RETHINKING REGULATION: UBER AND THE RIDE-SHARING INDUSTRY*

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ABSTRACT

Ride-sharing services, such as Uber, have found a niche in the Philippine transportation industry by offering services superior to taxicabs at competitive prices, and by exploiting a gap in our laws that allow them to operate at minimal costs. Traditional regulatory approaches are proving to be inadequate because the established framework, conceived over a century ago, did not foresee the amalgamation of mobile telecommunications and public transportation. Considering its public safety implications, the question for the legislature is not whether to regulate the industry but to determine the intensity of the regulation. The article proposes a co-regulatory approach in order to find a middle ground between nurturing new economies and creating legal protections for the riding public. But the bigger challenge for legislators is to avoid the pitfall of force-fitting modern businesses into the traditional framework.

I. INTRODUCTION

Public utility regulation is among the most pervasive concepts in Philippine law. Directly intertwined with police power, it allows the government to intervene in what would otherwise be a purely private enterprise. It has traditionally been applied to public land transport dating back to the American occupation, including the taxicab industry. The industry has fundamentally remained unchanged for the better part of the last century. Operators of for-hire transport services have been relying on the same business model, with improvements coming only by way of the vehicles utilized. But as with other industries well-established prior to the digital age, technology is bound to shake up the transport industry. Similar to how online-based Amazon has overtaken brick-and-mortar giant Walmart in the retail industry, the taxicab industry is now under threat from companies exploiting mobile data and global positioning system (GPS) capabilities to offer "peer-to-peer" car-sharing.

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Uber, founded in 2010 by Travis Kalanick, is the most well-known of these platforms. It has capitalized on the ubiquity of smartphones by offering a convenient application, or simply an "app," that links people who need a ride with community drivers desiring to share their cars. The app lets users request for a ride at the tap of the finger, predicts pick-up and arrival time, and facilitates cashless transactions. Uber launched its Philippine operations in 2014, and has since gained popularity for its ability to deliver higher quality transportation services at competitive fares vis-à-vis taxi services.

A revolution in a traditionally stagnant industry is likely to shake up the regulatory framework, as well. What is unique about Uber is that it does not own any of the vehicles that transport the passengers. This is one of the reasons why it is able to keep its overhead costs low. It fashions itself as a tech company that merely provides a method for connecting riders and drivers through its app. This poses a problem for our regulators who, like the industry itself, is used to the old way of doing things.

The convenience offered by Uber has undoubtedly benefitted the riding public, which have increasingly become frustrated by overcharging and selective taxi drivers. Nonetheless, it would be unwise to simply allow Uber to operate in the market unchecked. Its rapid expansion necessitates some form of government regulation in order to ensure public safety. This paper proceeds by exploring the history and current status of public utility regulation in the Philippines. Part III draws directly on the existing legal framework discussed in Part II and how it would theoretically apply to Uber. Part IV will analyze the inadequacy of applying current regulatory approaches and propose possible approaches aimed at striking a balance between the need to safeguard the public and promote techno-economic development.

II. PUBLIC UTILITY REGULATION

A. History

The basic foundation of public utility regulation in the Philippine legal system can be traced back to the Anglo-American tradition during the 1600s from the commentaries of Lord Matthew Hale. In his treatise *De Portibus Maris*, Hale declared that when private property becomes "affected with a public interest," it "ceases to be *juris privati* only."[1] Thus, as to wharves and wharfingers, Hale says:

[1] Lord Hale, *De Portibus Maris*, cited in *Munn v. Illinois*, 94 U.S. 113 (1877).

> A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, *viz.*, makes the most of his own. . . . If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case, there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only, as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest.[2]

As to ferries, Hale says, in his treatise *De Jure Maris*, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers without a prescription time out of mind, or a charter from the king." According to Hale, any person can make a ferry for his own private use but not for the common use of all the king's subjects because it would then become a thing of public interest and use. Thus, "every ferry ought to be under a public regulation, *viz.*, that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these, he is finable."[3]

This statement of the law by Hale was later cited with approbation and acted upon by Lord Kenyon at the beginning of the 19th century, in *Bolt v. Stennett.* This was followed in 1810 by *Aldnut v. Inglis*,[4] where Lord Ellenborough, deciding on the right of an owner to charge an unreasonable amount for the use of his warehouse, said:

> There is no doubt that the general principle is favored, both in law and in justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have the right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.[5]

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[2] *Id.*

[3] Lord Hale, *De Jure Maris*, cited in *Munn*, 94 U.S. 113.

[4] 12 East. 527 (1810).

[5] *Aldnut v. Inglis*, cited in *Munn*, 94 U.S. 113.

Thus, notwithstanding the rights associated with private ownership of property, sometimes a private owner's business becomes "clothed with a public interest" and ceases to be solely private; the government assumes a role in protecting that public interest.

