, Sir.

The costing here would be the purchased (sic) price. And if we base it on the rate that we sued for the ARMM elections, the lease cost would be 70 percent of the total budget.

THE CHAIRMAN (SEN. GORDON). Well, I got thrown off because there is an allegation made by Mr. Dizon that says that they can make it for 14 to P18 billion, is that correct?

MR. DIZON. Yes, Mr. Chairman.

THE CHAIRMAN (SEN. GORDON). ...DRE machines...

MR. DIZON. Yes, Mr. Chairman.

THE CHAIRMAN (SEN. GORDON). ...for the entire country, right?

MR. DIZON. Yes, Mr. Chairman. That's approximately 37 million voters.<sup>31</sup> (Emphasis supplied.)

In the March 4, 2009 hearing:

THE CHAIRMAN (SEN. ESCUDERO). The only thing I am raising this (sic), Mr. Chairman, is without violating inter-chamber courtesies, we are talking here of 40, nearly 50 million voters and you are transmitting a vote located thousands of kilometers away in an area we are not even sure if there is signal, dahil kung wala ibababa ho physically iyong balota mula duon sa presinto para dalhin o maglalagay kayo ng satellite, hindi ko ho alam kung ano ang gagawin ninyo, wala pa ho tayo doon. x x x So, please, bear with us as your Oversight Committee attempts to sift through all of these various inputs and information and try to find some rhyme or reason into it and justify perhaps our action of the proposed full automation for the 2010 elections. x x x (Emphasis supplied.)

x x x x

THE CHAIRMAN (SEN. ESCUDERO). And as final point, Mr. Chair, I would like to make of record what we discussed. Kindly also look into the possibility, Mr. Chairman, fully automated tayo, OMR kayo, as you proposed, but in addition to electronic transmission, can't we have an OMR at the provincial level to count the ERs to be produced by our OMRs at the precinct or collapsed precinct level either OMR that can count ER or OMR that can count an encrypted CD from the PCOS located in the collapsed precinct so that you will have a hard copy of the ER at the provincial level which you can easily adopt once you go to the site? x x x<sup>32</sup> (Emphasis supplied.)

So it was during the February 2, 2009 hearing of the Senate Committee on Finance for the appropriation of ₱11.3 Billion for the May 10, 2010 AES, viz.:

MR. ROXAS-CHUA. Your Honor, Your Honor, the basis for this is really the ARMM election because we used similar structure. It was also a lease with an option to purchase and this is where we came up with the 70 percent price for the lease with the option to purchase. That is

the structure that we used and there was successful bidder so we used that as a basis, as the cost structure for this next election.

THE CHAIRMAN.<sup>33</sup> Hindi. Siyempre doon sa ARMM, kinocompartmentalized (compartmentalize) ninyo per province. O, Maguindanao, you will use DRE. The rest we will use COS. Oo. So, localized. Ito nationwide ito.<sup>34</sup>

The Comment-in-Intervention of the Senate of the Philippines also affirmed the congressional intention to implement a full nationwide automation of the elections this May 10, 2010. It categorically stated that the approval of the supplemental budget of ₱11.3 billion for the upcoming May 10, 2010 elections was not merely for a pilot test, but for a full nationwide implementation of the AES.

In the case at bar therefore, there is unmistakable evidence of the legislative intent to implement a full nationwide automation of the May 2010 elections. It is impossible to give effect to this intent and at the same time comply with the condition precedent of conducting pilot exercises in selected areas. The irreconcilability between Section 5 of RA 8436, as amended, and Section 2 of RA 9525 is apparent for Congress could not have maintained the requirement of a pilot exercise as a condition precedent to full automation when it had made it absolutely clear that it wanted to push through with a full nationwide AES this May 2010.

Laws of Congress have equal intrinsic dignity and effect; and the implied repeal of a prior by a subsequent law of that body must depend upon its intention and purpose in enacting the subsequent law.<sup>35</sup> What is necessary is a manifest indication of a legislative purpose to repeal. Repeal by implication proceeds from the premise that where a statute of a later date clearly reveals an intention on the part of the legislature to abrogate a prior act on the subject, that intention must be given effect.

### c.3 COMELEC's Award of the Automation Contract to the Smartmatic-TIM Consortium Not Attended by Grave Abuse of Discretion

The petitioners attribute grave abuse of discretion amounting to lack or excess of jurisdiction to the COMELEC for awarding the 2010 Elections Automation Project to Smartmatic TIM Corporation, on four grounds, viz.:

1. Private Respondents Smartmatic and TIM allegedly did not execute and submit a valid joint venture agreement evidencing the existence, composition and scope of their joint venture, in violation of the COMELEC's own bidding requirements and this Court's ruling in *Information Technology of the Philippines, et al. v. COMELEC, et al.*;<sup>36</sup>
2. Even granting that such an agreement was submitted, the joint venture is nevertheless illegal for having been constituted in violation of the nationality requirement, i.e., 60%-40% Filipino-foreign equity ceiling;

3. The AES chosen by the COMELEC does not comply with the "prior successful use" qualification set forth in Section 12 of RA 8436, as amended; and
4. The PCOS machines offered by the Smartmatic-TIM Consortium do not satisfy the minimum system capabilities mandated by Section 7 of RA 8436, as amended.

Preliminarily, it should be underscored that RA 8436, as amended by RA 9369, does not mandate the use of any specific voting equipment. Instead, the law gave COMELEC the sole power to prescribe the adoption of the most suitable technology of demonstrated capability<sup>37</sup> as it may deem appropriate and practical,<sup>38</sup> taking into account the situation prevailing in the area and the funds available for the purpose.<sup>39</sup> Absent any capricious and whimsical exercise of judgment on the part of the COMELEC, its determination of the appropriate election technology, as well as the procedure for its procurement, should be respected. Our judicial function is merely to check and not to supplant the judgment of the COMELEC; to ascertain merely whether it has gone beyond the limits prescribed by law, and not to exercise the power vested in it or to determine the wisdom of its act.<sup>40</sup>

#### c.4 Valid JVA was duly submitted

The petitioners claim that private respondents Smartmatic and TIM submitted a "sham" joint venture agreement during the bidding process. The claim is premised on the following allegations: (i) that although Smartmatic and TIM were awarded the Automation Contract by the COMELEC on June 9, 2009, it was only on July 6, 2009 (or twenty-seven days later) that they were able to "thresh out their serious differences," sign and thereafter submit their incorporation papers to the Securities and Exchange Commission; and (ii) that the provisions of the JVA do not sufficiently establish the due existence, composition and scope of the Smartmatic-TIM joint venture.

As to the first allegation, it should be noted that the TOR/RFP made by the COMELEC does not require that a joint venture bidder be incorporated upon the submission of its bid. Section 2.2.4 of Part IX (B) of the TOR/RFP declares "[m]anufacturers, suppliers and/or distributors forming themselves into a joint venture [...]" as eligible to participate in the bidding for the 2010 Automation Project, without any incorporated vs. unincorporated dichotomy. That the TOR/RFP does not specifically call for incorporation at the time of the bidding is significant, because Philippine law admits of a distinction between simple joint ventures and ordinary corporations.<sup>41</sup> In *Aurbach, et al. v. Sanitary Wares Manufacturing Corporation, et al.*,<sup>42</sup> a joint venture was likened by this Court to a partnership, thus:

The legal concept of a joint venture is of common law origin. It has no precise legal definition, but it has been generally understood to mean an organization formed for some temporary purpose. It is hardly distinguishable from the partnership, since their elements are similar – community of interest in the business, sharing of profits and losses, and a mutual right of control. The main distinction cited by most opinions in common law jurisdiction is that the partnership contemplates a general business with some degree of continuity, while the joint

venture is formed for the execution of a single transaction, and is thus of a temporary nature. This observation is not entirely accurate in this jurisdiction, since under the Civil Code, a partnership may be particular or universal, and a particular partnership may have for its object a specific undertaking. It would seem therefore that under Philippine law, a joint venture is a form of partnership and should thus be governed by the law of partnerships. The Supreme Court has however recognized a distinction between these two business forms, and has held that although a corporation cannot enter into a partnership contract, it may however engage in a joint venture with others. (Citations omitted.)

But any remaining doubt as to the need for incorporation is dispelled by Bid Bulletin No. 19<sup>43</sup> and Bid Bulletin No. 22,<sup>44</sup> issued by the COMELEC-SBAC to provide clarifications to prospective bidders. Both documents acknowledge that a bid by a joint venture may be made either through a joint venture corporation (JVC) or an unincorporated joint venture (UJV). Bid Bulletin No. 19 provides, in relevant part:

[Question/Issue:] If the bidding will be made through an unincorporated joint venture (UJV), and the UJV wins the bid, can the UJV partners subsequently assign the contract, after its award, to a newly-formed joint venture corporation (JVC) registered with the Securities and Exchange Commission? The registered JVC will assume all rights and obligations of the UJV. Does Comelec have any requirements for allowing such assignment to the JVC?

[Answer/Clarification:] Under the General Conditions of Contract, Sec. 26.1, "The supplier shall not assign his rights or obligations under this contract in whole or in part except with the Procuring entity's prior written consent." x x x

x x x x

[Question/Issue:] If the bid will be made through a joint venture (JV) (either a UJV or a JVC), is the JV required also to submit a Tax Identification No. and Value Added Tax (VAT) registration?

[Answer/Clarification:] Please see Bid Bulletin No. 13. (Emphasis supplied.)

Likewise, Bid Bulletin No. 22 states as follows:

[Question/Issue:] How does Joint Venture apply to our group in order to follow the requirement that Filipino ownership thereof shall be at least sixty percent (60%)?

[Answer/Clarification:] The 60% Filipino participation refers to capital ownership or the Filipino contribution in the pool of financial resources required to undertake a government project. In an unincorporated joint venture, determination of the required Filipino participation may be made by examining the terms and conditions of the joint venture agreement and other supporting financial documents submitted by the joint venture. (Emphasis supplied.)

The only restriction imposed on a UJV bidder (vis-à-vis a JVC bidder) by the TOR/RFP and the Bid Bulletins is that the COMELEC should consent before the UJV could assign its rights to the Automation Contract to the newly formed JVC. The records show that Smartmatic and TIM complied with the consent requirement. After emerging as the winning bidder, they incorporated the Smartmatic TIM Corporation, the corporate vehicle through which the joint venture is to be carried out.<sup>45</sup> COMELEC acquiesced to this arrangement, for it subsequently entered into a contract with this JVC for the Automation Project.

The petitioners next assert that the JVA does not sufficiently establish the due existence, composition and scope of the Smartmatic-TIM joint venture, in violation of our ruling in *Information Technology of the Philippines, et al. v. COMELEC, et al.*:<sup>46</sup> 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, it seems to the Court that this situation could readily give rise to all kinds of misunderstandings and disagreements over money matters"; and that "[u]nder such a scenario, it will be extremely difficult for Comelec to enforce the supposed joint and several liabilities of the members of the 'consortium.'" According to the petitioners, Smartmatic and TIM did not submit documents to show "the full identity of the entity it is dealing with," and "who controls the money, how much did each of these entities invest to (sic) the alleged joint venture, and who has control over the decision[-]making process of the alleged joint venture."

A cursory glance at the JVA belies the petitioners' posture. The agreement indicates in a thorough and comprehensive manner the identity, rights, duties, commitments and covenants of the parties, as well as the purpose, capitalization, and other pertinent details in respect of the joint venture, thus:

1. Smartmatic and TIM are the members of the joint venture.<sup>47</sup>
2. The purpose of the JVC is to carry out and perform jointly, severally and solidarily the obligations of TIM and Smartmatic arising from being declared the winning bidder in the public bidding for the Automation Project, which obligations are spelled out in the [TOR/RFP] released by the COMELEC.<sup>48</sup>
3. The authorized capital stock of the JVC is one billion, three hundred million Philippine pesos (₱1,300,000,000.00), divided into one billion, three hundred million common shares at one peso (₱1.00) par value.<sup>49</sup> The capital contribution of TIM is equivalent to sixty percent (60%) of the shares to be issued by the JVC, with Smartmatic contributing the residual forty percent (40%).<sup>50</sup>
4. The contributions<sup>51</sup> of the parties are as follows:
  - a. TIM – (i) the value-added services pertaining or related to canvassing units, systems integration, transmission and such other services as required by the Automation Project and as indicated in the [TOR/RFP]; (ii) services pertaining or

related to logistics, deployment, and manpower; (iii) hardware, software, ballot paper, consumables and such other services as may be requested by Smartmatic; and (iv) local support staff as may be required under the circumstances.

b. Smartmatic – (i) the development, manufacture and/or supply of [electronic voting machines], other machines and equipment, software, technology and systems; (ii) overall project management as required by the Automation Project and as indicated in the [TOR/RFP]<sup>52</sup>; and (iii) any other activity not expressly written in the JVA or assigned to TIM.

c. Both parties – (i) technical services and/or assistance to carry out the purpose of the JVC; (ii) financial assistance to the JVC; and (iii) additional capital contributions, as may be requested by the Board of Directors.

5. TIM shall be entitled to nominate and elect 60%, and Smartmatic shall be entitled to nominate and elect 40%, of the Board of Directors of the JVC.<sup>53</sup>

6. The EXCOM shall consist of at least three (3) Directors, two of whom must be Directors nominated by TIM, with the other nominated by Smartmatic.<sup>54</sup>

7. Profits are to be distributed to TIM and Smartmatic as may be determined by the Board of Directors under Article 4.5 or by the Shareholders under Article 5.3 of the JVA, taking into account the financial requirements of the JVC with respect to working capital.<sup>55</sup>

8. Any dispute or disagreement that may arise between the parties in connection with the JVA shall first be settled through mutual cooperation and consultation in good faith. Any dispute or disagreement that cannot be amicably settled between the parties shall be submitted to arbitration in Singapore, in accordance with the commercial arbitration rules of the Singapore Chamber of Commerce, the accompanying expenses in either case to be equally shared by both parties.<sup>56</sup>

9. TIM and Smartmatic are jointly and severally liable to the COMELEC for the obligations of each of TIM and Smartmatic under the TOR/RFP, should they be awarded the contract for the Automation Project.<sup>57</sup>

Trapped in their own "Catch-22," petitioners' invocation of Information Technology is misplaced. The facts of that case are entirely different. In the main, no JVA or document of similar import was submitted during the bidding process to the COMELEC in Information Technology. The only "evidence" as to the existence of the alleged joint venture was a self-serving letter expressing that Mega Pacific eSolutions, Inc., Election.com, Ltd., WeSolv Open Computing, Inc., SK C&C, and ePLDT and Oracle System (Philippines), Inc. had agreed to form a consortium to bid for the Automation Project. This notwithstanding, the COMELEC awarded the contract to the "consortium." And the Court pointedly ruled:

The March 7, 2003 letter, signed by only one signatory – "Willy U. Yu, President, Mega Pacific eSolutions, Inc., (Lead Company/Proponent) For: Mega Pacific Consortium" – and without any further proof, does not by itself prove the existence of the consortium. It does not show that MPEI or its president have been duly pre-authorized by the other members of the putative consortium to represent them, to bid on their collective behalf and, more important, to commit them jointly and severally to the bid undertakings. The letter is purely self-serving and uncorroborated.

To assure itself properly of the due existence (as well as eligibility and qualification) of the putative consortium, Comelec's BAC should have examined the bidding documents submitted on behalf of MPC. They would have easily discovered the following fatal flaws.

x x x x

In the case of a consortium or joint venture desirous of participating in the bidding, it goes without saying that the Eligibility Envelope would necessarily have to include a copy of the joint venture agreement, the consortium agreement or memorandum of agreement – or a business plan or some other instrument of similar import – establishing the due existence, composition and scope of such aggrupation. Otherwise, how would Comelec know who it was dealing with, and whether these parties are qualified and capable of delivering the products and services being offered for bidding?

In the instant case, no such instrument was submitted to Comelec during the bidding process. This fact can be conclusively ascertained by scrutinizing the two-inch thick "Eligibility Requirements" file submitted by Comelec last October 9, 2003, in partial compliance with this Court's instructions given during the Oral Argument. This file purports to replicate the eligibility documents originally submitted to Comelec by MPEI allegedly on behalf of MPC, in connection with the bidding conducted in March 2003. 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.

However, there is no sign whatsoever of any joint venture agreement, consortium agreement, memorandum of agreement, or business plan executed among the members of the purported consortium.

The only logical conclusion is that no such agreement was ever submitted to the Comelec for its consideration, as part of the bidding process.

It thus follows that, prior the award of the Contract, there was no documentary or other basis for Comelec to conclude that a consortium had actually been formed amongst MPEI, SK C&C and WeSolv, along with Election.com and ePLDT. Neither was there anything to indicate the exact relationships between and among these firms; their diverse roles, undertakings and prestations, if any, relative to the prosecution of the project, the extent of their respective investments (if any) in the supposed consortium or in the project; and the precise nature and

extent of their respective liabilities with respect to the contract being offered for bidding. And apart from the self-serving letter of March 7, 2003, there was not even any indication that MPEI was the lead company duly authorized to act on behalf of the others.

So, it necessarily follows that, during the bidding process, Comelec had no basis at all for determining that the alleged consortium really existed and was eligible and qualified; and that the arrangements among the members were satisfactory and sufficient to ensure delivery on the Contract and to protect the government's interest.

x x x x

At this juncture, one might ask: What, then, if there are four MOAs instead of one or none at all? Isn't it enough that there are these corporations coming together to carry out the automation project? Isn't it true, as respondent aver, that nowhere in the RFP issued by Comelec 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 also by supplementary documents executed by the parties signifying such intention. What then is the big deal?

The problem is not that there are four agreements instead of only one. The problem is that Comelec never bothered to check. It never based its decision on documents or other proof that would concretely establish the existence of the claimed consortium or joint venture or agglomeration. It relied merely on the self-serving representation in an uncorroborated letter signed by only one individual, claiming that his company represented a "consortium" of several different corporations. It concluded forthwith that a consortium indeed existed, composed of such and such members, and thereafter declared that the entity was eligible to bid.

x x x x

In brief, despite the absence of competent proof as to the existence and eligibility of the alleged consortium (MPC), its capacity to deliver on the Contract, and the members' joint and several liability therefor, Comelec nevertheless assumed that such consortium existed and was eligible. It then went ahead and considered the bid of MPC, to which the Contract was eventually awarded, in gross violation of the former's own bidding rules and procedures contained in its RFP. Therein lies Comelec's grave abuse of discretion. (Emphasis and underscoring supplied.)<sup>58</sup>

To make matters worse, the COMELEC in Information Technology awarded the bid to the "consortium" despite some failed marks during the technical evaluation.<sup>59</sup> In the case at bar, the Smartmatic-TIM Consortium passed the technical evaluation.

It is thus readily apparent that the joint venture of Smartmatic and TIM is not attended by any of the deficiencies of the MP "consortium," as the agreement in the instant case states with

precision the "exact nature and scope of the parties' respective undertakings, commitments, deliverables and covenants."<sup>60</sup> The petitioners' repeated recourse to Information Technology betrays a highly myopic and constricted view.

#### c.5 No nationality requirement is violated

Petitioners also contend that the joint venture agreement of TIM and Smartmatic violates the Filipino-foreign equity ceiling, the Anti-Dummy Law and COMELEC's own bidding requirements.

I concur fully with the ponencia of Mr. Justice Velasco on this point. There is no constitutional or statutory provision classifying the lease or provision of goods and technical services for the automation of an election as a nationalized activity. To be sure, Section 12 of RA 8436, as amended by RA 9369, explicitly authorizes the COMELEC to procure supplies, equipment, materials, software, facilities, and other services from foreign sources, as follows:

SEC. 12. Procurement of Equipment and Materials. – To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness. (Emphasis supplied.)

Petitioners cannot rely on Executive Order No. 584 (EO 584), containing the Seventh Regular Foreign Investment Negative List, which cites "contracts for the supply of materials, goods and commodities to [a] government-owned or controlled corporation, company, agency or municipal corporation" as limited to forty percent (40%) foreign equity. The reliance cannot be countenanced in light of two basic principles of statutory construction.

First, *leges posteriores priores contrarias abrogant*. In case of an irreconcilable conflict between two laws of different vintages, the later enactment prevails.<sup>61</sup> The rationale is simple: a later law repeals an earlier one because it is the later legislative will.<sup>62</sup> RA 9369, which allows the COMELEC to procure AES supplies and equipment from foreign sources, became law in 2007, whereas EO 584 is an executive issuance in 2006.

Second, *lex specialis derogat generali*. General legislation must give way to special legislation on the same subject, and generally is so interpreted as to embrace only cases in which the special provisions are not applicable.<sup>63</sup> In other words, where two statutes are of equal theoretical application to a particular case, the one specially designed therefor should prevail.<sup>64</sup> RA 9369 specifically covers a well-defined subject (i.e., procurement for election automation), whereas EO 584 has a more universal scope.

In sum, there is no constitutional or statutory Filipino-foreign equity ceiling to speak of, and the Anti-Dummy Law does not find application to the case at bar.

Nonetheless, I wish to clarify certain matters.

It appears that in preparing the bidder eligibility requirements, the COMELEC, exercising the discretion granted by Section 12 of RA 8436, as amended by RA 9369, adopted the guidelines that were set forth in the Implementing Rules and Regulations of RA 9184 (The Government Procurement Reform Act). Thus, in Sections 2.2.1 to 2.2.4 of Part IX (B) of the TOR/RFP, the COMELEC invited the following to bid for the Automation Project:

- (1) Duly licensed Filipino citizens/proprietorships;
- (2) Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;
- (3) Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;
- (4) Manufacturers, suppliers and/or distributors forming themselves into a joint venture, i.e., a group of two (2) or more manufacturers, suppliers and/or distributors, that intend to be jointly and severally responsible or liable for a particular contract, provided that Filipino ownership thereof shall be at least sixty percent (60%); and
- (5) Cooperatives duly registered with the Cooperatives Development Authority.

But for a few innocuous stylistic changes, this enumeration is an exact reproduction of Section 23.11.1<sup>65</sup> of the Implementing Rules and Regulations of RA 9184.

Per Smartmatic TIM Corporation's Articles of Incorporation, there is no question that the JVC complied with the 60-40 equity ceiling provided under the TOR/RFP. Out of a total paid-up capital of ₱1,130,000,000.00, TIM contributed sixty percent (60%) thereof (equivalent to ₱678,000,000.00), while Smartmatic paid the remaining forty percent (40%) (equivalent to ₱452,000,000.00).

The petitioners, however, allege that the sixty percent (60%) interest of TIM in the JVC was merely simulated. They point to certain provisions in the JVA as denoting that effective control over Smartmatic TIM Corporation was given to Smartmatic. Specifically, petitioners assail the following:

- (1) The mandatory presence of at least one of the nominated Directors of Smartmatic to establish a quorum of the Board of Directors, pursuant to Article 4.3<sup>66</sup> of the JVA;

- (2) The veto power in the Board of Directors granted by TIM to Smartmatic to authorize certain important financial and technical actions, pursuant to Article 4.5<sup>67</sup> of the JVA;
- (3) The mandatory presence of the Director representing Smartmatic to establish a quorum of the Executive Committee (EXECOM), pursuant to Article 4.7<sup>68</sup> of the JVA; and
- (4) The sole right of Smartmatic to nominate the (a) Chairman of the Board, (b) the Treasurer, and (c) the Corporate Secretary, and TIM's corresponding duty to elect said nominees, pursuant to Articles 4.10<sup>69</sup> and 4.11<sup>70</sup> of the JVA.

But far from establishing the tyranny of the minority, these provisions may be viewed as legitimate minority protection devices. Through them, Smartmatic sought to protect its huge investment in the Automation Project. Without these protective provisions, Smartmatic would be helplessly exposed to the risk of being outvoted on significant corporate activities and decisions – including decisions on technical matters falling within its field of expertise, for which it is primarily responsible (as against TIM) under the express terms of the COMELEC's bidding rules<sup>71</sup> and the Automation Contract<sup>72</sup> itself. If that would come to pass, Smartmatic could not perform its part of the Contract and the end result would be the ruin of its investment.

To be sure, our lawmakers wanted the foreign joint venture to be autonomous in carrying out its technical functions, and intended to protect it from the whims and caprices of the non-expert majority. This can be gleaned from the April 20, 2009 hearing of the Joint Committee on AES, during which the following exchanges were made:

MR. MELO. Here is a scenario, Your Honor. Scantron, for instance and a Philippine Company, they have an agreement, an agreement, joint venture agreement.

THE CHAIRMAN (REP. LOCSIN). And the one who carries it out will [be] Scantron even if it's 40 percent?

MR. MELO. Scantron, let us say, wins. After they win, after Scantron wins, now, the two, they form a company.

THE CHAIRMAN (REP. LOCSIN). Yes. But do you – will you check that the ones who will carry out the project will be, in the case of Smartmatic, the guys who actually conduct elections in Venezuela and not some local boys who are just, you know, dreaming that they can do it?

MR. MELO. But the contract will now be awarded in favor of the new company?

THE CHAIRMAN (REP. LOCSIN). Yes. But who will implement it?

MR. MELO. Yes, we will make them jointly and severally liable.

THE CHAIRMAN (REP. LOCSIN). I'm not really worried nor do (sic) am I concerned about punishing them up after the failure of elections. I would just really want to make sure that the guys who will run this will not be the local boys but the foreign boys who have actually done it abroad. I don't want amateurs, you know, trying to prove yes, the Filipino can.

MR. MELO. Yes, Your Honor, precisely. This is speaking my mind aloud (sic). Let us say, a foreign company goes into a partnership who (sic) are co-venture (sic) in system with a Philippine company. The Philippine company is usually taken for its expertise in the dispersal of the machines because [the foreign company] does not need another technical company expert in computers.

THE CHAIRMAN (REP. LOCSIN). It's the deployment of the machines.

