

EN BANC

G.R. No. 207246 – JOSE M. ROY III, *petitioner* v. CHAIRPERSON TERESITA HERBOSA, THE SECURITIES AND EXCHANGE COMMISSION, PHILIPPINE LONG DISTANCE TELEPHONE COMPANY, AND THE PHILIPPINE STOCK EXCHANGE, *respondents*

WILSON C. GAMBOA, JR., DANIEL V. CARTAGENA, JOHN WARREN P. GABINETE, ANTONIO V. PESINA, JR., MODESTO MARTIN Y. MANON III, and GERARDO C. EREBAREN, *Petitioners-in-intervention*

PHILIPPINE STOCK EXCHANGE, INC., *Respondent-in-intervention*

SHAREHOLDERS' ASSOCIATION OF THE PHILIPPINES, INC., *Respondent-in-intervention*

Promulgated:

April 18, 2017

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*[Signature]*-----X

DISSENTING OPINION

LEONEN, J.:

I maintain my dissent.

The primordial interest served by the limitation of foreign participation and ownership in certain economic activities is the “conserv[ation] and develop[ment of] our *patrimony*.”<sup>1</sup> By definition, this limitation is a matter of maintaining and rendering to the Filipino what belongs to the Filipino. This means that there is an effective control by Filipinos. It also means, as an act of preservation and development, that the Philippine economy stands to benefit from the fruits of capital. It is thus a question of national integrity:

It should be emphatically stated that the provisions of our Constitution which limit to Filipinos the rights to develop the natural resources and to operate the public utilities of the Philippines is one of the bulwarks of our national integrity. The Filipino people decided to include it in our Constitution in order that it may have the stability and permanency that its importance requires. It is written in our Constitution so that it may neither be the subject of barter nor be impaired in the give and take of politics. *With our natural resources, our sources of power and energy, our public lands, and our public utilities, the material basis of the nation's existence, in the hands of aliens over whom the Philippine Government does not*

<sup>1</sup> CONST., Preamble.

*[Handwritten mark]*

*have complete control, the Filipinos may soon find themselves deprived of their patrimony and living as it were, in a house that no longer belongs to them.*<sup>2</sup> (Emphasis supplied)

The 1987 Constitution leaves room for the legislature to identify “certain areas of investment” where foreign equity participation may be limited to 40% or even lower.<sup>3</sup> This is in addition to the areas of natural resources<sup>4</sup> and public utilities<sup>5</sup> where foreign equity participation was already limited to a maximum of 40% by the 1935<sup>6</sup> and the 1973<sup>7</sup>

<sup>2</sup> Former President of the University of the Philippines, Hon. Vicente G. Sinco (Congressional Record, House of Representatives, Vol. 1, No. 26, 561), quoted in *Republic v. Quasha*, 150-B Phil. 140, 170 (1972) [Per J. Reyes, J.B.L., En Banc].

<sup>3</sup> CONST., art. XII, sec. 10 provides:

Section 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

<sup>4</sup> CONST., art. XII, sec. 2, par. (1) provides:

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

<sup>5</sup> CONST., art. XII, sec. 11 provides:

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.

<sup>6</sup> CONST. (1935), art. XII, sec. 1 provides:

Section 1. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces or potential energy, and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution. Natural resources, with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and the limit of the grant.

CONST. (1935), art. XIII, sec. 8 provides:

Section 8. 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 other entities organized under the laws of the Philippines, sixty per centum of the capital of which is owned by citizens of the Philippines, nor shall such franchise, certificate, or authorization be exclusive in

Constitutions. This is also in addition to other activities explicitly mentioned outside of Article XIV of the 1987 Constitution.<sup>8</sup>

The Constitution recognizes private enterprise and investments as indispensable to national progress and therefore encourages and provides incentives for them.<sup>9</sup> Yet the Constitution's propitious stance towards private enterprise and investment is tempered by the primacy of a "self-reliant and independent national economy."<sup>10</sup>

The imperative of conserving and developing our inheritance and integrity is not an empty exhortation. The specific mandate is established by Article II, Section 19 of the 1987 Constitution: "The State *shall* develop a

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character or for a longer period than fifty years. No franchise or right shall be granted to any individual, firm, or corporation, except under the condition that it shall be subject to amendment, alteration, or repeal by the National Assembly when the public interest so requires.

<sup>7</sup> CONST. (1973), art. XIV, sec. 5 provides:

Section 5. 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 the capital of which 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 in by the National Assembly when the public interest 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 the capital thereof.