The United States adopted the prevailing common law doctrine in the seminal case of *Munn v. Illinois*,[6] decided by the US Supreme Court in 1877. The case, which came about in 1871 because of the Illinois legislature's setting of maximum rates that private companies could charge for the storage and transport of agricultural products as a response to pressure from the National Grange (an association of farmers), upheld the power of government to regulate private industries. The Chicago grain warehouse firm of Munn and Scott was subsequently found guilty of violating the law but appealed the conviction on the grounds that the Illinois regulation represented an unconstitutional deprivation of property without due process of law. Citing English common law sources (preeminently, Hale's treatises), the federal court held that when private property is devoted to a public use, it is subject to public regulation.

The American occupation at the turn of the 20th century ushered in the development of public utility regulation in the Philippines. In 1902, the Philippine Commission enacted Act No. 520 which created the "Coastwise Rate Commission," a regulatory body that fixed the maximum rates for coastwise trade. This was followed by Act No. 1779, enacted in 1907, which created the "Board of Rate Regulation." Compared to the Coastwise Rate Commission, the Board had broader jurisdiction as it supervised the rates of every public service corporation.

It was not until 1913, however, that the term "public utility" entered the Philippine statute books. Section 14 of Act No. 2307, or "An Act Creating A Board of Public Utility Commissioners and Prescribing its Duties and Powers, and for Other Purposes," as amended by Act No. 2694, defined a public utility to include any person who owns, operates, manages or controls

> [...] within the Philippine Islands any common carrier, railroad, street railway, traction railway, steamboat or steamship line, small water craft, such as *bancas*, *virais*, *lorchas*, and others, engaged in the transportation of passengers and cargo, line of freight and passenger automobiles, shipyard, marine railway, marine repair shop, ferry, freight or any other car service, public warehouse, public wharf or dock not under the jurisdiction of the Insular Collector of Customs,

[6] 94 U.S. 113 (1877).

> ice refrigeration, cold storage, canal, irrigation, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, wire or wireless telegraph system, plant or equipment, for public use.[7]

The Board of Public Utility Commissioners became the primary governmental regulatory body.

In 1923, Act No. 3108, "An Act Creating A Public Utility Commission and Prescribing its Duties and Power, and for Other Purposes," superseded Act No. 2307. The law reproduced verbatim the public utility activities enumerated in Act No. 2307. Three years later, Act No. 3316 amended Act No. 3108 by renaming the Public Utility Commission as the Public Service Commission (PSC) and substituting all references to "public utility" with "public service."

Public utility regulation reached a constitutional status during the 1934 Constitutional Convention. Gripped by the spirit of nationalism which pervaded the era, the framers of the 1935 Constitution provided for the Filipinization of public utilities by requiring that any form of authorization for the operation of public utilities should be granted only to "citizens of the Philippines or to corporations at least sixty per centum of the capital of which is owned by such citizens."[8] "The provision is a recognition of the sensitive and vital position of public utilities both in the national economy and for public security."[9] The Constitution also expressly declared that no franchise, certificate, or authorization shall be exclusive in character or for a longer period than fifty years. In addition, there is a reservation clause in favor of the State, such that every franchise "shall be subject to amendment, alteration, or repeal by the National Assembly when the public interest so requires." This was necessitated by the holding in *Fletcher v. Peck*[10] and *Dartmouth College v. Woodward*,[11] that whenever a corporation is chartered by a statute and certain rights are granted to it and accepted, the charter constitutes a contract between the State and the corporation, protected by the contract clause under the Constitution. Notably, however, it did not define the term "public utility."

Barely a year later, Commonwealth Act No. 146 or the "Public Service Act" superseded Act No. 3316. It retained the term "public service" and revised the definition to include:

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[7] Act No. 2307 (1913), § 14, *amended by* Act No. 2694 (1917).

[8] CONST. (1935), art. XIII, § 8.

[9] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1222 (2009).

[10] 10 U.S. (6 Cranch) 87 (1810), *cited by* BERNAS, *id.* at 1224.

[11] 17 U.S. (4 Wheat.) 518 (1819), *cited by* BERNAS, *id.* at 1224.

> [...] every person that... own[s], operate[s], manage[s], or control[s] in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, either for freight or passenger, or both with or without fixed route and whether may be its classification, freight or carrier service of any class, express service, steamboat or steamship line, pontines, ferries, and water craft, engaged in the transportation of passengers or freight or both, shipyard, marine railways, marine repair shop, wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, gas, electric light, heat and power water supply and power, petroleum, sewerage system, wire or wireless communications system, wire or wireless broadcasting stations and other similar public services.[12]

The PSC remained as the franchising and regulatory authority under the Public Service Act, and continued as such until 1972 when Presidential Decree No. 1 structurally reorganized the executive department and transferred the PSC's functions to specialized regulatory boards. The abolition of the PSC notwithstanding, the substantive portions of Commonwealth Act No. 146 remain in force today. Insofar as land transportation is concerned, the franchising and regulatory functions have since been transferred to the Land Transportation Franchising and Regulatory Board (LTFRB), which was created by Executive Order No. 202, issued on June 19, 1987.