MR. MELO. Deployment. x x x (Emphasis supplied)<sup>73</sup>

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THE CHAIRMAN (SEN. ESCUDERO). x x x What legal methodology, memorandum or agreement will you be requiring to make sure that it's the foreigner who knows how to run it, who will actually run the [show] and not be outvoted each time within the company, 60-40? I mean [the Filipino company] can promise that, "Hindi ho, sila ang nakakaintindi, sila bahala, kami roll-out lang." But what assurance do we have and what legal document do you intend to require insofar as this is concerned? (Emphasis supplied)<sup>74</sup>

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THE CHAIRMAN (REP. LOCSIN). x x x As I said, one of the most compelling arguments for the big guys to win, the foreigners, is that they have a reputation to defend. No Filipino has a reputation to defend in IT. In IT, there's none. The problem here is, as Senator Escudero said, a 60 percent joint venture partner. Are there any provisions you have made that would prevent them from interfering in the technical aspects of the electronic elections? What if you have the majority partners dictating how it will be done?

x x x x

THE CHAIRMAN (REP. LOCSIN). You will have to put really strict sanctions on any interference by the majority partner in the judgment of the minority partner in implementing the majority project. I don't know how that's done though. (Emphasis supplied)<sup>75</sup>

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THE CHAIRMAN (REP. LOCSIN). The question we were asking – Our apprehension here, Senator Escudero and myself, is that, will the 60 percent which has no track record and is Filipino and may have political affiliations, would they be in a position to influence the 40 percent minority

that is the expert in electronic elections? Would the 60 percent be able to compromise the integrity of the 40 percent?

MR. RAFANAN.<sup>76</sup> Do you say, sir, bidder with political connections?

THE CHAIRMAN (REP. LOCSIN). That's just an example. What we're saying is that a 40 percent track record – the track record of the 40 percent partner, say, Sequoia or whatever. I mean, no question. They're qualified but they're always in a minority position in the joint venture company. What if the majority Filipino tells them to compromise the integrity? What measures do you take? (Emphasis supplied)<sup>77</sup>

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THE CHAIRMAN (SEN. ESCUDERO). x x x So, ang tanong ko[,] you're awarding [the contract to] a company with a track record although may minority, minority lang siya. How sure are you na hindi siya didiktahan nung 60 percent na walang track record, walang experience, so useless yung requirement natin na may track record ka hindi naman siya ang masusunod, ang masusunod yung may-ari ng 60 percent na Filipino na walang track record at walang kaalam-alam presumably.

x x x x

THE CHAIRMAN (REP. LOCSIN). Senator Enrile, our worry is that the 60 percent may dictate on the expert 40 percent. Would a joint venture contract be able to provide some autonomy to the 40 percent expert so that they cannot be interfered with?

THE SENATE PRESIDENT. x x x [A] joint venture is a matter of contract. You have to – apart from the legal requirement, you have to embed into the joint venture contract the obligation of each of the joint venturer.

THE CHAIRMAN (SEN. ESCUDERO). So, essentially...

THE SENATE PRESIDENT. Including their voice in the joint venture.

THE CHAIRMAN (SEN. ESCUDERO). So, essentially nga ho[,] we are bound and doomed to award this contract to a company majority of which will be owned by individuals or another company that has no track record to speak of? Kasi yung obligasyon na nating i-award iyang 60/40 sa Filipino company, we are obligated by law, that's what you're saying, to award it to a company majority of which will be owned by a company or individuals without any track record whatsoever?

THE CHAIRMAN (REP. LOCSIN). But Senator Enrile, can the Comelec require a particular joint venture contract that would specify the particular obligations of the parties and in some cases that obligation would be – would protect the minority's integrity in conducting the election?

x x x x

THE CHAIRMAN (SEN. ESCUDERO). x x x [F]or you to require or impose a requirement saying that the 40 will control the 60 is a circumvention, if at all, of the 60/40 rule as well.

THE CHAIRMAN (REP. LOCSIN). But would it not be a circumvention, say, for voting purposes for control of the corporation but not for the purely technical aspect of conducting an electronic election to protect the integrity of that undertaking?

THE CHAIRMAN (SEN. ESCUDERO). Without arguing that point, I may tend to agree with that point but the fact is, legally the question is how will you be able to overcome it?

THE CHAIRMAN (REP. LOCSIN). Can you require that in your terms of reference?

MR. MELO. I suppose, Your Honor. You're the expert here, Manong Johnny. But in the joint venture, can it not be provided that the foreign company shall have exclusive say on the technical aspect?

THE SENATE PRESIDENT. Puwede iyon.

MR. MELO. Iyon.

THE SENATE PRESIDENT. You can insist [on] that.

MR. MELO. Yes.

THE SENATE PRESIDENT. The Comelec can impose that.

MR. MELO. Yes, insofar as the technical aspect is concerned, it's only – it's the foreign company, the supplier of the computers, of the machines which will have exclusive say. And so the dispersal or the deployment of the machines will be another matter. (Emphasis supplied.)<sup>78</sup>

The petitioners find particularly repugnant Smartmatic's veto power in the Board of Directors in respect of certain key financial and technical actions. In my view, however, this is but a fair and reasonable check against possible abuses by the majority stockholder. As Smartmatic is the joint venture partner having the greater experience in automated elections, it deemed it necessary to reserve to itself the veto power on these important financial matters so as not to compromise the technical aspects of the Automation Project. As far as matters other than those provided in Article 4.5 are concerned, Smartmatic does not have any veto right. This is clear from Article 4.4, which provides as follows:

4.4 Resolution on matters other than those set forth in Article 4.5 below shall be adopted by the vote of the majority of the Directors present and constituting a quorum, except as otherwise provided by law.

The same conclusion may be obtained from the deliberations of the Senate Committee on Constitutional Amendments, Revision of Codes and Laws. The following exchanges from their June 23, 2009 hearing<sup>79</sup> are illuminating on this point:

THE CHAIRMAN. I went through your JVA and I found some provisions peculiar and interesting. In your JVA[, it] states that no board resolution shall be passed – in the first place, three members of the board will belong to TIM, local, two members of the board will belong to Smartmatic, foreign, so 60-40 naman talaga iyon. My question is, under your JVA[,] it says no resolution shall be passed unless TIM with three votes, presumably majority already, can secure the vote of Smartmatic, vice versa. But vice versa is expected because you only have two votes. If TIM needs to secure one more vote from you before they can do anything, number one, there is a potential for a deadlock. Number two, is that not effective control or veto power over the company that essentially overrides or circumvents the 60-40 requirement?

MR. FLORES. No, sir. That's a standard practice to protect minority investors and it only relates to certain key decisions not to the whole development of the project.

THE CHAIRMAN. Major decisions?

MR. FLORES. Yes, sir.

THE CHAIRMAN. We discussed this before[,] Chairman Melo, remember?

MR. MELO. Yes, Your Honor. Precisely at that time it was the suggestion of the committee, the Oversight Committee that major decisions or decisions concerning technical matters, concerning the machines will have to be made by Smartmatic. They cannot be controlled by the local partner because, otherwise, baka ho hindi naman expert 'yung local partner sa ano – so we follow that.

x x x x

THE CHAIRMAN. But my question is, still there is a 60-40 requirement. What if ayaw pumayag ng Smartmatic? So does the local company have effective control over the joint venture company? x x x

MR. RAFANAN.<sup>80</sup> Sir, concerning decisions that will pertain to technical problems or troubleshooting problems in the election, we are providing in the contract that these matters will be entrusted to the foreign corporation which is Smartmatic International.

THE SENATE PRESIDENT. I assume that this provision in their agreement, between the joint venturers[,] is a function of trust between them. I suppose they have just met in this particular venture and so they do not know each other very well, so the foreign company will naturally protect – want to protect itself that it will not be ousted from the venture in case of – You

know, you are dealing here with a certain magnitude of financial benefits. So I suppose that is intended to protect themselves.

x x x x

THE CHAIRMAN. Sir, I'll give you an example.

THE SENATE PRESIDENT. As collectivity ha.

THE CHAIRMAN. This is what they will on requiring [Smartmatic's] one vote even if TIM, the local company, already has three votes. Approval of operating capital expenditures and budgets for the year; approval of financial statements; election or removal of corporate officers – [We are] not talking technical here yet. x x x Approval of financial plans; borrowing, etcetera. Entering into or terminating an agreement involving technology transfer; delegation of powers to directors, officers and delegation of powers to committees. x x x

x x x x

THE CHAIRMAN. Financial, appointing of officials.

THE SENATE PRESIDENT. Yes, if they can be removed, if they do not have that veto power, the 60 percent can kick them out after they get the contract.

x x x x

THE CHAIRMAN. But wherever it is coming from...

THE SENATE PRESIDENT. As a lawyer, from my experience, we have done that before in many cases in order to protect, to be fair, to be equitable to the people who are coming here for the first time or who are dealing with people that they do not know very well.<sup>81</sup> (Emphasis supplied.)

Petitioners also find objectionable Smartmatic's sole right to nominate the Treasurer, Corporate Secretary and the Chairman of the Board, and TIM's corresponding duty to elect said nominees. However, the objection conveniently disregards the fact that, to maintain the balance of power, TIM in turn has the sole right to nominate the President and Chief Executive Officer and the Assistant Corporate Secretary of the joint venture corporation.<sup>82</sup> Pursuant to Article 4.11 of the JVA, Smartmatic is in fact obliged to cause its Directors to vote for the officers chosen by TIM. Moreover, as an added means to protect their respective interests in the joint venture, Smartmatic and TIM further agreed that for the validity of the resolutions contained therein, all certifications to be issued must bear the signatures of both the Corporate Secretary and the Assistant Corporate Secretary.<sup>83</sup>

In fine, the provisions assailed by Petitioners are reasonable under the circumstances and should be upheld as legitimate minority protection devices.

c.6 "Prior Successful Use" qualification has been complied with

The petitioners postulate that the PCOS machines offered by the Smartmatic TIM Corporation have not been successfully used in an electoral exercise in the Philippines or abroad, as required by Section 12 of RA 8436, as amended.<sup>84</sup> A quick overview of the optical scan technology is in order.

Optical scan or "Marksense" technology has been used for decades for standardized tests such as the Scholastic Aptitude Test (SAT).<sup>85</sup> The optical scan ballot is a paper-based technology that relies on computers in the counting and canvassing process. Voters make their choices by using a pencil or a pen to mark the ballot, typically by filling in an oval or by drawing a straight line to connect two parts of an arrow.<sup>86</sup> The ballots are counted by scanners, which may be located either at the precinct (in "precinct-count" systems) or at some central location ("central-count" systems).<sup>87</sup> If ballots are counted at the polling place, voters put the ballots into the tabulation equipment, which scans and tallies the votes.<sup>88</sup> These tallies can be captured in removable storage media, which are transported to a central tally location or are electronically transmitted from the polling place to the central tally location.<sup>89</sup> If ballots are centrally counted, voters drop ballots into sealed boxes; and, after the polls close, election officials transfer the sealed boxes to the central location where they run the ballots through the tabulation equipment.<sup>90</sup>

The central-count system (via the CCOS machines) was used during the 2008 elections in all the provinces of the ARMM except in Maguindanao. The COMELEC Advisory Council – created by RA 9369 to recommend to the COMELEC the "appropriate, secure, applicable, and cost-effective technology" to be used in the automation of elections – deployed various monitors from the DOST, PPCRV and Consortium on Electoral Reforms to observe the usability of the technologies used in the ARMM elections as well as to observe the electoral process in general.<sup>91</sup> The CCOS machines were assessed before and during the actual elections, and the COMELEC Advisory Council eventually determined that these machines sufficiently complied with the minimum systems configuration specified in Section 6 of RA 9369.<sup>92</sup>

In light of this background, the question is whether the central-count system used in 2008 may be considered as substantial compliance with the "prior successful use" qualification set forth in Section 12 of RA 8436, as amended.

With due respect, I answer in the affirmative. It is obvious that the PCOS and CCOS machines are based on the same optical scan technology. The sole difference is that the PCOS machines dispense with the physical transportation of the ballots to the designated counting centers, since the votes will be counted in the precinct itself and the results electronically transmitted to the municipal, provincial and national Board of Canvassers. Tellingly, but for their sweeping and convenient conclusion that "[e]ven if a PCOS [machine] is an OMR [Optical Mark Reader]

[machine], nevertheless[,] it is totally different from a CCOS [machine]," the petitioners were silent on this point.<sup>93</sup>

In any event, the AES procured by COMELEC for the 2010 elections has been successfully used in prior electoral exercises in (i) New Brunswick, Canada; (ii) Ontario, Canada; and (iii) New York; the United States of America. The petitioners nevertheless question the certifications submitted to this effect, arguing that these were issued not to the Smartmatic-TIM joint venture, but to a third party – Dominion Voting Systems.

I find this argument meritless, for it foists unto the law an imaginary requirement. As the COMELEC correctly observed, what the law requires is that the system must have been successfully utilized in a prior electoral exercise, not that the provider (i.e., Smartmatic TIM Corporation) should have been the one that previously used or employed the system. Considering that the system subject of the certifications is the same one procured by the COMELEC for the 2010 elections, the prior successful use requirement has been adequately met. At any rate, the clear terms of the Licensing Agreement between Smartmatic and Dominion Voting Systems indicate that the former is the entity licensed exclusively by the latter to use the system in the Philippines.

c.7 COMELEC's determination as to minimum systems capabilities of the PCOS machines must be respected

This Court is neither constitutionally permitted nor institutionally outfitted to conduct a cost-benefit analysis of the system or of the nuances of the available technology. It is ill-equipped to deal with the complex and difficult problems of election administration. This inordinately difficult undertaking requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and the executive branches of government.

The petitioners contend that the PCOS machines do not comply with the minimum system capabilities<sup>94</sup> set forth by Section 6 of RA 8436, as amended. Then, in an entirely speculative exercise, they conjure a perturbing series of doomsday scenarios that would allegedly result from using this particular technology: 'unaddressed logistical nightmares,' 'failure of elections,' and 'massive disenfranchisement.'

Let me preface my discussion of this issue by accentuating once more the core of RA 8346, as amended: the COMELEC, an independent Constitutional Commission armed with specialized knowledge born of years of experience in the conduct of elections, has the sole prerogative to choose which AES to utilize.<sup>95</sup> In carrying out this mandate, Section 6 of the same law directs the COMELEC to develop and adopt, with the assistance of the COMELEC Advisory Council, an evaluation system to ascertain that the minimum system capabilities are met.

The COMELEC did in fact adopt a rigid technical evaluation system composed of twenty-six criteria, against which the procured AES was benchmarked by the TWG to determine its

viability and concomitant security.<sup>96</sup> In this regard, the TWG ascertained that the PCOS machines "PASSED all tests as required in the 26-item criteria,"<sup>97</sup> as follows:

ITEM <sup>98</sup>	REQUIREMENT	REMARK / DESCRIPTION
1	Does the system allow manual feeding of a ballot into the PCOS machine?	Yes. The proposed PCOS machine accepted the test ballots which were manually fed one at a time.
2	Does the system scan a ballot sheet at the speed of at least 2.75 inches per second?	Yes. A 30-inch ballot was used in this test. Scanning the 30-inch ballot took 2.7 seconds, which translated to 11.11 inches per second.
3	Is the system able to capture and store in an encrypted format the digital images of the ballot for at least 2,000 ballot sides (1,000 ballots, with back to back printing)?	<p data-bbox="893 678 1476 877">Yes. The system captured the images of 1,000 test ballots in encrypted format. Each of the 1,000 image files contained the images of the front and back sides of the ballot, totaling 2,000 ballot sides.</p> <p data-bbox="893 919 1476 1108">To verify the captured ballot images, decrypted copies of the encrypted files were also provided. The same were found to be digitalized representations of the ballots cast.</p>
4	Is the system a fully integrated single device as described in item no. 4 of Component 1-B?	Yes. The proposed PCOS is a fully integrated single device, with built-in printer and built-in data communication ports (Ethernet and USB).
5	Does the system have a scanning resolution of at least 200 dpi?	<p data-bbox="893 1297 1476 1465">Yes. A portion of a filled[-]up marked oval was blown up using image editor software to reveal the number of dots per inch. The sample image showed 200 dpi.</p> <p data-bbox="893 1497 1476 1570">File properties of the decrypted image file also revealed 200 dpi.</p>
6	Does the system scan in grayscale?	Yes. 30 shades of gray were scanned in the test PCOS machine, 20 of which were recognized, exceeding the required 4-bit/16 levels of gray as specified in Bid Bulletin No. 19.
7	Does the system require authorization and authentication of	Yes. The system required the use of a security key with different sets of

all operators, such as, but not limited to, usernames and passwords, with multiple user access levels? passwords/PINs for Administrator and Operator users.

- 8 Does the system have an electronic display? Yes. The PCOS machine makes use of an LCD display to show information:
- ☐ if a ballot may be inserted into the machine;
  - ☐ if a ballot is being processed;
  - ☐ if a ballot is being rejected;
  - ☐ on other instructions and information to the voter/operator.
- 9 Does the system employ error handling procedures, including, but not limited to, the use of error prompts and other related instructions? Yes. The PCOS showed error messages on its screen whenever a ballot is rejected by the machine and gives instructions to the voter on what to do next, or when there was a ballot jam error.
- 10 Does the system count the voter's vote as marked on the ballot with an accuracy rating of at least 99.995 %? Yes. Two rounds of tests were conducted for this test using only valid marks/shades on the ballots. 20,000 marks were required to complete this test, with only one (1) allowable reading error.
- 625 ballots with 32 marks each were used for this test. During the comparison of the PCOS-generated results with the manually prepared/predetermined results, it was found out that there were seven (7) marks which were inadvertently missed out during ballot preparation by the TWG. Although the PCOS-generated results turned out to be 100% accurate, the 20,000-mark [requirement] was not met thereby requiring the test to be repeated.
- To prepare for other possible missed out marks, 650 ballots (with 20,800 marks) were used for the next round of test, which also yielded 100% accuracy.

- 11 Does the system detect and reject fake or spurious, and previously-scanned ballots? Yes. This test made use of one (1) photocopied ballot and one (1) "re-created" ballot. Both were rejected by the PCOS.
- The test for the rejection of previously-scanned (sic) ballots was done during the end-to-end demonstration.
- 12 Does the system scan both sides of a ballot and in any orientation in one pass? Yes. Four (4) ballots with valid marks were fed into the PCOS machine in the four (4) portrait orientations specified in Bid Bulletin No. 4 (either back or front, upside down or right side up), and all were accurately captured.
- 13 Does the system have necessary safeguards to determine the authenticity of a ballot, such as, but not limited to, the use of bar codes, holograms, color shifting ink, micro printing, to be provided on the ballot, which can be recognized by the system? Yes. The system was able to recognize if the security features on the ballot are "missing".
- Aside from the test on the fake or spurious ballots (Item No. 11), three (3) test ballots with tampered bar codes and timing marks were used and were all rejected by the PCOS machine.
- The photocopied ballot in the test for Item No. 11 was not able to replicate the UV ink pattern on the top portion of the ballot[,] causing the rejection of the ballot.
- 14 Are the names of the candidates pre-printed on the ballot? Yes. Two sample test ballots of different lengths were provided: one (1) was 14 inches long while the other was 30 inches long. Both were 8.5 inches wide.
- The first showed 108 pre-printed candidate names for fourteen (14) contests / positions, including two (2) survey questions on gender and age group, and a plebiscite question.
- The other showed 609 pre-printed candidate names, also for fourteen (14) positions, including three (3) survey

questions.

- 15 Does each side of the ballot sheet accommodate at least 300 names of candidates with a minimum font size of 10, in addition to other mandatory information required by law? Yes. The 30-inch ballot, which was used to test Item No. 2, contained 309 names for the national positions and 300 names for local positions. The total pre-printed names on the ballot totaled 609.
- This type of test ballot was also used for test voting by the public, including members of the media.
- Arial Narrow, font size 10, was used in the printing of the candidate names.
- 16 Does the system recognize full shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. The ballots used for the accuracy test (Item No. 10), which made use of full shade marks, were also used in this test and were accurately recognized by the PCOS machine.
- 17 Does the system recognize partial shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. Four (4) test ballots were used with one (1) mark each per ballot showing the following pencil marks:
- top half shade;
  - bottom half shade;
  - left half shade; and
  - right half shade[.]
- These partial shade marks were all recognized by the PCOS machine.
- 18 Does the system recognize check marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. One (1) test ballot with one check mark, using a pencil, was used for this test. The mark was recognized successfully.
- 19 Does the system recognize x marks on the appropriate space on the ballot opposite the name of the candidate to be voted for? Yes. One (1) yes ballot with one x mark, using a pencil, was used for this test. The mark was recognized successfully.

- 20 Does the system recognize both pencil and ink marks on the ballot? Yes. The 1000 ballots used in the accuracy test (Item No. 10) were marked using the proposed marking pen by the bidder.
- A separate ballot with one (1) pencil mark was also tested. This mark was also recognized by the PCOS machine. Moreover, the tests for Items No. 17, 18 and 19 were made using pencil marks on the ballots.
- 21 In a simulation of a system shut down, does the system have error recovery features? Yes. Five (5) ballots were used in this test. The power cord was pulled from the PCOS while the 3rd ballot was in the middle of the scanning procedure, such that it was left "hanging" in the ballot reader.
- After resumption of the regular power supply, the PCOS machine was able to restart successfully with notification to the operator that there were two (2) ballots already cast in the machine. The "hanging" 3rd ballot was returned to the operator and was able to be re-fed into the PCOS machine. The marks on all five (5) were all accurately recognized.
- 22 Does the system have transmission and consolidation/canvassing capabilities? Yes. The PCOS was able to transmit to the CCS during the end-to-end demonstration using [a] Globe prepaid [i]nternet kit.
- 23 Does the system generate a backup copy of the generated reports, in a removable data storage device? Yes. The PCOS saves a backup copy of the ERs, ballot images, statistical report and audit log into a Compact Flash (CF) card.
- 24 Does the system have alternative power sources, which will enable it to fully operate for at least 12 hours? Yes. A 12-volt 18AH battery lead acid was used in this test.
- The initial test had to be repeated due to a short circuit, after seven (7) hours from start-up without ballot scanning. This was explained by TIM-Smartmatic to be (sic) caused by non-computable wiring of the battery to the PCOS. A smaller wire than what is required was inadvertently used,

likening the situation to incorrect wiring of a car battery. Two (2) COMELEC electricians were called to confirm TIM-Smartmatic's explanation.

The PCOS machine was connected to regular power and started up successfully.

The following day, the "re-test" was completed in 12 hours and 40 minutes, starting from the initialization to the printing of the reports. 984 ballots were fed into the machine. The ER, as generated by the PCOS[,] was compared with the predetermined result, showing 100% accuracy.

- 25 Is the system capable of generating and printing reports? Yes. The PCOS prints reports via its built-in printer[,] which [reports] include:
1. Initialization Report
  2. Election Returns (ER)
  3. PCOS Statistical Report
  4. Audit Log
- 26 Did the bidder successfully demonstrate EMS, voting, counting, consolidation/canvassing and transmission? (see B. Demo model) Yes. An end-to-end demonstration of all proposed systems was presented, covering:
- importing of election data into the EMS;
  - creation of election configuration data for the PCOS and the CCS using EMS;
  - creation of ballot faces using EMS;
  - configuring the PCOS and the CCS using the EMS-generated election configuration file;
  - initialization, operation, generation of

reports and backup using the PCOS;

☐ electronic transmission of results ... :

o from the PCOS to city/municipal CCS and to the central server;

o from the city/municipal CCS to the provincial CCS;

o from the provincial CCS to the national CCS;

☐ receipt and canvass of transmitted results:

o by the city/municipal CCS from the PCOS;

o by the provincial CCS from the city/municipal CCS;

o by the national CCS from the provincial CCS;

☐ receipt of transmitted results by the central server from the PCOS

We cannot close our eyes to the fact that the TWG's technical evaluation of the AES was corroborated by knowledgeable and impartial third parties: the law-mandated Official Observers. In their respective reports to the COMELEC, the PPCRV and the Office of the Ombudsman found the system procured and the attendant COMELEC proceedings to be consistent, transparent, and in consonance with the relevant laws, jurisprudence and the terms of reference.<sup>99</sup>

Accordingly, I do not find any grave abuse of discretion on the part of the COMELEC in awarding the Automation Contract to the Smartmatic TIM Corporation. It has approved the PCOS system, and we are bereft of the right to supplant its judgment. Hoary is the principle that the courts will not interfere in matters that are addressed to the sound discretion of government agencies entrusted with the regulation of activities coming under their special technical knowledge and training.<sup>100</sup> Our disquisition in the seminal case *Sumulong v. COMELEC*<sup>101</sup> again finds cogent application:

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 this court may also. It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the greater objective for which it was created – free, orderly and honest elections. We may not fully agree 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 derive from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions.

x x x x

There are no ready-made formulas for solving public problems. Time and experience are necessary to evolve patterns that will serve the ends of good government. In the matter of the administration of the laws relative to the conduct of elections, ..., we must not by any excessive zeal take away from the Commission on Elections the initiative which by constitutional and legal mandates properly belongs to it. 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. We are not satisfied that the present suit is one of such cases. (Emphasis supplied.)

As the ultimate guardian of the Constitution, we have the distinguished but delicate duty of determining and defining constitutional meaning, divining constitutional intent, and deciding constitutional disputes.<sup>102</sup> Nonetheless, this power does not spell judicial superiority (for the judiciary is co-equal with the other branches) or judicial tyranny (for it is supposed to be the least dangerous branch).<sup>103</sup> Thus, whenever the Court exercises its function of checking the excesses of any branch of government, it is also duty-bound to check itself.<sup>104</sup> The system of divided and interlocking powers of the branches of government are carefully blended so as to produce a complex system of checks and balances that preserve the autonomy of each branch, without which independence can become supremacy.

Petitioners disparage the technical test and end-to-end demonstration conducted by the COMELEC for having been done merely for media mileage. This baseless accusation is easily dismissed by repairing to the presumption of regularity of official acts. As we ruled in *The Province of Agusan del Norte v. Commission on Elections, et al.*:

Appropriately, the Constitution invests the COMELEC with broad power to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite and other electoral exercises. In the discharge of its legal duties, the COMELEC is provided by the law with tools, ample wherewithal, and considerable latitude in adopting means that will ensure the accomplishment of the great objectives for which it was created — to promote free, orderly

and honest elections.<sup>105</sup> Conceived by the charter as the effective instrument to preserve the sanctity of popular suffrage, endowed with independence and all the needed concomitant powers, COMELEC deserves to be accorded by the Court the greatest measure of presumption of regularity in its course of action and choice of means in performing its duties, to the end that it may achieve its designed place in the democratic fabric of our government.<sup>106</sup> (Emphasis supplied.)

The COMELEC is a constitutional body, mandated to play a distinct and important role in the governmental scheme. In the performance of its constitutional duties, it must be given a range of authority and flexibility, for the art of good government requires cooperation and harmony among the branches. We may not agree fully with the choices and decisions that the COMELEC makes, but absent any constitutional assault, statutory breach or grave abuse of discretion, we should never substitute our judgment for its own.

