A POUND OF FLESH FOR FOREIGN INVESTMENT: A STUDY ON THE CONSTITUTIONALITY OF LIBERALIZING FOREIGN OWNERSHIP OF PUBLIC UTILITIES THROUGH LEGISLATIVE ACTION*

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"At sa kanyang yumi at ganda
Dayuhan ay nahalina
Bayan ko, binihag ka
Nasadlak sa dusa"

– Bayan Ko[1]

I. INTRODUCTION

The anthemic *kundiman* "*Bayan Ko*" echoes the sentiments of the Filipino people stemming from the colonial experience that marred the nation: "*Bayan ko, binihag ka, nasadlak sa dusa.*"[2] Philippine history has cemented the belief that the wealth of the Philippines is best kept in the hands of the Filipino people. The colonial experience has taught the Filipino people that foreign control over the country placed the interest of the Filipinos second to that of foreigners. The Philippines has fought hard to break the chains of bondage of foreign control, a fight that has spilled over to the regulatory environment of the Philippines.

In light of the historical experiences of the Filipino people, the framers engrained in the Constitution safeguards of protection from possible

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[1] The song "Bayan Ko" was written by Jose Corazon de Jesus and composed by Constancio de Guzman. The English translation of the quoted portion is as follows: "And with her tenderness and beauty, the foreigner was attracted. My country, you were made captive, falling into suffering."

[2] The English translation of the quoted portion from the song "Bayan Ko" is as follows: "My country, you were made captive, falling into suffering."

foreign influence or control. The Constitution limits foreign ownership of certain industries to Filipinos. Among such limits is found in Section 11, Article XII, which restricts the operation of public utilities to Filipino citizens or domestic corporations, sixty percent of the capital of which is owned by Filipino citizens.[3]

Public utilities are the veins of the country since they provide services essential to daily living. The continued use and operation of public utilities is vital to life itself, and the disruption thereof can cause starvation, poverty, violence, and even death. As such, the one who controls public utilities carries immense power that can either sustain life or cripple a nation.

The regulation of public utilities transcends economic considerations. The framers of the Constitution limited the ownership of public utilities to Filipinos not merely to give an advantage to Filipino citizens but, more importantly, to protect the country from the feared colonial takeover. For the Filipino people, liberalizing this policy would come at great economic and socio-political costs. Forcing Filipinos to pay the proverbial pound of flesh without their direct approval and consent would be an injustice, especially in light of the Filipino desire for independence after almost 400 years of colonial imperialism.

At present, Philippine lawmakers are attempting to change the regulatory environment by introducing a statutory definition of "public utility" which effectively limits the application of the ownership restriction under Section 11, Article XII of the Constitution. This article will determine if it was part of the sovereign will of the Filipino people to allow the liberalization of the constitutional restriction on foreign ownership of public utilities through legislative action. It will examine the extent of legislative power as it applies to Section 11, Article XII of the Constitution and determine if allowing a statutory definition of the term "public utility" aligns with the Constitution and the intent of its framers.

II. BACKGROUND OF THE STUDY

A. Evolution of Laws Regulating Public Utilities

The regulation of public utilities is certainly not a novel piece of legislation. As early as 1913, public utilities were already subject to government

[3] CONST. art. XII, § 11.

regulation. The recent movement to amend Commonwealth Act No. 146,[4] or the "Public Service Act," has been motivated by its perceived outdatedness,[5] its enactment dating back to 1936.

In Philippine legislative history, there are laws that once defined what a public utility was and allowed full foreign ownership of the same. This article traces the evolution of laws regulating public utilities to highlight how public utilities became regulated subject matter under the present Constitution and the Public Service Act. A study of the evolution of laws would show that before the term "public services" was introduced to the Philippine regulatory environment, the term "public utilities" was employed in the laws preceding the 1987 Constitution and the Public Service Act.

Act No. 2307[6] defined a public utility through an enumeration of examples and created a Board of Public Utility Commissioners to regulate all public utilities. The public utilities identified by Act No. 2307 include "any steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, telegraph system, plant, or equipment for public use."[7]

Act No. 2694 expanded the definition of a public utility, providing a broader enumeration of examples while also notably allowing foreign ownership thereof:

> The Public Utility Commission or Commissioner shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Act. The term 'public utility' is hereby defined to include every individual, co-partnership, association, corporation or joint stock company,

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[4] Com. Act No. 146 (1936).

[5] H. No. 78, 18th Cong., 1st Sess., Explanatory Note (2019).

[6] Act No. 2307 (1913), § 14: "The Board shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Act. The term 'public utility' is hereby deemed to include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control within the Philippine Islands any steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, telegraph system, plant, or equipment for public use, under privileges granted or hereafter to be granted by the Government of the Philippine Islands or by any political subdivision thereof."

[7] § 14.

> *whether domestic or foreign*, their lessees, trustees or receivers appointed by any court whatsoever, or any municipality, province or other department of the Government of the Philippine Islands, that now or hereafter may own, operate, manage or control within the Philippine Islands any common carrier, railroad, street railway, traction railway, steamboat or steamship line, small water craft, such as bancas, virais, lorehas, 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, ice, refrigeration, cold storage, canal, irrigation, express, subway, telephone, wire or wireless telegraph system, plant or equipment, for public use[.][8]

Act No. 3108 added to the enumeration of examples of a public utility, reflecting the technological advancements of the times:

> [A]ny common carrier, railroad, street railway, traction railway, steamboat or steamship line, small water craft, such as bancas, virays, lorehas, and others, engaged in the transportation of passengers or cargo, freight and or passenger motor vehicles, with or without fixed route 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, 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.[9]

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[8] Act No. 2694 (1917), § 9. (Emphasis supplied.)

[9] Act No. 3108 (1923), § 13. The Commission shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, property rights, equipment, facilities and franchises so far as may be necessary for the purposes of carrying out the provisions of this Act. The term 'public utility' is hereby defined to include every individual, copartnership, association, corporation, or joint-stock company, whether domestic or foreign, their lessees, trustees, or receivers appointed by any court whatsoever, or any municipality, province, or other department of the Government of the Philippine Islands, that now or hereafter may own, operate, manage, or control within the Philippine Islands any common carrier, railroad, street railway, traction railway, steamboat or steamship line, small water craft, such as bancas, virays, lorehas, and others, engaged in the transportation of passengers or cargo, freight and or passenger motor vehicles, with or without fixed route 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, 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: Provided, That as regards such common carriers, by land or by water, whose equipment is used principally or secondarily in furtherance of their private

Act No. 3316 amended Section 13 of Act No. 3108, replacing the word "public utility" with the word "public service." It is important to observe that other than the change in terminology, the definition of the regulated subject matter remained almost unchanged. Thus, as early as 1926, when Act No. 3316 was enacted, the term "public service" was used interchangeably with the term "public utility," with both terms referring to the same regulated subject matter.