The 1973 Constitution restated the 1935 provision concerning public utility with the additional restriction that the participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in the capital.[13] The 1987 Constitution expanded the rule to absolutely prohibit foreigners from acting as executive or managing officers.[14]

B. Judicial Definition

The change in terminology introduced by Act No. 3316—from "public utility" to "public service"—effectively withdrew the legislative definition of a public utility. This gap became relevant when the 1935 Constitution introduced foreign ownership limitations and franchise restrictions on

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[12] Com. Act No. 146 (1936), § 13(b). Public Service Act.

[13] CONST. (1935), art. XIV, § 5.

[14] CONST. art. XII, § 11.

public utilities.[15] Consistent with American jurisprudence,[16] the determination whether a given business, industry, or service is a public utility was thus left to the courts.

The Supreme Court has since defined public utility as "a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service."[17] Admittedly, this definition is very encompassing. Given the nature of the concept, it would be difficult to construct a definition of a public utility which would fit every conceivable case. But as its name indicates, the term implies (1) public service and (2) public use.[18]

The first requisite denotes that the nature of the service provided is one that caters to the needs of the public and conduces to their comfort and convenience.[19] As stated by the Philippine Supreme Court, "[t]o constitute a public utility, the facility must be necessary for the maintenance of life and occupation of the residents."[20] In determining if an activity is a public service, the activities enumerated in the Public Service Act are instructive.

In this regard, the shift in terminology under Act No. 3316, later retained by the Public Service Act implies that "public service" is not synonymous to "public utility." As observed by Justice Tinga, "the terms public service and public utility... do not have the same legal meaning"[21] and that "all public utilities are public services but the converse is not true."[22] The distinction is significant not so much in determining the power of the State to

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[15] CONST. (1935), art. XIII, § 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 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.

[16] 73 C.J.S. Public Administrative Bodies and Procedure § 2, p. 993.

[17] National Power Corporation v. Court of Appeals, G.R. No. 112702, 279 SCRA 506, 523, Sept. 26, 1997.

[18] Albano v. Reyes, G.R. No. 83551, 175 SCRA 264, Jul. 11, 1989 *citing* Am. Jur. 2d V. 64, p. 549.

[19] Kilusang Mayo Uno Labor Center v. Garcia, G.R. No. 115381, 239 SCRA 386, 391, Dec. 23, 1994.

[20] JG Summit Holdings, Inc. vs. Court of Appeals, G.R. No. 124293, 412 SCRA 10, 20, Sept. 24, 2003.

[21] *Id.* at 36 (Tinga, *J., concurring*). *Cf.* Luzon Brokerage Co., Inc. v. Public Service Commission, G.R. No. L-37761, 57 Phil. 536, Nov. 16, 1932.

[22] *Id.* at 38.

regulate—indeed, the government retained the traditional public utility regulatory powers over public services under the Public Service Act—but in deciding whether the constitutional restrictions on public utilities apply.

The second—arguably controlling—requisite is that the activity must be for public use. A business affected with a public interest is not necessarily a public utility corporation. The fact that a business is affected with a public interest means that it may be regulated for the public good but does not imply that it is under a duty to serve the public.[23] In *Iloilo Ice and Cold Storage Company vs. Public Utility Board*,[24] the Supreme Court explained: "the essential feature of public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character." The test laid down by the Supreme Court in determining if an activity is for public use is whether the public may enjoy it by right or only by permission.[25] This requires that the use not be merely optional or tolerated by the owners, nor the public benefit be merely incidental. There must generally be a right which the law compels the owner to give to the general public.[26] The second requisite may be more appropriately be referred to as "public demandability," to avoid confusion with the common language usage of "public use."

Therefore, to be classified as a public utility, it is necessary that the entity must provide the good or service to the general public, who have a legal right to compel the entity to provide such goods and services. The distinguishing feature of a public utility is that it holds out generally and may not refuse legitimate demand for service, unlike private enterprises which are free to determine whom they will serve.[27] In *JG Summit Holdings, Inc. vs. Court of Appeals*, it was implied that the element of public demandability is what sets public utility apart from other enterprises: "The principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public or portion of the public as such which has a legal right to demand and receive its services or commodities."[28] Without this element, the entity, even if imbued with public interest because of the significance of the services rendered, does not qualify as a public utility.

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[23] *Id.* at 22.

[24] Iloilo Ice and Cold Storage v. Public Utility Board, G.R. No. L-19857, 44 Phil. 551, 557, March 2, 1923.

[25] *Id.* at 557-558, *citing* United States v. Tan Piaco, G.R. No. 15122, 40 Phil. 853, Mar. 10, 1920.

[26] *Id.* at 557.

[27] *JG Summit Holdings, Inc.*, 412 SCRA 10, 21.

[28] *Id.*

C. Common Carriers

Closely related to public utility, particularly in the land transport industry, is the common law concept of common carriers. It is included in the enumeration of public services under Public Service Act and is more specifically defined by the Civil Code as follows:

> Article 1732. Common carriers are persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air for compensation, offering their services to the public.

