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G.R. No. 207246 ***(Jose M. Roy III, petitioner; Wilson C. Gamboa, Jr., Daniel Cartagena, John Warren P. Gabinete, Antonio V. Pesina, Jr., Modesto Martin Y. Manon III and Gerardo C. Erebaren, petitioners-in-intervention vs. Chairperson Teresita Herbosa, The Securities and Exchange Commission, Philippine Long Distance Telephone Company, and the Philippine Stock Exchange, respondents)***

Promulgated:

November 22, 2016

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CONCURRING OPINION

VELASCO, JR., *J.*:

Nature of the Case

Before the Court is a petition for Certiorari under Rule 65 of the Rules of Court assailing the constitutionality and validity of Memorandum Circular (MC) No. 8, entitled "Guidelines on Compliance with the Filipino-Foreign Ownership Requirements prescribed by the Constitution and/or Existing Laws by Corporations Engaged in Nationalized Activities," issued by the Securities and Exchange Commission (SEC).

Factual Antecedents

On June 28, 2011, the Court issued a Decision in *Gamboa v. Teves*[1] on the matter of "whether the term 'capital' in Section 11, Article XII of the Constitution refers to the total common shares only or to the total outstanding capital stock (combined total of voting and non-voting shares) of PLDT, a public utility."

Resolving the issue, the majority of the Court held that: "**The term 'capital' in Section 11, Article XII of the Constitution refers only to shares of stock entitled to vote in the election of directors**, and thus in the present case only to common shares, and not to the total outstanding capital stock comprising both common and non-voting preferred shares."[2] The Court then directed the SEC to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in PLDT.

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[1] G.R. No. 176579, June 28, 2011, 652 SCRA 690 and October 9, 2012, 682 SCRA 397.

[2] Emphasis supplied.

Several motions for reconsideration assailing the Decision in *Gamboa* were filed but, eventually, denied by the Court in its October 9, 2012 Resolution.

Pursuant to the Court's directive in *Gamboa*, the SEC prepared a draft memorandum circular on the guidelines to be followed in determining compliance with the constitutional and statutory limitations on foreign ownership in nationalized and partly nationalized industries. The SEC then invited the public to a dialogue and submit comments on the draft of the memorandum circular.[3]

Representatives from various organizations, government agencies, the academe and the private sector attended the public dialogue and submitted position papers and written comments on the draft to the SEC.

On May 20, 2013, the SEC issued MC No. 8. Section 2 of the circular provides:

> Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.
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> Corporations covered by special laws which provide specific citizenship requirements shall comply with the provisions of said law.

Petitioner Jose Roy III takes exception to the foregoing provision alleging that it is not in accord with the ruling of the Court in *Gamboa.* He contends that the SEC committed grave abuse of discretion since Section 2 of MC No. 8 "fails to differentiate the varying classes of shares and does not require the application of the foreign equity limits to each class of shares issued by a corporation." Petitioner relies on a portion of the October 9, 2012 Resolution in *Gamboa* providing that "the 60-40 ownership requirement must apply to each class of shares, whether common, preferred non-voting, preferred voting or any other class of shares." He, thus, prays for this Court to declare MC No. 8 unconstitutional and to direct the SEC to issue new guidelines regarding the determination of compliance with Section 11, Article XII of the Constitution in accordance with *Gamboa.*

Petitioner further maintains that the SEC gravely abused its discretion in ruling that PLDT is compliant with the Constitutional rule on Foreign Ownership.

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[3] PLDT's Consolidated Memorandum, pp. 2-3, citing SEC Notice dated 6 November 2012.

William Gamboa, Jr., Daniel Cartagena, John Wilson Gabinete, Antonio V. Pesina, Jr., Modesto Martin Y. Mamon III, Gerardo C. Erebaren and the Philippine Stock Exchange (PSE) sought, and were granted, intervention.

Issue

Considering that the Court is not a trier of facts and is not in a position to make a factual determination of PLDT's compliance with Section 11, Article XII of the Constitution, the Court can only address the pure question of law presented by the petitioner and petitioners-in-intervention: whether or not the SEC gravely abused its discretion in issuing MC No. 8.