> The Commission shall have general supervision and regulation of, jurisdiction and control over, all public services, and also over their property, property rights, equipment, facilities and franchises so far as may be necessary for the purposes of carrying out the provisions of this Act. The term 'public service' is hereby defined to include every individual, copartnership, association, corporation, or joint-stock company, whether domestic or foreign, their lessees, trustees, or receivers appointed by any court whatsoever, or any municipality, province, or other department of the Government of the Philippine Islands, that now or hereafter may own, operate, manage, or control within the Philippine Islands, for hire or compensation, *any common carrier, railroad, street railway, traction railway, subway, freight and or passenger motor vehicles, with or without fixed route, freight or any other car service, express service, steamboat or steamship line, ferries, small water craft, such as lighters, pontines, lorchas, and others, engaged in the transportation of passengers or cargo, shipyard, marine railway, marine repair shop, public warehouse, public wharf or dock not under the jurisdiction of the Insular Collector of Customs, ice, refrigeration, canal, irrigation, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, wire or wireless telegraph system, plant or equipment*[.][10]

In the case of *Santos v. The Public Service Commission*,[11] the Supreme Court observed the change in terminology. The Supreme Court recognized the phrases "public services" and "public service" substituted and superseded the phrases "public utilities" and "public utility." Moreover, Act No. 3316 added the new qualification that the entity should be "for hire or compensation," which was similarly adopted in the Public Service Act. The Supreme Court then held that the entity *El Tren de Aguadas* met the definition

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business, the net earnings of the latter business shall be considered in connection with their common carrier business for the purposes of rate fixing: Provided, further, That the Commission shall have no jurisdiction over ice plants, cold storage plants, or any other kind of public utilities operated by the Federal Government exclusively for its own and not for public use: And provided, lastly, That the Public Utility Commission shall not exercise any control or supervision over the Manila Railroad Company so long as the same shall be controlled by the Government of the Philippine Islands, except with regard to its rates.

[10] Act No. 3316 (1926), § 13. (Emphasis supplied.)

[11] [Hereinafter "Santos"], 50 Phil. 720, (1927).

of "public utility" under Act No. 3108 and "public service" under Act No. 3316, in effect recognizing the similarity in the definitions used.[12]

The 1935 Constitution repealed the provision allowing foreign public utilities by introducing the nationality requirement, which reserved the operation of public utilities to Filipino citizens or domestic corporations, sixty percent of the capital of which is owned by Filipino citizens:

> 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.[13]

After the promulgation of the 1935 Constitution, the Public Service Act was enacted on November 7, 1936. It remains effective and substantially the same as when it was first passed. The Act introduced the definition of "public service" employed at present, which is notably of similar structure and content as the laws discussed above.

> The term "public service" includes every person that now or hereafter may own, operate, manage, or control 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, [warehouse] 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: Provided, however, That a person engaged in agriculture, not otherwise a public service, who owns a motor

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[12] *Id.* at 723-724.

[13] CONST. (1935), art. XIII, § 8.

> vehicle and uses it personally and/or enters into a special contract whereby said motor vehicle is offered for hire or compensation to a third party or third parties engaged in agriculture, not itself or themselves a public service, for operation by the latter for a limited time and for a specific purpose directly connected with the cultivation of his or their farm, the transportation, processing, and marketing of agricultural products of such third party or third parties shall not be considered as operating a public service for the purposes of this Act.[14]

The 1987 Constitution retained the nationality requirement of the 1935 Constitution for the operation of a public utility. Father Joaquin G. Bernas, S.J., a leading member of the Constitutional Commission, remarked that the "Filipinization" provision is one of the products of the spirit of nationalism of the 1935 Constitutional Convention.[15] Section 11, Article XII of the Constitution provides:

> 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.[16]

In addition, special laws have been enacted to regulate specific public utilities. Some of these laws include Presidential Decree No. 198,[17] or the "Provincial Water Utilities Act of 1973," Republic Act No. 7925,[18] or the "Public Telecommunications Policy Act of the Philippines," and Republic Act No. 9136,[19] or the "Electric Power Industry Reform Act of 2001."

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[14] Com. Act No. 146 (1936), § 13(b).
[15] Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690 (2011).
[16] CONST. art. XII, § 11.
[17] Pres. Dec. No. 198 (1973).
[18] Rep. Act No. 7925 (1995).
[19] Rep. Act No. 9136 (2001).

B. Proposed Legislation to Statutorily Define "Public Utility"

At present, the Eighteenth Congress of the Philippines has included in its legislative agenda the passage of the "New Public Service Act," the primary feature of which is to define a public utility and differentiate the same from a public service. This attempt at providing a statutory definition comes almost a century since the term "public service" superseded the term "public utility" through Act No. 3316.[20]

House Bill No. 78 was introduced to "develop a clear statutory definition of a public utility by amending the Public Service Act"[21] with the objective of "providing the general public with more choices, better services, and lower prices"[22] through increased competition with the allowance of foreign operators. It provides that the State policy "to promote a just and dynamic social order that will alleviate poverty through measures that promote an improved quality of life for all" would be fulfilled through the "rationaliz[ation] of foreign equity restrictions by clearly defining the term 'public utilities.'"[23] On March 10, 2020, the House of Representatives approved the Bill on its third and final reading.[24]

To clearly define the term "public utilities," House Bill No. 78 made a distinction between a public service and a public utility.

House Bill No. 78 generally maintained the definition of a public service, with the added qualification, however, of "services which are non-rivalrous or imbued with public interest."[25] It also added "public market" and "telecommunications system"[26] to the enumeration of what a public service is.

The Bill provided for two means of defining a public utility. *First*, a public service that meets the four criteria specified in the Bill would be deemed a public utility.[27] The National Economic and Development

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[20] *Santos*, 50 Phil. 720, 723-24.

[21] H. No. 78, 18th Cong., 1st Sess., Explanatory Note ¶ 1 (2019).

[22] Explanatory Note, ¶ 4

[23] § 2.

[24] Filane Mikee Cervantes, *House passes bill amending 84-year-old public service law*, PHIL. NEWS AGENCY, Mar. 10, 2020, *at* https://www.pna.gov.ph/articles/1096150

[25] § 5

[26] § 5.

[27] § 5. The four criteria are: the person or entity regularly supplies, transmits and distributes to the public through a network a commodity or service of public consequence;

Authority (NEDA), in consultation with the Philippine Competition Commission (PCC), shall recommend to Congress the classification of a public service as a public utility. *Second*, an entity that operates, manages, or controls for public use any of the following systems is deemed a public utility: distribution of electricity, transmission of electricity, water pipeline distribution, and sewerage pipeline.[28]

In its Senate counterpart, the proposal to revise the Public Service Act was made through Senate Bill No. 1372. This was forwarded to align the Public Service Act with the "quantum leaps in technology"[29] over the years since its enactment. "This bill therefore aims to be in tune with the times by rationalizing restrictions which may no longer be necessary."[30] Among such restrictions is the nationalization of public utilities. Senate Bill No. 1372 rationalized the said restriction by similarly providing a statutory definition of a public utility to cause a differentiation from a public service. It largely adopted House Bill No. 78,[31] including its definition of the terms "public service" and "public utility."[32] As of the time of writing, Senate Bill No. 1372 remains pending at the committee level.

From the time Act No. 3316 removed the definition of the term "public utility" in 1926, up to the enactment of the 1935 Constitution and the Public Service Act, and even until the present, no law has since defined the term "public utility." The legislative attempt to rationalize foreign restrictions by defining a public utility comes over eighty years since the passage of the Public Service Act and the 1935 Constitution.

C. Judicial Interpretation of a Public Utility

The proposed bills are not the first attempt to define the term "public utility." The Supreme Court had already provided the definition of a public utility in jurisprudence as early as 1923 in *Iloilo Ice v. Public Utility Board*.[33] Through the exercise of its power to interpret laws,[34] the Supreme Court

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the public service is a natural monopoly that needs to be regulated (for this purpose, natural monopoly exists when the market demand for a commodity or service can be supplied by a single entity at a lower cost than by two or more entities); the commodity or service is necessary for the maintenance of life and occupation of the public; and the person or entity is obligated to provide adequate service to the public on demand.