In construing the above article, the Supreme Court, in the seminal case of *De Guzman v. Court of Appeals*,[29] noted that it "makes no distinction between one whose principal business activity is the carrying of persons or goods or both, and one who does such carrying only as an ancillary activity". As Justice Feliciano remarked: "Article 1732 also carefully avoids making any distinction between a person or enterprise offering transportation service on a regular or scheduled basis and one offering such service on an occasional, episodic or unscheduled basis. Neither does Article 1732 distinguish between a carrier offering its services to the 'general public,' i.e., the general community or population, and one who offers services or solicits business only from a narrow segment of the general population."[30] Thus, "the true test for a common carrier is not the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the activity, but whether the undertaking is a part of the activity engaged in by the carrier that he has held out to the general public as his business or occupation".[31]

It has been observed that the concept of common carrier under Article 1732 coincides neatly with the notion of public service under the Public Service Act.[32] Accordingly, courts have used the non-discrimination between "general or limited clientele" and "permanent, occasional or accidental" appearing in the Public Service Act to supplement the Civil Code definition. Given the expansive concept adopted by the Supreme Court, a junk dealer utilizing six-wheeler trucks that loaded cargo from various merchants for a fee was held to be a common carrier.[33]

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[29] De Guzman v. Court of Appeals, G.R. No. L-47822, 168 SCRA 612, Dec. 22, 1988.

[30] *Id.*

[31] Pereña v. Zarate, G.R. No. 157917, 679 SCRA 208, 226, Dec. 12, 1997.

[32] *De Guzman*, 168 SCRA at 618.

[33] *Id.*

While the business of common carriers is legislatively recognized as a "public service," there has been no encompassing declaration—whether legislative or judicial—that all common carriers are "public utilities." In one case, however, the Supreme Court impliedly recognized that a domestic corporation engaging in business as a common carrier is a public utility that is subject to the constitutional restriction on foreign ownership.[34] Certainly, ubiquitous public transport vehicles such as buses, taxis, *jeepneys*, ferries, and airplanes are to be considered public utilities when the two-fold test in Part II.B is applied. The operators of these vehicles hold themselves out to the public as engaged in the transport business generally and may not refuse legitimate demand for their service,[35] thereby satisfying the public use requirement.

But for entities that offer mere ancillary transport services, their characterization as public utilities does not appear to be clear-cut—primarily because of a clear right of the public to demand the service. Thus, it was held that casual or incidental service devoid of public character and interest is not brought within the category of public utility.[36] Take the case of the junk dealer offering to carry goods for merchants cited above, for example. He may validly refuse to carry goods from a prospective customer without giving rise to a cause of action on the part of the latter. The prospective customers do not have a clear, demandable right to the dealer's transport services. Yet, he is still classified as a common carrier because it is sufficient that he offers his services to any segment of the public, broad or narrow.

That there is an apparent mismatch between the two concepts should not, however, be unexpected. While they are interrelated, "common carrier" is a concept in torts that primarily deals with apportioning liability in a contract of carriage, while "public utility" is an administrative law concept involving governmental regulation over private enterprises. It is an important distinction to keep in mind given the constitutional implications of being classified as a public utility. But in practice, there has been little need to make a cut-and-dry delineation since most of the cases that reach the courts involve claims for damages against common carriers without raising constitutional questions such as, for example, the latter's equity structure.

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[34] People v. Quasha, G.R. No. L-6055, 93 Phil. 333, June 12, 1953.

[35] Public Service Act, § 19(a).

[36] Luzon Stevedoring Co., Inc. v. Public Service Commission, G.R. No. L-5458, 93 Phil. 735, Sept. 16, 1953.

III. UBER

A. What is Uber?

Uber provides a digital platform that connects passengers with independent drivers in real-time through an application on a smartphone. Customers download the app to their smartphones, register and agree to the terms of use, and provide payment information. When in need of a ride, the customer opens the app and taps the request button. The app works by connecting customer requests with Uber-registered drivers in the surrounding area using GPS technology. It allows a customer to view a car's location, a driver's photograph, and customer ratings before choosing whether to accept a driver's offer for a ride. The app displays GPS-enabled maps that accurately predict fare estimates and arrival times, and alerts passengers upon their driver's arrival. At the end of the trip, the app automatically charges the saved credit card and the passenger receives a receipt through e-mail.[37]

Uber has its own fare calculation formula that charges a base rate plus per kilometer and per minute charges subject to surge pricing during peak times. Surge pricing refers to the fare multiplier it charges during times of high demand for rides and low supply of drivers; the rate of the surge price is calculated by the scale of the shortage in supply. Its fare structure differs from taxis because taxis charge per kilometer when moving and per minute when idling whereas Uber charges are both distance- and time-based while moving and idling, and taxis are not allowed to charge surge prices (although, in practice, many taxi drivers add a top-up which is not legally permissible).[38] Unlike taxis, Uber cars are generally owned by private individuals as opposed the company owning LTFRB-registered vehicles itself. This allows Uber to keep operating costs low.[39]

To differentiate itself from taxis and other public utility vehicles, and to limit its own liability, Uber asserts that it merely connects individuals to third-party drivers. Uber's terms and conditions state that "Uber does not provide transportation or logistics services or function as a transportation carrier." It characterizes its drivers as independent contractors, not as employees.[40]

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[37] *Available at* https://www.uber.com (last accessed Dec. 18, 2015).