I concur with the ruling in the *ponencia*.

The petition has not met the requisites for the exercise of judicial review

It is elementary that the power of judicial review is subject to certain limitations, which must be complied with by the petitioner before this Court may take cognizance of the case.[4] The Court held, thus:

> When questions of constitutional significance are raised, the Court can exercise its power of judicial review only if the following requisites are present: (1) the existence of an actual and appropriate case; (2) the existence of personal and substantial interest on the part of the party raising the constitutional question; (3) recourse to judicial review is made at the earliest opportunity; and (4) the constitutional question is the lis mota of the case.[5]

The petitioner's failure to sufficiently allege, much less prove the existence of the first two requisites, warrants the outright dismissal of the petition.

To satisfy legal standing in assailing the constitutionality of a governmental act, the petitioner must prove the **direct and personal injury** that he might suffer if the act is permitted to stand. Petitioner Roy, however, merely glossed over this requisite, simply claiming that the law firm he represents is "a subscriber of PLDT." It is not even clear whether the law firm is a "subscriber" of PLDT's shares or purely of its various communication services.

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[4] *In Re Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement*, UDK-15143, January 21, 2015.

[5] *Hon. Luis Mario M. General v. Hon. Alejandro S. Urro*, G.R. No. 191560, March 29, 2011, citing *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618, 632 (2000).

Clearly, the very limited information provided by the petitioner does not sufficiently demonstrate how he is left to sustain or is in immediate danger of sustaining some direct injury as a result of the SEC's issuance of MC No. 8. As correctly argued by the respondents, assuming that his law firm is indeed a subscriber of PLDT shares of stocks, whether or not the constitutionality of MC No. 8 is upheld, his law firm's rights as a shareholder in PLDT will not be affected or altered. There is simply no rational connection between his law firm's rights as an alleged shareholder with the legality of MC No. 8.

The *locus standi* requisite is likewise not satisfied by the mere fact that petitioner Roy is a "concerned citizen, an officer of this Court and... a taxpayer." We have previously emphasized that the *locus standi* requisite is not overcome by one's citizenship or membership in the bar. These supposed interests are too general, shared as they are by other groups and by the whole citizenry.[6]

The only "injury" attributable to petitioner Roy is that the position paper he submitted to the SEC was not adopted by the Commission in issuing MC No. 8. This injury, however, is not sufficient to clothe him with the requisite standing to invoke the Court's exercise of judicial power to review and declare unconstitutional the issuance of a governmental body.

Neither can petitioner Roy take refuge in his status as a taxpayer. Lest it is forgotten, a taxpayer's suit is proper only when the petitioner has established that the act complained of directly involves the illegal disbursement of public funds derived from taxation.[7] MC No. 8 does not involve an expenditure of public funds. It does not even concern the taxing and spending power of the Congress. Hence, justifying the recourse as a taxpayer's suit is far-fetched and implausible, with petitioner ignoring the basic requirements of the concept.

In like manner, the petitioners-intervenors suffer the same infirmity as petitioner Roy. None of them alleged, let alone proved, even a remote link to the implementation of MC No. 8. Certainly, there is nothing by which this Court can ascertain their personality to challenge the validity of the SEC issuance.

The casual invocation of the supposed "transcendental importance" of the questions posed by the petitioner and petitioners-in-intervention does not automatically justify the disregard of the stringent requirements for this Court's exercise of judicial power. Otherwise, the Court would be allowing

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[6] *Galicto v. Aquino III*, G.R. No. 193978, February 28, 2012, citing *Integrated Bar of the Philippines (IBP) v. Hon. Zamora*, 392 Phil. 618 (2000).