[28] § 5.

[29] S. No. 1372, 18th Cong., 1st Sess., Explanatory Note, ¶ 5 (2020).

[30] Explanatory Note, ¶ 6.

[31] Explanatory Note, ¶ 6.

[32] § 5.

[33] Iloilo Ice v. Pub. Util. Bd. [hereinafter "Iloilo Ice"], 44 Phil. 551 (1923).

[34] Endencia v. David, 93 Phil. 696, 700 (1953).

addressed any ambiguity which may be raised as to the application of Section 11, Article XII of the Constitution.

From a survey of jurisprudence, there are common characterizations possessed by a public utility. *First*, property is devoted to public use of such character that the general public may demand that the service shall be conducted.[35] *Second*, the service of the public utility is essential to the general public, specially catering to the needs of the public and conducing to their comfort and convenience.[36]

In *Iloilo Ice v. Public Utility Board*,[37] the Supreme Court, citing *Allen v. Railroad Commission of the State of California*,[38] emphasized that a public utility is one with property devoted to public use. It serves the general public, with every individual having the right to demand that the service be conducted with reasonable efficiency under reasonable charges. As such, it is under the police power of the State and subject to regulation.

In *North Negros Sugar Co. v. Hidalgo*,[39] the Supreme Court, citing *Stoehr v. Natatorium Co.*,[40] held that a corporation becomes a public service corporation, and therefore subject to regulation as a public utility, when its business becomes devoted to public use.

In *Kilusang Mayo Uno Labor Center v. Garcia*,[41] the Supreme Court defined public utilities as privately owned and operated businesses whose services are essential to the general public. Considering that public utilities specially cater to public needs and conduce to public comfort and convenience, they are impressed with public interest.

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[35] *Iloilo Ice*, 44 Phil 551; N. Negros Sugar Co. v. Hidalgo, 63 Phil. 664 (1936); JG Summit Holdings, Inc. v. CA [hereinafter "JG Summit Holdings"], G.R. No. 124293, 412 SCRA 10 (2003).

[36] Kilusang Mayo Uno Lab. Ctr. v. Garcia [hereinafter "Kilusang Mayo Uno Labor Center"], G.R. No. 115381, 239 SCRA 386 (1994); Tatad v. Garcia [hereinafter "Tatad"], G.R. No. 114222, 243 SCRA 436 (1995); Republic v. Manila Elec. Co., G.R. No. 141314, 401 SCRA 130, (2003); *JG Summit Holdings,* 412 SCRA 10; Freedom from Debt Coal. v. Energy Reg. Comm'n [hereinafter "Freedom from Debt Coalition"], G.R. No. 161113, 432 SCRA 157 (2004).

[37] *Iloilo Ice*, 44 Phil 551.

[38] 179 Cal., 68, 8 A.L.R. 249 (1918).

[39] 63 Phil. 664, 688 (1936).

[40] 34 Idaho 217, 200 P. 132 (1921).

[41] *Kilusang Mayo Uno Labor Center*, 239 SCRA at 386, 391.

In *Tatad v. Garcia*,[42] the Supreme Court placed emphasis on a public utility's service to the public as the defining characteristic thereof. Similarly, in *Republic v. Manila Electric Company*,[43] the Supreme Court held that a public utility is engaged in the public service of providing basic commodities and services indispensable to the general public.

In *JG Summit Holdings, Inc. v. Court of Appeals*,[44] the Supreme Court defined a 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."[45] It further emphasized that a public utility is necessary for the maintenance of life. The Supreme Court adopted the same definitive characteristic as it did in *Iloilo Ice v. Public Utility Board*,[46] ruling that a public utility must have devoted itself to the use of the general public, such that the public has the right to demand that use or service with reasonable efficiency and under proper charges.

The Supreme Court has identified traditional examples of public utilities, which include electricity,[47] public transportation,[48] telecommunications,[49] gas,[50] and water.[51] These examples demonstrate the characteristics of a public utility. They are services devoted to public use, accessible to the general public by demand, and are indispensable to the general public as they provide basic commodities for daily comfort and convenience.

Notably, the Supreme Court has not provided any interpretation of the term "public service" as defined in the Public Service Act. It has instead used the term "public service" interchangeably with the term "public utility,"

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[42] *Tatad*, 243 SCRA 436, 452.

[43] G.R. No. 141314, 401 SCRA 130, 131 (2003).

[44] *JG Summit Holdings,* 412 SCRA 10 (2003).

[45] *Id.* at 20.

[46] *Iloilo Ice*, 44 Phil 551.

[47] Republic v. Manila Elec. Co., G.R. No. 141314, 401 SCRA 130, 131 (2003); Republic v. Medina, G.R. No. L-32068, 41 SCRA 643 (1971); *JG Summit Holdings,* 412 SCRA 10, 20.

[48] *Tatad*, 243 SCRA 436, 452; Phil. Airlines, Inc. v. CAB, G.R. No. 119528, 270 SCRA 538 (1997); Comm'r of Internal Revenue v. Phil. Airlines, Inc., G.R. No. 180066, 592 SCRA 237 (2009); *JG Summit Holdings,* 412 SCRA 10.

[49] Pilipino Tel. Corp. v. NTC, G.R. No. 138295, 410 SCRA 82 (2003); GMA Network, Inc. v. NTC, G.R. No. 196112, 717 SCRA 435 (2014); *JG Summit Holdings,* 412 SCRA 10.

[50] *JG Summit Holdings,* 412 SCRA 10.

[51] *Id.*

or in some cases, has considered public service as an aspect of a public utility. This is demonstrated through the following examples of discussions of the Supreme Court in cases involving electricity suppliers.

Republic v. Medina	"While a *public utility* like MERALCO may in effect be deemed to be a monopoly, its favored position as such is more than counterbalanced by the regulatory limitation on the rate of return on its capital and its unavoidable obligation to maintain and expand its services as demand therefor increases."[52]
Republic v. Manila Electric Company	"The business and operations of a public utility are imbued with public interest. In a very real sense, a *public utility* is engaged in *public service*—providing basic commodities and services indispensable to the interest of the general public."[53]
Freedom from Debt Coalition v. Energy Regulation Commission	"The privately-owned *public utility* 'is the substitute for the State in the performance of . . . (a) *public service*, thus becoming a public servant,' so wrote Justice Louis Brandeis more than eighty years ago. As in the United States, the provision of public utility services in the Philippine setting is a combination of private ownership and public control."[54]
National Power Corporation v. Philippine Electric Plant Owners Association, Inc.	"The supply of electricity is a *public service* that affects national security, economic growth and public interest."[55] "A just rate is founded on conditions that are fair and reasonable to both the *public utility* and the public. This stipulation means that the *public utility* must have, as profit, a fair

[52] Republic v. Medina, G.R. No. L-32068, 41 SCRA 643, 667 (1971). (Emphasis supplied.)

[53] Republic v. Manila Elec. Co., G.R. No. 141314, 401 SCRA 130, 131 (2003). (Emphasis supplied.)

[54] *Freedom from Debt Coalition*, 432 SCRA 157, 163. (Emphasis supplied.)