#### c.8 No abdication by the COMELEC of its duty to enforce election laws

The petitioners assert that the COMELEC abdicated its constitutional duty to enforce and administer all laws relative to the conduct of elections, and to decide all questions affecting elections when it entered into the Automation Contract with Smartmatic TIM Corporation.

Article 3.3 of the contract for the 2010 Elections Automation Project provides:

Article 3.3 The PROVIDER shall be liable for all its obligations under this Project, and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

The PROVIDER must provide to SMARTMATIC at all times the support required to perform the above responsibilities. (Emphasis supplied.)

Petitioners claim that under this Article 3.3, the COMELEC has surrendered to Smartmatic the supervision and control of the system to be used for the AES in violation of section 26 of RA 8436.

The petitioners also refer to COMELEC Bid Bulletin No. 10,<sup>107</sup> which was made an integral part of the Automation Contract by virtue of Articles 21.1 and 21.4 of the contract.<sup>108</sup> Bid Bulletin No. 10 provides that the "digital signature shall be assigned by the winning bidder to all members of the Board of Election Inspectors (BOI) and the city, municipal, provincial or district Board of Canvassers (BOC)." Since Smartmatic would have access to the digital signatures and

would have the authority to assign the access keys to the BEI and BOC, the petitioners readily conclude that the COMELEC has abdicated its constitutional mandate to enforce election laws. What the petitioners failed to consider is that, although the digital signature shall be assigned by the winning bidder, Bid Bulletin No. 10 further provides that the certificate of authority for the digital signatures must still be approved by the COMELEC. Thus, the COMELEC retains control over the process of generation and distribution of the digital signatures.

Abdication denotes a relinquishment or surrender of authority, which has not been done by the COMELEC. Part II of the TOR/RFP provides:

The Commission on Elections (COMELEC), through its Bids and Awards Committee (BAC), is currently accepting bids for the lease, with an option to purchase, of an automated election system (AES) that will meet the following needs:

x x x x

6. A complete solutions provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, etc.), under COMELEC supervision and control, to ensure effective and successful implementation of the Project. (Emphasis supplied.)

The COMELEC identified the type of technology, specifications and capabilities of the system to be used in the 2010 elections; and the bidders were required to submit their bids in accordance with the COMELEC's stipulations. All the choices made by the winning bidder were to be subject to approval by the COMELEC, and "the final design and functionality of the system shall still be subject to [its] final customization requirements."<sup>109</sup>

It is clear that the COMELEC has not abdicated its constitutional and legal mandate to control and supervise the elections. Smartmatic and TIM are merely service providers or lessors of goods and services to the Commission. Indeed, Article 6.7 of the Automation Contract, provides that "the entire process of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials."

This control and supervision by the COMELEC was assured in the June 23, 2009 hearing of the Senate Committee on Constitutional Amendments and Revision of Codes and Laws. This is reflected in the following exchange between Senator Francis Escudero and COMELEC Executive Director Jose Tolentino, thus:

"THE CHAIRMAN. Will you deputize the workforce of the winning bidder? Or are you going to deputize by way of additional technological support the students?

MR. TOLENTINO. It would be the students, Mr. Chairman, whom we will deputize.

With respect to the providers (sic) technical support, we consider them as partners. So, there is really no need for us to deputize them because the supervision and control over the counting center would be solely on the part of the Comelec.

THE CHAIRMAN. Pero pwede ho nilang pakialaman 'yung makina, hindi po ba? Puwede nilang kalikutin 'yon, galawin 'yon, kasi nga – kung may palpak, di ba?

So they're employees of Smartmatic without any counterpart authorization or deputization from Comelec. So, anyone can just walk in [and] say, "I am an employee of Smartmatic. Something is wrong with the machine. I'll check it."

MR. TOLENTINO. No. It doesn't work that way, Mr. Chairman.

First of all, aside from our EO who would be going around all over the municipality to check on the polling centers, Comelec aside from our Information Technology Department personnel, would also be going around to determine the status of the machines on election day.

And I am even sure that the watchers of the political parties and the candidates will [not] allow anyone to touch a machine if he is not a member of the Board of Election Inspector (sic).

THE CHAIRMAN. But sir, the workforce of on-site technicians are not allowed to touch the machines? Something is wrong with the machine, who is authorized to...

MR. TOLENTINO. Yes, sir. Only when there is a problem with the machine.

THE CHAIRMAN. Precisely my point, sir. So, then these people be at least known to Comelec.

MR. TOLENTINO. Yes, Mr. Chairman. In fact, they'll be given appropriate identification cards...

THE CHAIRMAN. From Comelec.

MR. TOLENTINO. Yes, Mr. Chairman.

THE CHAIRMAN. That was my question, sir. Because you said a while ago, they're employees only of Smartmatic and you have BEI, anyway.

So, ... under the control and supervision din sila ng Comelec.

MR. TOLENTINO. Yes, Mr. Chairman.

THE CHAIRMAN. Yes." (Emphasis supplied.)<sup>110</sup>

Finally, the power and duty of the COMELEC to administer election laws and to have control and supervision over the automated elections is not incompatible with the decision to

subcontract services that may be better performed by those who are well-equipped to handle complex technological matters with respect to the implementation of the AES. The subcontractor cannot act independently of the COMELEC.

#### D. Conclusion

We are not unaware of the many doomsday scenarios peddled by doubting Thomases if the coming May 2010 elections will be fully automated. To downgrade these scenarios, let it be emphasized that the PCOS System procured by COMELEC is a paper-based system. It has a provision for system auditability and a voter-verified paper trail. The official ballots may be compared with their digital images stored in the memory cards. All actions done on the machine are stored and can be printed out by the BEI chairperson as an audit log, which includes time stamps. And in the event of problems arising from non-functioning PCOS machines, the official ballots cast in the precincts, which have previously been fed into the locked ballot box, could be used for a manual recount. With these safeguards, the fear of automation failure should not overwhelm us.

We have been bedevilled in the past by elections that are not free, fair and honest. These elections have made a mockery of our democracy for they frustrated the sovereign right of the people to choose who ought to rule them. These elections have also resulted in instability of governments whose legitimacy has been placed in doubt. All these elections were conducted manually. For the first time, we shall be conducting our May 2010 elections through full automation. To be sure, full automation will not completely cleanse the dirt in our electoral system. But it is a big forward step which can lead us to the gateway of real democracy where the vote of the people is sacred and supreme.

Accordingly, I vote to DISMISS the petition.

**REYNATO S. PUNO**  
Chief Justice

#### Footnotes

<sup>1</sup> constitution, Art. VIII, Sec. 1.

<sup>2</sup> 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.

<sup>3</sup> G.R. No. 159139, January 13, 2004, 419 SCRA 141.

<sup>4</sup> Republic Act No. 9369 (2007), Sec. 6, amending Republic Act No. 8436 (1997), Sec. 5.

<sup>5</sup> Republic Act No. 9369 (2007), Sec. 12.

<sup>6</sup> An Act Appropriating the Sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (P11,301,790,000.00) As Supplemental Appropriations for an Automated Election System and for Other Purposes.

<sup>7</sup> COMELEC Resolution No. 8608, In The Matter Of The Report/Recommendation Of The Special Bids And Awards Committee Relative To The Award Of The Contract For The May 10, 2010 Automated Elections, 09 June 2009.

<sup>8</sup> The COMELEC Advisory Council is chaired by Ray Anthony Roxas-Chua III (from the Commission on Information and Communications Technology) and its members are Geronimo L. Sy (from the Department of Education), Fortunato De La Pena (from the Department of Science and Technology), Manuel C. Ramos, Jr. (from the University of the Philippines), Renato B. Garcia (from the Philippine Electronics and Telecommunications Federation, Inc.), Lilia C. Guillermo (from the Chief Information Officers Forum, Inc.), Ivan John E. Uy (from the Philippine Computer Society), Henrietta T. De Villa (from the Parish Pastoral Council for Responsible Voting) and Andie C. Lasala (from the Commission on Electoral Reforms).

<sup>9</sup> The Task Force is composed of Orlando C. Casimiro, Evelyn Baliton, Rafael Rodriguez Hipolito, Gina Lyn Lucas, Mary Rawnsle Lopez, Judy Anne Doctor-Escalona, Manolette Eugenio, Mary Antonette Yalao, Marina Demetrio, Hilario Fabila, Jr. and Marian Candelaria.

<sup>10</sup> Republic Act No. 8436 (1997), Sec. 6.

<sup>11</sup> Republic Act No. 8436 (1997), Sec. 5.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> The Joint Congressional Oversight Committee on Automated Election System was created pursuant to Section 27 of RA 8436, as amended. It was formerly chaired by Senator Richard Gordon, and now by Senator Francis Escudero. The former Senate Members are: Senator Juan Ponce Enrile, Senator Edgardo Angara, Senator Lito Lapid, Senator Loren Legarda, Senator Manuel Roxas II, and Senator M.A. Consuelo Madrigal. The present Senate members are: Senator Loren Legarda, Senator M.A. Consuelo Madrigal, Senator Manuel Roxas II, Senator Francis Pangilinan, Senator Alan Cayetano, and Senator Aquilino Pimentel. The House Panel is composed of: Representative Teodoro Locsin, Representative Edcel Lagman, Representative Rufus Rodriguez, Representative Abdullah Dimaporo, Representative Martin Romualdez, Representative Abigail Binay, and Representative Roman Gabriel Tecson Romulo.

<sup>16</sup> TSN, Joint Congressional Oversight Committee on Automated Election System, March 11, 2008, I-2, p. 30.

<sup>17</sup> TSN, Joint Congressional Oversight Committee on Automated Election System, March 11, 2008, pp. 34-35.

<sup>18</sup> Record of the Senate, Vol. 3, Session No. 23, September 13, 2006, pp. 133-134.

<sup>19</sup> Id. at pp. 181-184.

<sup>20</sup> Id. at p. 136.

<sup>21</sup> Id. at pp. 136-137.

<sup>22</sup> Id. at p. 137.

<sup>23</sup> Id.

<sup>24</sup> An Act Appropriating the Sum of Eleven Billion Three Hundred One Million, Seven Hundred Ninety Thousand Pesos, March 5, 2009.

<sup>25</sup> Deliberations of the House of Representatives, February 4, 2009, pp. 21-22.

<sup>26</sup> Id. at pp. 69-71.

<sup>27</sup> TSN, Joint Congressional Oversight Committee on Automated Election System Hearing on September 1, 2008, Part II-2, p. 74.

<sup>28</sup> Id. at Part V-2, p. 104.

<sup>29</sup> TSN, Joint Congressional Oversight Committee on Automated Election System Hearing on September 9, 2008, Part II-1, pp. 21-23.

<sup>30</sup> Mr. Jose Tolentino is the Executive Director of COMELEC.

<sup>31</sup> Id. at part IV-1, p. 31.

<sup>32</sup> TSN, Joint Congressional Oversight Committee on Automated Election System Hearing on March 4, 2009, Part V-2, pp. 117-118.

<sup>33</sup> Senator Edgardo Angara.

<sup>34</sup> TSN, Hearing of the Senate Committee on Finance, February 2, 2009, Part IV-1, p. 4.

<sup>35</sup> Te v. Bell, G.R. No. 8866, November 19, 1914.

<sup>36</sup> Supra note 3.

<sup>37</sup> RA 9369, Section 1 states:

"Section 1. Section 1 of Republic Act No. 8436 is hereby amended to read as follows:

"Section 1. Declaration of Policy –

x x x

The State recognizes the mandate and authority of the Commission to prescribe the adoption and use of the most suitable technology of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose." (Emphasis supplied)

<sup>38</sup> Id., Section 6 provides:

"Sec. 6. Section 6 of Republic Act No. 8436 is hereby amended to read as follows:

"Sec. 5. Authority to Use an Automated Election System. - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: x x x" (Emphasis supplied)

<sup>39</sup> Supra note 37.

<sup>40</sup> Mr. Justice Kapunan's Concurring Opinion, *AKBAYAN – Youth, et al. v. Commission on Elections*, G.R. No. 147066, March 26, 2001, citing *Lansang vs. Garcia*, 42 SCRA 448 (1971).

<sup>41</sup> *JG Summit Holdings, Inc. v. Court of Appeals, et al.*, G.R. No. 124293, September 24, 2003.

<sup>42</sup> G.R. No. 75875, 15 December 1989, 180 SCRA 130.

<sup>43</sup> Issued on April 18, 2009.

<sup>44</sup> Issued on April 20, 2009.

<sup>45</sup> The incorporation of a JVC was done pursuant to Article 2 of the Joint Venture Agreement which provides, in relevant part:

"2.1. In the event that COMELEC declares the bid tendered by TIM and SMARTMATIC to be the winning bid for the Automation Project, the parties hereto shall incorporate, or cause to be incorporated, the JVC which shall be names "TIM SMARTMATIC CORPORATION", or any other name acceptable to the parties which may be allowed by the SEC.

2.2. The JVC shall be the corporate vehicle through which the joint venture of TIM and SMARTMATIC shall be carried out for the purpose set forth in Article 2.3 hereunder. The JVC shall be the entity which shall enter into a contract with the COMELEC for the Automation Project of the 2010 National Elections.

x x x x"

<sup>46</sup> Infra.

<sup>47</sup> Joint Venture Agreement, Chapeau states:

"This Joint Venture Agreement ("the Agreement") is made and entered into this 23rd day of April 2009 at Makati City, Metro Manila by and between:

TOTAL INFORMATION MANAGEMENT CORPORATION, a corporation duly organized under the laws of the Republic of the Philippines, with address at 5600 South Superhighway corner Arellano Street, Makati City, Philippines, represented herein by its President and Chairman of the Board, Mr. Jose Mari M. Antunez ("TIM");

–and –

SMARTMATIC INTERNATIONAL CORPORATION, a corporation organized and existing under the laws of Barbados, with address at N° 4 Stafford House, Garrison Savannah, St. Michael, Barbados W.I. BB 14038, and a fully-owned subsidiary of SMARTMATIC INTERNATIONAL HOLDING, B.V., a corporation duly organized and existing under the laws of [the] Netherlands, represented herein by its authorized representative, Mr. Juan C. Villa, Jr. ("SMARTMATIC")

x x x x" (emphasis in the original)

<sup>48</sup> Id., Article 2.3.

<sup>49</sup> Id., Article 2.4.

<sup>50</sup> Id., Article 2.5.

<sup>51</sup> Id., Article 3.

<sup>52</sup> The TOR/RFP specifies, in relevant part:

### "COMPONENT 3

#### OVERALL PROJECT MANAGEMENT

x x x x

The scope of the work is to assist the COMELEC in ensuring the successful implementation of the Project.

The project management services component of the 2010 National and Local Elections Project shall include:

1. Project management, including team organization and implementation schedule
2. Physical site design, preparation and operationalization
3. Quality control and assurance
4. Change management, including voter education and training
5. Risk management and contingency planning
6. Configuration management

x x x x

<sup>53</sup> Joint Venture Agreement, supra note 47, Article 4.1.

<sup>54</sup> Id., Article 4.7.

<sup>55</sup> Id., Article 7.1.

<sup>56</sup> Id., Article 11.1.

<sup>57</sup> Id., Article 13.1.

<sup>58</sup> Information Technology of the Philippines, et al. v. COMELEC, et al., *infra*.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> David v. Commission on Elections, et al., G.R. No. 127116, April 8, 1997, 271 SCRA 90.

<sup>62</sup> Id.

<sup>63</sup> Leveriza v. Intermediate Appellate Court, 157 SCRA 282 (1988), citing *Sto. Domingo v. de los Angeles*, 96 SCRA 139.

<sup>64</sup> Id, citing *Wil Wilhensen Inc. v. Baluyot*, 83 SCRA 38.

<sup>65</sup> Under Section 23.11.1 of the Implementing Rules and Regulations of RA 9184, the following are qualified to bid in the procurement of goods:

(1) Duly licensed Filipino citizens/proprietorships;

(2) Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;

(3) Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;

(4) Manufacturers, suppliers and/or distributors forming themselves into a joint venture, i.e., a group of two (2) or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract, provided that Filipino ownership or interest of the joint venture concerned thereof shall be at least sixty percent (60%); and

(5) Cooperatives duly registered with the Cooperatives Development Authority (CDA).

It must be noted that this enumeration does not appear in the text of RA 9184 itself. However, I will desist from inquiring into whether the Implementing Rules and Regulations unduly enlarged the scope of the law, for this case is not the proper avenue to rule on this issue. It suffices to say that (i) RA 9184 does not impose a mandatory Filipino-Foreign equity ceiling for the procurement of goods, as to bring into application the Anti-Dummy Law in this case, and (ii) the eventual adoption into the TOR/RFP of the text of the IRR was made by COMELEC in the free exercise of its discretion.

<sup>66</sup> Article 4.3 provides:

"4.3 A quorum for a meeting of the Board of Directors shall require the presence of at least three (3) Directors, Provided, that at least one (1) Director nominated by each of TIM and SMARTMATIC are present."

<sup>67</sup> Article 4.5 provides:

"The following acts of the Board of Directors of the JVC shall require the authorization and approval by the affirmative vote of at least three (3) Directors, one (1) of whom must be a Director nominated by TIM and one (1) of whom must be a Director nominated by Smartmatic:

a) Approval of the operating and capital expenditures budgets for each fiscal year, including the setting of relevant policies and guidelines for implementation of the capex program, as well as any expenditures in excess of the approved capex budget and any deviation from the policies and guidelines pertinent thereto;

b) Approval of the audited financial statements;

c) Election or removal of the corporate officers, and senior officers with a rank of Vice-President or higher, the terms and conditions of their employment, and the adoption of, or change in, their compensation package, including per diems and bonuses;

d) Approval of the financial plan for each fiscal year, embodying the approved borrowing limits of the Corporation, as well as any borrowings in excess of said limits;

e) Entering or terminating any agreement involving technology transfer;

f) Delegation of powers and duties to individual directors or officers, and delegation of powers to committees;

g) Approval of any contract between the JVC and TIM or SMARTMATIC, involving more than Philippine Pesos: Ten Million Pesos (PHP10,000,000.00), with the exception of (i) those contracts contemplated under this Agreement; (ii) those contracts for the purchase, supply, lease or other kind of contract with respect to equipments (sic) or services to be provided by SMARTMATIC reflected in the budget approved by the Board of Directors; and (iii) those contracts for the purchase of raw materials, supplies and spare parts required by the JVC in the ordinary course of business, Provided always, that the terms and conditions of such contracts shall be competitive with those being offered by other suppliers; and

h) Any matter not specified in the agenda set forth in the notices of the Board meetings."

<sup>68</sup> Article 4.7 provides:

"4.7 The Board of Directors may create an EXCOM which shall consist of at least three (3) Directors, two must be Directors nominated by TIM and another must be a Director nominated by SMARTMATIC.

A quorum at any meeting of the EXCOM shall require the presence of a majority of the entire membership of the EXCOM, Provided, that at least one (1) Director representing TIM and one (1) [D]irector representing SMARTMATIC are present.

The EXCOM will have the authority to pass upon and decide any matter, which may be delegated to it by the Board of Directors, except the important matters and actions provided in Article 4.5 above and Article 5.3 of this Agreement.

Every decision of at least a majority of the members of the EXCOM at which there is a quorum present shall be valid as a corporate act."

<sup>69</sup> Article 4.10 provides:

"4.10 At all times while this Agreement is in effect, SMARTMATIC shall have the right to nominate the following officers:

- a. Chairman of the Board;
- b. Treasurer; and
- c. Corporate Secretary."

<sup>70</sup> Article 4.11 provides:

"4.11 The parties shall cause their respective Directors to vote the individuals nominated by TIM and SMARTMATIC in accordance with Articles 4.9 and 4.10 hereof. In case of resignation, retirement, death or disability of any officer, the party that nominated the officer whose resignation, retirement, death or disability occasioned the vacancy shall nominate the individual to fill such vacancy, and the parties agree to cause its nominee Directors to vote to elect to the position vacated the individual nominated by the party which nominated the officer who resigned, retired, died or was disabled from office."

<sup>71</sup> The relevant portion of the Instructions to Bidders of SBAC Bid Bulletin No. 21 provides:

"(e) The JV member with a greater track record in automated elections shall be in-charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and systems integration; x x x"

<sup>72</sup> Section 3.3 of the Automation Contract provides in relevant part:

"x x x x

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and systems integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

x x x x"

<sup>73</sup> TSN, Joint Congressional Oversight Committee on Automated Election System, April 20, 2009, pp. 61-63.

<sup>74</sup> Id., p. 67.

<sup>75</sup> *Id.*, p. 71.

<sup>76</sup> Atty. Ferdinand Rafanan is the Director of the Law Department of the COMELEC. He is also the Chairman of the COMELEC SBAC.

<sup>77</sup> *Supra* note 73, p. 71.

<sup>78</sup> *Id.*, pp. 80-85.

<sup>79</sup> This was supposed to be a hearing of the Joint Committee on AES, but Representative Locsin (Chair of the House Panel) was indisposed and was not able to attend. As such, only the Senate Committee on Constitutional Amendments, Revision of Codes and Laws was convened, with the understanding that the records of the hearing were to be reproduced in the Joint Committee on AES.

<sup>80</sup> Mr. Ferdinand Rafanan is the Head of the COMELEC Legal Department.

<sup>81</sup> TSN, Senate Committee on Constitutional Amendments, Revision of Codes and Laws, June 23, 2009, pp. 40-45.

<sup>82</sup> Article 4.9 provides:

"4.9 At all times while this Agreement is in effect, TIM shall have the right to nominate the following officers:

a. President and Chief Executive Officer; and

b. Assistant Corporate Secretary."

<sup>83</sup> Joint Venture Agreement, Article 4.12.

<sup>84</sup> Section 12 of RA 8436, as amended, sets forth the prior successful use qualification as follows:

"SEC. 12. Procurement of Equipment and Materials. — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness." (Emphasis supplied)

<sup>85</sup> Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *Fordham L. Rev.* 1711 (2005), citing Eric A. Fischer, *Voting Technologies in the United States: Overview and Issues for Congress 2* (2001).

<sup>86</sup> *Id.*, citing also R. Michael Alvarez et al., *Counting Ballots and the 2000 Election: What Went Wrong?*, in *Rethinking the Vote: The Politics and Prospects of American Electoral Reform* 34, 39 (Ann N. Crigler et al. eds., 2004).

<sup>87</sup> *Id.*, citing Caltech/MIT Voting Tech. Project, *Voting: What Is, What Could Be* 18 (2001).

<sup>88</sup> U.S. General Accounting Office, Elections: Elections Voting Offers Opportunities and Presents Challenges (GAO Report No. GAO-04-766T) (2004). Note that the AES procured by COMELEC from Smartmatic TIM Corporation entails the electronic transmission of the tally results from the polling place to the central tally location.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> COMELEC Advisory Council Post-election Report on the Use of Automated Election System (AES) in the 2008 ARMM Elections Submitted to the Joint Congressional Oversight Committee on Automated Election System and the Commission on Elections (October 2008), at 4.

<sup>92</sup> Id. at 16.

<sup>93</sup> As a point of clarification, the CCOS machines used during the 2008 ARMM elections, as well as the PCOS machines offered by the Smartmatic TIM Corporation for the 2010 elections, do not use the Optical Mark Reader (OMR) technology. This is evident from the statements of COMELEC Executive Director Jose M. Tolentino during the February 2, 2009 hearing of the Senate Committee on Finance, as follows:

"MR. TOLENTINO. So there are three technologies recommended by the Advisory Council [for the 2010 elections]. We have the Direct Recording Electronic or the DRE wherein all that the voter has to do is to press a touchpad or a touchscreen. In the ARMM, with – the voters pressed the photograph of the candidate of his choice.

The two other technologies would be the Precinct Count Optical Scan and Central Count Optical Scan. You'll note that the last two are both optical scans, meaning they scan the ballot and they actually take photographs of the ballot. The only difference being the precinct count would be at the precinct level while the central count would be installed or machines installed at the voting center.

x x x x

MR. TOLENTINO. x x x x

And we also included a small slide on the difference between the optical scan and the OMR. Everybody thinks that OMR and optical scan are one and the same and they are the same only with respect to the use of a paper ballot. However, the optical scan scans the entire ballot while OMR reads marks only. [An] important feature there would be, in an optical scan, the system can take the photograph of the ballot which is actually a second paper trail of the ballot.

THE CHAIRMAN [SEN. ANGARA]. Which one did you test during the...

MR. TOLENTINO. We called it OMR, but actually in the ARMM, it was already an optical scan.

THE CHAIRMAN. OMR?

MR. TOLENTINO. Yeah, we called it the OMR but actually the system is already an optical scan." (Emphasis supplied.)

<sup>94</sup> The law specifically requires that the AES to be procured by COMELEC must at least have the following functional capabilities:

- (a) Adequate security against unauthorized access;
- (b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;
- (c) Error recovery in case of non-catastrophic failure of device;
- (d) System integrity which ensures physical stability and functioning of the vote recording and counting process;
- (e) Provision for voter verified paper audit trail;
- (f) System auditability which provides supporting documentation for verifying the correctness of reported election results;
- (g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election results in the shortest time possible;
- (h) Accessibility to illiterates and disabled voters;
- (i) Vote tabulating program for election, referendum or plebiscite;
- (j) Accurate ballot counters;
- (k) Data retention provision;
- (l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;
- (m) Utilize or generate official ballots as herein defined;
- (n) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and
- (o) Configure access control for sensitive system data and functions.

<sup>95</sup> See Sections 1 and 5 of RA 8436, as amended.

<sup>96</sup> The TWG was composed of twenty-two (22) representatives from the COMELEC – Information Technology Department, COMELEC – Internal Audit Office, the offices of each of the COMELEC Commissioners, the National Computer Center and the Department of Science and Technology.

<sup>97</sup> Systems Evaluation Consolidated Report and Status Report on the Post-Qualification Evaluation Procedures, June 1, 2009, p. 1.

<sup>98</sup> Id., pp. 2-6.

<sup>99</sup> Official Observer's Report on the AES Bidding Process by Dr. Arwin A. Serrano of the PPCRV (Annex 10 of Public Respondents' Memorandum); Observation Report of the Ombudsman Task Force: "Poll Automation" (Annex 11 of Public Respondents' Memorandum).