[7] *Automotive Industry Workers Alliance v. Romulo*, 489 Phil. 710, 719 (2005); *Gonzales v. Narvasa*, 392 Phil. 518, 525 (2000).

the dilution of the settled doctrine of *locus standi* as every worthy cause is an interest shared by the general public.[8]

Indeed, while this Court has previously allowed the expansion of the boundaries of the rule on legal standing in matters of far-reaching implications, the Court cannot condone the trivial treatment of the element of *locus standi* as a mere technical requirement. The requirement of legal standing goes into the very essence of jurisdiction and the competence of this Court to intrude into matters falling within the executive realm. In *Galicto v. Aquino III*,[9] the Court explained the importance of the rule, viz:

> ... **The rationale for this constitutional requirement of locus standi is by no means trifle**. Not only does it assure the vigorous adversary presentation of the case; more importantly, **it must suffice to warrant the Judiciary's overruling the determination of a coordinate,** democratically elected **organ of government,** such as the President, and the clear approval by Congress, in this case. Indeed, the rationale goes to the very essence of representative democracies.[10] (emphasis supplied)

The liberality of the Court in bypassing the *locus standi* rule cannot, therefore, be abused. If the Court is to maintain the respect demanded by the concept of separation of governmental powers, it must subject applications for exemptions from the requirements of judicial review to the highest possible judicial inquiry. In the present case, the anemic allegations of the petitioner and petitioners-in-intervention do not warrant the application of the exceptions rather than the rule on *locus standi*.

The Rule on the Hierarchy of Courts has been violated

In like manner, a hollow invocation of "transcendental importance" does not warrant the immediate relaxation of the rule on hierarchy of courts. That hierarchy is determinative of the venue of appeals, and also serves as a general determinant of the appropriate forum for petitions for the extraordinary writs.[11] Indeed, "the Supreme Court is a court of last resort and must so remain if it is to satisfactorily perform the functions assigned to it by the fundamental charter and immemorial tradition."[12] This Court has explained that the rationale for this strict policy is to prevent the following: (1) inordinate demands upon its time and attention, which is better devoted

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[8] *Republic v. Roque*, G.R. No. 204603, September 24, 2013.

[9] G.R. No. 193978, February 28, 2012.

[10] Emphasis supplied.

[11] *The Liga ng mga Barangay National v. The City Mayor of Manila*, G.R. No. 154599, January 21, 2004.

[12] *Vergara Sr. v. Suelto*, 240 Phil. 719, 732 (1987); *De Castro v. Santos*, G.R. No. 194994, April 16, 2013.

to those matters within its exclusive jurisdiction; and (2) further overcrowding of the Court's docket.[13]

While direct recourse to the court has previously been allowed on exceptional grounds, the circumstances set forth in the petition and petition-in-intervention do not justify the disregard of the established policy. Worse, petitioner's allegation that there is little value in presenting the petition to another court is demeaning and less than fair to the lower courts. There is no reason to doubt our trial court's ability and competence to determine the existence of grave abuse of discretion.

Section 4, Rule 65 of the Rules of Court itself provides that the RTC and the CA have concurrent jurisdiction to issue the writ of *certiorari*. For certainly, the issue of abuse of discretion is not so complex as to disqualify every court, except this Court, from deciding it. Thus, due deference to the competence of these courts and a becoming regard of the time-honored principle of the hierarchy of courts bars the present direct recourse to this Court.

Indispensable Parties are Being Denied their Rights to Due Process

Even assuming that the issue involved in the present recourse is of vital importance, it is dismissible for its failure to implead the indispensable parties.

Under Rule 3, Section 7 of the Rules of Court, an indispensable party is a party-in-interest, without whom there can be no final determination of an action. The interests of such indispensable party in the subject matter of the suit and the relief are so bound with those of the other parties that his legal presence as a party to the proceeding is an absolute necessity.[14] As a rule, an indispensable party's interest in the subject matter is such that a complete and efficient determination of the equities and rights of the parties is not possible if he is not joined.[15]

In the case at bar, it is alleged that the propriety of the SEC's enforcement of this Court's interpretation of "capital" is important as it affects corporations in nationalized and partly-nationalized industries. And yet, besides respondent PLDT, no other corporation subject to the same restriction imposed by Section 11, Article XII of the Constitution has been joined or impleaded by the present recourse. These corporations are in danger of losing their franchises and property holdings if they are found not compliant with a revised interpretation of the nationality requirement.

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[13] *De Castro v. Santos*, supra note 12, citing *Santiago v. Vasquez*, G.R. Nos. 99289-90, January 27, 1993, 217 SCRA 633; and *People v. Cuaresma*, 254 Phil. 418, 427 (1989).