[55] Nat'l Power Corp. v. Phil. Elec. Plant Owners Ass'n, Inc., G.R. No. 159457, 486 SCRA 577, 581 (2006). (Emphasis supplied.)

	return on the reasonable value of the property."[56]
Samar II Electric Cooperative, Inc. v. Quijano	"Electricity is a basic necessity the generation and distribution of which is imbued with public interest, and its provider is a *public utility* subject to strict regulation by the State in the exercise of police power."[57]
Manila Electric Company v. Wilcon Builders Supply, Inc.	"We would like to emphasize at this point that the production and distribution of electricity is a highly technical business undertaking, and in conducting its operation, it is only logical for a *public utility*, such as the petitioner, to employ mechanical devices and equipment for the orderly pursuit of its business [...] *Public service* companies which do not exercise prudence in the discharge of their duties shall be made to bear the consequences of such oversight."[58]

The case of *Santos v. Public Service Commission*[59] may explain the reason behind the interchangeable use of the terms "public utility" and "public service." The Supreme Court observed "that the phrases 'public services' and 'public service' [in Act No. 3316] substitute and supersede the phrases 'public utilities' and 'public utility' [in Act No. 3108]."[60] Thus, since the origin of the statutory definition of the term "public service" stems from a statutory definition of the term "public utility," this may explain the Supreme Court's interchangeable use of the terms. Moreover, even the framers of the Constitution have recognized how the term "public utility" is almost synonymous with the term "public service":

> MR. NOLLEDO. The Commissioner will notice that the term "public utility" is almost synonymous with "public service" and that public utilities may cover the following:
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> 1) Transportation in all its ramifications — land transportation, sea transportation, water transportation and possibly ferry service; 2)

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[56] *Id.* at 592.

[57] Samar II Elec. Coop., Inc. v. Quijano, G.R. No. 144474, 522 SCRA 364, 365 (2007). (Emphasis supplied.)

[58] Manila Elec. Co. v. Wilcon Builders Supply, Inc., G.R. No. 171534, 556 SCRA 742, 754 (2008). (Emphasis supplied.)

[59] *Santos*, 50 Phil. 720.

[60] *Id.* at 723-724.

> electric service; (3) maintenance and operation of ice plants; and 4) telecommunication and others.[61]

Based on the study of jurisprudence, the definition of terms appears to be a matter of semantics in the absence of any material distinction between a public utility and a public service.

III. DISCUSSION

A. The Constitution Did Not Grant Congress the Power to Statutorily Define a Public Utility

Unlike other countries which regulate public utilities through statute, the Philippines has written into its Constitution the sovereign will of the people to restrict the operation and ownership of public utilities to Filipinos. While the Constitution specifically imposes the restriction limiting the operation of public utilities to Filipino citizens or domestic corporations with at least sixty percent of capital owned by Filipino citizens, it is silent on the definition of a public utility:

> 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.[62]

In light of the proposed bills,[63] there is a need to determine if the silence of the Constitution permits Congress to provide a statutory definition of a public utility, or if the judicial interpretation of a public utility should

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[61] V RECORD CONST. COMM'N 92 (Sept. 25, 1986).

[62] CONST. art. XII, § 11.

[63] *See supra* pp. 739-740.

prevail in the absence of a constitutional amendment of Section 11, Article XII.

Section 11, Article XII of the Constitution is not the only constitutional provision that leaves subject matter undefined. The Bill of Rights is full of undefined Constitutional terms, such as "liberty," "freedom of speech," "freedom of expression," and "free exercise of religion." It is drafted in such a way that leaves these constitutional terms open to definition.

> No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.[64]
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> * * *
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> No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.[65]
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> * * *
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> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.[66]

However, Section 11, Article XII and the above-quoted provisions of the Bill of Rights do not delegate to Congress the power to define these terms. It is submitted that if the framers had intended to allow Congress to supplement certain constitutional provisions with statutory definitions of constitutional terms, the Constitution would have expressly delegated such power as it did in the other provisions.

It is a cardinal rule of constitutional construction that the Constitution be interpreted as a whole—*ut magis valeat quam pereat.* It must be read in harmony, and interpreted in a manner that will render every word operative.[67] Appreciating the Constitution as a whole, it becomes evident that it employs

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[64] CONST. art. III, § 1.

[65] Art. III, § 4.

[66] Art. III, § 5.

[67] Francisco v. House of Representatives. G.R. No. 160261, 415 SCRA 44, 127-128 (2003).

phrases such as "defined by law,"[68] "provided by law,"[69] "determined by law,"[70] "made by law,"[71] and others of similar import when it intends to delegate to Congress the power to supplement its provisions. The provisions qualified by these phrases either require an enabling law to take effect,[72] or supplemental statutory conditions and limitations.[73] This is demonstrated in several decisions of the Supreme Court interpreting constitutional provisions that use these qualifying phrases.

Section 26, Article II of the Constitution uses the phrase "as may be defined by law." To quote in full, it provides that "[t]he State shall guarantee equal access to opportunities for public service, and prohibit political dynasties *as may be defined by law*."[74]

The Supreme Court in *Belgica v. Ochoa*[75] considered the above provision to be non-self-executing due to the qualifying phrase:

> At the outset, suffice it to state that the foregoing provision is considered as not self-executing due to the qualifying phrase "as may be defined by law." In this respect, said provision does not, by and of itself, provide a judicially enforceable constitutional right but merely specifies guideline for legislative or executive action. Therefore, since there appears to be no standing law which crystallizes the policy on political dynasties for enforcement, the Court must defer from ruling on this issue.[76]

Section 7, Article III of the Constitution uses the phrase "as may be provided by law":

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations *as may be provided by law*.[77]

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[68] CONST. art. II, § 26; art. XVIII, § 22.
[69] Art. VI, § 5(1); art. IV, § 3.
[70] Art. VI, § 10.
[71] Art. VI, § 29(1).
[72] Belgica v. Ochoa, G.R. No. 208566, 710 SCRA 1, 134 (2013).
[73] Legaspi v. CSC, G.R. No. L-72119, 150 SCRA 530 (1987).
[74] CONST. art. II, § 26. (Emphasis supplied.)
[75] G.R. No. 208566, 710 SCRA 1 (2013).
[76] *Id.* at 134.
[77] CONST. art. III, § 7. (Emphasis supplied.)

While the Supreme Court in *Legaspi v. Civil Service Commission*[78] considered the above provision as self-executing, it interpreted the same to allow for statutory limitations because of the qualifying phrase "as may be provided by law." Thus, it was the express grant of legislative power to provide limitations that led the Supreme Court to affirm that Congress can indeed legislate on this subject matter:

> These constitutional provisions are self-executing[...] What may be provided for by the Legislature are reasonable conditions and limitations upon the access to be afforded which must, of necessity, be consistent with the declared State policy of full public disclosure of all transactions involving public interest.[79]

Section 5(1), Article VI of the Constitution uses the phrase "as provided by law":

> The House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law, who shall be elected from legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio, and those who, *as provided by law*, shall be elected through a party-list system of registered national, regional, and sectoral parties or organizations.[80]

In *Ang Bagong Bayani-OFW Labor Party v. Ang Bagong Bayani-OFW Labor Party Go! Go! Philippines*,[81] the Supreme Court held that Congress was empowered to give effect to the above provision by enacting law because the Constitution allowed this legislative exercise through the phrase "as provided by law":

> The foregoing provision on the party-list system is not self-executory. It is, in fact, interspersed with phrases like "in accordance with law" or "as may be provided by law"; it was thus up to Congress to sculpt in granite the lofty objective of the Constitution. Hence, RA 7941 was enacted.[82]

In contrast to the aforementioned provisions, Section 11, Article XII of the Constitution is not qualified with phrases such as "as may be defined

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[78] G.R. No. L-72119, 150 SCRA 530 (1987).