<sup>100</sup> See *Espinosa v. Makalintal*, 79 Phil. 134 (1947); *Coloso v. Board of Accountancy*, 92 Phil 938 (1953); *Pajo v. Ago*, 108 Phil. 905 (1960); *Suarez v. Reyes*, G.R. No. L-19828, February 28, 1963, 7 SCRA 461; *Ganitano v. Secretary of Agriculture and Natural Resources*, G.R. No. L-21167, March 31, 1966, 16 SCRA 543; *Villegas v. Auditor General*, G.R. No. L-21352, November 29, 1966, 18 SCRA 877; *Manuel v. Villena*, G.R. No. L-28218, February 27, 1971, 37 SCRA 745; *Lacuesta v. Herrera*, G.R. No. L-33646, January 28, 1975, 62 SCRA 115; *Liang Bay Logging Co., Inc. v. Enage*, G.R. No. L-30637, July 16, 1987, 152 SCRA 80; *Felipe Ysmael, Jr. & Co., Inc. v. The Deputy Executive Secretary, et al.*, G.R. No. 79538. October 18, 1990; *Concerned Officials of the Metropolitan Waterworks and Sewerage System (MWSS) v. Vasquez, et al.*, G.R. No. 109113, January 25, 1995; *First Lepanto Ceramics, Inc. v. Court of Appeals, et al.*, G.R. No. 117680, February 9, 1996.

<sup>101</sup> G.R. No. 48609, October 10, 1941, 73 Phil. 288.

<sup>102</sup> *Duenas v. House of Representatives Electoral Tribunal, et al.*, G.R. No. 185401, July 21, 2009.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Citing *Cauton v. COMELEC*, G.R. No. L-25467, April 27, 1967, 19 SCRA 911; *Pangandaman v. COMELEC*, G.R. No. 134340, November 25, 1999, 319 SCRA 283.

<sup>106</sup> Citing *Aratuc v. COMELEC*, G.R. Nos. L-49705-09, February 8, 1979, 88 SCRA 251.

<sup>107</sup> Issued by the COMELEC-SBAC on April 15, 2009.

<sup>108</sup> Article 21- Contract Documents

21.1 "Contract Documents" refers to the following documents, and they [sic] are hereby incorporated and made integral parts of this Contract:

x x x x

21.4 This Contract, together with the Contract Documents, constitutes the entire agreement between the parties. x x x

<sup>109</sup> Request for Proposal, Part IV, item 33.

<sup>110</sup> TSN, Senate Committee on Constitutional Amendments and Revision of Codes and Laws, June 23, 2009, pp.95-97.

## DISSENTING OPINION

**CARPIO, J.:**

I vote to grant the petition in part. The stipulations in the Contract<sup>1</sup> between the Commission on Elections (COMELEC), on the one hand, and Total Information Management, Inc., (TIM) and Smartmatic International, Inc., (Smartmatic), on the other, implementing a **nationwide automated election** in the 10 May 2010 elections, are **void for being violative of Section 5 and Section 26 of Republic Act No. 8436 (RA 8436), as amended by Republic Act No. 9369 (RA 9369)**.

Section 5 of RA 8436, as amended, mandates a pilot or partial automation before a nationwide automated election system can be implemented. Section 26 of the same law vests on the COMELEC "exclusive control and supervision" over the automated election system. The Contract violates these provisions of RA 8436, as amended.

### Background

On 23 January 2007, Congress passed RA 9369 amending the first automated election law, RA 8436.<sup>2</sup> Section 5 of RA 8436, as amended by RA 9369, which amendment took effect on 10 February 2007, authorized the COMELEC to:

[U]se an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording automated election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: Provided, that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission x x x In succeeding regular national or local elections, the AES shall be implemented nationwide. (Emphasis supplied)

The COMELEC did not use any automated election system in the 14 May 2007 elections, the national and local elections held after RA 9369 took effect.

On 10 July 2009, the COMELEC, on the one hand, and TIM and Smartmatic (Provider), on the other, signed the Contract for the automated tallying and recording of votes cast nationwide in the 10 May 2010 elections. For ₱7,191,484,739.48, the COMELEC leased for use in the 10 May 2010 elections 82,200 optical scanners (and related equipment) and hired ancillary services of the Provider.<sup>3</sup>

On 9 July 2009, petitioners, as taxpayers and citizens, filed this petition<sup>4</sup> to enjoin the signing of the Contract or its implementation and to compel disclosure of the terms of the Contract and other agreements between the Provider and its subcontractors.<sup>5</sup> Petitioners sought the Contract's invalidation for non-compliance with the requirement in Section 5 of RA 8436, as

amended, mandating the partial use of an automated election system before deploying it nationwide. To further support their claim on the Contract's invalidity, petitioners alleged that (1) the optical scanners leased by the COMELEC "do not satisfy the minimum systems capabilities" under RA 8436, as amended and (2) the Provider not only failed to submit relevant documents during the bidding but also failed to show "community of interest" among its constituent corporations as required in *Information Technology Foundation of the Philippines v. COMELEC (Infotech)*.<sup>6</sup>

In their Comments, respondents COMELEC and the Provider raised the following threshold contentions: (1) petitioners neither have legal interest nor locus standi to question the validity of the Contract as none of them was party to the Contract and the petition does not raise constitutional issues; (2) the controversy is not ripe for adjudication as the 2010 elections have not taken place; (3) petitioners failed to exhaust administrative remedies;<sup>7</sup> (4) petitioners failed to observe the hierarchy of courts by not seeking prior recourse from lower courts of concurrent jurisdiction; and (5) neither the writ of mandamus nor the writ of certiorari lies because the documents petitioners wish to compel production are available to the public and the COMELEC's execution of the Contract does not involve the exercise of its quasi-judicial powers.

On the merits, respondents defend the validity of the Contract on the following grounds: (1) the requirement for the limited use of an automated election system was intended for the 14 May 2007 elections, the national and local elections "held immediately after effectivity" of RA 9369 on 10 February 2007; (2) compliance with the requirement of limited automation in the 2007 elections is not a condition precedent for deploying the automated system nationwide in the 2010 elections following the mandate of Section 5, as amended, that "In succeeding regular national or local elections, the AES shall be implemented nationwide;" (3) compliance with Section 5, as amended, is merely directory considering Section 12 of RA 8436, as amended by RA 9369, which provides that "With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.;" and (4) Republic Act No. 9525 (RA 9525), enacted on 23 March 2009, allocating the budget for "an automated election system" in the 10 May 2010 elections represents the most recent expression of legislative intent on the subject.

Belying petitioners' allegation that the optical scanners failed to meet minimum systems capabilities under RA 9369, respondents invoked the results of the pre-procurement demonstration of the system before the COMELEC and other government officials on four occasions with the tested scanners showing 100% reading accuracy, surpassing COMELEC's 99.995% standard.<sup>8</sup>

Lastly, respondents contended that the Provider not only complied with the bidding documentation requirements but also met the "community of interest" standard in Infotech for

joint ventures. On disclosing the terms of its subcontracts, the Provider maintained that the Contract does not require them to do so.

We granted intervention to the Philippine Senate, which filed a Comment-in-Intervention, joining causes with respondents, and to Atty. Pete Quadra, who filed a Petition-in-Intervention, assailing the lack of credible systems audit under the Contract. We also requested three amici curiae to comment on the petition.<sup>9</sup>

We heard the parties and an amicus curiae<sup>10</sup> in oral arguments on 29 July 2009.

In their Memoranda, respondents called the Court's attention to Senate Resolution Nos. 96 and 567, passed after the 11 August 2008 automated elections in the Autonomous Region in Muslim Mindanao (ARMM), urging the COMELEC to prepare for the "full automation" of the 10 May 2010 elections. Respondents TIM and Smartmatic also raised a new alternative argument that the 2008 ARMM elections constitute "substantial compliance" with the initial limited use of an automated system under Section 5 of RA 8436, as amended.<sup>11</sup>

#### On the Threshold Issues

The threshold issues respondents raise on petitioners' lack of locus standi and non-exhaustion of administrative remedies were similarly raised and found surmountable in Infotech. There, as here, the individual petitioners were citizens and taxpayers who sought immediate recourse from this Court in a petition for certiorari to annul the award of the contract to use an automated election system in the 2004 elections. The Court in Infotech found the petitioners' status as taxpayers sufficient to give them personality to file the suit since the contract involved the disbursement of public funds.<sup>12</sup> The underlying important public interest involved in the contract in Infotech, as here, of ensuring the "conduct of free, orderly, clean, honest and credible elections"<sup>13</sup> also suffices to vest legal standing to petitioners as citizens.

Direct resort to this Court was not deemed fatal to the cause of the petitioners in Infotech for facts peculiar to that case<sup>14</sup> and because the nature of the petition allows for the application of some exceptions to the rule on prior resort to administrative remedies, namely, the unreasonability of insisting on compliance with the rule, resort to this Court is the plain, speedy and adequate remedy, and there is urgent need for judicial intervention.<sup>15</sup> These exceptions equally apply here and doubly serve as grounds to reject the COMELEC's objection on prematurity of this suit. Indeed, waiting until after the Contract has been implemented, as what the COMELEC wants petitioners to do, is a sure way to moot any challenges to its validity.

Nor can the rule of mandating observance of hierarchy of courts bar resolution of this suit on the merits. Just as we found it proper to review the contract in Infotech, we should do so now for the same reasons that we waived compliance with the rule on exhausting remedies before the COMELEC.

#### On the Validity of the Contract

The Use of an Automated Election System Nationwide

**Under the Contract Violates Section 5 of RA 8436,  
as Amended**

Section 5 of RA 8436, as

**Amended, Imposes a Mandatory  
Two-tiered Use of an Automated  
Election System**

Contrary to the COMELEC's view that Section 5,<sup>16</sup> as amended, "merely envisions" an initial limited use of an automated system in the 2007 elections,<sup>17</sup> both the text of the law and the intent behind its enactment show a legislative design to use an automated system following a staggered, dual-phased implementation scheme: the first phase calls for the use of an automated system on a partial or limited scale involving selected, voter-dense areas in each of our three major island groupings while the second phase calls for the full use of an automated system nationwide. Textually, this is made mandatory by the uniform use of the word "shall" when Section 5 mandated that "the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission" (phase one) and "In succeeding regular national or local elections, the AES shall be implemented nationwide" (phase 2). The word "shall" operates to impose a duty.<sup>18</sup>

The sponsorship speech interpellation and floor deliberations on Senate Bill 2231, the precursor Section 6 of RA 9369 (amending and re-numbering Section 6 of RA 8436), confirm the legislative intent to adopt a dual-phased scheme of implementation, thus:

[Interpellation by Senator Aquilino Pimentel, Jr. on the Sponsorship Speech of Senator Richard Gordon]:

Senator Gordon . . . [], it is important that we show that in our proposal here today, which I am sure practically every member of the Senate will help me craft better legislation, in the interpellations and on the amendments, it is my hope that we could proceed with this. We impose an absolute minimum of 2 cities and 2 provinces, so that if we can do so with 10 cities of 10 provinces, so be it, Mr. President.

Senator Pimentel. The gentleman is trying to pilot the. . . .

Senator Gordon. Yes, Mr. President, That is right. We want to pilot this so that by 2010, we should be ready to go all out. That is why it is important that we take the first steps. We can even pilot this in all the highly urbanized cities or one remote province, like somewhere in Mindanao, even in Tawi-Tawior, for that matter, just to prove the point that it can happen.

It is up to us here in the Senate now to say, if we want to inculcate or to put in there the number of cities or the number of provinces that are committed, this shall be part of it. That is why we leave that open-ended, Mr. President.

x x x x

Senator Pimentel. Mr. President, the comments of the gentleman really demonstrate that there are practical suggestions that he is espousing, especially on the matter of starting to cover not the entire country immediately in one fell blow but gradually. There is merit to that proposal.<sup>19</sup> (Emphasis supplied)

x x x x

[Interpellation by Senator Luisa P. Estrada of Senator Gordon during Second Reading]:

Senator Estrada (L). Will the gentleman agree with me that the best way to remove doubt as to the integrity of the system is to conduct the mock elections at least three days prior to the actual elections?

Senator Gordon. Actually, Mr. President, we could do that, yes, but we provided three months for the conduct of the mock elections so that we have enough time to correct the kinks, if there are any. And we would need that time, after which the whole thing is secured and the only time the system gets started is in the morning of the elections, just like the previous elections when the ballot box is opened and the machine codes are simultaneously triggered.

Senator Estrada (L). Mr. President, I think, that is a long time. Three months is a long time to conduct mock elections before the actual elections.

Senator Gordon. That is why, Mr. President, in the initial phase of this exercise, for the year 2007, the absolute minimum is two cities and two provinces so we can really control the scenario.

Now, when we see that this had worked in a controlled scenario, perhaps, I hope that we can do all the major cities of the country, all the highly urbanized cities in the country, because I guess that this is just an absolute minimum. But, certainly, when the main elections come in 2010, I am sure technology will be advancing so well that we could actually take the kinks out of the system, protect it and make sure that we can even do a mock election maybe even closer than the aforesaid three months.<sup>20</sup> (Emphasis supplied)

The framework of using an automated election system in a staggered, dual-phased manner in RA 9369 is not novel. The same legislative scheme was adopted by Congress in RA 8436, although the controlled variable in the first phase of RA 8436 was not the scope of the electoral area but the positions included in the automated tallying. Thus, instead of limiting the use of an automation system in highly urbanized areas and provinces in the first phase, RA 8436

mandated the use of an automated system in the 11 May 1998 elections to canvass the votes cast "only for the positions of president, vice-president, senators, and parties, organizations or coalitions participating under the party-list system."<sup>21</sup>

One need not search far and wide to see the wisdom, logic and practicality for this legislative insistence on transforming our electoral processes from manual to automated gradually in phases. As Senator Gordon puts it, the ultimate goal is to "take the kinks out of the system" before deploying it full scale. Indeed, in systems implementation, a pilot run or a parallel run before full turn-over to the new system is a norm.<sup>22</sup> Thus, even as Congress gave the COMELEC discretion in choosing the appropriate technology, Congress insisted on a phased implementation involving local government units from each of our three major island groupings cognizant as it was of the difficulties inherent in automating elections in an archipelago as dispersed as ours, with an average nationwide telecommunications coverage of not more than 75%.

Nor can it be said that compliance with the requirement in RA 9369 for pre-election field test and mock election,<sup>23</sup> stipulated in the Contract,<sup>24</sup> serves the same purpose as the initial staggered or partial implementation of the automated system. Congress treated both mechanisms differently by separately providing for partial implementation in Section 5, as amended, and for a field test and mock election report by the Technical Evaluation Committee in Section 11.<sup>25</sup> Indeed, field tests and mock elections can never replicate actual conditions on election day.<sup>26</sup>

For the same reason, respondents' reliance on the results of the pre-procurement demonstration of the system hardly suffices to prove its reliability, much less functionality, in actual election conditions. The following observations on the laboratory tests by amicus Information Technology Foundation of the Philippines (ITFP), are enlightening:

The demonstration of PCOS only showed that the machine can scan accurately. Just like any computerized system, designing an Automated Election System (AES) should not only consider hardware that works. It should also ensure that all the other elements of an automated system such as the communication and transmission devices and networks, the servers, the end-to-end software system, the "peopleware" (project managers, system designers, development, maintenance personnel, operators, trainers, etc.), and the users (voters) mesh together smoothly. The scanning capability of the hardware has been demonstrated. The other equally important elements have not. It is these other elements that should now be considered and focused on and be the concentration of the pilot run. The framers of the law (RA 9369), who were assisted by a Technical Working Group (TWG), appreciate[d] the complexities of an automated election system and for that reason included the requirement of a pilot run.<sup>27</sup> (Emphasis supplied)

The COMELEC, dangerously parroting the line of the party which stands to profit from the Contract, justifies non-compliance with the partial automation mandated in Section 5, as amended, by treating such partial automation as limited to the 2007 elections. Continuing with

their line of reasoning and thus, ignoring the compelling reason behind such partial automation, respondents conclude that if Section 5, as amended, is interpreted as requiring an initial partial use of the automated system before its full deployment nationwide, then "Philippine elections will never be automated."<sup>28</sup>

It may be that, Section 5, as amended, needs statutory interpretation whether a partial automation is a condition precedent to a full national automation. Section 5, as amended, provides that: (1) "for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao" and the elections of 14 May 2007 was the first regular national and local election after RA 9369 took effect on 10 February 2007, and (2) "In succeeding regular national or local elections, the AES shall be implemented nationwide" and the 10 May 2010 elections is the "regular national or local elections" succeeding the elections of 14 May 2007.

The office of statutory interpretation has never been to privilege the letter of the law over its spirit. On the contrary, it has been and always will be the other way around – to breathe life to the legislative intent even to the extent of ignoring the text.<sup>29</sup> This is because use of language, while a mark of civilization,<sup>30</sup> remains susceptible to error as the Court knows all too well after having reviewed in the past imprecisely drafted legislation.<sup>31</sup>

To give effect to the legislative intent behind Section 5, as amended, the automated election system under the Contract should be limited to partial automation only, covering at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the COMELEC. Afterwards, with the COMELEC having tested its capabilities and manpower and after learning all the valuable lessons from the initial exercise, the automated system the COMELEC selects for the succeeding elections of 12 May 2013 can be fully deployed nationwide.

Procurement as System Capability, Standards	Under Amended, and Under Section 6, as Amended	Standards Meant Proof Supplementing	Under to of	Assure System	Section Efficiency System	12, of Provider's Minimum
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Section 12<sup>32</sup> of RA 8436, as amended by RA 9369, which involves the procurement of equipment and materials for automation, provides another layer of standard of system and system's provider capability for the 10 May 2010 elections, namely: (1) prior use, here or abroad, of the system and (2) proof by the system provider of its system's fitness, regardless of its "[p]articipation in the 2007 pilot exercise."<sup>33</sup> These are mandatory requirements which any provider bidding to automate the 10 May 2010 elections must show the COMELEC before the COMELEC can procure the offered goods and services.

The phrase "[p]articipation in the 2007 pilot exercise" appears in Section 12 of RA 8436, as amended by RA 9369, under the sub-heading "Procurement of Equipment and Materials." The phrase refers to the participation of a bidder in the 2007 elections, which participation is not conclusive that the bidder's system of equipment and materials is fit and suitable for the 2010 nationwide electoral exercise. This phrase does not mean that the pilot or partial automation in Section 5, as amended, can be dispensed with prior to a nationwide automated electoral exercise. The requirement of a pilot or partial automation in Section 5, as amended, is a totally different requirement from the requirement of fitness of a bidder's system in the procurement of equipment and materials under Section 12, as amended.

Consequently, Section 12, as amended, is no authority to support respondents' proposition that the phased automation mandated under Section 5, as amended, may be dispensed with. Indeed, Section 12 has nothing to do with the issue. Section 5 and Section 12, as amended, are separate mechanisms of the law, governing different aspects of the automation project, but commonly intended to ensure the conduct of secure, accurate, and reliable automated elections.

RA 9525 Funding the May 10 2010 Elections did not Repeal Section 5 of RA 8436, as amended

Neither the text nor purpose of RA 9525 supports respondents' submission that RA 9525 has repealed Section 5 of RA 8436, as amended. On the contrary, the proviso in Section 2 of RA 9525 states that "the disbursement of the amounts herein appropriated or any part thereof shall be authorized only in strict compliance with the Constitution [and] the provisions of Republic Act No. 9369 x x x." Thus, the COMELEC is authorized to spend the appropriated amount only in strict compliance with RA 9369, which mandates a partial automation. The statement in Section 2 that "such measures that will guaranty transparency and accuracy in the selection of the relevant technology of the machines to be used in the May 10, 2010 automated national and local election" shall be adopted should be read with the rest of Section 2. At any rate, RA 9525 funds the implementation of RA 8436, as amended by RA 9369. An implementing statute cannot repeal what it intends to enforce.

The ARMM Elections in 2008 did not Meet the Parameters of a Limited Initial Use of the AES in RA 8436, as Amended

The parameters for the initial limited use of an automated election system under Section 5 of RA 8436, as amended, are (1) the AES is used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, (2) as selected by the COMELEC. The automated elections<sup>34</sup> in the ARMM held last 11 August 2008 did not satisfy these parameters because (1) they were held in southern Mindanao only, involving six provinces and two cities,<sup>35</sup> (2) as mandated by law.<sup>36</sup>

In practical terms, this means that the COMELEC, in the 2008 ARMM elections, did not use the tri-level transmission of election results from voter-dense areas from north to south of the

archipelago, the transmission scheme to be used in the 10 May 2010 elections. This fact and the comparatively narrow scope of the 2008 ARMM elections in terms of voter population (1.6M in the 2008 ARMM elections as against 40M in the 10 May 2009 elections), number of machines provided by Smartmatic (2,558 DRE machines in the 2008 ARMM elections as against 82,200 precinct-based scanners in the 10 May 2009 elections), and positions involved (26 in the 2008 ARMM elections as against roughly 300 in the 10 May 2010 elections),<sup>37</sup> put into serious doubt the validity of the Provider's claim that the 2008 ARMM elections constitute "substantial compliance" with the mandate for an initial limited use of the automated system under Section 5 of RA 8436, as amended. On the other hand, the initial implementation under Section 5, as amended, because of its dispersed geographic scope, puts to use all the system's components.

The Position of the Senate, While

**Entitled to Respectful Consideration, is not Controlling**

The Senate's position that the COMELEC is authorized to use an automated election system nationwide in the 10 May 2010 elections, as reflected in its Resolution Nos. 96 and 567, represents its contemporaneous interpretation of Section 5 of RA 8436, as amended. As the upper half of our legislature, the Senate is certainly entitled to construe legislation. By tradition and for comity, this branch of the government has always accorded interpretive attempts by the other branches with respectful consideration.<sup>38</sup> But it is timely to reiterate that in the distribution of powers ordained in the Constitution, the final word on what the law is lies with this branch.<sup>39</sup>

The Stipulations in the Contract Relinquishing

**to Smartmatic Control of the "Technical Aspects" of the Automated Election System Violates Section 26 of RA 8436**

Implementing the mandate in the Constitution for the COMELEC to "[e]nforce and administer all laws and regulations relative to the conduct of an election,"<sup>40</sup> Section 26 of RA 8426 places the automated election system under the COMELEC's "**exclusive control and supervision,**" thus:

Supervision and control. - The System shall be under the exclusive supervision and control of the Commission. For this purpose, there is hereby created an information technology department in the Commission to carry out the full administration and implementation of the System.

The Commission shall take immediate steps as may be necessary for the , installation, administration, storage, and maintenance of equipment and devices, and to promulgate the necessary rules and regulations for the effective implementation of this Act. (Italicization in the original; boldfacing supplied)

This power of "exclusive control and supervision" covers the adoption of measures for the "installation, administration, [and] storage" of the system's "equipment and devices."

Juxtaposed with these constitutional and statutory parameters is the sweeping stipulation in the Contract that "Smartmatic x x x shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration."<sup>41</sup> The extent of Smartmatic's control over the Contract's "technical aspects" is divulged in the Contract's supporting documents which vest on the Provider the responsibility to:

- (1) generate and distribute the access keys for the canvassing equipment and 82,200 optical scanners to be used on election day;<sup>42</sup>
- (2) deliver the 82,200 optical scanners to their designated precincts and secure them on site;<sup>43</sup>
- (3) prepare the polling places and canvassing centers in all levels (that is, municipal, provincial and national) to make them "fully functional";<sup>44</sup> and
- (4) maintain 100% electronic transmission capability on election day (and thus fill the 25% gap of the country's current 75% network coverage).<sup>45</sup>

Items (1) and (3) are unmistakably repugnant to Section 26 of RA 8426. Whoever controls the access keys controls the elections. Control of the access keys means the capacity to instantaneously change the election results in any precinct in the country. Giving to the Provider the access keys — both the private and public access keys — is like giving to the system administrator of Yahoo or Hotmail one's private password to his or her email account. The private key is supposed to be private to the Chair of the Board of Election Inspectors, generated by him and unknown to the Provider. Otherwise, the Provider will have the capacity to alter the election results at the precinct level. Worse, even the private keys at the canvassing level are generated by the Provider, allowing the Provider to change the election results at the canvassing level. Clearly, the COMELEC has abdicated control over the elections to the Provider, putting the integrity and outcome of the 10 May 2010 elections solely in the hands of the Provider. Moreover, the polling places and canvassing centers, which are the critical operational areas during the elections, must be under the full control of the COMELEC.

What Section 26 confines to the COMELEC's "exclusive control and supervision," the COMELEC in the Contract relinquishes to Smartmatic. By designating Smartmatic as the entity "in charge" of the crucial "technical aspects" of the automated system's operation — equipment security and installation and results canvassing and transmission — the COMELEC contented itself with taking charge over the system's "non-technical," that is, manual aspects. However, RA 8436 does not bifurcate control and supervision along technical and non-technical lines. On the contrary, Section 26 treated the entire automated system wholistically by mandating that "[t]he System shall be under the exclusive supervision and control of the Commission." Section 26

requires no less than complete and exclusive control and supervision by the COMELEC over the automated system. The regime of partial, non-exclusive COMELEC control over the automated system under the Contract falls short of Section 26's stringent standard.

A vital policy consideration lies behind the blanket mandate of Section 26. Under our constitutional scheme, the COMELEC is the state organ tasked to "[e]nforce and administer all laws and regulations relative to the conduct of an election"<sup>46</sup> and of "ensuring x x x credible elections."<sup>47</sup> By exercising exclusive control and supervision over the automated system, the COMELEC can harness its manpower and resources to efficiently prevent or correct fraud. By surrendering to Smartmatic control over the automated system's "technical aspects," the COMELEC closed the door on manual fraud but opened wide the window to its automated counterpart. As highlighted in the findings of a recent independent study, the threat of internal hacking is all too real:

The greater threat to most systems comes not from external hackers, but from insiders who have direct access to the machines. Software can be modified maliciously before being installed into individual voting machines. There is no reason to trust insiders in the election industry any more than in other industries, such as gambling, where sophisticated insider fraud has occurred despite extraordinary measures to prevent it.<sup>48 x x x x</sup>

Respondents gloss over the import of the offending contractual stipulations, calling attention to the request for bid proposals which gave notice that the COMELEC was accepting bids from "a complete solutions provider x x x which can provide x x x overall nationwide project management service and total customer support under COMELEC supervision and control."<sup>49</sup> The Provider also limits the application of the second paragraph of Article 3.3 between TIM and Smartmatic.<sup>50</sup>

A close reading of the RFP shows that the provision by the Provider of "project management service and total customer support" (paragraph 6, Part II) over which the COMELEC will have supervision and control, corresponds only to Component 3 of the Contract, that is, overall project management. The RFP does not say that the COMELEC exercises supervision and control over the Contract's remaining two components, namely, the paper-based automated-election system (Component 1) and the the provision for electronic transmission using public telecommunications networks (Component 2).<sup>51</sup>

On the Provider's contention that the second paragraph of Article 3.3 regulates the relations between TIM and Smartmatic, suffice it to say that the argument would carry weight if the stipulation was placed in the joint venture agreement. The provision in question was placed in the Contract precisely to hold the Provider "liable for all its obligations under this Project," as the first sentence of Article 3.3 provides.