[38] Emily Dobson, *Transportation Network Companies: How Should South Carolina Adjust Its Regulatory Framework?*, 66 S.C. L. REV. 701, 703 (2015).

[39] Paul Nussbaum, *Fight over ride sharing comes to Philadelphia, available at* http://articles.philly.com/2014-07-24/news/51956654_1_uber-and-lyft-transportation-network-companies-uberx.

[40] Mark Macmurdo, *Hold the Phone! "Peer-to-Peer" Ridesharing Services, Regulation, and Liability*, 76 LA. L. REV. 307, 326.

B. Classifying Uber

Guided by the definitions and tests laid out in Parts II.B and II.C, the paper shall now examine how Uber fits under the existing legal regime. The logical first step in the analysis is to determine if Uber is a common carrier. If it is a common carrier, then it is necessarily a public service defined in the Public Service Act. The next step would be to resolve whether it satisfies the public demandability requirement for it to be considered a public utility.

1. Uber is not a common carrier

The classification of Uber as a common carrier varies from one jurisdiction to another. In the United States, for example, some states classify Uber as a common carrier while others do not. In 2014, the Maryland Public Service Commission declared Uber as a common carrier like other for-hire car services.[41] Recently, the Pennsylvania Public Utility Commission declared that Uber meets the definition of a common carrier and is basically similar to other ride-for-hire services.[42] On the other hand, California pioneered new regulations in 2013, which created a new classification for Uber and other ride-sharing companies as "Transportation Network Companies" (TNCs) to differentiate them from common carriers. A TNC is defined as a "company or organization that provides transportation services using an online-enabled platform to connect passengers with drivers using their personal vehicles".[43] Twenty-eight other states have since recognized TNC as a new classification of passenger service.[44]

In the Philippines, the Department of Transportation and Communication (DOTC) has adopted California's definition. In its Department Order No. 2015-011, DOTC defined a TNC as an "organization whether a corporation, partnership, sole proprietor, or other form, that provides pre-arranged transportation services for compensation using internet-based technology application or digital platform technology to connect passengers with drivers using their personal vehicles." TNC's partner

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[41] Kevin Rector, *Md. commission rules Uber is 'common carrier,' will face regulations*, *available at* http://articles.baltimoresun.com/2014-08-06/business/bs-bz-uber-common-carrier-20140806_1_maryland-public-service-commission-uber-technologies-new-regulations.

[42] Pennsylvania Public Utility Commission v. Uber Technologies, Inc., C-2014-2422723, Nov. 17, 2015, *available at* http://www.puc.state.pa.us/pcdocs/1394879.docx.

[43] Basic Information For Transportation Network Companies and Applicants, *available at* http://www.cpuc.ca.gov/General.aspx?id=787.

[44] Information from the official website of the Property Casualty Insurers Association of America, *available at* http://www.pciaa.net/industry-issues/transportation-network-companies.

drivers who own the motor vehicles are referred to as Transportation Network Vehicle Service (TNVS).

Under the DOTC's framework, it is the TNVS that is considered the common carrier—not the TNC. Accordingly, the operating conditions imposed by the DOTC are primarily directed at the TNVS, including insurance requirements.[45] The DOTC directed the LTFRB to promulgate guidelines for the accreditation of TNCs pending legislation on the matter.[46] In turn, the LTFRB issued Memorandum Circular No. 015-15 which lists the documentary requirements for accreditation. Notably, the circular provides this section on TNC liability:

> "The TNC shall exercise due diligence and reasonable care in accrediting drivers. The TNC shall be liable for failure to exercise due diligence and reasonable care, except if such non-compliance is due to acts or omissions outside of the TNC's control. However, such liability shall not extend to actions of drivers, who are independent contractors who provide the transportation services directly to passengers."[47]

Juxtaposed with the extraordinary diligence required of common carriers under Article 1733 of the Civil Code, it is clear that the regulators have taken the position that TNCs such as Uber are not common carriers.

The approach of the regulators finds support when one considers the underlying juridical tie between a common carrier and a passenger i.e. a contract of carriage. This contract is defined as "one whereby a certain person or association of persons obligate themselves to transport persons, things, or news from one place to another for a fixed price".[48] An entity that does not enter into contracts of carriage is therefore not a common carrier.

At its core, Uber is an "e-hailing" service that pairs people who require a ride with people willing to share their car. The contract of carriage is between the passenger and driver, with Uber acting as the middleman. This basic function makes it analogous to a travel agency, which the Supreme Court, in *Crisostomo v. Court of Appeals*,[49] declared not to be a common carrier. That case involved a suit for damages filed by a passenger against the travel

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[45] DOTC Dep't Order No. 2015-011, 4.

[46] *Id.* at 5.

[47] LTFRB Memo. Circ. 015-15, § VI.

[48] Crisostomo v. Court of Appeals, G.R. No. 138334, 456 Phil. 845, 855, Aug. 25, 2003.