[79] *Id.* at 534.

[80] CONST. art. VI, § 5(1). (Emphasis supplied.)

[81] G.R. No. 147589, 359 SCRA 698 (2001).

[82] *Id.*

by law." Because of the absence of such qualifying phrases, the Supreme Court in *Gamboa v. Teves*[83] categorically identified this provision as self-executing, without need for legislation to implement the same:

> Section 11, Article XII of the Constitution, like other provisions of the Constitution expressly reserving to Filipinos specific areas of investment, such as the development of natural resources and ownership of land, educational institutions and advertising business, is self-executing. There is no need for legislation to implement these self-executing provisions of the Constitution.[84]

A self-executing provision is complete in itself and operative without the aid of supplementary or enabling legislation. In a self-executing provision, the extent of the right conferred and the liability imposed are fixed by the Constitution itself, such that "they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action."[85]

In *Ganzon v. Court of Appeals*,[86] the Supreme Court interpreted the omission of the phrase "as may be provided by law" from Section 4, Article X of the Constitution to signify the framers' objective to strengthen local autonomy by severing congressional control of its affairs. Thus, the Supreme Court recognized it was the qualifying phrase "as may be provided by law" that allowed Congress to provide supplementary legislation upon the President's power of supervision over local governments.[87]

The Supreme Court in *Genuino v. De Lima*[88] interpreted the qualifying phrase "as may be provided by law" in a similar manner, holding that such phrase signifies that an enabling law is needed for the constitutional provision on curtailment of movement to take effect.[89]

Applying the foregoing, and considering that Section 11, Article XII of the Constitution is a self-executing provision,[90] it can be gleaned that the extent of the applicability of Section 11, Article XII is fixed by the Constitution itself. The provision cannot be expanded or limited by legislative

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[83] G.R. No. 176579, 652 SCRA 690 (2011).
[84] *Id.* at 738-739.
[85] Manila Prince Hotel v. GSIS, G.R. No. 122156, 267 SCRA 408, 431 (1997).
[86] G.R. No. 93252, 200 SCRA 271 (1991).
[87] *Id.*
[88] G.R. No. 197930, 861 SCRA 325 (2018).
[89] *Id.*
[90] Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690 (2011).

action in the absence of a qualifying phrase expressly granting such power. Any ambiguity arising from the constitutional terms employed by Section 11, Article XII can be addressed through an examination and construction of its terms.

Clearly, in the absence of any express language written into Section 11, Article XII, there is no constitutional grant of authority to Congress to supplement the Constitution with a statutory definition of a public utility. In contrast, and as discussed above, provisions such as Section 26, Article II of the Constitution contain the qualifying phrase "as may be defined by law," thus allowing, in that case, for the statutory definition of the constitutional term "political dynasties."[91]

Congress cannot vest upon itself a power which is not conferred to it by the Constitution in light of the doctrine of constitutional supremacy. The powers of Congress are confined to what had been expressly granted in the Constitution:

> The Constitution is the basic and paramount law to which all other laws must conform and to which all persons including the highest official of this land must defer. From this cardinal postulate, it follows that the three branches of government must discharge their respective functions within the limits of authority conferred by the Constitution.[92]

While Congress cannot provide a definition for a public utility, it is not proscribed from enacting laws to facilitate the operation of Section 11, Article XII.[93] In fact, the Supreme Court has recognized this power in *Philippine Airlines, Inc. v. Civil Aeronautics Board*,[94] where it held that "[t]he power to authorize and control the operation of a public utility is admittedly a prerogative of the legislature, since Congress is that branch of government vested with plenary powers of legislation."[95] Hence, the current Public Service Act and other special laws regulating public utilities are defensible against Constitutional challenge.

Notably, there are two cases that may counter the presented submission and support the position that Congress can define a public utility, or at least classify and declassify public utilities by declaration.

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[91] Belgica v. Ochoa, G.R. No. 208566, 710 SCRA 1, 134 (2013).
[92] Bengzon v. Drilon, G.R. No. 103524, 208 SCRA 133, 142 (1992).
[93] Manila Prince Hotel v. GSIS, G.R. No. 122156, 267 SCRA 408 (1997).
[94] G.R. No. 119528, 270 SCRA 538, 549 (1997).
[95] *Id.*

In the case of *IDEALS, Inc. v. Power Sector Assets and Liabilities Management Corporation*,[96] the Supreme Court applied Section 6 of Republic Act No. 9136[97] or the "Electric Power Industry Reform Act of 2001," which provides that "[a]ny law to the contrary notwithstanding, power generation shall not be considered a public utility operation."[98] The Supreme Court held that "[p]ower generation shall not be considered a public utility operation, and hence no franchise is necessary."[99] Effectively, the Supreme Court allowed the statutory declassification of power generation as a public utility, notwithstanding its prior decisions defining a public utility.

Meanwhile, in the case of *JG Summit Holdings, Inc v. Court of Appeals*,[100] the Supreme Court did not consider a shipyard to be a public utility because; (1) it did not meet the definition thereof; and (2) because there was no legislative declaration. It held that "[a] shipyard has been considered a public utility merely by legislative declaration. Absent this declaration, there is no more reason why it should continuously be regarded as such."[101] Thus, the Supreme Court impliedly recognized that there may be a legislative declaration classifying or declassifying an entity as a public utility.

B. The Framers of the Constitution Did Not Intend for Section 11, Article XII of the Constitution to be Subject to Statutory Amendment

More than the absence of an express delegation of power to define a public utility,[102] a study of the state's policy on public utilities will show that it was not the intent of the framers to provide Congress with the discretion to decide on what entities are subject to regulation.

Public utilities are heavily regulated by statutes and the Constitution itself because they are engaged in public service by "providing basic commodities and services indispensable to the interest of the general public."[103]

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[96] Hereinafter "IDEALS, Inc." G.R. No. 192088, 682 SCRA 602 (2012).

[97] Rep. Act No. 9136 (2001).

[98] § 6.

[99] *IDEALS, Inc.*, 682 SCRA 602.

[100] *JG Summit Holdings*, 412 SCRA 10.

[101] *Id.* at 28.

[102] *See supra* p. 745.

[103] Republic v. Manila Electric Company, G.R. No. 141314, 401 SCRA 130, 132 (2003).