[14] *Cua, Jr. v. Tan*, G.R. No. 181455-56, December 4, 2009.

[15] Id.; citing *Galicia v. Mercado*, G.R. No. 146744, March 6, 2006, 484 SCRA 131, 136-137.

Nonetheless, they have not been afforded due notice, much less the opportunity to be heard, in the present case.

Worse, petitioner and petitioners-in-intervention failed to acknowledge that their restrictive interpretation of the Court's ruling in *Gamboa* affects not only the public utility corporations but, more so, the shareholders who will likely be divested of their stocks. The sheer number of foreign shareholders and the affected shareholdings have been illustrated by the Shareholder's Association of the Philippines, Inc. (SHAREPHIL) when it explained that, in five companies alone, more than One Hundred Fifty Billion Pesos (₱150,000,000,000.00) worth of shares have to be forcibly taken from foreign shareholders (and absorbed by Filipino investors).

The rights of these other corporations and numerous shareholders cannot simply be ignored in making a final determination on the constitutionality of MC No. 8. The petitioner's failure to implead is not just a simple procedural misstep but a patent denial of due process rights.[16]

The Constitution is clear as it is categorical. The State cannot proceed with depriving persons their property without first ensuring that compliance with due process requirements is duly observed.[17] This Court cannot, thus, sanction a restrictive interpretation of the nationality requirement without first affording the other public utility corporations and their shareholders an opportunity to participate in the present proceedings.

The SEC did not abuse its discretion in issuing MC No. 8

Even if the Court takes the lenient stance and turns a blind eye on all the numerous procedural infirmities of the petition, the petition still fails on the merits.

The petition is anchored on the contention that the SEC committed grave abuse of discretion in issuing MC No. 8. By grave abuse of discretion, the petitioners must prove that the Commission's act was tainted with the quality of whim and caprice.[18] Abuse of discretion is not enough. It must be shown that the Commission exercised its power in an arbitrary or despotic manner because of passion or personal hostility that is so patent and gross as

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[16] See *David v. Paragas*, G.R. No. 176973, February 25, 2015 and *Sy v. Court of Appeals*, G.R. No. 94285, August 31, 1999.

[17] Id.

[18] *OKS Designtech, Inc. v. Caccam*, G.R. No. 211263, August 5, 2015.

to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined or to act at all in contemplation of law.[19]

With this standard in mind, the petitioner and petitioners-in-intervention failed to demonstrate that the SEC's issuance of MC No. 8 was attended with grave abuse of discretion. On the contrary, the assailed circular sufficiently applied the Court's definitive ruling in *Gamboa*.

To recall, *Gamboa* construed the word "capital" and the nationality requirement in Section 11, Article XII of the Constitution, which states:

> SECTION 11. **No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens**, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. **The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital**, and all the executive and managing officers of such corporation or association must be citizens of the Philippines. (emphasis supplied)

The Court explained in the June 28, 2011 Decision in *Gamboa* that **the term "capital" in Section 11, Article XII refers "only to shares of stock entitled to vote in the election of directors."** The rationale provided by the majority was that this interpretation ensures that **control** of the Board of Directors stays in the hands of Filipinos, since foreigners can only own a maximum of 40% of said shares and, accordingly, can only elect the equivalent percentage of directors. As a necessary corollary, Filipino stockholders can always elect 60% of the Board of Directors which, to the majority of the Court, translates to control over the corporation. The June 28, 2011 Decision, thus, reads:

> Considering that common shares have voting rights which translate to control, as opposed to preferred shares which usually have no voting rights, the term 'capital' in Section 11, Article XII of the Constitution refers only to common shares. However, if the preferred shares also have the right to vote in the election of directors, then the term "capital" shall include such preferred shares because **the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors. In short, the term "capital" in**

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[19] *Gold City Integrated Services, Inc. v. Intermediate Appellate Court*, G.R. Nos. 71771-73, March 31, 1989, citing *Arguelles v. Young*, G.R. No. L-59880, September 11, 1987, 153 SCRA 690; *Republic v. Heirs of Spouses Molinyawe*, G.R. No. 217120, April 18, 2016; *Olaño v. Lim Eng Co*, G.R. No. 195835, March 14, 2016; *City of Iloilo v. Honrado*, G.R. No. 160399, December 9, 2015; *OKS Designtech, Inc. v. Caccam*, G.R. No. 211263, August 5, 2015.