[49] *Id.*

agency from whom she got her plane tickets. In ruling that a travel agency is not a common carrier, the court held that the agency did not undertake to transport the passenger from one place to another since its covenant with its customers is simply to make travel arrangements in their behalf. The court ruled that the "object of the passenger's contractual relation with the travel agency is the latter's service of arranging and facilitating petitioners booking, ticketing and accommodation in the package tour", as opposed to the "object of a contract of carriage that is the transportation of passengers or goods".[50]

But the complexity of Uber's business model makes a simplistic comparison to travel agencies inadequate. Unlike the latter, Uber takes an active role in providing transportation service. Drivers submit their applications to Uber in order to become partner drivers and are required to meet minimum criteria established by Uber. It also has the prerogative to "deactivate" a driver in case of violation of any of Uber's policies or failure to deliver transportation which meets Uber's quality controls. Furthermore, the service is unequivocally being held out to the public as an "Uber" service. Notwithstanding Uber's self-serving disclaimer in its terms and conditions, there is no denying that from the perspective of a common person using the app, he is being serviced by Uber. To be sure, the rise in the number of Uber users is directly related with their association of Uber as a transport service. Passengers log into the app and receive notifications from Uber. If they encounter any problems, they can report directly to Uber. Finally, Uber sets the fare rates and employs its own formula in determining when to apply surge pricing. For these reasons, the Pennsylvania Public Utility Commission has concluded that Uber was "offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers," and, thus, a common carrier.[51]

It is submitted that this counter-argument may be addressed by applying the "control test" on independent contractors. An independent contractor is one who carries on a distinct and independent business and undertakes to perform the job, work, or service on its own account and under one's own responsibility according to one's own manner and method, free from the control and direction of the principal in all matters connected with the performance of the work except as to the results thereof.[52] In determining whether Uber is engaged in the business of a common carrier, one must look

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[50] *Id.*

[51] Pennsylvania Public Utility Commission v. Uber Technologies, Inc., C-2014-2422723, Nov. 17, 2015, *available at* http://www.puc.state.pa.us/pcdocs/1394879.docx.

[52] Fuji Television Network, Inc. v. Espiritu, G.R. No. 204944-45, 744 SCRA 31, Dec. 3, 2014.

at the level of control it has over its partner drivers. Uber drivers have no specified working hours and may clock in and out when they choose without any compulsion from Uber. They are also at liberty to accept or reject a request from a passenger. Under the agreement between Uber and the drivers, the latter retain the sole right to determine when and for how long they will utilize Uber's services. The drivers' relationship with Uber is also non-exclusive, meaning they can utilize other TNC platforms. In sum, the totality of the circumstances in the preceding paragraph is insufficient to establish that Uber has legal control over its partner drivers. Uber's influence over the drivers is limited to self-check mechanisms to ensure service quality rather than control over the method and manner in performing the transport service. Guidelines or rules and regulations that do not pertain to the means or methods to be employed in attaining the result have been held not to be indicative of control.[53]

It may be helpful to analyze a single Uber transaction (an accepted request for a ride) as comprising of three separate sub-transactions or contracts. The first is a service contract between Uber and the passenger. When the passenger uses the app and requests for a ride, Uber undertakes to find a nearby driver who is willing to take on the passenger. In return, the passenger pays Uber a certain percentage of the fare charged to his credit card. The second contract is between Uber and the driver, where Uber matches an open ride request with a driver who agrees to pick up a passenger at a specified location. For this service, Uber charges a fee calculated as a percentage of the fare and acts as the driver's collecting agent. The nature of the contract is essentially one of an independent contractor as previously discussed. Finally, there is the contract between the driver and the passenger. The driver agrees to transport the passenger directly to his specified destination without unauthorized interruption or unauthorized stops. In exchange, the driver receives his share of the fare collected by Uber. This is the contract of carriage *per se.*

2. Uber is neither a public service nor a public utility

Under the Public Service Act, the term "public service" has a technical legal meaning.[54] Since Uber is not a common carrier and its e-hailing service does not otherwise fit (or is analogous to) any of the enumerated activities in the Act, then it is not a public service. Unlike public utilities whose nature is generally subject to judicial determination, courts have consistently deferred to the statutory definition of public service, particularly when it

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[53] Tongko v. The Manufacturers Life Insurance Co. (Phils.), Inc., G.R. No. 167622, 622 SCRA 58, 85, Jun. 29, 2010.

[54] Public Service Act, § 13(b).

comes to placing it under the jurisdiction of the former PSC.[55] While there is no doubt that Uber caters to the convenience of the riding public—in that sense, it is a "public service"—the non-inclusion of its services in the Public Service Act renders this characterization practically ineffective as it would ultimately fall outside the jurisdiction of the regulatory agencies that succeeded PSC.

To further the analysis, the element of public demandability as an essential feature of public utility is similarly lacking. At this junction, it is important to distinguish public accessibility and public demandability. Accessibility simply refers to its availability to the general population. Uber is accessible because any person with a smartphone can download the app and avail of the services. To an extent, it is even affected with a public interest. But this is legally distinct from demandability, which connotes a public right to the services. To be demandable, there must be a law granting the public a right to such services. Refusal to offer a publicly demandable service would give rise to a right of action. In the case of Uber's e-hailing service, however, there is no law making it publicly demandable. Ergo, it is not a public utility.