The importance of public utilities cannot be overemphasized. In *Kilusang Mayo Uno Labor Center v. Garcia*,[104] the Supreme Court held:

> Public utilities are privately owned and operated businesses whose service are essential to the general public. They are enterprises which specially cater to the needs of the public and conduce to their comfort and convenience. As such, public utility services are impressed with public interest and concern. The same is true with respect to the business of common carrier which holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation when private properties are affected with public interest, hence, they cease to be *juris privati* only. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to the control by the public for the common good, to the extent of the interest he has thus created.[105]

A study by the Lincoln Institute of Land Policy characterized public utilities as a matter of humanity and human rights, such that the extended disruption thereof would "jeopardize public health, safety, and welfare, and destabilize economic and social systems."[106] Taking a similar position, the Organization for Economic Co-operation and Development (OECD) emphasized that inadequacies in public utilities may contribute to low levels of human development:

> Lack of coverage and poor quality of public utility networks typically mean that populations have insufficient clean water supplies and sewerage, insufficient electricity to light and power their homes, insufficient transport to get them to work or allow them leisure travel, and no means of rapid communication with remote friends and family.[107]

Indeed, businesses that provide services such as telecommunications, water, and power are impressed with public interest and concern. These are services essential to the general public, the interruption of which may cause more material harm as compared to ordinary businesses. Thus, the regulation

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[104] *Kilusang Mayo Uno Labor Center*, 239 SCRA 386.

[105] *Id.* at 391.

[106] Janice A. Beecher, *Economic Regulation of Utility Infrastructure*, *in* INFRASTRUCTURE AND LAND POLICIES 88 (Gregory K. Ingram & Karin L. Brandt eds., 2013).

[107] KENNETH DAVIES, REGULATORY TREATMENT OF FOREIGN DIRECT INVESTMENT IN INFRASTRUCTURE AND PUBLIC UTILITIES AND RECENT TRENDS: THE OECD EXPERIENCE 3 (2004).

of public utilities is needed to protect the public's use thereof and promote public interest.

The Constitution regulates public utilities by adopting a nationalist policy and limiting its operation to Filipino citizens or corporations at least sixty percent of whose capital is owned by Filipino citizens.[108] The Supreme Court in *Gamboa v. Teves*[109] held that Section 11, Article XII of the Constitution is a recognition of the vital position of public utilities, for purposes of both the national economy and national security. It explained how the rationale behind the nationality requirement is to prevent alien control of public utilities since such control may be inimical to the national interest:

> The provision is [an express] recognition of the sensitive and vital position of public utilities both in the national economy and for national security. *The evident purpose of the citizenship requirement is to prevent aliens from assuming control of public utilities, which may be inimical to the national interest.* This specific provision explicitly reserves to Filipino citizens control of public utilities, pursuant to an overriding economic goal of the 1987 Constitution: to 'conserve and develop our patrimony' and ensure 'a self-reliant and independent national economy effectively controlled by Filipinos.'[110]
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> * * *
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> This interpretation is consistent with the intent of the framers of the Constitution to place in the hands of Filipino citizens the control and management of public utilities.[111]

A study by the Asia-Pacific Economic Cooperation (APEC) raised the concern that foreign investors are less likely to identify with the public policy goals of the host government as compared to domestic investors. As such, they may be inclined to forward corporate interests instead of supporting the government in the realization of its goals.[112]

The Supreme Court also demonstrated the harms of foreign ownership of public utilities in jurisprudence. In the *Gamboa v. Teves* Resolution,[113] the Supreme Court reminded Filipinos of the exploitation

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[108] CONST. art. XII, § 11.

[109] G.R. No. 176579, 652 SCRA 690, 716 (2011).

[110] *Id.* at 716. (Emphasis supplied.)

[111] *Id.* at 726.

[112] ECONOMIC COMMITTEE ASIA-PACIFIC ECONOMIC COOPERATION, THE IMPACT OF INVESTMENT LIBERALIZATION IN APEC 6 (1997).

[113] G.R. No. 176579, 682 SCRA 397 (2012).

under the Parity Amendment, which once gave foreigners parity rights with Filipinos, and strictly applied the nationality requirement in its construction of the term "capital." It held that "[n]o economic suicide happened when control of public utilities and mining corporations passed to Filipinos' hands upon expiration of the Parity Amendment."[114]

The harm of allowing aliens to control industries that are considered vital to the economy and national security was recognized in *Manila Electric Company v. Public Service Commission*:[115]

> These measures, in turn, represent a financial outlay of such magnitude that — it seems conceded — the MERALCO is incapable of making with its present resources. Although it may raise the funds necessary therefor, either by increasing its capitalization or through loans, the first alternative is fraught with the danger — which is clear and present, owing to the scarcity and timidity of local capital — *that foreigners may eventually, if not surely, control an industry so vital to our economy and national security.* Hence, the only alternative left, consistently with the policy of nationalism and independence underlying our political and legal system, is to secure foreign loans.[116]

The Supreme Court also emphasized in *Luzon Stevedoring Corporation v. Anti-Dummy Board*[117] that alien control means economic control and political domination of the country by alien hands. It demonstrated, through a scenario involving shipping vessels, the possible harms of foreign control, such as smuggling, gun-running, and aiding enemies, among others:

> Aside from employing dummies, the stockholders who own 40% of the capital stock of a public utility, may effectively control its operation by employing aliens to implement their plan to subvert our territorial integrity and our economic stability. Shipping lines, whether for passengers alone, for cargo only, or for both passengers and cargo, are the vital arteries of commerce, perhaps more vital to our security and independence than the nationalization of the retail trade. *Alien control of inter-island navigation mean economic control and political domination of our country by alien hands.* It should be stressed that the interest of Filipino stockholders may be nullified by the employment of hostile aliens who actually man and operate the ships. In times of peace, such vessels may be

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[114] *Id.* at 469.

[115] G.R. No. L-24762, 18 SCRA 651 (1966).

[116] *Id.* at 663. (Emphasis supplied.)

[117] G.R. No. L-26094, 46 SCRA 474 (1972).

> utilized for smuggling not only of prohibited or dutiable goods but also on hostile human cargo as well as for gun-running. In times of war, the peril to the State is greater because the officer and employees manning the ships or directing their open rations may be enemy aliens. And even if they are nationals of a neutral country, they may operate the ship in violation of the laws of war to embarrass our government and alienate the sympathy or support of other nations and thus weaken our position vis-a-vis the enemy.[118]

Studies have also shown how public utility facilities can become strategic targets for terrorism.[119] Public utilities are part of the vital system of a functioning society, so much so that the paralysis of public utility industries could destabilize the nation.

Experiences in other countries also highlight some of the harms of placing public utilities under foreign control. In Bolivia, foreign-owned water companies increased tariffs by up to 200% in order to recover infrastructure costs. This forced the poor to spend half their income on water bills. Clearly an unsustainable policy, it was terminated after public outrage led to widespread street protests.[120] In Argentina, the government concessions given to foreign-owned public utilities led to an economic crash and public protests. The "Argentine experience shows the dangers of exposing the utilities sector to the volatilities of global investment and finance markets."[121]

However, liberalization of foreign ownership may also be beneficial. The positive impact of foreign ownership of public utilities has been felt in countries such as South Korea, where the liberalization of policies on foreign investment led the country out of an economic crisis.[122] The increase in foreign direct investment brought about by the liberalization of South Korea's policies resulted in the growth of the country's net trade surplus, employment generation, and manufacturing production.[123]

Studies also support the view that foreign investment would significantly alter the economic structure of the capital-importing country by

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[118] *Id.* at 490. (Emphasis supplied.)

[119] Beecher, *supra* note 106.

[120] James Haselip, The globalization of utilities liberalization: Impacts upon the poor in Latin America, at 8 (2004), *at* http://wrap.warwick.ac.uk/1976/1/WRAP_Haselip_wp13804.pdf

[121] *Id.* at 9.

[122] Francoise Nicolas, Stephen Thomsen & Mi-Hyun Bang, *Lessons from Investment Policy Reform in Korea*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2013).