Until the COMELEC and the Provider amend the offending stipulations, these stipulations govern the rights and obligations between them.

*The Contract Provides for*  
**the Effects of Partial Annulment**

Unlike the disposition in Infotech, a finding that the Contract violates Section 5 and Section 26 of RA 8436, as amended, results only in its partial invalidation under the Contract's Severability clause.<sup>52</sup> This leaves COMELEC free to renegotiate with the Provider to scale down scope of the Contract, adjust the contract price, and modify other pertinent stipulations.

**Using the Automated System Nationwide in the 10 May 2010 Elections**  
**Places our Fragile Democracy at Needless Risk**

The COMELEC's lack of experience in nationwide automation, its non-familiarity with its chosen technology, the gaps in security features of the system, the scale of its operation, Smartmatic's control over the automation aspects of the system, and the not more than 75% network coverage currently available in this archipelago of more than 7,000 islands all combine to create a gaping black hole of unknown risks which can crash the untested system come 10 May 2010. Undoubtedly, no automated election system is perfect.<sup>53</sup> But we also cannot take chances with our fragile democracy. After all, what these machines count are not the day's earnings of a general merchandise store. They tabulate the rawest expression of the sovereign will of every voter in this polity. This is why Congress saw fit to use technology's benefits gingerly.

Lost in the headlong rush to switch this country's electoral system from fully manual to fully automated overnight is the sobering thought that if, for any reason relating to the implementation of the Contract, there is a failure of elections and no President and Vice-President are proclaimed, and no Senate President and Speaker of the House are chosen, by noon of 30 June 2010, a power vacuum is certain to emerge.<sup>54</sup> This is the surest way to defeat the purpose of the entire electoral exercise, and put at unnecessary risk our hard-earned democracy.

Accordingly, I vote to GRANT IN PART the petition by annulling the provisions of the Contract relating to the nationwide use of automated election system, and instead to DIRECT the COMELEC (1) to implement a partial automation of the 10 May 2010 elections as provided in Section 5 of RA 8436, as amended by RA 9369; (2) to assume full and exclusive control of the access keys to the partial automation system; and (3) to assume control over preparation of the polling places and canvassing centers in all levels to make them fully functional.

**ANTONIO T. CARPIO**  
Associate Justice

## Footnotes

<sup>1</sup> Contract for the Provision of An Automated Election System for the May 10, 2010 Synchronized National and Local Elections ("Contract"). The affected provisions of the Contract are Article 3 (Scope of the Project), Article 4 (Contract Fee and Payment), relevant sub-provisions of Article 5 (Responsibilities of the Provider), relevant sub-provisions of Article 6 (COMELEC's responsibilities), and relevant sub-provisions Article 7 (Delivery and Acceptance). The affected portions of the Request for Proposal (made integral to the Contract under Article 21) are Component 1-B (Precinct Count Optical Scan), Component 1-C (Counting/Consolidation System), Component 2 (Provision for Electronic Transmission Using Public Telecommunication Networks) and Component 3 (Overall Project Management). Under the Contract's Severability Clause (Article 20), the unaffected provisions remain valid and the parties may opt to renegotiate the invalidated provisions.

<sup>2</sup> 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.

<sup>3</sup> The Contract, divided into three components (paper-based automated-election system [Component 1], provision for electronic transmission using public telecommunications networks [Component 2], and overall project management [Component 3]), requires the Provider to, among others:

(1) Develop a data management system (Election Management System), capable of generating audit log and integrating with the COMELEC's database to create pre-election configuration data (i.e., voting jurisdictions, number of voters per precinct, positions and seats for election, candidates' information and title and date of elections), generate ballot faces, and configure relevant data for different types of elections (e.g. national and local elections, ARMM elections, plebiscites, initiatives, recall elections, and special elections). The Provider is required to secure the system with authorization and authentication requirements (Component I-A). (Contract, p. 1; Request For Proposal [RFP], pp. 14-15);

(2) Configure each of the 82,200 precinct optical scanners (80,136 allocated units plus 2,064 contingency units) for use in the city/municipality/councilor district where each scanner will be deployed on election day to scan "ballots intended for the city/municipality/councilor district for which it has been configured." The Provider's obligations on the security features for the scanning of ballots at, and transmission of election results from, each of the 80,000 clustered precincts of 1,000 voters per cluster, are as follows: (a) to generate access keys (such as usernames and passwords) with at least two access levels (operator and administrator); (b) to program each scanner to require "the electronic authentication and certification of the election results x x x by at least two [Board of Election Inspector] (BEI) members" before transmission of the results, in encrypted form, from the precinct level (to the municipal board of canvassers, the COMELEC central server, and the server for the political parties, accredited citizens' arm and the Kapisanan ng mga Brodkaster ng Pilipinas) using "wireless, wired or satellite-based connection or a combination thereof" ensuring that the transmission service must be "available 99% of the time"; and (c) to program each scanner "to generate a backup copy of the digitally signed and encrypted ER in a removable data storage device" (Component I-B). (Contract, p. 1; RFP, pp. 15-16; Bid Bulletin No. 4, 27 April 2009, p. 5; Bid Bulletin No. 6, 27 April 2009, pp. 1, 7);

(3) Develop a consolidation and canvassing system which will tally election results for municipal, provincial and national offices using transmitted data (i.e. for municipal canvassing, using precinct results; for provincial/district canvassing, using consolidated city/municipal results; for COMELEC canvassing [for senatorial and party-list elections], using consolidated provincial/city results; and for canvassing by Congress [for Presidential and Vice-Presidential elections], using

consolidated provincial/city results). To secure the system, the contract requires the Provider to: (a) program the consolidation and canvassing system to "monitor, detect, [and] record x x x intrusion and/or unauthorized access and recognize its authorized users with the use of physical security devices, such as USB flash drives or PCMCIA cards, with digital certificates, aside from the use of user IDs and passwords"; (b) program the system to "decrypt and authenticate the transmitted encrypted election results prior to consolidation/canvassing"; and (c) to program the system to allow the Board of Canvassers (BOC) "to digitally sign all electronic results and reports before transmission." (Component I-C). (Contract, pp. 1, 6; RFP, p. 18);

(4) Provide overall project management services and staffing (Component 3) (RFP, pp. 23-27);

(5) Train COMELEC executives (83 to 100), technical personnel (100), field personnel (4,000) and BEI members (160,272) on the systems operations. For the COMELEC technical staff, the training should enable them to "operate the systems on their own." (RFP, p. 31; Bid Bulletin No. 20, 27 April 2009, pp. 1-2); and

(6) Provide, one week before and after the elections, at least "one technician for every voting/counting and data transmission centers," who "must have cellular telephones or other means of real time communication." (RFP, p. 32).

<sup>4</sup> For the writs of Certiorari, Prohibition and Mandamus.

<sup>5</sup> Jarltech International Corporation (supplier of optical scanners), Dominion Voting Systems (copyright owner of the software for the optical scanners) and ToGo Corporation (hired by the Provider to distribute the optical scanners to their assigned precincts).

<sup>6</sup> 464 Phil.173 (2004).

<sup>7</sup> Respondents TIM and Smartmatic invoke Sections 55 and 58 of Republic Act No. 9184 which provide:

Section 55. Protests on Decisions of the BAC.- Decisions of the BAC in all stages of procurement may be protested to the head of the procuring entity and shall be in writing. Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the IRR.

Section 58. Report to Regular Courts; Certiorari.- Court action may be resorted to only after the protests contemplated in this Article shall have been completed. Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of jurisdiction. The regional trial court shall have jurisdiction over final decision of the head of the procuring entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure.

This provision is without prejudice to any law conferring on the Supreme court the sole jurisdiction to issue temporary restraining orders and injunctions relating to Infrastructure Projects of Government.

<sup>8</sup> The first test used 625 ballots each with 32 "pre-determined" marks while the second test used 650 ballots each similarly bearing 32 marks (COMELEC Comment, pp. 30-31).

<sup>9</sup> The University of the Philippines Computer Center, National Computer Center, and Information Technology Foundation.

<sup>10</sup> Information Technology Foundation of the Philippines.

<sup>11</sup> Memorandum (TIM and Smartmatic), pp. 54-63.

<sup>12</sup> Supra note 6.

<sup>13</sup> Section 2(4) and Section 4 , Article IX(C), Constitution.

<sup>14</sup> The COMELEC awarded the contract to a bidder even before the Bids and Awards Committee submitted its Report on the bidding.

<sup>15</sup> Supra 6at 163. It also appears that the protest mechanism provided in RA 9184, which respondents invoke, applies to losing bidders, not to third parties like petitioners. Section 55.2 of its implementing rules requires the "bidder" to provide relevant contact information in its position paper.

<sup>16</sup> Section 5, as amended, reads in its entirety: "SEC. 6. Section 6 of Republic Act No. 8436 is hereby amended to read as follows:

SEC. 5 Authority to Use an Automated Election System. - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording automated election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: Provided, that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission: Provided, further, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen: Provided, finally, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. In succeeding regular national or local elections, the AES shall be implemented nationwide."

<sup>17</sup> COMELEC Comment, p. 23.

<sup>18</sup> Bersabal v. Salvador, 173 Phil. 379 (1978).

<sup>19</sup> 2 Record of the Senate 50-51 (20 March 2006).

<sup>20</sup> Id. at 67-68 (28 March 2006).

<sup>21</sup> Section 5 of RA 8436 reads in pertinent parts:

Section 5. Authority to use an automated election system. - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system, herein referred to as the System, for the process of voting, counting of votes and canvassing/consolidation of results of the national and local elections: Provided, however, That for the May 11, 1998 elections, the System shall be applicable in all areas within the country only for the positions of president, vice-president, senators and parties, organizations or coalitions participating under the party-list system.

Unlike in RA 9369, Congress in Section 5 of RA 8436 provided a contingency mechanism, that is, for the COMELEC to revert to manual system for "the elections for both national and local positions x x x except in the Autonomous Region in Muslim Mindanao (ARMM)," if "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."

Significantly, the original draft for Section 5 in Senate Bill No. 3214, the precursor of RA 8436, provided for the use of an automated system in "three regions" for the 11 May 1998 elections. However, upon the advice of the COMELEC that it will not be able to comply with this scheme, Senator Miriam Santiago, the bill's principal author, amended the draft for the first phase to instead cover "17 highly-urbanized cities." During the bill's Second Reading, Senator Marcelo Fernan submitted a proposal to limit the first phase of automation to selected positions instead of selected areas. The Senate approved his proposal (2 Record of the Senate 986-987, 989-990 [19 November 1997]; id. at 149 [1 December 1997]).

<sup>22</sup> TSN Oral Arguments (Augusto Lagman), 29 July 2009, pp. 528-529.

<sup>23</sup> Section 11 of RA 9369 provides in pertinent parts:

SEC. 11. Functions of the Technical Evaluation Committee. - The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercises, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act based, among others, on the following documented results:

1. The successful conduct of a field testing process followed by a mock election event in one or more cities/municipalities;

<sup>24</sup> RFP, pp. 32-33.

<sup>25</sup> The distinction was elucidated during the floor deliberations of Senate Bill 2231 when Senator Gordon opposed the amendment of Senator Pimentel to substitute the word "use" in Section 5 with "pilot," thus:

Senator Pimentel. x x x x I propose that in lieu of the word "USED", we substitute the following two words PILOT-TESTED IN AT LEAST TWO (2) HIGHLY URBANIZED CITIES AND TWO (2) PROVINCES IN LUZON: AT LEAST TWO (2) HIGHLY URBANIZED CITIES AND TWO (2) PROVINCES IN THE VISAYAS: AND AT LEAST TWO (2) HIGHLY URBANIZED CITIES AND TWO (2) PROVINCES IN MINDANAO TO BE DETERMINED BY THE COMELEC.

Senator Gordon. I accept the amendment, without the use of the word "PILOT". I would insist that we use the word "USED" because it might be misconstrued. There is already a provision that there would be a mock election in one province or one city in the bill down the line. Maybe we can go ahead with the word "USED". (2 Record of the Senate 60 [5 April 2006]; capitalization in the original, boldfacing supplied).

<sup>26</sup> Under the Contract, both the field test and mock election will use 10 optical scanners involving 17 canvassing units (8 city/municipality, 6 provincial, 2 national and 1 central backup) using 3,000 ballots (Bid Bulletin No. 4, 27 April 2009, pp. 6-7). On 10 May 2010, 80,136 optical scanners will be used with 1,234 canvassing units tallying results from approximately 40M ballots.

<sup>27</sup> ITFP Comment, p. 3. ITFP's observation that based on the laboratory tests results, the optical scanners can scan accurately is not shared by another information technology expert, Prof. Pablo Manalastas, who opined that "under actual election conditions where people may use pencil, ball pen, rolling ball jotter, and felt-tip pen, and using all allowable marking styles (dot, check mark, cross mark, and complete shade), the [optical scanners] will be lucky to achieve an accuracy of 50%." (see [http://newsbreak.com.ph/index.php?option=com\\_content&task=view&id=6589&Itemid=88889287](http://newsbreak.com.ph/index.php?option=com_content&task=view&id=6589&Itemid=88889287) [last visited on 14 August 2009]).

<sup>28</sup> Memorandum (TIM and Smartmatic), p. 5. The COMELEC advanced the same view (Memorandum [COMELEC]), pp. 36-37.

<sup>29</sup> *City of Baguio v. Marcos*, 136 Phil. 569 (1969); *Lopez & Sons, Inc. v. Court of Tax Appeals*, 100 Phil. 850 (1957). The same rule applies in interpreting the Constitution (*Tañada v. Cuenco*, 103 Phil. 1051 [1958]).

<sup>30</sup> *Philippine Constitutional Association v. Mathay*, 124 Phil. 890, 922 (1966) Castro, J., concurring (referring to language as "one of the distinctive qualities x x x of modern thinking man.")

<sup>31</sup> See *City of Baguio v. Marcos*, supra (involving a textual conflict between the title and Section 1 of Republic Act No. 931 on the reckoning of the prescriptive period to reopen cadastral proceedings) and *Lopez & Sons, Inc. v. Court of Tax Appeals*, supra note 29 (involving a textual conflict between Section 7 and Section 11 of Republic Act No. 1125 on the review jurisdiction of the Court of Tax Appeals).

<sup>32</sup> The provision reads in its entirety: "SEC. 10. Section 8 of Republic Act No. 8436 is hereby amended to read as follow:

SEC.12. Procurement of Equipment and Materials. - To achieve the purpose of this Act, the Commission in authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.

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

<sup>33</sup> As pointed out by Justice Teresita J. Leonardo-De Castro in the oral arguments (TSN, 29 July 2009, pp. 499-500).

<sup>34</sup> Using optical mark reader (OMR) and direct recording electronic (DRE) technologies.

<sup>35</sup> Shariff Kabunsuan, Maguindanao, Lanao del Sur, Basilan, Sulu and Tawi-Tawi and the cities of Marawi and Lamitan. Shariff Kabunsuan has since reverted to its mother province, Maguindanao, under the ruling in *Sema v. Commission on Elections* (G.R. No. 177597, 16 July 2008, 558 SCRA 700) voiding its creation.

<sup>36</sup> Republic Act No. 9333.

<sup>37</sup> Governor, Vice-Governor and 24 legislators (members of the Regional Legislative Assembly).

<sup>38</sup> Yra v. Abaño, 52 Phil. 381 (1928).

<sup>39</sup> In Tañada v. Cuenco, 103 Phil. 1051 (1958), the Court noted but did not follow the interpretation of the Secretary of Justice of Section 11, Article VI of the 1935 Constitution.

<sup>40</sup> Section 2(1), Article IX(C), Constitution.

<sup>41</sup> Article 3.3 which provides in full:

The PROVIDER shall be liable for all its obligations under this Project, and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

The PROVIDER must provide to SMARTMATIC at all times the support required to perform the above responsibilities.

<sup>42</sup> RFP, p. 15; Bid Bulletin No. 10, 27 April 2009, p. 2. The importance of controlling the access keys was illustrated in the ARMM Regional elections in 2008 when Smartmatic, which the COMELEC contracted to supply some of the equipment used, remotely accessed several tabulating machines to recalibrate their software after the machines "zeroed-out" the results due to an error in logging the number of cast ballots. (Manuel A. Alcuaz, Jr., Mapping the Future [Is the Smartmatic-TIM-COMELEC Contract Front-Loaded?], Philippine Daily Inquirer, 20 July 2009, p. B2-2). Commenting on Smartmatic's control over the private and public keys (to be distributed to the BEIs and [Board of Canvassers] personnel), an IT expert noted: "Since Smartmatic has this responsibility [of generating the access keys], it will have possession of all BEIs' private keys, and will give Smartmatic the capability to change the [Election Results] of any precinct in the entire country, resulting in massive computerized cheating in case this capability is exploited by Smartmatic." (Professor Pablo Manalastas at [http://pmana.multiply.com/journal/item/68/Harry\\_Roque\\_vs\\_COMELEC-Smartmatic](http://pmana.multiply.com/journal/item/68/Harry_Roque_vs_COMELEC-Smartmatic)[last visited on 25 August 2009]).

<sup>43</sup> Bid Bulletin No. 6, 27 April 2009, p. 7; Bid Bulletin No. 10, 27 April 2009, p. 3.

<sup>44</sup> Bid Bulletin No. 19, 27 April 2009, p. 2.

<sup>45</sup> Bid Bulletin No. 6, 27 April 2009, pp. 1-2.

<sup>46</sup> Section 2(1), Article IX(C), Constitution.

<sup>47</sup> See Section 2(4) and Section 4, Article IX(C) of the Constitution authorizing the COMELEC to deputize law enforcement agencies and regulate franchises, respectively, to ensure "free, orderly, honest, peaceful, and credible elections."

<sup>48</sup> Report of the Commission on Federal Election Reform (September 2005), p. 36, available at [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf) (last visited on 14 August 2009).

<sup>49</sup> RFP, p. 5.

<sup>50</sup> Memorandum (TIM and Smartmatic), p. 100.

<sup>51</sup> The relevant portion of the RFP provides (p. 5):

The Commission on Elections (COMELEC), through its Bids and Awards Committee (BAC), is currently accepting bids for the lease, with an option to purchase, of an automated election system (AES) that will meet the following needs:

(1) Introduction of a new system of voting to the Filipino electorate nationwide without deviating much from the manual manner of voting and which protects the voter's right to the secrecy of his vote;

(2) An automated system of counting of votes which can count the voter's vote accurately and as intended by the voter, which can secure the precinct results in such a way that it cannot be tampered with or read outside the system, and the results of which can be accepted as input by the existing canvassing application of the COMELEC;

An integrated and comprehensive system for preparing and managing pre-election configuration and post-election requirements;

(3) A secure, reliable and redundant service for electronic transmission of precinct results from authorized sources to COMELEC-designated target destinations using public telecommunication network, including Internet access from all cities, municipalities and provinces;

(4) A consolidation/canvassing system that allows consolidation of precinct results, and city/municipal and provincial results; and

(5) A complete solutions provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, etc.), under COMELEC supervision and control, to ensure effective and successful implementation of the Project. (Emphasis supplied)

When matched with the Contract's "components," paragraph 3 corresponds to Component 1 (paper-based automated-election system) while paragraphs 4 and 5 correspond to Component 2 (electronic transmission using public telecommunications networks).

<sup>52</sup> Article 20 of the Contract provides: "If any provision of this Contract is declared illegal, unenforceable or void, the parties shall negotiate in good faith to agree upon a substitute provision that is legal and enforceable and consistent with the intentions of the Project. The rest of this contract that is not materially affected by such declaration shall remain valid, binding and enforceable." Under Article 1409 of the Civil Code, contracts whose purpose is contrary to law are void.

<sup>53</sup> Indeed, even technologically advanced democracies such as the United States and some countries in Europe continue to experience glitches in the operation of their electronic voting systems. (See F.

Emmert, Trouble Counting Votes? Comparing Voting Mechanism in the United States and Selected Countries, 41 Creighton L. Rev. 3 [2007]).

<sup>54</sup> Under Section 7, Article VII of the Constitution, the Vice-President, Senate President and Speaker of the House succeeds to the Office of the President in case of vacancy, in that order. Congress has yet to pass a law providing "for the manner in which one who is to act as President shall be selected until a President or a Vice-President shall have qualified" as required under Section 7.

## SEPARATE OPINION

### **CORONA, J:**

A new civilization is emerging in our lives, and blind men everywhere are trying to suppress it. This new civilization brings with it new family styles; changed ways of working, loving, and living; a new economy; new political conflicts; and beyond all this, an altered consciousness as well. Pieces of this new civilization exist today. Millions are already attuning their lives to the rhythms of tomorrow. Others, terrified of the future, are engaged in a desperate, futile flight into the past and are trying to restore the dying world that gave them birth.

The dawn of this new civilization is the single most explosive fact of our lifetimes.<sup>1</sup>

The Third Wave of the Philippine electoral system is upon us. The ballot, one of the most significant means through which the people directly participate in governance by periodically choosing their representatives, is evolving from purely paper-based to computer-readable and the elections are progressing from manual to automated. Indeed, the means by which popular sovereignty may be exercised through suffrage is about to change considerably. The tsunami of change in our electoral system encourages us to adopt the words of the renowned futurist Alvin Toffler as our own: "We are the children of the new transformation, the Third Wave."

Back then, there was the papeleta oficial. It was barely the size of this paper and only one side was written with the titles of seven elective offices. On the space corresponding to each office, a voter wrote the name of the chosen candidate. The voter would then deposit the papeleta in a ballot box and, at the closing of the polls, the votes would be publicly counted and tallied, with a copy of the statement of the results sent by registered mail or special messenger to the provincial treasurer. If heaven cooperated, the election results were known within two months.<sup>2</sup>

Through the years, the papeleta evolved into the official ballot, commonly known as the balota. The balota was of uniform size and provided by the Commission on Elections (Comelec). It was printed in black ink on white security paper with distinctive, clear and legible water marks that

readily distinguished it from ordinary paper. Each balota was in the shape of a strip with stub and detachable coupon containing the ballot's serial number and a space for the thumbmark of the voter on the detachable coupon. It contained all the names of all the offices to be voted for in the election, allowing opposite the name of each office sufficient space or spaces with horizontal lines where the voter wrote the name or names of individual candidates voted for by him. The voter, after affixing his thumbmark on the detachable coupon in the presence of the board of election inspectors, deposited his balota and the coupon in the respective compartments of the ballot box. As soon as the voting was finished, the ballots were counted publicly and the totals of votes recorded in the tally board and election returns. The returns were then submitted to the various boards of canvassers (municipal or city, provincial and national) for canvassing. The election results were hopefully proclaimed within one week (for local positions) or up to two months (for national positions).

In the coming synchronized national and local elections in May 2010, it will be the precinct count optical scan (PCOS) ballot. It will be nearly thrice the size of this paper, with both sides filled with the names of at least 600 candidates and opposite each name will be a spot which the voter can mark to indicate his choice. It will be fed manually into the PCOS which in turn will determine the ballot's authenticity, tally the votes marked therein and generate digitally signed and encrypted election results to be electronically transmitted to different levels for consolidation and canvass.<sup>3</sup> Hopefully, within two days the election results will be known.

The shift from manual elections to an automated election system (AES) has indeed become inevitable. Not just one but four laws have been passed decreeing it: RA<sup>4</sup> 8046<sup>5</sup> in 1995, RA 8436<sup>6</sup> in 1997, RA 9369<sup>7</sup> in 2007 and RA 9525<sup>8</sup> in 2009.

For the 2010 elections, automation is envisaged in RA 8436, as amended by RA 9369. Pursuant to that purpose, respondent Commission on Elections-Special Bids and Awards Committee (Comelec-SBAC) conducted biddings and issued to the joint venture of respondents Smartmatic International Corporation and Total Information Management Corporation (Smartmatic-TIM) a notice of award on June 10, 2009.<sup>9</sup> On July 10, 2009, respondent Comelec and Smartmatic-TIM executed a contract governing the procurement of counting machines, including the supply of ballot paper, electronic transmission services using public telecommunications networks, training, technical support, warehousing, deployment, installation, pull-out, systems integration and overall project management.<sup>10</sup> On the same day, Smartmatic-TIM received a notice to proceed with the implementation of the contract.<sup>11</sup>

Early on, however, petitioners as concerned citizens and taxpayers filed a petition in this Court for certiorari, prohibition and mandamus urging us to annul the June 10, 2009 notice of award and permanently enjoin respondents from signing and/or implementing any contract for the 2010 elections. They also sought to compel all respondents to disclose the full terms and conditions of the relevant agreements between and among themselves, including the agreements among respondent Smartmatic, Dominion Voting Systems (Dominion) and Jarltech International Corporation (Jarltech) and between respondent TIM and 2Go Corporation (2Go),

respectively.<sup>12</sup> However, with the execution of the July 10, 2009 contract between Comelec and Smartmatic-TIM, petitioners are now also seeking the annulment of the said contract.<sup>13</sup>

Petitioners argue that the impugned June 10, 2009 notice of award and July 10, 2009 contract violate the following:

(a) Sections 5 and 12 of RA 8436, as amended by RAs 9329 and 9525 on pilot-testing and Section 7 of RA 8436, as amended by RA 9329, on the systems capability of the PCOS machines and<sup>14</sup>

(b) Section 8 of RA 7042<sup>15</sup> in relation to EO<sup>16</sup> 584<sup>17</sup> and Article IX, Part B, Items 2.2.4, 2.2.6.1.2.2, 2.2.6.1.2.3, 2.2.6.1.2.5 and 2.2.6.2.1 of the Request for Proposal (RFP) on the eligibility of Smartmatic TIM as a bidder.<sup>18</sup>

They also claim that Articles 3.3, 6.7, 7.4, 21.1 and 21.4 of the impugned contract violate paragraphs 1 and 3, Section 2, Article IX-C of the Constitution and Section 26 of RA 9369 on the mandate of the Comelec.<sup>19</sup>

They further contend that Articles 3.1, 3.2 and 21.1 of the impugned contract incorporating the March 10, 2009 RFP and bid documents issued by the Comelec violate Section 2, Article V of the Constitution on the sanctity and secrecy of the ballot.<sup>20</sup>

Petitioners exhort the Court to recognize their *locus standi* in view of the transcendental importance of the matters raised in their petition.<sup>21</sup> They also pray that their failure to exhaust the administrative remedies provided under the implementing rules of RA 9184 (or the Government Procurement Reform Act) be excused.<sup>22</sup>

In view of the great significance of the matters involved in this case in our national life especially at this critical juncture of our history, I am inclined to gloss over the technical deficiencies and focus only on the substantive issues. Nonetheless, after careful study and reflection, I vote to dismiss the instant petition for the reasons I will explain.

