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G.R. No. 176579 --- **HEIRS OF WILSON P. GAMBOA** *Petitioner*, *versus* **FINANCE SECRETARY MARGARITO B. TEVES, FINANCE UNDERSECRETARY JOHN P. SEVILLA, and COMMISSIONER RICARDO ABCEDE OF THE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT (PCGG) in their capacities as Chair and Members, respectively, of the Privatization Council, et al.** *Respondents*.

Promulgated:

OCTOBER 09, 2012

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DISSENTING OPINION

ABAD, *J.*:

In the Decision dated June 28, 2011, the Court partially granted the petition for prohibition, injunction, declaratory relief, and declaration of nullity of sale, of Wilson P. Gamboa, a Philippine Long Distance Telephone Company (PLDT) stockholder, and ruled 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 only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). The Court also directed the Chairperson of the Securities and Exchange Commission (SEC) to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in PLDT, and to impose the appropriate sanctions if there is a violation of Section 11, Article XII of the 1987 Constitution.

Respondents Manuel V. Pangilinan, Napoleon L. Nazareno, Francis Lim, Pablito V. Sanidad, Arno V. Sanidad, and the SEC filed their respective motions for reconsideration.

Thereafter, the Court conducted oral arguments to hear the parties on the following issues:

1. Whether the term "capital" in Section 11, Article XII of the 1987 Constitution refers only to shares of stock with the right to vote in

the election of directors (common shares), or to all kinds of shares of stock, including those with no right to vote in the election of directors;

2. Assuming the term "capital" refers only to shares of stock with the right to vote in the election of directors, whether this ruling of the Court should have retroactive effect to affect such shares of stock owned by foreigners prior to this ruling;

3. Whether PLDT and its foreign stockholders are indispensable parties in the resolution of the legal issue on the definition of the term "capital" in Section 11, Article XII of the 1987 Constitution; and

    3.1. If so, whether the Court has acquired jurisdiction over the persons of PLDT and its foreign stockholders.

I am constrained to maintain my dissent to the majority opinion.

One. To reiterate, the authority to define and interpret the meaning of "capital" in Section 11, Article XII of the 1987 Constitution belongs, not to the Court, but to Congress, as part of its policy making powers. This matter is addressed to the sound discretion of the lawmaking department of government since the power to authorize and control a public utility is admittedly a prerogative that stems from Congress.[1] It may very well in its wisdom define the limit of foreign ownership in public utilities.

Section 11, Article XII of the 1987 Constitution which reads:

> 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.

is one of the constitutional provisions that are not self-executing and need sufficient details for a meaningful implementation. While the provision states that no franchise for the operation of a public utility shall be granted to a corporation organized under Philippine laws unless at least 60% of its

1 *Francisco, Jr. v. Toll Regulatory Board*, G.R. No. 166910, October 19, 2010, 633 SCRA 470, 499.

capital is owned by Filipino citizens, it does not provide for the meaning of the term "capital."

As Fr. Joaquin G. Bernas, S.J. explained, acting as *Amicus Curiae*, the result of the absence of a clear definition of the term "capital," was to base the 60-40 proportion on the total outstanding capital stock, that is, the combined total of both common and non-voting preferred shares. But while this has become the popular and common understanding of the people, it is still incomplete. He added that in the Foreign Investments Act of 1991 (FIA), Congress tried to clarify this understanding by specifying what capital means for the purpose of determining corporate citizenship, thus:

> Sec. 3. Definitions. - As used in this Act:
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> a. The term "Philippine national" shall mean a citizen of the Philippines; of 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 corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos 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 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 stock outstanding and entitled to vote of each 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 each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a "Philippine national." (As amended by Republic Act 8179)

Indeed, the majority opinion also resorted to the various investment laws[2] in construing the term "capital." But while these laws admittedly govern foreign investments in the country, they do not expressly or impliedly seek to supplant the ambiguity in the definition of the term "capital" nor do they seek to modify foreign ownership limitation in public utilities. It is a rule that when the operation of the statute is limited, the law should receive a restricted construction.[3]

More particularly, much discussion was made on the FIA since it was enacted after the 1987 Constitution took effect. Yet it does not seem to be a supplementary or enabling legislation which accurately defines the term "capital."

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2 These laws include the Investment Incentives Act of 1967, the Foreign Business Regulations Act of 1968, the Omnibus Investments Code of 1981, the Omnibus Investments Code of 1987, and the Foreign Investments Act of 1991.

3 *Lokin, Jr. v. Commission on Elections*, G.R. Nos. 179431-32 & 180443, June 22, 2010, 621 SCRA 385, 410.

For one, it specifically applies only to companies which intend to invest in certain areas of investment. It does not apply to companies which intend to apply for a franchise, much less to those which are already enjoying their franchise. It aims "to attract, promote or welcome productive investments from foreign individuals, partnerships, corporations and government, including their political subdivisions, in activities which significantly contribute to national industrialization and socio-economic development."[4] What the FIA provides are new rules for investing in the country.