[123] *Id.* at 11.

permanently increasing its productive capacity.[124] A caveat presented against the argument on economic gains is that much of the profits are repatriated instead of being reinvested in other local enterprises.[125]

While this article does not advocate for or against the merits of foreign ownership of public utilities, it recognizes that any policy on foreign ownership of public utilities would substantially impact the economic, cultural, socio-political, and legal landscape of the nation. In fact, the OECD observed that in South Korea, reforms on foreign investment were undertaken against the backdrop of an overall reform process that resulted in a shift of the general regulatory framework.[126]

In light of the importance of public utilities, the public interest to be preserved, and the significant impact of foreign control, it was the intent of the framers of the Constitution not to give Congress the discretion to limit the entities subject to the nationality restrictions. Unlike statutes, which are alterable by mere legislation, the Constitution is a superior, paramount law unchangeable by ordinary means.[127] The Constitution can only be changed through amendment or revision:

> The Constitution, as the fundamental law of the land, deserves the utmost respect and obedience of all the citizens of this nation. No one can trivialize the Constitution by cavalierly amending or revising it in blatant violation of the clearly specified modes of amendment and revision laid down in the Constitution itself.[128]

Considering the process to make changes in the Constitution is more stringent than legislative action, the regulation of public utilities is not subject to the risk that any "new dominant political group that comes will demand its own set of changes in the same cavalier and unconstitutional fashion."[129] Thus, the decision to regulate public utilities was not given to Congress, ensuring that it would not be subject to "unchartered waters, to be tossed and turned by every dominant political group of the day."[130]

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[124] Alexis Coudert & Asher Lans, *Direct Foreign Investment in Undeveloped Countries: Some Practical Problems*, 11 LAW AND CONTEMPORARY PROBLEMS 741, 744 (1946).

[125] *Id.* at 741, 746; Haselip, *supra* note 120 at 11-12.

[126] Nicolas, *supra* note 122.

[127] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[128] Lambino v. Comelec, G.R. No. 174153, 505 SCRA 160, 263 (2006).

[129] *Id.* at 264.

[130] *Id.* at 263.

C. The Legislation of a Definition of a Public Utility Amounts to a Usurpation of the Judicial Power to Interpret the Constitution

It has been submitted that Congress does not have the power to statutorily define a public utility. However, any ambiguity as regards the operation of Section 11, Article XII of the Constitution can be resolved through judicial interpretation.

The Constitution was purposely designed to stand the test of time. The Constitution is meant to be interpreted to cover even future and unknown circumstances. "It is to the credit of its drafters that a Constitution can withstand the assaults of bigots and infidels but at the same time bend with the refreshing winds of change necessitated by unfolding events."[131]

As discussed earlier, the Supreme Court had already provided a definition of a public utility in several cases.[132] To allow a statutory definition of a public utility to supersede the judicial interpretation of a public utility would violate the principle of separation of powers—a fundamental principle of the Philippine system of government. The Constitution divided the government into three departments and conferred upon each department exclusive cognizance of matters within its jurisdiction, making each supreme within its own sphere.[133]

The power to enact laws was generally granted to Congress, while the power to interpret laws was vested exclusively in the judiciary. Because of the separation of powers, Congress cannot perform judicial functions, such as interpreting the law.[134] Indeed, when constitutional terms require further definition, the Supreme Court has supplied the same in jurisprudence. For instance, it defined the "right to privacy"[135] as the "right to be let alone,"[136] "supervision"[137] as "overseeing,"[138] "patrimony"[139] as "heritage,"[140] and "free

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131 Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 64 (1997).
132 *See supra* p. 740.
133 Angara v. Electoral Commission, 63 Phil. 139, 156 (1936).
134 Bengzon v. Drilon, G.R. No. 103524, 208 SCRA 133, 142 (1992).
135 CONST. art. III, § 3(1).
136 Ople v. Torres, G.R. No. 127685, 293 SCRA 141, 153 (1998).
137 CONST. art. X, § 4.
138 Ganzon v. Ct. of Appeals, G.R. No. 93252, 200 SCRA 271, 283 (1991).
139 CONST. art. XII, § 10.
140 Manila Prince Hotel v. GSIS, G.R. No. 122156, 267 SCRA 408, 437 (1997).

speech"[141] as "liberty to discuss publicly and truthfully any matter of public interest."[142]

As early as in the case of *Endencia v. David*,[143] the Supreme Court already recognized that the interpretation and application of the laws, including the Constitution, belong exclusively to the judiciary. It struck down as unconstitutional Section 13 of Republic Act No. 590, which provided that taxation of the salary of a judicial officer is not a decrease of compensation, because such was a legislative attempt to interpret the Constitutional provision on non-diminution of salaries of judicial officers:

> By legislative fiat as enunciated in section 13, Republic Act No. 590, Congress says that taxing the salary of a judicial officer is not a decrease of compensation. This is a clear example of interpretation or ascertainment of the meaning of the phrase "which shall not be diminished during their continuance in office," found in section 9, Article VIII of the Constitution, referring to the salaries of judicial officers. *This act of interpreting the Constitution or any part thereof by the Legislature is an invasion of the well-defined and established province and jurisdiction of the Judiciary.*
>
> > *The rule is recognized elsewhere that the legislature cannot pass any declaratory act, or act declaratory of what the law was before its passage, so as to give it any binding weight with the courts. A legislative definition of a word as used in a statute is not conclusive of its meaning as used elsewhere; otherwise, the legislature would be usurping a judicial function in defining a term.*[144]

The Supreme Court further emphasized how it is outside the province of the legislature to interpret laws, especially after a judicial interpretation has already been established through jurisprudence. Under such a system, a judicial interpretation provided in a court decision may be undermined, or even annulled, by a subsequent and different interpretation of the law or of the Constitution by the legislative department. The Supreme Court held:

> We have already said that the Legislature under our form of government is assigned the task and the power to make and enact laws, but not to interpret them. This is more true with regard to the interpretation of the basic law, the Constitution, which is not within the sphere of the Legislative department. *If the Legislature may declare*

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[141] CONST. art. III, § 4.

[142] Gonzales v. Commission on Elections, G.R. No. L-27833, 27 SCRA 835, 856 (1969).

[143] 93 Phil. 696 (1953).

[144] *Id.* at 701. (Emphasis supplied.)

> *what a law means, or what a specific portion of the Constitution means, especially after the courts have in actual case ascertain its meaning by interpretation and applied it in a decision, this would surely cause confusion and instability in judicial processes and court decisions. Under such a system, a final court determination of a case based on a judicial interpretation of the law of the Constitution may be undermined or even annulled by a subsequent and different interpretation of the law or of the Constitution by the Legislative department.* That would be neither wise nor desirable, besides being clearly violative of the fundamental, principles of our constitutional system of government, particularly those governing the separation of powers.[145]

Therefore, since the power of interpretation belongs exclusively to the judiciary, Congress cannot enact a law that would effectively set aside and overrule all the decisions of the Supreme Court that had defined a "public utility"[146] without violating the principle of separation of powers. To allow such statutory definition of "public utility" would be to countenance a usurpation of judicial authority, in violation of the principle of separation of powers.