3. Uber is a value-added service

If Uber is neither a common carrier nor a public service nor a public utility, then what is it? Under the existing legal regime, companies utilizing mobile internet and GPS to deliver its services would fall under the rubric of value-added services providers (VAS) as defined in the Public Telecommunications Policy Act of the Philippines.[56] The Telecoms Act defines a VAS as "an entity which, relying on the transmission, switching and local distribution facilities of the local exchange and inter-exchange operators, and overseas carriers, offers enhanced services beyond those ordinarily provided for by such carriers."[57] The National Telecommunications Commission (NTC), the government agency with jurisdiction over VAS, issued Memorandum Circular No. 02-05-2008 enumerating services classified as value-added. The list includes "applications service" which includes "all types of applications delivered to/accessed by the users/subscribers."[58]

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[55] *See* Chamber of Filipino Retailers, Inc. v. Villegas, G.R. No. L-2981944, SCRA 405, Apr. 14, 1972; Sorita v. Public Service Commission, G.R. No. L-20965, 18 SCRA 516, Oct. 29, 1966; Javellana v. Public Service Commission, G.R. No. L-9088, 98 Phil. 964, Apr. 29, 1956.

[56] Rep. Act No. 7925 (1995). Public Telecommunications Policy Act of the Philippines.

[57] § 3(h).

[58] NTC Memo. Circ. No. 02-05-2008, A.1(h).

Generally, the NTC requires VAS to register.[59] However, for free-to-download apps, the NTC has adopted a *laissez faire* policy. Its justification is that free services ultimately benefit the public and that non-interference with such services promotes consumer welfare, which is consistent with its mandate under the Telecoms Act.[60]

IV. DEFICIENCIES AND RECOMMENDATIONS

A. Jurisdiction

The classification of Uber as VAS only serves to highlight an existing gap in our laws. DOTC itself, the department with overall jurisdiction over transportation, was unable to properly classify Uber and seemingly delegated authority over TNCs to the wrong agency. Nonetheless, DOTC cannot be entirely faulted for granting LTFRB, whose jurisdiction is generally confined to "public land transportation services provided by motorized vehicles,"[61] (or, simply, common carriers), the imprimatur to issue the implementing rules for registration of TNCs instead of the NTC. Given the NTC's hand-off approach over free app services, it may simply be a case of whether regulation by the wrong agency is better than no regulation at all.

From a practical standpoint, it makes sense that LTFRB should have jurisdiction over TNCs since it is the agency with the expertise and experience in public transportation—not NTC. Although it is clear that Uber is not directly engaged in public land transportation services, its platform is deeply intertwined with the conduct of such service in such a manner that without the platform, the driver and user would not be able to perfect a contract of common carriage. Since passenger safety is the paramount purpose of regulation, NTC may not be the appropriate agency to entrust this function.

Unfortunately, the law which defined LTFRB's authority[62] did not foresee that technology will enable a ride-hailing service to play a significant role in public transport. An amendatory law or executive issuance is thus advisable in order to address this apparent gap in jurisdiction.

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[59] *Id.*

[60] Rep. Act No. 7925 (1995), § 5(e).

[61] Exec. Order No. 202 (1987), § 5.

[62] Exec. Order No. 202 (1987).

B. Regulation

Public safety is one of the most fundamental functions of government.[63] In the case of Uber and other TNCs, the question is not whether there should be government regulation but simply the extent of such regulation. While it is not a public utility—and neither should it be classified as such—its services are publicly accessible and, as the industry continues to expand, become imbued with public interest. There is a danger with allowing private firms such as Uber to continue unregulated: they will logically put their own profits ahead of the public interest, and self-regulatory standards will inevitably prove too lenient.[64]

While DOTC and LTFRB have released issuances covering TNCs, these are grossly inadequate. Though they copied the California Public Utility Commission's definition of TNCs, both agencies conspicuously failed to adopt provisions on driver background checks, vehicle inspections, and mandatory insurance prominent in their counterpart.[65] The regulations are, at best, *pro forma* that do very little in terms of regulating TNCs themselves since bulk of the relevant regulations pertain to TNVS (the common carrier under traditional analysis). It is thus left to the legislature to enact a regulatory law covering TNCs.

It is recommended that the legislative approach be that of co-regulation—a regulatory framework where government and industry work jointly to formulate and enforce standards.[66] This requires Congress to impose baseline standards that TNCs must comply with, such as driver screening, insurance and public reportorial requirements. But government intervention must not stifle technological development of TNCs or make their businesses unprofitable. Neither should it unwittingly create monopolies. As Balleisen & Eisner observe, enterprises "thrive on predictable regulatory environments, and some level of self-imposed limitations and cooperation with the

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[63] *See* CONST. art. III, §§ 3(1), 6, 15.