CONST. (1973), art. XIV, sec. 9 provides:

Section 9. The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens. The National Assembly, in the national interest, may allow such citizens, corporations, or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitation, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance are hereby recognized as such.

<sup>8</sup> CONST., art. XIV, sec. 4 (2) provides:

Section 4.

....

(2) Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.

CONST., art. XVI, sec. 11 provides:

SECTION 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.

(2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.

Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.

The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

<sup>9</sup> CONST., art. II, sec. 20 provides:

Section 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.

<sup>10</sup> CONST., art. II, sec. 19:

Section 19. The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.

self-reliant and independent national economy effectively controlled by Filipinos.”

There is thus a positive duty imposed upon state organs. They are charged with the definite prestation of going about and ensuring such conservation and development. This is done through the *conscious* adoption of legal mechanisms that *adequately* effect such conservation and development.

The mechanisms we adopt in jurisprudence must work not only at a barefaced identification of Filipino and foreign stock ownership. They must go beyond surveying nominal compliance but discerningly – even astutely – account for and foreclose avenues for circumvention.

This begins with a conceptual understanding of capital and a functional comprehension of what it means to own capital. These must be thorough, with keen awareness that formal designations are not always representative of attendant rights, benefits, prerogatives, and other incidents. More than titular descriptions therefore, the mechanisms we adopt must scrutinize the many features of stock ownership, such as, its ultimate end of deriving commercial gains, the mutable as against the inviolable rights it entails, and its implications for participating in corporate affairs, the avenues for withholding participation, as well as the extent and quality of such participation depending on the nature of the affair. Our jurisprudential mechanisms must focus on beneficial, not merely titular, ownership. It cannot be true that a share of stock is held by a Filipino when it is only the title that he holds while the entire usufruct belongs to a foreigner.

Accordingly, the apparatus for reckoning foreign ownership must be willing go beyond what (i.e., the class of shares) corporate participants are holding but also at how they are holding it. When appropriate, there must be an unravelling of who ultimately derives the gains, as well as who benefits from and influences the manner of exercising the rights and prerogatives attendant to holding shares. Our mechanisms must rise beyond the naivety of assuming that nominal ownership translates to consummate and beneficial ownership.

The majority's position limiting the conception of “capital” vis-à-vis foreign equity participation in public utilities under Article XII, Section 11 of the 1987 Constitution only to shares of stock entitled to vote for directors in a corporation fails to adequately effect the Constitution's dictum. Rather than guarding our patrimony, it has opened the door for foreign control of corporations engaged in nationalized economic activities.<sup>11</sup>

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<sup>11</sup> RIGOBERTO D. TIGLAO, *COLLOSAL DECEPTION: HOW FOREIGNERS CONTROL OUR TELECOMS SECTOR* (2016).

In keeping with the primacy of our patrimony and the charge of a “self-reliant and independent national economy,” capital must be construed in such a manner as to secure “the controlling interest in favor of Filipinos.”<sup>12</sup>

To limit capital to so-called voting shares is to be shortsighted. It fails to account for the reality that every class of shares exercises a measure of control over a corporation. Even so-called non-voting shares vote and may be pivotal in the most crucial corporate actions. A cursory reading of the Corporation Code reveals this:

No class of shares is ever truly bereft of a measure of control of a corporation. It is true, as Section 6 of the Corporation Code permits, that preferred and/or redeemable shares may be denied the right to vote extended to other classes of shares. For this reason, they are also often referred to as “[“]non-voting shares.[”] However, the absolutist connotation of the description “non-voting” is misleading. The same Section 6 provides that these “non-voting shares” are still “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;
7. Investment of corporate funds in another corporation or business in accordance with this Code; and
8. Dissolution of the corporation.

In the most crucial corporate actions – those that go into the very constitution of the corporation – even so-called non-voting shares may vote. Not only can they vote; they can be pivotal in deciding the most basic issues confronting a corporation. Certainly, the ability to decide a corporation’s framework of governance (i.e., its articles of incorporation and by-laws), viability (through the encumbrance or disposition of all or

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<sup>12</sup> Dissenting Opinion of J. Leonen in *Roy v. Herbosa*, G.R. No. 207246, November 22, 2016 < [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_leonen.pdf) > 6 [Per J. Caguioa, En Banc], citing Dissenting Opinion of J. Mendoza in *Roy v. Herbosa*, G.R. No. 207246, November 22, 2016 < [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246\\_mendoza.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_mendoza.pdf) > 21 [Per J. Caguioa, En Banc].

substantially all of its assets, engagement in another enterprise, or subjection to indebtedness), or even its very existence (through its merger or consolidation with another corporate entity, or even through its outright dissolution) demonstrates not only a measure of control, but even possibly *overruling* control. “Non-voting” preferred and redeemable shares are hardly irrelevant in controlling a corporation.<sup>13</sup> (Emphasis in the original, citation omitted)

The constitutional imperative demands a consideration not just of nominal power and control or the identification of which shares are denominated as “voting” and “non-voting”, but equally of beneficial ownership.