> **Section 11, Article XII of the Constitution refers only to shares of stock that can vote in the election of directors.**
>
> This interpretation is consistent with the intent of the framers of the Constitution to place in the hands of Filipino citizens the control and management of public utilities. As revealed in the deliberations of the Constitutional Commission, "capital" refers to the voting stock or **controlling interest** of a corporation x x x.

The dispositive portion of the June 28, 2011 Decision in *Gamboa* clearly spelled out the doctrinal declaration of the Court on the meaning of "capital" in Section 11, Article XII of the Constitution, *viz*:

> WHEREFORE, we PARTLY GRANT the petition and rule that the term **"capital"** in Section 11, Article XII of the 1987 Constitution **refers only to shares of stock entitled to vote in the election of directors**, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). Respondent Chairperson of the Securities and Exchange Commission is DIRECTED to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in respondent Philippine Long Distance Telephone Company, and if there is a violation of Section 11, Article XII of the Constitution, to impose the appropriate sanctions under the law. (emphasis supplied)

The motions for reconsideration of the June 28, 2011 Decision filed by the movants in *Gamboa* argued against the application of the term "capital" to the voting shares alone and in favor of applying the term to the total outstanding capital stock (combined total of voting and non-voting shares). Notably, none of them contended or moved for the application of the capital or the 60-40 requirement to "each and every class of shares" of a public utility, as it was **never an issue in the case**.

In resolving the motions for reconsideration in *Gamboa*, it is relevant to stress that the majority **did not modify** the June 28, 2011 Decision. The *fallo* of the October 9, 2012 Resolution simply stated:

> WHEREFORE, we DENY the motions for reconsideration WITH FINALITY. No further pleadings shall be entertained.

Clearly, the Court had no intention, express or otherwise, to amend the construction of the term "capital" in the June 28, 2011 Decision in *Gamboa*, much less in the manner proposed by petitioner Roy. Hence, no grave abuse of discretion can be attributed to the SEC in applying the term "capital" to the "voting shares" of a corporation.

The portion quoted by the petitioners is nothing more than an *obiter dictum* that has never been discussed as an issue during the deliberations in

Gamboa. As such, it is not a binding pronouncement of the Court[20] that can be used as basis to declare the SEC's circular as unconstitutional.

This Court explained the concept and effect of an *obiter dictum* thusly:

> An *obiter dictum* has been defined as an opinion expressed by a court upon some question of law that is not necessary in the determination of the case before the court. It is a remark made, or opinion expressed, by a judge, in his decision upon a cause by the way, that is, *incidentally* or *collaterally*, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. **It does not embody the resolution or determination of the court, and is made without argument, or full consideration of the point.** It lacks the force of an adjudication, being a mere expression of an opinion with no binding force for purposes of *res judicata*.[21] (emphasis and underscoring supplied)

What is more, requiring the SEC to impose the 60-40 requirement to "each and every class of shares" in a public utility is not only unsupported by Section 11, Article XXI, it is also administratively and technically infeasible to implement and enforce given the variety and number of classes that may be issued by public utility corporations.

Common and preferred are the usual forms of stock. However, it is also possible for companies to customize and issue different classes of stock in any way they want. Thus, while all issued common shares may be voting, their dividends may be "deferred" or subject to certain conditions. Corporations can also issue "cumulative preferred shares" that are issued with the stipulation that any scheduled dividends that cannot be paid when due are carried forward and must be paid before the company can pay out ordinary share dividends. A company can likewise issue "hybrid stocks" or preferred shares that can be converted to a fixed number of common stocks at a specified time. These stocks may or may not be given voting rights. Further, some stocks may be embedded with derivative options so that a type of stock may be "called" or redeemed by the company at a specified time at a fixed price, while some stocks may be "puttable" or offered by the stockholder at a certain time, at a certain price.