[64] Edward J. Balleisen & Marc Eisner, *The Promise and Pitfalls of Co-Regulation: How Governments Can Draw on Price Governance for Public Purpose*, *in* NEW PERSPECTIVES ON REGULATIONS 127, 143-45 (David Moss & John Cisternino eds., 2009), *available at* http://www.tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch6_Balleisen_Eisner.pdf.

[65] *Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry*, California Public Utility Commission Decision 13-09-045, Sept. 19, 2013.

[66] Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA COMPUTER & HIGH TECH. L.J. 23, at 27.

government is necessary in order to build stability so that funders and market participants will invest in the market activity and have some assurance that the business will remain legally and economically viable".[67]

For nascent technology-based businesses, a symbiotic relationship between the government and the proprietor ultimately benefits the public. For example, imposing reportorial requirements, such as complaints against drivers, can increase transparency. This allows the government to monitor the activities and enforce the law, including the meting out of penalties when appropriate. On the other hand, TNCs have inbuilt motivations to improve delivery of information to regulators and participants and to maintain customer protection norms, since trust and reliable-reputational information are vital parts of their marketing mix.[68] A legitimate regulatory threat acts as a crucial component to ensure industry coordination and compliance, and an improved relationship between government and industry lays the groundwork for future cooperation.[69]

C. Liability Allocation

The most contentious issue that Congress will have to address is the liability of Uber and other TNCs for acts and negligence of their partner drivers. As the law currently stands, the liability of Uber on this front is near-zero. Since the drivers are independent contractors, Uber is not vicariously liable for their acts or omissions. Not being common carriers, the extraordinary diligence requirement does not apply to Uber—only to the drivers or vehicle owners. It is expected that the company will resist any attempt to increase its liability. But if government aims to protect passengers, the drivers, and the public, it cannot merely rely on the existing legal regime. For a co-regulation framework to be effective, there must be a plausible threat of governmental intervention or litigation,[70] and liability allocation works to legitimize such threat.

This may be achieved by adopting a two-pronged approach. The first step would be to create vicarious liability if Uber fails to exercise diligence in the screening of their drivers and their vehicles. This is similar to paragraph 5 of Article 2180 of the Civil Code which makes employers liable for damages caused by their employees. The employer must prove that he exercised the diligence of a good father of a family in the selection and supervision of his

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[67] *Id.* at 58-59.
[68] *Id.* at 63.
[69] *Id.* at 60.
[70] *Id.* at 67.

employee in order to avoid liability under tort.[71] Since Article 2180 does not apply to Uber and its drivers due to the absence of an employer-employee relationship, it is up to Congress to create a juridical tie that would make the former indirectly liable for the acts of the latter.

The second step would be to institutionalize a mandatory "no fault-all risk" insurance coverage for TNCs. Under the regulations issued by LTFRB, the party liable for securing the passenger insurance policy is the TNVS.[72] The problem with individualized insurance is that there is a greater risk of non-compliance and red tape. Corollary to this is the issue of enforcement and prosecution; it is simply more practical to go after a handful TNCs than individual car owners. The peer-to-peer nature of the transport services means that going after individual actors will have little deterrence impact overall. On the other hand, focusing the attention to a few key players makes it easier for the regulators to monitor, enforce and impose sanctions. There is also more incentive for Uber to make sure that its insurance policy is up-to-date—in order to preserve its carefully built reputation—than there is for vehicle owners who drive cars only as a sideline.

Finally, liability allocation also fosters accountability. The riding public views Uber as the service provider—Uber's terms and conditions notwithstanding. Hence, it is imperative that each time a user requests a ride through the Uber platform, he feels secure that the driver has been properly screened and the vehicle adequately insured.

V. CONCLUSION

Uber has so revolutionized the metropolitan transport industry that it does not fit traditional classifications under Philippine laws. Jurisprudential analysis reveals that it is neither a common carrier nor a public service nor a public utility. Perhaps this is to be expected considering that the laws governing public transportation were enacted in the first half of the 20th century.

The inability of the law to keep up with technology has allowed the likes of Uber to exploit the gap and operate with minimal overhead costs. This is not necessarily a bad thing, and it is conceded that the government must encourage innovation. But it cannot be gainsaid that the service offered by

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[71] CIVIL CODE, art. 2180, ¶ 8.

[72] LTFRB Memo. Circ. No. 017-15 (2015).

Uber and other TNCs is affected with a public interest. Uber's minimal liability under the current legal framework is a cause for concern. It is generally left to self-regulate passenger safety standards given the DOTC's and LTFRB's feeble attempt at regulation. This provides cold comfort, however, since a company is ultimately accountable to its shareholders rather than the public.

To protect the public, Congress and the regulatory agencies must carefully craft standards and rules that foster shared responsibility. Laws and regulations must straddle the line between promoting technological development and safeguarding the riding public. One thing is clear, however: government must be careful not to force-classify Uber into one of the traditional classifications. Doing so will not be beneficial to any of the stakeholders, and to the development of our laws in general. The traditional classifications were formulated in a different era, and the analysis evolved by jurisprudence will expectedly prove inadequate. To keep up with technology, the law needs to innovate as well.

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