### **Are the June 10, 2009 Notice of Award and July 10, 2009 Contract Legal?**

The mandate of the Comelec under RA 8436, as amended, is two-fold: first, **to use an AES** (automated election system) as provided under Section 1:

*Sec. 1. Declaration of Policy.* — It is the policy of the State to ensure free, orderly, honest, peaceful, credible and informed elections, plebiscites, referenda, recall and other similar electoral exercises by improving on the election process and adopting systems which shall **involve the use of an automated election system** that will ensure the secrecy and sanctity of the ballot and all election, consolidation and transmission documents in order that the process shall be transparent and credible and that the results shall be fast, accurate and reflective of the genuine will of the people.

**The State recognizes the mandate and authority of the Commission to prescribe the adoption and use of the most suitable technology of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose.**<sup>23</sup> (emphasis supplied)

Such authority to use "an automated election system or systems xxx as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises" is reiterated in Section 5 of the law, as amended.

Second, as provided under Section 12 of the same law, as amended, **to procure** supplies, equipment, materials, software, facilities, and other services for the purpose of implementing an AES.

There are provisions which outline how the Comelec is to carry out its mandate. Section 5 of RA 8436, as amended, provides:

*Sec. 5. Authority to Use an Automated Election System.* — To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: **Provided, that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission: Provided, further,** That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen:*Provided, finally,* That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. **In succeeding regular national or local elections, the AES shall be implemented nationwide.**<sup>24</sup>(emphasis supplied)

Moreover, Section 12 of RA 8436, as amended, states:

*Sec.12. Procurement of Equipment and Materials.* — To achieve the purpose of this Act, the Commission in authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition,**supplies, equipment, materials, software, facilities, and other service,** from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. **With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.** x x x<sup>25</sup> (emphasis supplied)

Citing the proceedings of the Senate on Senate Bill No. 2231 (from which RA 9329 originated),<sup>26</sup> petitioners posit that Sections 5 and 12 of RA 8436, as amended, impose the restriction that no AES can be implemented in the 2010 elections unless the said AES shall have been pilot-tested in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao during the 2007 elections.<sup>27</sup> Petitioners claim that the impugned notice of award and contract contravene Sections 5 and 12 of RA 8436, as amended, because they authorize the use of PCOS machines that have never undergone pilot-testing.

The view of petitioners is, however, at odds with the plain language of the law and the proceedings of the Senate.

The aforecited provisions do not limit or restrict the statutory mandate of the Comelec to implement a nationwide AES beginning the 2010 elections. The provisos of Section 5 merely prescribe the minimum scope of, as well as the conditions for, the implementation of an AES by the Comelec in the 2007 elections. On the other hand, Section 12 simply regulates the capability of the supplies, equipment, materials, software, facilities and other services which the Comelec can procure. **Neither provision, however, removes or constrains the mandate of the Comelec to implement an AES nationwide beginning the 2010 elections.**

A review of the evolution of Section 5 of RA 8436, as amended, will shed light on the matter.

Prior to its amendment by RA 9369, Section 5 was numbered Section 6 of RA 8436. It provided that "for the May 11, 1998 elections" the Comelec could use an AES which "shall be applicable in all areas within the country **only for** the positions of president, vice-president, senators and parties, organizations or coalitions participating under the party-list."<sup>28</sup> If by February 9, 1998 it would have become evident that the AES could not be implemented for national positions in the 1998 elections, the provision stated that elections for both national and local positions would be done manually except in the Autonomous Region in Muslim Mindanao where the automated election system would be used for all positions. The then Section 6 of RA 8436, therefore, contained the specific limitation or restriction that, while the Comelec may implement an AES nationwide in the 1998 elections, it could do so only for certain national positions. However, it did not provide that if no AES would have been implemented in the 1998 elections, the Comelec would forfeit its mandate to implement an AES nationwide in the succeeding elections.

As amended and renumbered by RA 9369, (the former Section 6) Section 5 of RA 8436 contains a proviso which provides that "for the regular national and local election, which shall be **held immediately after effectivity of this Act,**" the Comelec shall implement an AES "in **at least** two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao." The preceding clause is significant in two aspects.

First, it refers solely to the May 14, 2007 synchronized national and local elections because the 2007 elections were the only regular and local elections held immediately after the effectivity of RA 9369. It was held on February 10, 2007.<sup>29</sup>

Second, by ordinary definition, the phrase "at least" sets a minimum<sup>30</sup> scope but does not bar attempts or efforts to exceed or surpass it. The clause in Section 5 deliberately employs the phrase "at least" rather than "not more than" or the word "only" (as in the original text of Section 5). As qualified, the clause means that, in the 2007 elections the Comelec had the discretion to implement an AES within the minimum scope of "two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao," or within the maximum scope of all areas in the country. It did not proscribe the nationwide implementation of an AES in the 2007 elections. Nor does it forbid one in the 2010 and succeeding elections.

In sum, the aforementioned proviso of Section 5 of RA 8436, as amended, merely delineates the minimum scope of implementation of the AES for the 2007 elections.

More significantly, in the event that no AES was implemented in the 2007 elections, Section 5 does not prohibit the Comelec from implementing an AES nationwide starting in the 2010 elections. Rather, the last clause of Section 5 is categorical that "in succeeding regular national or local elections, an AES shall be implemented nationwide." And the 2010 elections were the elections that immediately followed the 2007 elections, the regular elections "held immediately after effectivity of [RA 9369]." In other words, the directive of the law itself is clear: the nationwide implementation of the AES commences in the 2010 elections.

Laws are to be interpreted in a way that will render them effective, not in a manner that will make them inoperative. To insist, as petitioners do, that no nationwide AES can be implemented in the 2010 elections because no AES was implemented in the 2007 elections is to disregard the categorical language of the law. It frustrates and defeats the legislative intent to fully automate the 2010 elections. Indeed, if petitioners' argument were to be pursued to its (not-so-) logical conclusion, RA 8436, as amended by RA 9369, would be a dead law. Under petitioners' theory, no AES can be implemented in any future election unless Congress enacts another law. This is so because, according to petitioners themselves, the "condition precedent" for any nationwide implementation of the AES – the implementation of the AES in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao in the 2007 elections – was not complied with.

Moreover, considering that RA 9369 took effect only on February 10, 2007, it was almost impossible to utilize an AES even in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao during the May 14, 2007 elections. Considering that, from the effectivity date of RA 9369, there was only a little over three months left before the 2007 elections, the additional burden (on the preparations for the 2007 elections) of the procurement process for and implementation of even a partial AES of the said elections would have been a superhuman task. More significantly, the 2007 appropriations for the Comelec did not include a budget for AES. The convergence of time and funding constraints made the implementation of any AES in the 2007 elections impossible for the Comelec to conduct. *Nemo tenetur ad impossibile*.<sup>31</sup> The law obliges no one to perform an impossibility. Laws and rules must be interpreted in a way that they are in accordance with logic, common sense, reason and practicality.<sup>32</sup>

Furthermore, Section 12 of RA 8436, as amended, relevantly states that "[p]articipation in the 2007 pilot exercise shall not be conclusive of the system's fitness." This has a two-fold implication on petitioners' position. One, since participation in the intended automation of the 2007 elections was not a conclusive determinant of the system's fitness, partial automation of the 2007 elections pursuant to the proviso of Section 5 (assuming it was a condition for the full/nationwide automation of elections starting 2010) was merely preferable, not indispensable. Two, the fact that the PCOS machines were not pilot-tested in the 2007 elections has no significant bearing on the fitness and suitability of those machines for the elections to be held subsequent to the 2007 polls.

The Senate proceedings invoked by petitioners do not at all indicate that partial implementation of the AES in the 2007 elections is a condition *sine qua non* to its full implementation in the 2010 elections. A close reading of the transcript of the proceedings reveals that, in urging his colleagues to approve the proviso in Section 5 (that AES be implemented in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao), Sen. Richard Gordon, the principal sponsor of Senate Bill No. 2231, was merely underscoring the need to demonstrate the possibility and viability of poll automation even in the 2007 elections.<sup>33</sup> Nowhere in the transcript cited by petitioners did the Senate proscribe the nationwide implementation of the AES beginning the 2010 elections if no partial AES was implemented in the 2007 elections.

In addition to the clarity of the language of RA 8436, as amended by RA 9369, as well as the legislative intent to have the nationwide implementation of the AES starting the 2010 elections, the intent of the lawmakers can furthermore be seen from the passage of RA 9525 on March 23, 2009. With this law, an ₱11,301,790,000 supplemental appropriations was specifically made for the automation of the 2010 elections. When Congress passed RA 9525, it was well aware that there was no pilot-testing of the PCOS in any previous Philippine electoral exercise. Nonetheless, Section 2 of the law states that the sum should be disbursed to ensure the "transparency and accuracy in the selection of the relevant technology of the machines to be used on May 10, 2010 automated national and local election[s]."

In fine, under Section 5 in relation to Section 1 of RA 8436, as amended, the mandate of the Comelec to prescribe the adoption and use of an AES is complete. It can determine which suitable technology of demonstrated capability to adopt for an AES. It can determine which, between a paper-based or a direct recording electronic election system, is more appropriate and practical. More notably, in the 2007 elections, it could decide whether to implement an AES within a maximum scope of all areas in the country or within the minimum scope of two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao. And in the 2010 and succeeding elections, its unqualified mandate is to implement an AES nationwide.

Therefore, when it issued the notice of award to and executed the contract with Smartmatic-TIM for the nationwide implementation of an AES in the 2010 elections, the Comelec acted pursuant to its mandate and did not violate Section 5 of RA 8436 as amended by RA 9369.

Neither did the Comelec violate Section 12 of RA 8436, as amended. The provision merely requires that, to implement a nationwide AES starting from the 2010 elections, the Comelec must procure a system that has a demonstrated capability and has been successfully used in a prior electoral exercise here or **abroad**, though application of the system in the 2007 elections would not have been conclusive evidence of its fitness. Clearly, it is not imperative that the system was successfully applied in the 2007 elections; it suffices that the system can be shown to have been viable in an election abroad. As the Comelec averred, the system it procured for the 2010 elections was successfully employed in prior electoral exercises in New Brunswick and New York in 2008 and in Ontario in 2009.<sup>34</sup>

### **Did the June 10, 2009 Notice of Award and the July 10, 2009 Contract Comply With Requirements on Bidding Eligibility?**

Petitioners impugn the notice of award and contract in favor of Smartmatic TIM on the ground that the latter violated the RFP when it failed to submit a valid joint venture agreement (JVA), a copy of its single largest contract for the last three years, an ISO 9001 certificate and an environmental protection agency certification.

Petitioners are wrong.

#### Validity of the JVA

Under RA 9184,<sup>35</sup> to be eligible to bid for a project involving the procurement of goods, a joint venture must submit a valid JVA<sup>36</sup> which must be duly notarized and under oath.<sup>37</sup> It is further required by Section 8 of RA 7042 in relation to EO 584 that Filipino ownership or interest in the joint venture be at least 60%.<sup>38</sup>

The foregoing requirements were reiterated under Items 2.2.4 and 2.2.6.2.1 of the RFP.

On April 23, 2009 Smartmatic and TIM constituted themselves into an unincorporated joint venture under a JVA. They submitted their JVA to the Comelec on May 4, 2009<sup>39</sup> and on July 8, 2009, they caused the incorporation of their joint venture with the Securities and Exchange Commission (SEC).<sup>40</sup>

Petitioners contend that Smartmatic-TIM failed to seasonably comply with the eligibility requirements of the law because they were still unincorporated at the time they filed their JVA in the Comelec. Their lack of community of interest surfaced in late June 2009 when the two entities publicly bickered over their rights and obligations. Moreover, petitioners claim that the JVA is defective because it left out key parties to the automation project, namely, Jarltech from which Smartmatic will procure the PCOS machines, Dominion which owns the copyright to the software for the PCOS machines and 2Go which will be responsible for transporting/distributing PCOS machines throughout the country. Petitioners insist that the inclusion of Jarltech, Dominion and 2Go in the joint venture is indispensable to hold them solidarily liable with Smartmatic-TIM for any problem that may arise from the use of their automation system.<sup>41</sup>

Petitioners exaggerate the eligibility requirements of the law.

RA 9184 and its implementing rules only require that the JVA be valid and notarized. Incorporation of a JVA under the Corporation Code through registration with the SEC is not essential for the validity of a JVA. So long as it meets the essential requisites of a contract<sup>42</sup> and is embodied in a public document, a JVA is valid regardless of its incorporation through registration with the SEC. Where the law makes no distinction, no distinction need be made.

Since the validity of the JVA is separate and distinct from its incorporation, I cannot subscribe to petitioners' position that the incorporation of the Smartmatic and TIM JVA must also be required for purposes of the bidding. To hold that the JVA ought to be accompanied by articles of incorporation is to unduly add to the requirement of the law and its implementing regulations, in the guise of interpretation or construction.

Even without an accompanying incorporation paper, a JVA is considered valid if notarized and under oath. As explained by the Government Procurement Policy Board (GPPB):<sup>43</sup>

For purposes of conducting eligibility on the prospective bidders for the procurement of goods and infrastructure projects, Section 23.6 (2) of the IRR-A of R.A. 9184 requires the prospective bidders to submit the following Class "B" Documents:

- (a) Valid joint venture agreement, in case of a joint venture; and
- (b) Letter authorizing the BAC or its duly authorized representative/s to verify any or all of the documents submitted for the eligibility check.

**As regards the requirement of a "valid joint venture agreement" for JV bidders, the IRR-A of R.A. 9184 does not prescribe a standard form nor does it spell out the specific terms and conditions that should be included in such agreement to be valid.** However, for purposes of eligibility check, all JVAs are required to be notarized in order to be considered valid as prescribed in the aforequoted section. Further, it is advised that the JVAs should specifically state the name of the person who is appointed as the lawful attorney-in-fact of the JV to sign the contract, if awarded, and the member who is the lead representative of the concerned JV.<sup>44</sup> (emphasis added)

It would likewise be an unreasonable imposition not only on Smartmatic-TIM to absorb into their joint venture each and every entity they do business with, but also on the Comelec to transact directly with all these other entities. Aware of this, the Comelec's Instruction to Bidders allowed the bidders to subcontract portions of the goods or services under the automation project.<sup>45</sup>

RA 9184 provides under Article XVI for direct contracting as one of the alternative methods of procurement. Direct contracting or single source procurement does not require elaborate bidding because all the supplier needs to do is submit a price quotation, which offer may then

be accepted immediately, but only under the following conditions: (a) when the goods may be obtained only from the proprietary source because patents, trade secrets and copyrights prohibit others from manufacturing the same item; (b) when procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance and (c) those sold by an exclusive dealer or manufacturer, which does not have a sub-dealer selling. Clearly then, the intention of RA 9184 is not to compel government agencies to deal with every copyright-holder, exclusive manufacturer and exclusive distributor; otherwise, it will restrict the mode of procurement to direct contracting only. Thus, there is no compulsion under the law for the Comelec to contract with Dominion as the holder of the copyright to the PCOS machine or with Jarltech as the manufacturer thereof or 2Go as the transporter/distributor of the PCOS machines. What is crucial is that Smartmatic-TIM assumes solidary liability for the principal prestation of the July 10, 2009 contract and the RFP, and that it stipulates (under Article 3.3 of the contract) that "the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve [it] of said obligations and concomitant liabilities."

#### Compliance with the Nationality Requirement

Regarding the ownership requirement under RA 7042 and the RFP, the JVA and articles of incorporation of Smartmatic-TIM categorically state that 60% of the shares of the joint venture shall be held by TIM itself or its subsidiary while 40% shall be held by Smartmatic itself or its subsidiary, but each shall be jointly and severally liable to the Comelec for the obligations of the other under the RFP.<sup>46</sup>

However, notwithstanding the clarity of the provisions of the JVA and the articles of incorporation, petitioners argue that the 60-40% control of the joint venture by TIM and Smartmatic, respectively, is merely on paper and that, in reality, Smartmatic has control equal to or greater than TIM. According to petitioners, Smartmatic's nominated director can determine the quorum in the board of directors and the executive committee, and approve or veto the acts of the board or executive committee. Smartmatic alone can nominate the chairman of the board, the treasurer and the corporate secretary.<sup>47</sup>

But then, it is not the management but the ownership of the joint venture Smartmatic-TIM which is required to be at least 60% Filipino. The board of directors of a corporation is a creation of the stockholders and, as such, the board controls and directs the affairs of the corporation by delegation of the stockholders.<sup>48</sup> Hence, the authority to be exercised by the board of directors of the joint venture of Smartmatic-TIM is actually the authority of the stockholders of TIM and Smartmatic from which the joint venture derives its authority. As the source of the authority, the stockholders may by auto-limitation impose restraints or restrictions on their own powers such as that allegedly done by TIM in its joint venture with Smartmatic. Besides, issues on the distribution of management powers in the joint venture are a purely business prerogative in which the Court would rather not meddle.<sup>49</sup>

#### Submission of Required Documents

With regard to petitioners' claim that Smartmatic-TIM failed to comply with the requirement under the RFP for the joint venture to submit the following technical documents: (1) a statement of the value of its largest single contract for the last three years;<sup>50</sup> (2) ISO 9000 certificate or its equivalent<sup>51</sup> and (3) certification from the environment protection agency of the country of origin of the product,<sup>52</sup> the Comelec-SBAC noted in its memorandum dated June 3, 2009 that, while Smartmatic-TIM failed to show a copy of its single largest contract (because of its non-disclosure agreement with the election body of Venezuela), Smartmatic-TIM submitted "a duly authenticated certification from the Consejo Nacional Electoral (CNE) of the Venezuelan government x x x indicating the amount of the contract as [\$141,356,604.54], (equivalent to Php6,345,502,017.90) which was well above the eligibility requirement of at least 50% of the Approved Budget for the Contract (ABC) of Php5,611,809,200.50." The certification further indicates "the name of the vendor Smartmatic Group, the name of procuring entity CNE, the period of the contract — between 01 June 2008 to 28 February 2009 and the description of goods and services provided — to provide voting machines and supplies for the elections in the Bolivarian Republic of Venezuela."<sup>53</sup> Thus, the Comelec-SBAC recommended that this certification be admitted under Section 19, Rule 132 of the Rules of Court as it was issued by a government of another country and duly authenticated by the officials of the Philippine embassy.<sup>54</sup> The Comelec-SBAC's recommendation was approved by the Comelec *en banc* in Resolution No. 8608 dated June 9, 2009.<sup>55</sup>

There is no cogent reason to overturn the resolution of the Comelec *en banc* approving the recommendation of the Comelec-SBAC on this matter. It should be borne in mind that, as expressly stated in Section 23.11.1.1, Rule VIII of the implementing rules of RA 9184, the purpose of the requirement is to establish the track record of the prospective bidder of having completed within the last three years a single contract similar to the contract to be bidden out. This purpose was served when CNE certified that Smartmatic had implemented in Venezuela a \$141 Million project similar to the one it was bidding for. With such authenticated information made available to it, the Comelec correctly dispensed with a copy of the contract itself.

The Comelec also did not err in accepting the ISO 9000 and EPA certifications submitted by Smartmatic-TIM. Though not required under RA 9184, ISO 9000 and EPA certificates are required under the RFP. An ISO certificate is intended to assure the Comelec "that the manufacturing process of the solution provider complies with international standards."<sup>56</sup> This purpose is nevertheless still achieved if the PCOS machines are produced by a facility that has an ISO 9000 certification.<sup>57</sup> It is of record that the PCOS machines to be procured by the Comelec are manufactured for Smartmatic by its subsidiary Jarltech. Thus, the ISO certification of Jarltech provides sufficient assurance that the PCOS machines are manufactured according to international standards.

The same principle applies to the EPA certificate. Its purpose is to establish that the product to be procured meets the environmental standards of the country of origin.<sup>58</sup> The EPA certificate submitted by Smartmatic-TIM serves that purpose even though it is in the name of Kenmec Mechanical Engineering Company (Kenmec). As found by the Comelec-SBAC, Kenmec has an outsourcing manufacturing contract with Jarltech under which Kenmec will provide a space

within its facility where Smartmatic, through Jarltech, will assemble and manufacture the PCOS machines.<sup>59</sup> It is logical for the EPA certificate to be issued to Kenmec's facility.

In sum, Smartmatic-TIM substantially complied with the technical requirements for eligibility. Accordingly, no bidding requirement under the law and the RFP was violated by the notice of award and the contract issued to Smartmatic-TIM.

### **Does the July 10, 2009 Contract Diminish the COMELEC's Constitutional Mandate?**

The Constitution appointed the Comelec as the sole authority to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall,<sup>60</sup> and to decide all questions affecting elections, except those involving the right to vote.<sup>61</sup>

Petitioners deplore what they claim to be a denigration of the mandate of the Comelec through the following provisions in its contract with Smartmatic-TIM:

3.3 The PROVIDER<sup>62</sup> shall be liable for all its obligations under this Project, and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

The PROVIDER must provide to SMARMATIC at all times the support required to perform the above responsibilities.

x x x      x x x      x x x

6.7 Subject to the provisions of the General Instructions to be issued by the Commission *En Banc*, the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials, and their performance, completion and final results according to specifications and within the specified periods shall be the shared responsibility of the COMELEC and the PROVIDER.

x x x      x x x      x x x

7.4 Upon delivery of the Goods, in whole or in part, to the warehouses as approved by COMELEC, the equipment shall be under the custody, responsibility and control of the PROVIDER.

x x x      x x x      x x x

According to petitioners, the mandate of the Comelec is seriously undermined by these provisions. Article 3.3 of the contract authorizes Smartmatic to supervise and control the technical aspect of the AES, whereas under Section 26 of RA 8436, it is the Comelec information technology department (Comelec-ITD) which should be given such control. On the other hand, Articles 6.7 and 7.4 of the contract assign to Smartmatic-TIM portions of the electoral responsibilities of the Comelec, whereas the Constitution mandates the authority of the Comelec to be exclusive.

Moreover, by virtue of Articles 21.1 and 21.4 of the contract, bid document no. 10 is deemed part thereof. According to the bid document, it is Smartmatic-TIM which shall generate the digital signature and assign the same to all the members of the board of inspectors, the board of canvassers, the Comelec, the Senate President and the House Speaker. To petitioners' mind, since Smartmatic-TIM has custody of the digital signature, it has virtual control of the election result as it is the digital signature which authenticates the election returns for the canvassing of votes.<sup>63</sup>

Petitioners' fears are unfounded.

We expect that, with the advent of electronic voting, procurement contracts will be accompanied by concerns about their tendency to obscure traditional lines of responsibility. Nonetheless, well-designed and carefully-crafted contracts will represent neither an abdication of the Comelec's mandate nor a restraint on the Comelec's oversight powers, but rather a valid reconfiguration much needed in election administration.

The Comelec took pains to draft a contract that preserves its constitutional and statutory responsibilities and at the same time meets the novel contingencies resulting from the automation of elections.

For the 2010 automated elections, the Comelec exercises not only exclusive supervision and control of the electoral process,<sup>64</sup> including the discretion over which suitable technology to adopt and use.<sup>65</sup> Article 6.7 of the contract reiterates the authority of the Comelec over the purely electoral component of the process, thus:

6.7 Subject to the provisions of the General Instructions to be issued by the Commission En Banc, the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by Comelec's personnel and officials x x x.

With respect to the technical component of the Comelec's authority in the automation of elections, several specialized units have been created under RA 8436 and RA 9369 to support the Commission: (1) an Information Technology Department tasked to carry out the full administration and implementation of the AES;<sup>66</sup> (2) an Advisory Council on Information and Communication and Technology,<sup>67</sup> headed by the Chairman of the Commission, tasked to

recommend the technology to be applied in the AES and to advise and assist in the review of its system's planning, inception, development, testing, operationalization and evaluation stages and in the identification, assessment and resolution of systems problems or inadequacies,<sup>68</sup> and (3) a Technical Evaluation Committee tasked to certify that, based on documented evaluation, the hardware and software components of the chosen AES are operating properly, securely, and accurately, in accordance with the provisions of RA 9369.<sup>69</sup>

Moreover, under the contract, the Comelec committed to create a project management office (PMO) that will oversee the execution and implementation of the automation project.<sup>70</sup>

Thus, both under the law and the contract, it is clear that each of the foregoing units of the Comelec is assigned specific technical functions in support of the AES.*1avvphi1*

On the other hand, Smartmatic is given a specific and limited technical task to assist the Comelec in implementing the AES. The highly specialized language of the contract circumscribes the role of Smartmatic.

For instance, while, under Article 6.7, the counting and canvassing of votes are the responsibilities of the Comelec, under Article 3.3, the technical aspects of the "counting and canvassing software and hardware, including transmission configuration and system integration," and the "[prevention] and troubleshooting [of] technical problems that may arise during the election" are the responsibilities of Smartmatic. The delineation of roles is clear and the tasks assigned to Smartmatic are specific. By no stretch of interpretation can Article 3.3 be deemed to mean that Smartmatic shall count and canvass the votes.

Still under Article 6.7, it is the Comelec through its personnel and officials that shall conduct the entire processes of voting, counting, transmission, consolidation and canvassing of votes. The Comelec, jointly with Smartmatic, will ensure that the performance, completion and final results of these processes meet the stipulated specifications and schedules. This a reasonable assignment of role to Smartmatic, considering that, under Articles 3.1.a, 3.1.b and 3.2 of the contract, Smartmatic-TIM undertakes to ensure the proper, satisfactory and timely execution and completion of the entire scope of the project.<sup>71</sup> There is no reason to view it as a diminution of the exclusive mandate of the Comelec to control the conduct of the elections.