Without a doubt, the classes and variety of shares that may be issued by a corporation are limited only by the bounds of the corporate directors' imagination. Worse, they can be classified and re-classified, *ad nauseam*, from time to time.

Thus, to require the SEC and other government agencies to keep track of the ever-changing capital classes of corporations would be impractical, if

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[20] *Ocean East Agency, Corp. v. Lopez*, G.R. No. 194410, October 14, 2015.
[21] *Landbank of the Philippines v. Suntay*, G.R. No. 188376, December 14, 2011.

not downright impossible. Perhaps it is best to be reminded that the law does not require the impossible. (*Lex non cogit ad impossibilia.)*[22]

Neither can the petitioners rely on the concept of "beneficial ownership" to sustain their position. The phrase, "beneficial ownership," is nowhere found in Section 11, Article XII of the Constitution. Rather "beneficial ownership" was introduced in the Implementing Rules and Regulations of the Foreign Investment Act of 1991 (FIA), not even in the law itself. Suggesting that the phrase can expand, qualify and amend the intent of the Constitution is, bluntly, preposterous.

In defining a "Philippine National," the FIA stated, *viz*:

> a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national.

The definition was taken a step further in the Implementing Rules and Regulations of the law where the phrase "beneficial ownership" was used, as follows:

> b. Philippine national shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by the citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of the Philippine nationals; Provided, that where a corporation its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporation must be citizens of

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[22] *Biraogo v. The Philippine Truth Commission*, G.R. Nos. 192935 and 193036, December 7, 2010.

> the Philippines, in order that the corporation shall be considered a Philippine national. The control test shall be applied for this purpose.
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> The term Philippine national shall not include juridical entities organized and existing under the laws of any other country even if wholly owned by Philippine citizens.
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> Compliance with the required Filipino ownership of a corporation shall be determined on the basis of outstanding capital stock whether fully paid or not, but only such stocks which are generally entitled to vote are considered.
>
> **For stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. Full beneficial ownership of the stocks, coupled with appropriate voting rights is essential. Thus, stocks, the voting rights of which have been assigned or transferred to aliens cannot be considered held by Philippine citizens or Philippine nationals.**
>
> Individuals or juridical entities not meeting the aforementioned qualifications are considered as non-Philippine nationals. (emphasis and underscoring supplied)

While the foregoing provisions were cited in *Gamboa* in identifying the "capital stock outstanding and entitled to vote" as equivalent to "capital" in Section 11, Article XII of the Constitution, nothing in either provision requires the application of the 60% threshold to "each and every class of shares" of public utilities.

At most, as pointed out by the majority, "beneficial ownership" must be understood in the context in which it is used. Thusly, the phrase simply means that the **name and *full* rights of ownership** over the 60% of the voting shares in public utilities must belong to Filipinos. If either the voting rights or the right to dividends, among others, of voting shares registered in the name Filipino citizens or nationals are assigned or transferred to an alien, these shares shall not be included in the computation of the 60% threshold.

The Commission even went above and beyond the duty levied by the court and imposed the 60-40 requirement not only on the voting shares but also on the totality of the corporation's shareholding, thus ensuring that the public utilities are, in fact, "effectively controlled" by Filipinos given the added layers of protection given to ensure that Filipino stockholders have the full beneficial ownership and control of public utility corporations in accordance with the Constitution, thus:

> 1. Forty percent (40%) ceiling on foreign ownership in the capital stock that ensures sixty percent (60%) Filipino control over the capital stock which covers both voting and non-voting shares. As a consequence, Filipino control over the stockholders is assured. Thus, foreigners can own only up to 40% of the capital stock.

2. Forty percent (40%) ceiling on the right of foreigners to own and hold voting shares and elect board directors that guarantees sixty percent (60%) Filipino control over the Board of Directors.

3. Reservation to Filipino citizens of the executive and managing officers, regardless of the level of alien equity ownership to secure total Filipino control over the management of the public utility enterprise. Thus, all executive and managing officers must be Filipinos.