The implementing rules and regulations (amended 2004) of Republic Act No. 8799, the Securities Regulation Code (SRC), define “beneficial owner or beneficial ownership.” It identifies the two (2) facets of beneficial ownership: first, having or sharing voting power; second, having or sharing investment returns or power:

Rule 3 – Definition of Terms Used in the Rules and Regulations

1. As used in the rules and regulations adopted by the Commission under the Code, unless the context otherwise requires:
  - A. *Beneficial owner or beneficial ownership means any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power, which includes the power to vote, or to direct the voting of such security; and/or investment returns or power, which includes the power to dispose of, or to direct the disposition of such security; provided, however, that a person shall be deemed to have an indirect beneficial ownership interest in any security which is:*
    - i. held by members of his immediate family sharing the same household;
    - ii. held by a partnership in which he is a general partner;
    - iii. held by a corporation of which he is a controlling shareholder; or
    - iv. subject to any contract, arrangement or understanding which gives him voting power or investment power with respect to such securities; provided however, that the following persons or institutions shall not be deemed to be beneficial owners of securities held by them for the benefit of third parties or in customer or fiduciary accounts in the ordinary

<sup>13</sup> Dissenting Opinion of J. Leonen in *Roy v. Herbosa*, G.R. No. 207246, November 22, 2016 <[http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_leonen.pdf)> 6–7 [Per J. Caguioa, En Banc].

course of business, so long as such shares were acquired by such persons or institutions without the purpose or effect of changing or influencing control of the issuer:

- a. a broker dealer;
- b. an investment house registered under the Investment Houses Law;
- c. a bank authorized to operate as such by the Bangko Sentral ng Pilipinas;
- d. an insurance company subject to the supervision of the Office of the Insurance Commission;
- e. an investment company registered under the Investment Company Act;
- f. a pension plan subject to regulation and supervision by the Bureau of Internal Revenue and/or the Office of the Insurance Commission or relevant authority; and
- g. a group in which all of the members are persons specified above.

All securities of the same class beneficially owned by a person, regardless of the form such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

A person shall be deemed to be the beneficial owner of a security if that person has the right to acquire beneficial ownership, within thirty (30) days, including, but not limited to, any right to acquire, through the exercise of any option, warrant or right; through the conversion of any security; pursuant to the power to revoke a trust, discretionary account or similar arrangement; or pursuant to automatic termination of a trust, discretionary account or similar arrangement. (Emphasis supplied)

The concept of beneficial ownership uncovers that control is not entirely the end of participating in a stock corporation. As stock corporations are fundamentally business organizations, participating in their affairs by partaking in ownership is ultimately a matter of reaping gains from investments.

Consistent with the composite character of stock ownership and impelled by the need to equip state organs with the most efficacious means for conserving our heritage are the correlative mechanisms of the Control Test and the Grandfather Rule. These are the guideposts through which foreign participation in nationalized economic activities is reckoned. Together, the Control Test and the Grandfather Rule enable an adequate

mechanism for state organs to examine whether a stock corporation is *effectively* controlled and *beneficially* owned by Filipinos.

My dissent to the majority's November 22, 2016 Decision,<sup>14</sup> as well as to the April 21, 2014 Decision<sup>15</sup> and January 28, 2015 Resolution<sup>16</sup> in *Narra Nickel and Development Corp. v. Redmont Consolidated Mines Corp.*, emphasized that the Control Test finds initial application and "must govern in reckoning foreign equity ownership in corporations engaged in nationalized economic activities."<sup>17</sup> Further, "the Grandfather Rule may be used as a supplement to the Control Test, that is, as a further check to ensure that control and beneficial ownership of a corporation is in fact lodged in Filipinos."<sup>18</sup>

The correlation between the Control Test and the Grandfather Rule – where the former finds initial application, and the latter supplements – is settled in jurisprudence, having been affirmed in the January 28, 2015 Resolution in *Narra Nickel*. The Court explained:

[T]he Control Test can be, as it has been, applied jointly with the Grandfather Rule to determine the observance of foreign ownership restriction in nationalized economic activities. The Control Test and the Grandfather Rule are not, as it were, incompatible ownership-determinant methods that can only be applied alternative to each other. Rather, *these methods can, if appropriate, be used cumulatively in the determination of the ownership and control of corporations engaged in fully or partly nationalized activities*, as the mining operation involved in this case or the operation of public utilities as in Gamboa or Bayantel.