D. The Legislation of a Definition of a Public Utility is an Indirect Amendment of the Constitution

Finally, allowing Congress to statutorily define a public utility, which is a Constitutional term, would amount to an indirect amendment of the Constitution through unsanctioned means. Adding a definition of "public utility" to Section 11, Article XII of the Constitution is an amendment because it changes the meaning of the provision and contravenes the intent of the framers. The change in definition of a public utility would materially alter the application of Section 11, Article XII because it is determinative of the subject matter of the restriction provided. A different definition would result in expanding or limiting the entities regulated by the Constitutional restriction on foreign ownership.

Moreover, the constitutional deliberations indicate the intent of the framers when they drafted Section 11, Article XII, which is for the term "public utility" to contemplate entities such as telecommunications, electric power, ice, shipping, transportation. The proposed legislation[147] seeks to limit

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[145] *Id.* at 701-702. (Emphasis supplied.)
[146] *See supra* p. 740.
[147] *See supra* p. 739.

the entities defined as public utilities, and essentially change its definition. This would run counter to the intent of the framers presented below:

> MR. FOZ. I would like to ask a few clarificatory questions of the proponent. By the term "public utilities," to what are we referring? Will the Gentleman give some examples?
>
> MR. DAVIDE. *Not only these commercial telecommunications, but corporations supplying electric power, transportation, and even ice. Those are public utilities.* So, even in this regard, we will now allow aliens. Even if it is only 40 percent, that is still alien control. I know it is alien control.
>
> MR. SUAREZ. Thank you.[148]
>
> * * *
>
> MR. FOZ. At present, are these public utilities required by law to be Filipino-owned? The examples that the Gentleman gave – *ice plants, transportation* – what is the statutory requirement as regards ownership.
>
> MR. DAVIDE. I am not very familiar with special laws, but under the Constitution as worded in Section 15, *all public utilities will be included.*
>
> MR. FOZ. Is shipping a public utility?
>
> MR. DAVIDE. It is a public utility. *Transportation, air transportation, is a public utility.* So, foreign capital, foreign interest, may now come into PAL to control 40 percent of PAL.[149]
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> * * *
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> FR. BERNAS. In our conversation with some members of the committee, I was made to understand that they would be open to treating telecommunications separately. So I hope that while this may foreclose the question of public utilities in general, it will not be without prejudice to reopening the matter with respect to telecommunication.
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> MR. ROMULO. No, it is the other way around.

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[148] III RECORD CONST. COMM'N 64 (Aug. 23, 1986). (Emphasis supplied.)
[149] *Id.* (Emphasis supplied.)

> MR. VILLEGAS. *Telecommunication is part of public utility.*[150]

Therefore, since the proposed statutory definition of "public utility" changes Section 11, Article XII, it would ultimately amount to an indirect amendment of the Constitution.

Article XVII of the Constitution provides the three exclusive modes by which the Constitution may be amended—constituent assembly, constitutional convention, and people's initiative.[151] The Constitution does not recognize statutory amendment in the exercise of legislative power to be a mode of amendment. The Constitution being the basic and paramount law to which all other laws must conform to,[152] Congress cannot by legislative whim amend it in a manner outside the modes provided under Article XVII.

In *Lambino v. Commission on Elections*,[153] the Supreme Court did not allow the challenged initiative precisely because it was outside the sanctioned means of revision. The Supreme Court ruled that the Constitution cannot be amended or revised in what would be a blatant violation of the clearly specified modes laid down in the Constitution itself. To sanction other means of amendment or revision would lead to a "revolving-door" constitution, where the dominant political group can demand its own set of changes in such a cavalier and unconstitutional fashion. The Supreme Court held:

> The Constitution, as the fundamental law of the land, deserves the utmost respect and obedience of all the citizens of this nation. *No one can trivialize the Constitution by cavalierly amending or revising it in blatant violation of the clearly specified modes of amendment and revision laid down in the Constitution itself.*
>
> To allow such change in the fundamental law is to set adrift the Constitution in unchartered waters, to be tossed and turned by every dominant political group of the day. *If this Court allows today a cavalier change in the Constitution outside the constitutionally prescribed modes, tomorrow the new dominant political group that comes will demand its own set of changes in the same cavalier and unconstitutional fashion.* A revolving-door constitution does not augur well for the rule of law in this country.[154]

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[150] *Id.* (Emphasis supplied.)
[151] CONST. art. XVII, §§ 1-2.
[152] Bengzon v. Drilon, G.R. No. 103524, 208 SCRA 133, 142 (1992).
[153] G.R. No. 174153, 505 SCRA 160 (2006).
[154] *Id.* at 263-264. (Emphasis supplied.)

The landmark case of *Marbury v. Madison*[155] upheld Constitutional supremacy and distinguished the Constitution from ordinary legislative acts. Should one accept a constitution as a superior and paramount law, as it is considered in the Philippines, it should be unchangeable by other means. Otherwise, it would be on the same level as ordinary legislative acts, alterable whenever the legislature so pleases.[156]

In light of the above discussion, any definition of a public utility outside judicial interpretation should be written into the Constitution itself through the methods for amendment or revision specified under Article XVII. The statutory definition of a public utility cannot withstand a constitutional challenge, lest the Constitution be degraded to the level of statutory law. There is no middle ground.[157]

IV. CONCLUSION

Public utilities are vital not only to the nation, but also to the life of its citizens. The continuous use and operation of public utilities is impressed with great public interest because the services rendered are essential to daily living. Any interruption in the services rendered by public utilities paralyzes the different industries of the country and diminishes one's quality of life.

This article has shown that, because of the critical role of public utilities, the State imposes heavy regulation upon them. The regulation of public utilities is directed by the Constitution as it restricts its ownership to Filipinos. As discussed, foreign control has been viewed in Philippine history and jurisprudence as inimical to public interest. Thus, it was the intent of the framers to ingrain in the Constitution itself the restriction of foreign ownership.

Since the restriction of foreign ownership is provided in the Constitution itself, any alteration to it is subject to the strict process of constitutional amendment. In the absence of an express grant of power to Congress to expand or limit the scope of application of Section 11, Article XII, Congress cannot legislate a statutory definition of the term "public utility" that would necessarily result in a change of the regulated subject matter. It has been established that Congress cannot indirectly amend the Constitution in the guise of a legislative exercise of power.

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[155] 5. U.S. (1 Cranch) 137 (1803).

[156] *Id.* at 177.

[157] *Id.*

Furthermore, there is no ambiguity in Section 11, Article XII that requires supplementary legislation from Congress. In fact, the judiciary has sufficiently provided a definition and characterization of public utilities in jurisprudence. Should any ambiguity remain, it is not within the province of the legislative branch to interpret the Constitution, as such would be a usurpation of judicial power that runs afoul to the principle of separation of powers.

Liberalizing the restrictions on foreign ownership of public utilities comes at a steep price that transcends economic considerations. The Constitution ensures that in the event it is decided to allow a pound of flesh of their motherland to be given, such decision must be made directly by the Filipino people, and not left merely to the discretion of their legislative representatives. The sovereign will of the people as embodied in the Constitution cannot be disregarded by any legislative exercise. Thus, it is only through constitutional amendment that a public utility may be defined and the subject matter of the foreign ownership restriction be determined.

For as long as Section 11, Article XII of the Constitution remains unchanged by amendment or revision, the sovereign will of the Filipino people to protect public utilities from foreign control prevails. This does not preclude the shifting of the national sentiment towards liberalization in the future. Should such shift occur and the Filipino decide to pay that pound of flesh, the restriction on foreign ownership may be lifted, but only through and in the Constitution.

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