In my opinion in *Heirs of Gamboa v. Teves*,[23] I pointed out the dire consequences of not imposing the 40% limit on foreign ownership on the totality of the shareholdings, *viz*:

> [L]et us suppose that the authorized capital stock of a public utility corporation is divided into 100 common shares and 1,000,000 non-voting preferred shares. Since, according to the Court's June 28, 2011 Decision, the word "capital" in Sec. 11, Art. XII refers only to the voting shares, then the 40% cap on foreign ownership applies only to the 100 common shares. Foreigners can, therefore, own 100% of the 1,000,000 non-voting preferred shares. But then again, the ponencia continues, at least, the "control" rests with the Filipinos because the 60% Filipino-owned common shares will necessarily ordain the majority in the governing body of the public utility corporation, the board of directors/trustees. Hence, Filipinos are assured of control over the day-to-day activities of the public utility corporation.
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> Let us, however, take this corporate scenario a little bit farther and consider the irresistible implications of changes and circumstances that are inevitable and common in the business world. Consider the simple matter of a possible investment of corporate funds in another corporation or business, or a merger of the public utility corporation, or a possible dissolution of the public utility corporation**. Who has the "control" over these vital and important corporate matters?** The last paragraph of Sec. 6 of the Corporation Code provides:
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> > Where the articles of incorporation provide for non-voting shares in the cases allowed by this Code, **the holders of such (non-voting) shares shall nevertheless be entitled to vote on the following matters**:
>
> 1. Amendment of the articles of incorporation;
> 2. Adoption and amendment of by-laws;
> 3. Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporate property;
> 4. Incurring, creating or increasing bonded indebtedness;
> 5. Increase or decrease of capital stock;
> 6. Merger or consolidation of the corporation with another corporation or other corporations;

[23] G.R. No. 176579, October 9, 2012, 682 SCRA 397.

7. Investment of corporate funds in another corporation or business in accordance with this Code; and
8. Dissolution of the corporation. (Emphasis and underscoring supplied.)

In our hypothetical case, all 1,000,100 (voting and non-voting) shares are entitled to vote in cases involving fundamental and major changes in the corporate structure, such as those listed in Sec. 6 of the Corporation Code. Hence, with only 60 out of the 1,000,100 shares in the hands of the Filipino shareholders, control is definitely in the hands of the foreigners. The foreigners can opt to invest in other businesses and corporations, increase its bonded indebtedness, and even dissolve the public utility corporation against the interest of the Filipino holders of the majority voting shares. This cannot plausibly be the constitutional intent.

Consider further a situation where the majority holders of the total outstanding capital stock, both voting and non-voting, decide to dissolve our hypothetical public utility corporation. **Who will eventually acquire the beneficial ownership of the corporate assets upon dissolution and liquidation?** Note that Sec. 122 of the Corporation Code states:

> Section 122. Corporate liquidation. — Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three (3) years . . . to dispose of and convey its property and to distribute its assets, but not for the purpose of continuing the business for which it was established.
>
> At any time during said three (3) years, the corporation is authorized and empowered to convey all of its property to trustees for the benefit of stockholders, members, creditors, and other persons in interest. From and after any such conveyance by the corporation of its property in trust for the benefit of its stockholders, members, creditors and others in interest, all interest which the corporation had in the property terminates, the legal interest vests in the trustees, and the beneficial interest in the stockholders, members, creditors or other persons in interest. (Emphasis and underscoring supplied.)

Clearly then, the bulk of the assets of our imaginary public utility corporation, which may include private lands, will go to the beneficial ownership of the foreigners who can hold up to 40 out of the 100 common shares and the entire 1,000,000 preferred non-voting shares of the corporation. These foreign shareholders will enjoy the bulk of the proceeds of the sale of the corporate lands, or worse, exercise control over these lands behind the façade of corporations nominally owned by Filipino shareholders. Bluntly, while the Constitution expressly prohibits the transfer of land to aliens, foreign stockholders may resort to schemes or arrangements where such land will be conveyed to their dummies or nominees. Is this not circumvention, if not an outright violation, of the fundamental Constitutional tenet that only Filipinos can own Philippine land?