The Grandfather Rule, standing alone, should not be used to determine the Filipino ownership and control in a corporation, as it could result in an otherwise foreign corporation rendered qualified to perform nationalized or partly nationalized activities. Hence, it is only when the Control Test is first complied with that the Grandfather Rule may be applied. Put in another manner, if the subject corporation's Filipino equity falls below the threshold 60%, the corporation is immediately considered foreign-owned, in which case, the need to resort to the Grandfather Rule disappears.

On the other hand, a corporation that complies with the 60-40 Filipino to foreign equity requirement can be considered a Filipino corporation if there is no doubt as to who has the "beneficial ownership"

<sup>14</sup> Dissenting Opinion of J. Leonen in *Roy v. Herbosa*, G.R. No. 207246, November 22, 2016, <[http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_leonen.pdf)> [Per J. Caguioa, En Banc]

<sup>15</sup> Dissenting Opinion of J. Leonen in *Narra Nickel Mining & Development Corp. v. Redmont Consolidated Mines Corp.*, 733 Phil. 365, 420-490 (2014) [Per J. Velasco, Third Division].

<sup>16</sup> Dissenting Opinion of J. Leonen in *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp.*, G.R. No. 195580, January 28, 2015, 748 SCRA 455, 492-510 [Per J. Velasco, Special Third Division Resolution].

<sup>17</sup> Dissenting Opinion of J. Leonen in *Narra Nickel Mining & Development Corp. v. Redmont Consolidated Mines Corp.*, 733 Phil. 365, 468 (2014) [Per J. Velasco, Third Division].

<sup>18</sup> *Id.* at 478.



and “control” of the corporation. In that instance, there is no need for a dissection or further inquiry on the ownership of the corporate shareholders in both the investing and investee corporation or the application of the Grandfather Rule. As a corollary rule, even if the 60-40 Filipino to foreign equity ratio is apparently met by the subject or investee corporation, a resort to the Grandfather Rule is necessary if doubt exists as to the locus of the “beneficial ownership” and “control.”<sup>19</sup> (Emphasis supplied)

Characterizing the Grandfather Rule as a “supplement” or as a “*further* check” is not understating its importance.

Precisely, the Grandfather Rule is intended to frustrate the use of ostensible equity ownership as an artifice for circumventing the constitutional imperatives of “conserv[ing] and develop[ing] our patrimony”<sup>20</sup> and “develop[ing] a self-reliant and independent national economy.”<sup>21</sup>

We should be mindful of schemes used to frustrate the Constitution’s ends. These include the use of dummies and corporate layering and cloaking devices. As early as 1936, we have adopted the Anti-Dummy Law.<sup>22</sup> It not only proscribes, but even penalizes concession to use one’s name or citizenship to evade constitutional or legal requirements of citizenship for the exercise of a right, franchise or privilege,<sup>23</sup> the simulation of minimum capital stock,<sup>24</sup> and other acts deemed tantamount to the unlawful use, exploitation or enjoyment of a right, franchise, privilege, property or business, reserved to citizens.<sup>25</sup> In 1984, the Department of Justice, through

<sup>19</sup> *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp.*, G.R. No. 195580, January 28, 2015, 748 SCRA 455, 477–478 [Per J. Velasco, Special Third Division Resolution].

<sup>20</sup> CONST., preamble.

<sup>21</sup> CONST., art. II, sec. 19.

<sup>22</sup> Com. Act No. 108, as amended.

<sup>23</sup> Com. Act No. 108, sec. 1 provides:

Section 1. In all cases in which any constitutional or legal provision requires Philippine or United States citizenship as a requisite for the exercise or enjoyment of a right, franchise or privilege, any citizen of the Philippines or the United States 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 for not less than two nor more than ten years, and by a fine of not less than two thousand nor more than ten thousand pesos.