It has likewise not been established that, under Article 7.4 of the contract, the Comelec abnegated its mandate. It must be borne in mind that the contract entered into by the Comelec is a mere lease with option to purchase. Hence, it will be grossly disadvantageous to the Comelec if, upon delivery of the goods by Smartmatic-TIM, custody thereof will be immediately transferred to it, for then liability for damage to or loss of the goods while in storage will be borne by it. It is bad enough that Filipino taxpayers are footing the bill for the continued storage of machines in the scrapped Mega Pacific consortium automation deal. It will be worse if they should likewise be answerable for any PCOS machine that is damaged or lost during storage.

Are the Sanctity of the Ballot and the Integrity of the Automated Electoral Process Compromised By the July 10, 2009 Contract?

The more serious argument raised by petitioners has to do with the sanctity of the ballot and the integrity of the AES.

Petitioners argue that the constitutional right of the people to the secrecy and sanctity of their ballot is compromised by the requirement under the contract and the RFP that the ballot be approximately three-feet long and pre-printed with the names of at least 600 candidates and that it be manually fed into the PCOS machine with the assistance of a Smartmatic-TIM employee, when needed.<sup>72</sup>

Under Section 2, Article V of the Constitution, it is Congress which is primarily tasked with the duty to provide a system of securing the secrecy and sanctity of the ballot. In fulfillment of its duty, Congress adopted the following provisions in RA 9369, to wit:

Sec. 13. Section 11 of Republic Act No. 8436 is hereby amended to read as follows:

"Sec.15. Official Ballot. — **The Commission shall prescribe the format of the electronic display and/or the size and form of the official ballot, which shall contain the titles of the position to be filled and/or the proposition to be voted upon in an initiative, referendum or plebiscite. Where practicable, electronic displays must be constructed to present the names of all candidates for the same position in the same page or screen, otherwise, the electronic displays must be constructed to present the entire ballot to the voter, in a series of sequential pages, and to ensure that the voter sees all of the ballot options on all pages before completing his or her vote and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot. Under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size.** The maiden or married name shall be listed in the official ballot, as preferred by the female candidate. Under each proposition to be vote upon, the choices should be uniformly indicated using the same font and size.

X X X      X X X      X X X

Sec. 18. Procedure in voting. — The Commission shall prescribe the manner and procedure of voting, which can be easily understood and followed by the voters, taking into consideration, among other things, the secrecy of the voting.

While delegating to the Comelec the determination of the size and form of the ballot, Congress prescribed the following minimum requirements of its content: (1) that it shall contain the titles of the position to be filled and/or the proposition to be voted upon in an initiative, referendum or plebiscite; (2) that under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size and (3) that the voter must see all of the ballot options on all pages before completing his or her vote

and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot.

In effect, the basic contents of the ballot as required by Congress dictate the size and form of the ballot that the Comelec shall prescribe. For as long as the requirements are met, the system of secrecy and sanctity of the ballot adopted by Congress under RA 9369 is deemed observed by the Comelec.

There is no showing that the size and form of the PCOS ballot as prescribed by the Comelec do not fulfill the minimum contents required by Congress. In fact, the three-foot, two-page ballot filled with 600 entries in font 10 was deliberately adopted by the Comelec to conform to the requirements of existing laws on the number of elective positions, and in anticipation of the possible number of candidates vying for these positions.

Moreover, there is no inherent flaw in the voting procedure adopted by the Comelec whereby each voter must manually feed the ballot into the PCOS machine. There are sufficient safeguards to the secrecy of the voting process in that the voter alone will hold the ballot and feed it to the PCOS machine. It is all up to the voter whether to discard caution and disclose the contents of the ballot. The law can only do so much in protecting its sanctity. Besides, assuming that the requirement under the contract between the Comelec and Smartmatic-TIM as to the size of the ballot poses concerns in connection with the secrecy of the ballot, the Comelec is not without power to issue the necessary rules and regulations that will effectively address them. Such rules and regulations may include the specific manner on how assistance on feeding the ballot to a PCOS machine may be rendered to a voter to avoid compromising the secrecy of the ballot.

Finally, petitioners are alarmed that the digital signature, security keys, source code and removable memory card are at the disposal of Smartmatic-TIM. They argue that all this puts Smartmatic-TIM in control not only of the process but also the outcome of the election.<sup>73</sup>

There are highly technical, specialized interstitial matters that Congress does not decide itself but delegates to specialized agencies to decide.<sup>74</sup> In RA 9369, Congress delegated to not just one but four specialized bodies the duty to ensure that the AES to be adopted for the 2010 elections will be the most appropriate and secure. These are the Comelec itself, the Comelec-ITD, the Advisory Council and the Technical Evaluation Committee. I am not prepared to say that we should doubt their ability and their dedication to ensure compliance with the minimum capabilities and features of the AES, as prescribed under Sections 6 and 7 of RA 9369.

It is significant that among the functions of the Advisory Council is to "provide advice and/or assistance in the identification, assessment and resolution of systems problems or inadequacies as may surface or resurface in the course of the bidding, acquisition, testing, operationalization, re-use, storage or disposition of the AES equipment and/or resources as the case may be."<sup>75</sup> Furthermore, the Technical Evaluation Committee is assigned these functions:

Sec. 9. New sections 8, 9, 10 and 11 are hereby provided to read as follows:

**"Sec. 11. Functions of the Technical Evaluation Committee.— The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercises, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act based, among others, on the following documented results:**

1. The successful conduct of a field testing process followed by a mock election event in one or more cities/municipalities;
2. The successful completion of audit on the accuracy, functionally and security controls of the AES software;
3. The successful completion of a source code review;
4. A certification that the source code is kept in escrow with the Bangko Sentral ng Pilipinas;
5. A certification that the source code reviewed is one and the same as that used by the equipment; and
6. The development, provisioning, and operationalization of a continuity plan to cover risks to the AES at all points in the process such that a failure of elections, whether at voting, counting or consolidation, may be avoided. (emphasis added)

It has not been satisfactorily shown that the Advisory Council and the Technical Evaluation Committee have shirked their duties. They have not even been given the chance to perform them yet they are already being torpedoed. At this point, the Court should not even attempt to interfere in the work of these specialized bodies and arrogate their functions by deciding highly technical issues that are within their expertise and knowledge, and which the law itself has assigned to them for determination. The Court has to exercise judicial restraint and not pretend to be an expert in something it is not really familiar with. Our function is merely to decide if automation and its implementing contract(s) are legal or not. It is not to find fault in it and certainly, not to determine to what extent the law should be or should not be implemented. After a half century of electoral debacle, there looms in the horizon the dawn of a truly honest, systematic and modern electoral system. But we have to cast our fears and insecurities aside, and take the first step — unsure as it may be — to witness its coming.

Fifteen years ago, the government launched the first on-line lottery ("lotto") system in the country. Back then, brickbats flew thick and fast — that it was nothing but a government racket on a grand scale, that it had a built-in capability to cheat people of their hard-earned money, that government was abdicating a big part of its finances to the Malaysians, that its computers

were going to be used to cheat in the elections and a slew of pseudo-intellectual arguments *ad nauseam*. But what has lotto become today? It has become one of the most successful government projects ever, heralded as one of the better lottery systems in any developing country. Practically the entire nation has been "wired together" under one efficient computer system. It has brought in billions to the government coffers and has helped millions of poor beneficiaries of the Philippine Charity Sweepstakes Office. What could have come out of it if the correct first step had never been boldly taken?

#### A Final Word

We are the final generation of an old civilization and the first generation of a new one. Much of our personal confusion, anguish and disorientation can be traced directly to the conflict within us and within our political institutions, between the dying Second Wave civilization and the emergent Third Wave civilization that is thundering in to take its place. Toffler's words fittingly describe the state of our electoral system.

Congress has vested the Comelec with the authority to modernize the Philippine electoral system through the adoption of an AES. In the exercise of the said authority and considering the nature of the office of the Comelec as an independent constitutional body specifically tasked to enforce and administer all laws relative to the conduct of elections, the Comelec enjoys wide latitude in carrying out its mandate. No worst-case scenarios painted by doomsayers, no speculative political catastrophe should be the basis of invalidating the Comelec's official acts. Only when the exercise by the Comelec of its discretion is done with grave abuse will this Court nullify the challenged discretionary act. Otherwise, the institutional independence of the Comelec will be unduly restricted and eroded, and its constitutional and statutory prerogatives encroached upon. This Court should not allow that in any situation. This Court should not allow that in this case.

Let us welcome the significant change in our electoral system that is the automated election system. The future is upon us. It beckons as it poses the challenge of spurring technological innovation and safeguarding values like accuracy and transparency in our electoral system. Let us not turn our backs on it simply out of speculation and fear. Let us give it a chance.

I vote to DISMISS the petition.

**RENATO C. CORONA**  
Associate Justice

## Footnotes

<sup>1</sup> Alvin Toffler, *The Third Wave*.

<sup>2</sup> See Chapter 18, Revised Administrative Code of the Philippine Islands of 1917. See also Act No. 1582, effective January 15, 1907.

<sup>3</sup> Request for Proposals (RFP) issued by the Commission on Elections for the 2010 elections automation project.

<sup>4</sup> Republic Act.

<sup>5</sup> 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.

<sup>6</sup> An act authorizing the Commission on Elections to use and 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.

<sup>7</sup> An act amending Republic Act No. 8436.

<sup>8</sup> An act appropriating the sum of eleven billion three hundred one million seven hundred ninety thousand pesos (P11,301,790,000.00) as supplemental appropriation for an automated election system and for other purposes.

<sup>9</sup> Annex "A", Petition.

<sup>10</sup> Annex "13", Comment.

<sup>11</sup> [www.comelec.gov.ph/modernization/2010](http://www.comelec.gov.ph/modernization/2010)

<sup>12</sup> Petition, pp. 46-47.

<sup>13</sup> Manifestation and Memorandum for Petitioner, pp. 107-108.

<sup>14</sup> Petition, pp. 28-31; Manifestation and Memorandum for Petitioners, pp. 53-80.

<sup>15</sup> Foreign Investments Act of 1991.

<sup>16</sup> Executive Order.

<sup>17</sup> Seventh Regular Foreign Investment Negative List dated December 8, 2006.

<sup>18</sup> Petition, pp. 32-40; Manifestation and Memorandum for Petitioners, pp. 81-93.

<sup>19</sup> Manifestation and Memorandum for Petitioners, pp. 17-29, 49-52.

<sup>20</sup> *Id.*, pp. 37-48.

<sup>21</sup> Manifestation and Memorandum,

<sup>22</sup> Manifestation and Memorandum, pp. 94-100.

<sup>23</sup> The original text read:

Section 1. Declaration of policy. - It is the policy of the State 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.

<sup>24</sup> The original text read:

Section 6. Authority to use an automated election system. - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system, herein referred to as the System, for the process of voting, counting of votes and canvassing/consolidation of results of the national and local elections: **Provided, however, That for the May 11, 1998 elections, the System shall be applicable in all areas within the country only for the positions of president, vice-president, senators and parties, organizations or coalitions participating under the party-list system.**

To achieve the purpose of this Act, the Commission is authorized to procure by purchase, lease or otherwise any supplies, equipment, materials and services needed for the holding of the elections by an expedited process of public bidding of vendors, suppliers or lessors: Provided, That the accredited political parties are duly notified of and allowed to observe but not to participate in the bidding. **If, inspite of its diligent efforts to implement this mandate in the exercise of this authority, it becomes evident by February 9, 1998 that the Commission cannot fully implement the automated election system for national positions in the May 11, 1998 elections, the elections for both national and local positions shall be done manually except in the Autonomous Region in Muslim Mindanao (ARMM) where the automated election system shall be used for all positions.** (emphasis supplied)

<sup>25</sup> The original text read:

Section 8. *Procurement of equipment and materials.* - The Commission shall procure the automated counting machines, computer equipment, devices and materials needed for ballot printing and devices for voting, counting and canvassing from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations.

<sup>26</sup> Manifestation and Memorandum, pp. 57-61, citing Records of the Senate, Volumes II and III.

<sup>27</sup> Petition, p. 28.

<sup>28</sup> Supra at 21.

<sup>29</sup> Section 47, RA 9369 provides that the law shall take effect 15 days after its publication in a newspaper of general circulation. It was first published in the January 26, 2007 issue of Malaya.

<sup>30</sup> [www.merriam-webster.com/dictionary](http://www.merriam-webster.com/dictionary).

<sup>31</sup> *Stemmerik v. Mas*, A.C. No. 8010, 16 June 2009.

<sup>32</sup> Id.

<sup>33</sup> Manifestation and Memorandum, p. 57.

The following relevant statements of Senator Gordon during the Senate deliberations on October 11, 2006 regarding Senate Bill No. 2231 is enlightening:

Sen. Gordon:

x x x Our position, Mr. President, is that this bill is essentially an amendment of an original bill that says automation of election, which means that it has already started. x x x

So, we are saying, Mr. President, that based on that, with all these things that are covered already, -- in fact, there is practically a delegation of authority given to the Comelec which, by the way, is constitutionally the implementor of elections to the advisory council and to the oversight committee which is composed of seven senators and seven congressmen. x x x

x x x The proponent's (Sen. Roxas') amendment will take acts of Congress to continue AES.

In other words, Congress has to act to continue the automated election system. **In our proposal, it will take an act of Congress to stop AES. In other words, the general rule is, AES is now on a heuristic path, umaandar na iyan. The reports have already been given, the budget will still have to be approved for that, which means congressional action will be taken every step of the way.** x x x

**Kaya nga ang sinasabi ko, magiging ludicrous tayo na in 1997, ang sabi natin automation. Hindi po ito test. Ito po ay desisyon natin na pairalin na iyong automation sa six provinces and six cities because gahol na ho tayo sa oras. We have ran out of time.** x x x

x x x **I find that hindi tayo lumalakad kung babalik ulit tayo sa 2010 sa six provinces and six cities, para ano pa at naglalagay tayo ng automated election title dito? All I am saying is that, once we go on automation, we should move on.** x x x (Senate Deliberations, 11 October 2006, p. 191-200.) (emphasis supplied)

<sup>34</sup> Memorandum for public respondent, p. 60, citing Annexes "12", "13" and "14".

<sup>35</sup> Government Procurement Reform Act; effective January 26, 2003.

<sup>36</sup> Sec. 23.6.2(a), Rule VIII, Implementing Rules and Regulations of RA 9184.

<sup>37</sup> Id. at Sec. 2.2.7.

<sup>38</sup> See also Sec. 23.11.1, Implementing Rules and Regulations of RA 9184.

<sup>39</sup> Annex 5, p. 9, Comment of public respondent.

<sup>40</sup> Annex 12, Comment of public respondent.

<sup>41</sup> Memorandum, pp. 90-92.

<sup>42</sup> These essential elements are consent, object certain and cause.

<sup>43</sup> Sec. 63, RA 9184.

<sup>44</sup> GPBB opinion NPM No. NPM 098-2004 dated July 23, 2004. [www.gppb.gov.ph/opinions/view\\_opinion.asp](http://www.gppb.gov.ph/opinions/view_opinion.asp). See also the GPPB Manual of Procedures for the Procurement of Goods and Services.

<sup>45</sup> Sec. 71 of the Instruction to Bidders provides that "The bidder shall specify in its Bid all portions of the Goods and Services that will be subcontracted, if any, including the entities to whom each portion will be subcontracted xxx. Subcontracting of any portion shall not relieve the Bidder from any liability or obligation that may arise from its performance."

<sup>46</sup> Supra at 32.

<sup>47</sup> Memorandum, pp. 32-35.

<sup>48</sup> Angeles v. Santos, 64 Phil. 697 (1937).

<sup>49</sup> Ong Yong, et al. v. David Tui, et al., G.R. No. 144476, April 8, 2003.

<sup>50</sup> Item 2.2.6.2.2.2.

<sup>51</sup> Item 2.2.6.1.2.3.

<sup>52</sup> Item 2.2.6.1.2.5.

<sup>53</sup> Annex 9, Comment of public respondent.

<sup>54</sup> Id., p. 2.

<sup>55</sup> Annex 10, Comment of public respondent.

<sup>56</sup> Omnibus SBAC Resolution No. 09-001, Annex 6, Comment of public respondent.

<sup>57</sup> Id..

<sup>58</sup> Item 2.2.6.1.2.5, RFP.

<sup>59</sup> Supra at 48.

<sup>60</sup> Article IX-C, Sec. 2, par. 1.

<sup>61</sup> Article IX-C, Sec. 2, par. 3.

<sup>62</sup> Under the contract, the term PROVIDER refers to Smartmatic TIM Corporation.

<sup>63</sup> Memorandum, pp. 17-29, 49-52.

<sup>64</sup> Section 26 of RA 8436 reads:

*Sec. 26. Supervision and control* - The System shall be under the exclusive supervision and control of the Commission. For this purpose, there is hereby created an information technology department in the Commission to carry out the full administration and implementation of the System.

The Commission shall take immediate steps as may be necessary for the acquisition, installation, administration, storage, and maintenance of equipment and devices, and to promulgate the necessary rules and regulations for the effective implementation of this Act.

<sup>65</sup> Section 1, RA 9369.

<sup>66</sup> Sec. 26, RA 8436.

<sup>67</sup> Under RA 9369, the Advisory Council shall be composed of the following:

Sec. 8. xx xx xx The Council shall be composed of the following members, who must be registered Filipino voters, of known independence, competence and probity;

"(a) The Chairman of the Commission on information and Communications Technology (CICT) who shall act as the chairman of the council;

"(b) One member from the Department of Science and Technology;

"(c) One member from the Department of Education;

"(d) One member representing the academe, to be selected by the chair of the Advisory Council from among the list of nominees submitted by the country's academic institutions;

"(e) Three members representing ICT professional organizations to be selected by the chair of the Advisory Council from among the list of nominees submitted by Philippines-based ICT professional organization. Nominees shall be individuals, at least one of whom shall be experience in managing or implementing large-scale IT projects.

"(f) Two members representing nongovernmental electoral reform organizations, to be selected by the chair of the Advisory Council from among the list of nominees submitted by the country's nongovernmental electoral reform organizations.

<sup>68</sup> Sec. 9.

<sup>69</sup> Sec. 11.

<sup>70</sup> Sec. 6.3.6.

<sup>71</sup> Articles 3.1.a, 3.1.b and 3.2 of the contract.

<sup>72</sup> Memorandum, pp.

<sup>73</sup> Memorandum, pp. 17-29, 49-52.

<sup>74</sup> See *Zuni Public School District No. 89, et al. v. Department of Education, et al.*, 550 U.S. \_\_\_ (2007).

<sup>75</sup> Sec. 9, RA 9369.

## DISSENTING OPINION

### **BRION, J.:**

I write this Dissent mindful that a new system of exercising the constitutional right of suffrage is upon us. Automated election, first tested in the ARMM election on August 11, 2008, shall sooner or later be applied at the national level. The development, to be sure, is a change that we should welcome for the promises it brings – a peaceful, clean, orderly, fair, honest, efficient, and credible election. The fulfillment of this promise, however, is not a result that we can simply wish into our national life. Nor is it something we can attain in a hurry. Fulfillment is a result that the whole country must plan, work, and sacrifice for.

### Interface of Powers: COMELEC and the Supreme Court

At the forefront in the national effort to achieve a computerized election system is, of course, the Commission on Elections (COMELEC) – the independent constitutional body tasked with the enforcement and administration of all election laws and regulations. The Supreme Court, as the court of last resort tasked to guard the Constitution and our laws through interpretation and adjudication of judiciable controversies, is an indispensable partner and participant in this endeavor, as the Constitution itself safeguards and regulates our electoral processes and policies, which are expressed through laws and COMELEC regulations. In fact, about five years ago, this Court decisively spoke on the matter of automation when we invalidated the "Mega Pacific Contract" between the COMELEC and Mega Pacific Consortium for the automation of the May 10, 2004 elections.<sup>1</sup>

Once again, we are called upon today with the daunting task of passing upon the validity of another election automation contract, this time between the COMELEC and Smartmatic International Corporation – Total Information Management Corporation (SMARTMATIC-TIM) for the coming May 10, 2010 elections.<sup>2</sup> In undertaking this task, I duly acknowledge that the COMELEC exercises considerable latitude and the widest discretion in adopting its chosen means and methods of discharging its tasks, particularly in its broad power "to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall."<sup>3</sup> The Court has interpreted this provision to mean the grant to "COMELEC [of] all the necessary and incidental powers for it to achieve the objective of holding free, orderly, honest, peaceful and credible elections"<sup>4</sup> – an expansive view of COMELEC powers

that is not at all novel. For, as early as 1941 under the 1935 Constitution, the Court already emphasized in *Sumulong v. COMELEC*<sup>5</sup> 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. [Emphasis supplied]

The automation question now before us, like any other COMELEC administration and enforcement matter, is a concern that COMELEC is entitled by law to handle on its own without any interference from any outside agency, not even from this Court, except pursuant to the allocation of powers that the Constitution has mandated. In other words, the COMELEC reigns supreme in determining how automation shall be phased in, how it shall affect all aspects of our electoral exercise, and how it shall operate, subject only to our intervention when our own constitutional duty calls for enforcement. Specifically, we cannot close our eyes when a grave abuse of discretion amounting to lack or excess of jurisdiction has been committed, such as when the COMELEC acts outside the contemplation of the Constitution and of the law.<sup>6</sup>

Consistent with this view, I do not aim to question the bidding the COMELEC undertook and its compliance with our automation laws – Republic Act (RA) Nos. 8436<sup>7</sup> and 9369<sup>8</sup> – in the absence of any violation sufficiently gross to amount to the proscribed grave abuse of discretion amounting to lack or excess of jurisdiction. My focus, rather, is on the gut issues that really strike at the heart of the right of suffrage and place the integrity of our electoral process at risk.

### The Pilot Testing Issue

For one, I do not question the COMELEC's present automation moves for lack of prior pilot testing – a point that has generated a lot of comment from both the ponencia and the separate opinions. I believe that raising a question on this point is misplaced because the disputed provision – Section 5 of RA No. 8436 as amended<sup>9</sup> – does not categorically and expressly demand a pilot test and, in fact, does not even mention the term "pilot test." As worded, this provision should be read in the context of its title "Authority to Use an Automated Election System." Thus, the provision is essentially a grant of authority to automate, with the

automation being a limited one in the election immediately following the law's passage and only going nationwide in the "succeeding regular national or local elections." A pilot test is not an absolute necessity because it was never imposed as a condition sine qua non to a nationwide automation; Section 5 merely expressed a limit on the extent of automation that could take place in the election following the passage of RA No. 9369; the automated election must be partial and local. The COMELEC first exercised its authority to partially automate in the ARMM election held on August 11, 2008, so that this automated electoral exercise was effectively the "pilot exercise" the country embarked on in electoral automation. It can very well be, as the COMELEC posits, the pilot test that Section 5, RA No. 8436, as amended, mentioned.

Strictly speaking, the use of automation for the first time in the ARMM election was not a violation of the limitation that Section 5 imposed, because the automation was properly local and partial. If there had been a violation at all, the violation was in the failure to use automation in the next following election after the passage of RA No. 9369 (in the 2007 national and local elections) and in the failure to strictly follow the terms of Section 5 in the first automated election, because the automated election took place only in portions of Mindanao. These violations, however, pertained to that first use of automation in the ARMM election, or, if at all, to the failure to use automation in the 2007 elections. They need not affect the automation for the May 10, 2010 election, whose budget for a nationally-implemented automated election Congress specifically provided for despite knowledge that no automation took place in the 2007 election as originally envisioned.<sup>10</sup> From this perspective, pilot testing is an issue that does not need to trigger the Court's certiorari powers invoked in the present petition.<sup>11</sup>

### The Abdication Issue

Despite the above conclusion, I still take exception to the present implementation of election automation, as it involves another more fundamental violation: the COMELEC, contrary to the Constitution and the law, now shares automation responsibilities with SMARTMATIC-TIM under their Automation Contract. In my view, this is a violation that transgresses the Constitution, at the same time that it is an action plainly outside the contemplation of the law. Based on this characterization, this sharing of responsibility over automation is a grave abuse of discretion on the part of the COMELEC that calls for the active intervention of this Court, pursuant to the second paragraph of Section 1, Article VIII of the Constitution.<sup>12</sup>

I take this view in light of Section 2, Article IX-C of the Constitution that commands the "COMELEC to enforce and administer all laws and regulations relative to the conduct of an election" and thereby gives the COMELEC sole authority to undertake enforcement and administrative actions in the conduct of elections. In the context of the present case, this constitutional mandate necessarily extends to the enforcement of Section 26 of RA No. 8436<sup>13</sup> which states in full:

Section 26. Supervision and control. – The System shall be under the exclusive supervision and control of the Commission. For this purpose, there is hereby created an information technology department in the Commission to carry out the full administration and implementation of the System.

The Commission shall take immediate steps as may be necessary for the acquisition, installation, administration, storage and maintenance of equipment and devices, and to promulgate the necessary rules and regulations for the effective implementation of this Act. [Emphasis supplied]

Rather than the exclusive supervision and control that this provision envisions, the COMELEC effectively shares responsibilities with SMARTMATIC-TIM in the automated May 10, 2010 elections by giving complete control of the technical aspects of this election to a private entity – SMARTMATIC-TIM. In the words of the petition, this was an "**abdication**" of the COMELEC's constitutional mandate, evidenced by the terms of Articles 3.3, 6.7 and 7.4 of the Automation Contract and by the grant to SMARTMATIC-TIM of the public and private keys to the voting equipment.

#### The Ponencia and the Issue of Abdication

In addressing the issue, the ponencia strangely uses the same Articles cited above in arguing that COMELEC did not relinquish its control over the technical aspect of the Automated Election System (AES). It asserts that Article 3.3 of the Automation Contract<sup>14</sup> (which designates SMARTMATIC-TIM as the joint venture partner in charge of the technical aspect of the counting and canvassing software and hardware including transmission configuration and system integration) does not translate to ceding control of the electoral process to SMARTMATIC-TIM. To the ponencia, SMARTMATIC-TIM's designated role is simply an eligibility requirement imposed on bidders operating under a joint venture.<sup>15</sup> The ponencia also supports this view by referring to the Request for Proposals (RFP) whose notice is for bids from a "complete solutions provider which can provide experienced and effective overall nationwide project management service and total customer support under COMELEC supervision and control to ensure the effective and successful implementation of the Project."<sup>16</sup>

The ponencia further points to Article 6.7 of the Automation Contract which provides:

6.7 Subject to the provisions of the General Instructions to be issued by the Commission En Banc, the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials, and their performance, completion and final results according to specifications and within the specified periods shall be the shared responsibility of COMELEC and PROVIDER. [Emphasis supplied]

To the ponencia, this provision apparently speaks for itself as it requires action by COMELEC's own personnel.