A construction of "capital" as referring to the total shareholdings of the company is an acknowledgment of the existence of numerous corporate control-enhancing mechanisms, besides ownership of voting

rights, that limits the proportion between the separate and distinct concepts of **economic right** to the cash flow of the corporation **and** the right to corporate **control** (hence, they are also referred to as proportionality-limiting measures). This corporate reality is reflected in SRC Rule 3 (E) of the Amended Implementing Rules and Regulations (IRR) of the SRC and Sec. 3 (g) of The Real Estate Investment Trust Act (REIT) of 2009, 72 which both provide that control can exist **regardless of ownership of voting shares**. The SRC IRR states:

> **Control is the power to govern the financial and operating policies** of an enterprise so as to obtain benefits from its activities. Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than one half of the voting power of an enterprise unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control. **Control also exists even when the parent owns one half or less of the voting power of an enterprise when there is:**
>
> i. **Power over more than one half of the voting rights** by virtue of an **agreement** with other investors;
>
> ii. **Power to govern the financial and operating policies** of the enterprise under a statute or an **agreement**;
>
> iii. **Power to appoint or remove the majority of the members of the board** of directors or equivalent governing body;
>
> iv. **Power to cast the majority of votes** at meetings of the board of directors or equivalent governing body. (Emphasis and underscoring supplied.)

As shown above, **ownership of voting shares or power alone without economic control of the company does not necessarily equate to corporate control.** A *shareholder's agreement* can effectively clip the voting power of a shareholder holding voting shares. In the same way, a *voting right ceiling*, which is "a restriction prohibiting shareholders to vote above a certain threshold irrespective of the number of voting shares they hold," 73 can limit the control that may be exerted by a person who owns voting stocks but who does not have a substantial economic interest over the company. So also does the use of *financial derivatives* with attached conditions to ensure the acquisition of corporate control separately from the ownership of voting shares, or the use of *supermajority provisions* in the by-laws and articles of incorporation or association. Indeed, there are innumerable ways and means, both explicit and implicit, by which the *control of a corporation can be attained and retained even with very limited voting shares*, i.e., there are a number of ways by which control can be disproportionately increased compared to ownership 74 so long as economic rights over the majority of the assets and equity of the corporation are maintained.

Hence, if We follow the construction of "capital" in Sec. 11, Art. XII stated in the ponencia of June 28, 2011 and turn a blind eye to these realities of the business world, **this Court may have veritably put a limit on the foreign ownership of common shares but have indirectly allowed foreigners to acquire greater economic right to the cash flow of public utility corporations,** which is a leverage to bargain for far greater control through the various enhancing mechanisms or proportionality-limiting measures available in the business world.

> In our extremely hypothetical public utility corporation with the equity structure as thus described, since the majority recognized only the 100 common shares as the "capital" referred to in the Constitution, the entire economic right to the cash flow arising from the 1,000,000 non-voting preferred shares can be acquired by foreigners. With this economic power, the foreign holders of the minority common shares will, as they easily can, bargain with the holders of the majority common shares for more corporate control in order to protect their economic interest and reduce their economic risk in the public utility corporation. For instance, they can easily demand the right to cast the majority of votes during the meeting of the board of directors. After all, money commands control.
>
> The court cannot, and ought not, accept as correct a holding that routinely disregards legal and practical considerations as significant as above indicated. Committing an error is bad enough, persisting in it is worse.

Thus, **the zealous watchfulness demonstrated by the SEC in imposing another tier of protection for Filipino stockholders cannot, therefore, be penalized** on a misreading of the October 9, 2012 Resolution in *Gamboa*, which neither added nor subtracted anything from the June 28, 2011 Decision defining capital as "shares of stock entitled to vote in the election of directors."

Thus, I join the majority in ruling that there is no need to clarify the ruling in *Gamboa* nor hold the Commission liable for grave abuse of discretion. As it has manifested in *Gamboa*,[24] in issuing MC No. 8, the SEC abided by the Court's decision and deferred to the Court's definition of the term "capital" in Section 11, Article XII of the Constitution.

In view of all the foregoing, I vote to **DISMISS** the petition.

PRESBITERO J. VELASCO, JR.
Associate Justice

[24] Id. at 414.