The fact that the citizen of the Philippines or of the United States charged with a violation of this Act had, at the time of the acquisition of his holdings in the corporations or associations referred to in section two of this Act, no real or personal property, credit or other assets the value of which shall at least be equivalent to said holdings, shall be admissible as circumstantial evidence of a violation of this Act.

<sup>24</sup> Com. Act No. 108, sec. 2 provides:

Section 2. In all cases in which a constitutional or legal provision requires that, in order 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 the United States, or both, it shall be unlawful to falsely simulate the existence of such minimum of stock or capital as owned by such citizens of the Philippines or the United States or both, for the purpose of evading said provision. The president or managers and directors or trustees of corporations or associations convicted of a violation of this section shall be punished by imprisonment for not less than two nor more than ten years, and by a fine of not less than two thousand nor more than ten thousand pesos.

<sup>25</sup> Com. Act No. 108, sec. 2-A provides:

its Opinion No. 165, referenced the Anti-Dummy Law and identified the following “significant indicators” or badges of “dummy status”:

1. That the foreign investor provides practically all the funds for the joint investment undertaken by Filipino businessmen and their foreign partner.
2. That the foreign investors undertake to provide practically all the technological support for the joint venture.
3. That the foreign investors, while being minority stockholders, manage the company and prepare all economic viability studies.<sup>26</sup>

The Grandfather Rule enables the piercing of ostensible control vested by ownership of 60% of a corporation’s capital when methods are employed to disable Filipinos from exercising control and reaping the economic benefits of an enterprise.<sup>27</sup> This – more assiduous – examination of who actually controls and benefits from holding such capital may very well be a jealous means of protecting our patrimony, but fending off the challenges to our national integrity demands it.

The application of the Grandfather Rule hinges on circumstances. It is an extraordinary mechanism the operation of which is impelled by a reasonable sense of doubt that even as 60% of a corporation’s capital is ostensibly owned by Filipinos, a more scrupulous arrangement may underlie

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Section 2-A. 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, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning, consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, that the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: and Provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.

<sup>26</sup> Sec. of Justice Op. No. 165, s. 1984.

<sup>27</sup> Dissenting Opinion of J. Leonen in *Narra Nickel Mining & Development Corp. v. Redmont Consolidated Mines Corp.*, 733 Phil. 365, 478–479 (2014) [Per J. Velasco, Third Division].

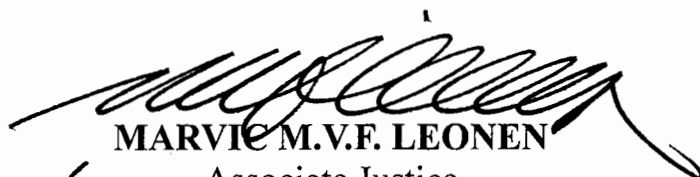
that compliance and that nominal Filipino owners have become parties to the besmirching of their own national integrity. As the 2015 Resolution in *Narra Nickel* explained, “[D]oubt’ refers to various indicia that the ‘beneficial ownership’ and ‘control’ of the corporation do not in fact reside in Filipino shareholders but in foreign stakeholders.”<sup>28</sup> It is necessary then, that proper evidentiary bases sustain resort to the Grandfather Rule.

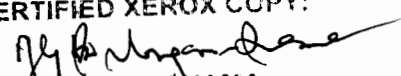
Adopting mechanisms that may be well-meaning, but ultimately inadequate, reduces state organs to unwitting collaborators in the despoiling and pillaging of the Filipino’s patrimony. Rather than work for and in the national interest, they fall prey to regulatory capture; facilitating private over public, or worse, foreign over national, gain.

The majority’s limitation of capital to so-called voting stocks entrenches an operational definition that can be a gateway to violating the Constitution’s righteous protection of our heritage. It licentiously empowers foreign interests to overrun public utilities, which are enterprises whose primary objectives should be the common good and not commercial gain, to wrest control of rights to our natural resources, and to takeover other crucial areas of investment.

The majority’s November 22, 2016 Decision may have set us along this course. We have the opportunity to reverse that position and truly do justice to the Filipino.

**ACCORDINGLY**, I vote to grant the Motion for Reconsideration

  
**MARVIC M.V.F. LEONEN**  
Associate Justice

**CERTIFIED XEROX COPY:**  
  
**FELIPA B. ANAMA**  
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<sup>28</sup> *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp.*, G.R. No. 195580, January 28, 2015, 748 SCRA 455, 478 [Per J. Velasco, Special Third Division Resolution].