The ponencia also found the petitioners' allegation that SMARTMATIC-TIM has control over the public and private keys necessary to operate the Precinct Count Optical Scan (PCOS) machines to be speculative and without factual basis. Instead, it agreed with the opinion of the National Computer Center that the "nowhere in the RFP/TOR was it indicated that the COMELEC would delegate to [SMARTMATIC-TIM] full discretion, supervision and control over the [public and private keys]."

### Refutation of the Ponencia's Positions

#### a. Effect of Automation

In my view, the ponencia has taken the above positions because it viewed the cited Articles in isolation and really did not take into account the whole election process and the effect of automation on this process. Be it remembered that an election entails an extended process that starts even before actual voting begins when voters register. Voting itself is only a part of the process, as this is followed by the counting of the votes by the Board of Election Inspectors (BEI), the canvassing of the tallied votes by the Board of Canvassers (BOC), the transmission and consolidation of the canvassed results to the municipal, provincial and a national BOC, and finally the announcement and proclamation of the winners. True enough, the people undertaking all these activities, particularly in the traditional voting process, have been COMELEC officials, employees, and duly deputized government personnel. This consideration, however, is not enough in passing upon the COMELEC-SMARTMATIC-TIM arrangement under the Automation Contract.

#### b. The Ponencia's Omissions

What the ponencia did not sufficiently explain is the COMELEC's intent to introduce a new way of voting<sup>17</sup> that affects, not only on the act of casting votes, but also the whole manner by which the counting and canvassing of votes, the transmission and collation of results, and the proclamation of winners are to be undertaken. All these are reflected in detail in the RFP, heretofore mentioned, whose call was for a "complete systems provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information, campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, etc.) under COMELEC supervision and control..."<sup>18</sup> All these automation activities are intrusions into the traditional COMELEC domain and cannot be simply glossed over.

The ponencia likewise failed to mention that Section 26 of RA No. 8436 categorically required that the AES to be installed shall be under COMELEC's **exclusive supervision and control**; for this purpose, the law created an **Information Technology Department (ITD)** within the COMELEC to carry out the **full administration and implementation of the system**. Underlying the COMELEC's mandate of exclusive supervision and control over the AES in Section 26 is the adoption of measures for the "acquisition, installation, administration, storage and

maintenance of equipment and devices and the promulgation of the necessary rules and regulations for the effective implementation of RA No. 8436."

### **c. Section 26 of RA No. 8436**

Under Section 26, the mandate of the law is clear – the operative word used is "**exclusive**," which means that the automation responsibility given to the COMELEC cannot be shared with any other entity. Specifically, it means that the COMELEC, through its ITD, shall have full and exclusive control over the entire process of voting, counting, transmission, consolidation and canvassing of votes, including their performance and completion and the final results. No special interpretative skill is necessary to appreciate the meaning of "exclusive." "Supervision and control," on the other hand, are terms that have practically attained technical legal meaning from jurisprudence.<sup>19</sup> "Control" as the established cases signify means to exercise restraining or directing influence over; to dominate, regulate; hence, to hold from action; to curb; to subject; also to overpower.<sup>20</sup> In any interpretation of Section 26, these are key terms and the standards that should predominate in determining whether this Section has been complied with. The ponencia, unfortunately does not appear to have considered this Section at all.

### **d. The Information Technology Department**

Given the bidding terms and the qualification imposed on the "complete systems provider," what the ITD remained to do after the systems provider is in place becomes a puzzle whose elusive answer is nowhere to be found in the laws and the regulations in place. Presumably, the ITD can still couch its functions in terms of the "supervision and control" that Section 26 commands and which the COMELEC specified in the RFP. This intent, however, cannot be simply manifested in the law and parroted in the RFP as proof that there had been compliance; such compliance must be shown and must stand the test of overt acts, particularly contemporaneous acts the COMELEC and its systems provider undertake in furtherance of the intended automation. The best evidence of this intent, of course, is the contract that defines the parties' respective roles in the automation. The contractual terms are likewise the best evidence of whether the responsibility for automation is exclusive, as the cited Section 26 requires.

### **e. The Automation Contract Examined**

The Automation Contract between the COMELEC and SMARTMATIC-TIM, executed on July 10, 2009, fully defines the automation "project" to be undertaken. It delineates as well the roles the parties shall respectively undertake in pursuing the project, and the expectations that each party has from the other.

The "project" is defined as "the COMELEC's nationwide automation of the voting, counting, transmission, consolidation and canvassing of votes for the May 10, 2010 Synchronized

National and Local Elections, consisting of the three (3) components mentioned in the Bidding Documents (the RFP)".<sup>21</sup> The three components are:<sup>22</sup>

Component I: Paper-based Automated Election System (AES)

1-A. Election Management System (EMS)

1-B. Precinct-Count Optical Scan (PCOS System)

1-C Consolidation / Canvassing System (CCS)

Component 2: Provision for Electronic Transmission of Election Results, using Public Telecommunications Network.

Component 3: Overall Project Management.

SMARTMATIC-TIM, as the service provider, has the obligation to provide the **goods** the project shall require, generally described in the contract as all the materials necessary to carry out the project," except the ballot boxes.<sup>23</sup> It shall likewise provide the **services** defined as "all the acts to be performed or provided by the PROVIDER [SMARTMATIC-TIM] to COMELEC for the operation and completion of the Project."<sup>24</sup>

Under **Article 3.2**, "[t]he provider shall provide the Goods and perform the Services under this Contract and the Contract Documents. It shall provide competent project management, technical manpower and efficient services. It shall ensure the proper, satisfactory and timely execution and completion of the Project." This is complemented by **Article 3.3** whose second paragraph in turn states that "[**SMARTMATIC-TIM**], as the joint venture partner with the greater track record in automated elections, **shall be in charge of the technical aspects** of the counting and canvassing software and hardware, including transmission, configuration and system integration. [**SMARTMATIC-TIM**] shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election."

The COMELEC, for its part, bound itself to pay under the terms of the contract, and shall be responsible, among others, for:

6.3.2. Closely coordinating with the PROVIDER in the preparation of the Sites and set-up the hardware, network installation, software installation, user testing and training. For the duration of the Project, COMELEC shall provide continuing assistance to the PROVIDER on the needs of the Project.

6.3.6. Creating its own Project Team called the Project Management Office (PMO) for the purpose, among others, of overseeing the Project's execution and implementation. It shall allow the PROVIDER access to concerned or responsible COMELEC officials.<sup>25</sup>

As heretofore mentioned, Article 6.7 of the Automation Contract provides for the conduct by the COMELEC personnel and officials of the entire electoral process, **but their performance, completion and final results, according to specifications and within the specified periods, shall be the shared responsibility of COMELEC and the PROVIDER.**<sup>26</sup> Article 7.4 provides that "[u]pon delivery of the Goods, in whole or in part, to the warehouses as approved by COMELEC, **the Equipment shall be under the custody, responsibility and control of the PROVIDER.**"<sup>27</sup>

Interestingly, the contract does not even mention the COMELEC's ITD and how it will interact with SMARTMATIC-TIM in the implementation of the project. The Project Management Office (PMO) is specifically mentioned, but only for the purpose of overseeing the project's execution and implementation; it is not considered as an office with authority to speak on technical matters. On technical matters, SMARTMATIC-TIM reigns supreme and the ITD is not even mentioned. Under this situation, the PMO cannot but merely be a monitoring or liaison office, rather than an office supervising or controlling the project for COMELEC. It cannot supervise and control if SMARTMATIC-TIM has the last say on technical matters. In fact, the COMELEC itself, under Article 6.3.2, only plays an assisting role to SMARTMATIC-TIM, thus raising the direct implication that the latter has the lead role in all technical activities this Article mentions. Thus viewed, can the PMO raise any higher than the COMELEC?

#### f. The Shared Responsibility

Based on all these considerations drawn from the RFP and the Automation Contract, I cannot escape the conclusion that what exists is not the exclusive supervision and control of the automation process by the COMLEC, but a shared responsibility between the contracting parties to achieve this end. To point out the obvious, SMARTMATIC-TIM takes care of project management, with the PMO relegated to the blurry role of "overseeing the Project's execution and implementation" and with no other clearly defined role in the automation project. ITD does not even exist insofar as the project documents are concerned. Thus, while the COMELEC retains its traditional role with respect to the running of the election itself, a new election process is in place that is substantially affected by automation. Stated otherwise, while the COMELEC truly controls the BEI, the BOC, and the administrative and adjudicative staff attending to the election process, the voters themselves, and even the BEI and the BOC, must yield to the process that automation calls for, which process is essentially technical and is in the hands of SMARTMATIC-TIM, the provider who wholly supplies the hardware and the software that controls the voting, counting, canvassing, consolidation and transmission of results, and who expressly has control and custody over the election equipment to be used in the voting, with no reserve power whatsoever on the part of the COMELEC in this regard.<sup>28</sup> Not to be forgotten is that SMARTMATIC-TIM also provides the necessary services that run across voting, counting, canvassing, consolidation and transmission activities.

These arrangements, viewed from all sides, does not indicate an exclusive supervision and control situation over the automation process. To be exact, they involve shared responsibilities

that, however practical they may be from the business and technical perspectives, are arrangements that Philippine law does not allow.

### Access Keys and Digital Signatures

Separately from all these considerations is the matter of the access keys and digital signatures that are objectionable, not merely because of the intrusion in the technical end of automation, but because they effectively hand over control of the election process to SMARTMATIC-TIM.

Contrary to the ponencia's findings, a close perusal of the automation contract's supporting documents indicate that the COMELEC has in fact effectively handed over to SMARTMATIC control over the AES, particularly with respect to the following quoted technical aspects:

- a. Generate and distribute the access keys for the canvassing equipment and 82,200 optical scanners to be used on election day;<sup>29</sup>
- b. Deliver the 82,200 optical scanners to their designated precincts and secure them on site;<sup>30</sup>
- c. Prepare the polling places and canvassing centers in all levels to make them fully functional;<sup>31</sup> and
- d. Maintain 100% electronic transmission capability on election day (SMARTMATIC-TIM to fill the 25% gap of the country's current 75% network coverage) [Emphasis supplied]

The access keys are significant because control and possession of these keys translate to the capacity to change election results in any precinct in the country. This conclusion can be drawn from the following exchanges during the oral arguments:

ASSOCIATE JUSTICE CARPIO: Now what is the first function of the Commission on Elections under the Constitution?

ATTY. ROQUE: Well, to supervise the conduct of elections, Your Honor.

x x x      x x x      x x x

ASSOCIATE JUSTICE CARPIO: In short, the Constitution mandates that the COMELEC must have control over the election process?

ATTY. ROQUE: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay. Who has possession of the public and private keys of this automation program.

ATTY. ROQUE: Smartmatic, Your Honor.

x x x      x x x      x x x

ASSOCIATE JUSTICE CARPIO: Would you know how these public and private keys are generated?

x x x      x x x      x x x

ATTY. ROQUE: Yes, Your Honor. It is also Smartmatic that would generate that.

x x x      x x x      x x x

ASSOCIATE JUSTICE CARPIO: Okay. The private keys refer to the keys given to BEI members, correct?

ATTY. ROQUE: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Is this generated by the BEI member or given to them?

ATTY. ROQUE: Given to them, Your Honor.

x x x      x x x      x x x

ASSOCIATE JUSTICE CARPIO: Okay. But in this case, the BEI members will not generate their own password, they will be given the password, the key, the private key by the Smartmatic people?

ATTY. ROQUE: Yes, Your Honor, because as explained by Professor Manalastas, they will have to be digital signatures to be provided by Smartmatic.

ASSOCIATE JUSTICE CARPIO: And the public keys--- why are the public keys important?

ATTY. ROQUE: Well, Your Honor, because unless you have – It has to be congruence between the private and public key before you can have access to the system, Your Honor. It works as if it is a functional equivalent of two keys, Your Honor. That must be used together, otherwise, it cannot enter.

ASSOCIATE JUSTICE CARPIO: And the public keys will not be known to the BEI but will only be known to the (interrupted)

ATTY. ROQUE: Smartmatic, Your Honor.

x x x      x x x      x x x

ASSOCIATE JUSTICE CARPIO: Okay. So the public and private keys will be generated by the Smartmatic and they will be in control of this, they can change it anytime, and that gives them the power to change the results of any precinct, correct?

ATTY. ROQUE: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: So they control the election process?

ATTY. ROQUE: Yes, Your Honor. [Emphasis supplied]<sup>32</sup>

Bid Bulletin No. 10 issued by COMELEC-SBAC on April 15, 2009 confirms the correctness of what the above exchange discussed. This Bulletin states, among others, that the "digital signature shall be assigned by the winning bidder [SMARTMATIC-TIM in the present case] to all members of the BEI and BOC. It further states that "for [National Board of Canvassers or NBOC], the digital signatures shall be assigned to all members of the Commission and to the Senate President and the House Speaker." These terms are all consistent with Article 3.3 of the Automation Contract, heretofore mentioned, which allows SMARTMATIC-TIM to be "in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration." On this point, the following oral argument exchanges are illuminating, viz:

ASSOCIATE JUSTICE CARPIO: Are you familiar with Bid Bulletin No. 10 issued on April 15, 2009 of the COMELEC's BAC Committee?

ATTY. ROQUE: Well, off-hand, Your Honor, I cannot recall Bid Bulletin No. 10, and I do not have a copy of Bulletin No. 10.

ASSOCIATE JUSTICE CARPIO: Okay. I will read to you Bid Bulletin No. 10 issued by the COMELEC dated April 15. This is from the website of the PCIJ.

ATTY. ROQUE: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: The digital ... I am quoting now: "The digital signature should be assigned by the winning bidder to all members of the BEI and BOC. The digital signature shall be issued by a Certificate Authority nominated by the winning bidder and approved by the COMELEC." In other words, SMARTMATIC, the winning bidder, will nominate DERISIGN to be the Certification Authority, just ask COMELEC for approval and COMELEC will say "approved." From then on, it is SMARTMATIC that will deal with DERISIGN on the generation of the public and private keys.

ATTY. ROQUE: That is correct, Your Honor.

ASSOCIATE JUSTICE CARPIO: So, control of the public and private keys are in the hands of SMARTMATIC. Now, what should the COMELEC do to regain control of the election process?

ATTY. ROQUE: Well, we do not know, Your Honor, because as far as DERISIGN is concerned, they will not deal with the COMELEC, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yes, but COMELEC should recall this and say we will deal with DERISIGN on generation of the public and private keys and we will hold exclusive possession and control; we will not share these public and private keys with SMARTMATIC-TIM or with anybody because whoever is in possession of these keys can change the results of the election, correct?

ATTY. ROQUE: That is possible, Your Honor. Yes. In fact, that is what COMELEC should do.

ASSOCIATE JUSTICE CARPIO: So, it is not enough that COMELEC should have co-possession of the keys. They must have sole and exclusive possession of those public and private keys because the Constitution vests in the COMELEC alone control of the electoral process, correct?

ATTY. ROQUE: Absolutely, Your Honor. [Emphasis supplied]<sup>33</sup>

A noted expert in computer science, Professor Pablo Manalastas of the Ateneo de Manila University Computer Science Department and the University of the Philippines Department of Computer Science explains the significance of the private keys in relation to the digital signatures to be provided by SMARTMATIC-TIM thus:

The real key to the sanctity of the ballot is the private keys to be issued by the BEI. Unfortunately, the private key is not private at all. After collation of votes, the BEI seals its tally with a digital signature using private keys before transmitting the results. These digital signatures would be generated and assigned by SMARTMATIC and or groups authorized by it. SMARTMATIC would have possession of the secret and the public keys of all BEI personnel. The person in possession of the secret key can change the vote of the precinct.<sup>34</sup>

The digital signatures are crucial since Section 22 of the RA No. 8436 as amended provides that "the election returns transmitted electronically and digitally signed shall be considered as official election results and shall be used as the basis for the canvassing of votes and the proclamation of a candidate."<sup>35</sup> Thus, by placing solely in the hands of SMARTMATIC-TIM the discretion to assign the "digital signatures," the COMELEC has effectively surrendered control of the May 10, 2010 elections and violated its constitutional mandate to administer the conduct of elections in the country. Significantly, even the counsel for SMARTMATIC-TIM admitted during the oral arguments that the COMELEC should not have given to SMARTMATIC-TIM the possession and control of the public and private keys, thus:

ASSOCIATE JUSTICE CARPIO: Okay, let us go [to] the public and private public keys, you were saying that COMELEC if it wants can have exclusive possession and control of the public and private keys, is that right?

ATTY. LAZATIN: That is correct, Your Honor.

ASSOCIATE JUSTICE CARPIO: And it will not be a problem for SMARTMATIC in performing its obligations under the contract, that is right?

ATTY. LAZATIN: That is correct, Your Honor.

ASSOCIATE JUSTICE CARPIO: So, it is the choice of COMELEC if they want to have sole and exclusive possession of the public and private keys?

ATTY. LAZATIN: We even believe Your Honor that the COMELEC has no choice because it is the one conducting the elections.

ASSOCIATE JUSTICE CARPIO: So, it should not have given to SMARTMATIC possession and control of the public and private keys?

ATTY. LAZATIN: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: So, you agree with me that it should be given back solely to COMELEC because that is the effective control over the automation process?

ATTY. LAZATIN: That is correct until after the election, Your Honor, I would like to stress that this is a least arrangement Your Honor so that the electronic key will have to be returned to the lessor, Your Honor.

ASSOCIATE JUSTICE CARPIO: No, I am not talking about the electronic key, I am talking about the digital signatures.

ATTY. LAZATIN: Agreed, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay, you agree that it belongs, it should be under the possession and control of COMELEC?

ATTY. LAZATIN: That is correct, Your Honor.<sup>36</sup>

## CONCLUSIONS

Section 26 clearly provides that the ITD shall have exclusive supervision and control of the AES and shall carry out the full administration and implementation of the system. To fully implement this statutory requirement, the COMELEC should have stipulated in the automation contract that it is the ITD, and not SMARTMATIC-TIM, that should be made in charge of the technical aspects of the automated May 10, 2010 elections, consistent with its constitutional mandate as well as Section 26 of RA No. 8436. Under the present contract, the exclusive supervision and control over the AES that the law in its wisdom has put in place, has simply been negated.

To be wary of giving control of the critical elements of our election process to an entity other than the COMELEC cannot and should not be regarded as an unhealthy skepticism that we should shy away from. On the contrary, wariness should be our mindset, particularly on legal matters bearing on elections and their automation, given the constitutional and legal guidelines that foist on us the standard of a fair, clean, honest and credible election. We must be wary, too, because we are not wanting in warnings from those who have waded ahead of us into the waters of automation. As observed in foreign jurisdictions with previous experience in the use of automated systems:<sup>37</sup>

The particular danger in computer-controlled voting machines was said to lie in the fact that elections could be much more effectively influenced via manipulation of the software by the device manufacturer than in ballot box elections. For instance, it was said to be possible for faulty software to allot a certain share of the votes cast to a certain party regardless of the election decision by the respective voter or for the total votes cast to be divided among the parties standing for election according to a set proportion. Manipulations were said to be possible both by politically or financially motivated "insiders", in particular employees of the manufacturer, and by external third parties who gained access to the computers used by the manufacturer (for instance via viruses or trojans); they were said with regard to the complexity of the software used not always to be discovered even in careful quality control effected by the manufacturer. Although it was said to be necessary to prevent unauthorised access to the devices between the elections through suitable security measures, no such monitoring was said to take place in Germany; there were also said to be no suitable regulations in force that were able to guarantee protected storage of the voting machines.<sup>38</sup>

Broad as the power of the COMELEC may be as the independent constitutional body tasked to enforce and administer all laws and regulations relative to the conduct of elections, it has no competence to act outside the Constitution and its supporting statutes;<sup>39</sup> the scope of its activities is circumscribed by our election laws and by the Constitution.<sup>40</sup> Thus, while we accord the greatest respect to the means adopted by the COMELEC to resolve policy questions on the conduct and regulation of elections and give its actions the greatest presumption of regularity, we must not hesitate to declare its actions grossly abusive of its constitutionally-granted discretion when it acts outside the contemplation of the Constitution and of our laws.<sup>41</sup> In saying this, I have to hark back to where I started in this Dissent. I am not against and would welcome automation undertaken within the legal and constitutional limits. Consequently, while I vote to strike down automation contract between COMELEC and SMARTMATIC-TIM as invalid for violating Section 2, Article IX (C) of the Constitution and Section 26 of RA No. 8436, as amended by RA No. 9369, I would not hesitate to accept an automation arrangement without the legally objectionable features if COMELEC can still work this out for partial or even national implementation in the May 10, 2010 elections.

Accordingly, I dissent from the majority opinion.

**ARTURO D. BRION**  
Associate Justice

## Footnotes

<sup>1</sup> See Information Technology Foundation of the Philippines v. COMELEC, G.R. No. 15939, January 13, 2004, 419 SCRA 141.

<sup>2</sup> Contract for the Provision of An Automated Election System for the May 10, 2010 Synchronized National and Local Elections dated July 10, 2009(Automation Contract).

<sup>3</sup> CONSTITUTION, Article IX (C)Section 2(1).

<sup>4</sup> Loong v. COMELEC, G.R. No. 133676, April 14, 1999, 305 SCRA 832, 870-871.

<sup>5</sup> 73 Phil. 288, 295-296 (1941).

<sup>6</sup> CONSTITUTION, Article VIII, Section 1. See also supra note 4.

<sup>7</sup> 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.

<sup>8</sup> An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing The Commission On Elections To Use An Automated Election System In The May 11, 1998 National Or Local Elections And In Subsequent National and Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending For The Purpose Batas Pambansa Blg. 881, As Amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor and For Other Purposes."

<sup>9</sup> SEC. 6. Section 6 of Republic Act No. 8436 is hereby amended to read as follows:

SEC. 5 *Authority to Use an Automated Election System.* - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: *Provided*, that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission: *Provided, further*, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen: *Provided, finally*, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. In succeeding regular national or local elections, the AES shall be implemented nationwide." [Emphasis supplied]

<sup>10</sup> See Republic Act No. 9525 entitled "An Act Appropriating The Sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (P11,301,790,000.00) As Supplemental Appropriations For An Automated Election System and For Other Purposes.

<sup>11</sup> "Section 5 of RA No. 8436 does not state that the use of the AES is necessary or is a condition precedent to the conduct of automated elections in 2010. Had the legislators intended the pilot testing to be mandatory, they could have stated the same in a language that is clear and straightforward. xxx. In any event, the pilot automation in the May 10, 2007 elections, as demanded by petitioners, could not be complied with owing to its innate impossibility;" COMELEC's Comment, pp. 23-24.

<sup>12</sup> The provision pertinently states: "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

<sup>13</sup> Not amended by RA No. 9436.

<sup>14</sup> Art. 3.3 reads pertinently provides:

3.3 The PROVIDER shall be liable for all its obligations under this Project and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the elections. [Emphasis supplied]

<sup>15</sup> Part 5, par. 5.4 (e) of the Instruction to Bidders states:

5.4. A JV of two or more firms as partners shall comply with the following requirements.

xxx

(e) The JV member with a greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission, configuration and system integration.

<sup>16</sup> The pertinent portion of the RFP provides:

The Commission on Elections (COMELEC), through its Bids and Awards Committee (BAC), is currently accepting bids for the lease, with an option to purchase, of an automated election system (AES) that will meet the following needs:

xxx

(6) A complete solutions provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, etc.), under COMELEC supervision and control, to ensure effective and successful implementation of the Project. [Emphasis supplied]

<sup>17</sup> See RFP, par. 1 and 2 at p. 5.

<sup>18</sup> Id., par. 6.

<sup>19</sup> Mondano v. Silvosa, 97 Phil. 158

<sup>20</sup> Roman Catholic Apostolic Administrator v. Land Registration Commission, 102 Phil. 625.

<sup>21</sup> Automation Contract at p. 1.

<sup>22</sup> Id., p. 1-2.

<sup>23</sup> Id., p. 4.

<sup>24</sup> Id., p. 4-5.

<sup>25</sup> Id., p. 11.

<sup>26</sup> Id., p. 12.

<sup>27</sup> Id., p. 13.

<sup>28</sup> Article 3.3 of the Automation Contract.

<sup>29</sup> Bid Bulletin No. 10, April 27, 2009.

<sup>30</sup> Bid Bulletin No. 6, April 27 2009, p. 7; Bid Bulletin No. 10, April 27, 2009, p.3.

<sup>31</sup> Bid Bulletin No. 19, April 27, 2009, p.2.

<sup>32</sup> TSN, Oral Arguments of July 29, 2009, pp. 49-57.

<sup>33</sup> TSN, Oral Arguments of July 29, 2009, pp. 218-221.

<sup>34</sup> See <http://pcij.org/stories/2009/election-automation2.html>, (last visited September 10, 2009).

<sup>35</sup> Par. 4.5 of the RFP dated March 11, 2009 also states that the Board of Election Inspectors shall digitally sign and encrypt the internal copy of the election return.

<sup>36</sup> TSN, Oral Arguments of July 29, 2009, pp. 461-463

<sup>37</sup> In the Judgment dated March 3, 2009, the German Federal Constitutional Court (GFCC) held that the use of computer-controlled voting machines under the Federal Voting Machines Ordinance was unconstitutional since it does not ensure that only such voting machines are permitted and used which meet the constitutional requirements of the principle of the public nature of elections. Accordingly, the GFCC ruled that the computer-controlled voting machines used in the election of the 16th German Bundestag did not meet the requirements which the constitution places on the use of electronic voting machines; See Judgment of the Second Senate of 3 March 2009 on the basis of the oral hearing of 28 October 2008, 2 BvC 3/07, 2 BvC 4/07, [http://www.bundesverfassungsgericht.de/entscheidungen/rs20090303\\_2bvc000307en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20090303_2bvc000307en.html), (last visited September 10, 2009)

<sup>38</sup> Id.

<sup>39</sup> Dipatuan v. COMELEC, 47 SCRA 258 (1972).

<sup>40</sup> Id.

<sup>41</sup> Cauton v. COMELEC, 19 SCRA 911 (1967).