Moreover, with its adoption of the definition of the term "Philippine national," has the previous understanding that the term "capital" referred to the total outstanding capital stock, as Fr. Bernas explained, been supplanted or modified? While it is clear that the term "Philippine national" shall mean a corporation organized under Philippine laws at least 60% of the capital stock outstanding and entitled to vote is owned and held by Filipino citizens **"as used in [the FIA],"** it is not evident whether Congress intended this definition to be used in all other cases where the term "capital" presents itself as an issue.

Two. Granting that it is the Court, and not Congress, which must define the meaning of "capital," I submit that it must be interpreted to encompass the entirety of a corporation's outstanding capital stock (both common and preferred shares, voting or non-voting).

First, the term "capital" is also used in the fourth sentence of Section 11, Article XII, as follows:

> Section 11. xxx 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.

If the term "capital" as used in the first sentence is interpreted as pertaining only to shares of stock with the right to vote in the election of directors, then such sentence will already prescribe the limit of foreign participation in the election of the board of directors. On the basis of the first sentence alone, the capacity of foreign stockholders to elect the directors will already be limited by their ownership of 40% of the voting shares. This will then render the fourth sentence meaningless and will run counter to the principle that the provisions of the Constitution should be read in consonance with its other related provisions.

Second, Dr. Bernardo M. Villegas, also an *Amicus Curiae*, who was the Chairman of the Committee on the National Economy that drafted Article XII of the 1987 Constitution, emphasized that by employing the term

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4 Section 2, Foreign Investments Act of 1991.

"capital," the 1987 Constitution itself did not distinguish among classes of shares.

During their Committee meetings, Dr. Villegas explained that in both economic and business terms, the term "capital" found in the balance sheet of any corporation always meant the entire capital stock, both common and preferred. He added that even the non-voting shares in a corporation have a great influence in its major decisions such as: (1) the amendment of the articles of incorporation; (2) the adoption and amendment of by-laws; (3) the 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) the increase or decrease of capital stock; (6) the merger or consolidation of the corporation with another corporation or other corporations; (7) the investment of corporate funds in another corporation or business in accordance with this Code; and (8) the dissolution of the corporation.

Thus, the Committee decisively rejected in the end the proposal of the UP Law Center to define the term "capital" as voting stock or controlling interest. To quote Dr. Villegas, "in the minds of the Commissioners the word 'capital' in Section 11 of Article XII refers, not to voting stock, but to total subscribed capital, both common and preferred."

Finally, Dr. Villegas observed that our existing policy on foreign ownership in public utilities already discourages, as it is, foreign investments to come in. To impose additional restrictions, such as the restrictive interpretation of the term "capital," will only aggravate our already slow economic growth and incapacity to compete with our East Asian neighbours.

The Court can simply adopt the interpretations given by Fr. Bernas and Dr. Villegas since they were both part of the Constitutional Commission that drafted the 1987 Constitution. No one is in a better position to determine the intent of the framers of the questioned provision than they are. Furthermore, their interpretations also coincide with the long-standing practice to base the 60-40 proportion on the total outstanding capital stock, that is, both common and preferred shares.

For sure, both common and preferred shares have always been considered part of the corporation's capital stock. Its shareholders are no different from ordinary investors who take on the same investment risks. They participate in the same venture, willing to share in the profits and losses of the enterprise. Under the doctrine of equality of shares – all stocks issued by the corporation are presumed equal with the same privileges and liabilities, provided that the Articles of Incorporation is silent on such differences.[5]

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5 *Commissioner of Internal Revenue v. Court of Appeals*, G.R. No. 108576, January 20, 1999, 301 SCRA 152, 187.

As a final note, the Filipinization of public utilities under the 1987 Constitution is a recognition of the very strategic position of public utilities both in the national economy and for national security.[6] The participation of foreign capital is enjoined since the establishment and operation of public utilities may require the investment of substantial capital which Filipino citizens may not afford. But at the same time, foreign involvement is limited to prevent them from assuming control of public utilities which may be inimical to national interest.[7] Section 11, Article XII of the 1987 Constitution already provides three limitations on foreign participation in public utilities. The Court need not add more by further restricting the meaning of the term "capital" when none was intended by the framers of the 1987 Constitution.

Based on these considerations, I vote to **GRANT** the motions for reconsideration.

ROBERTO A. ABAD
Associate Justice

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6 BERNAS, JOAQUIN G., FOREIGN RELATIONS IN CONSTITUTIONAL LAW, 1995 Ed., p. 87 citing *Smith, Bell and Co. v. Natividad*, 40 Phil 136, 148 (1919); *Luzon Stevedoring Corporation v. Anti-Dummy Board*, 46 SCRA 474, 490 (1972); DE LEON, HECTOR S., PHILIPPINE CONSTITUTIONAL LAW (Principles and Cases), 2004 Ed., Vol. 2, p. 940.

7 DE LEON, HECTOR S., PHILIPPINE CONSTITUTIONAL LAW (Principles and Cases), 2004 Ed., Vol. 2, p. 946.