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GOVERNMENT OWNERSHIP AND OPERATION OF PUBLIC UTILITIES IN THE PHILIPPINES

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INTRODUCTION

Government ownership and operation of public utilities is of interest to the student of social trends because this activity, more than any other feature of modern life, shows emphatically the increasing identity between the interests of organized society and those of the different individuals composing it.

In its earliest form the social contract was limited to the setting up of a common defense against external enemies and of machinery for the maintenance of law and order within the community. The field of economic activity was left entirely to individual exploitation. In this state of *laissez faire* individual initiative was held at a premium, and the best government was considered that which governed least.

The progress of industry, however, has brought about an increasing dependence by individuals upon each other for their means of livelihood and has augmented the number of interests possessed in common by members of society. Naturally the functions of government, as the instrument created by society for promoting the general welfare, have also increased.

At first the role of government in economic activity was confined to regulation, to laying down essential rules under which individuals could conduct their business, either alone or in competition with others in the open market. This activity was considered the limit to which government could go in exercising its functions, and those fields not occupied by it were considered forever dedicated to private enterprise.

The conditions of modern economic life have radically altered this concept of governmental functions. The dependence of society upon the products of economic activity and the danger of leaving such activity exclusively in the hands of private individuals, animated chiefly by the desire for profit, has made necessary the organization of business enterprises for the com-

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mon benefit. Governments have gone beyond regulation and have directly owned and operated instruments of economic activity. And despite considerable opposition from believers in *laissez faire*, government enterprises have tended to expand rather than limit their activities. The advance of government into the fields of industry formerly occupied by private individuals is the theme of the discussion following.

CONCEPT OF GOVERNMENT OWNERSHIP AND OPERATION OF PUBLIC UTILITIES

A. *Public Utilities*

1. *In General.*

Fundamentally and etymologically, a "public utility" is any thing or service which satisfies the wants of a community, as distinguished from the wants of a particular individual.¹ From this point of view, the bare necessities of life, such as food, clothing, and materials for shelter were the first public utilities.

But with the advance of civilization the needs of the community grew and extended beyond the bare necessities of life. As Mr. Justice Cornish of the Supreme Court of Oregon said, "a class of public uses has grown up and been recognized within a comparatively recent time, due both to the needs of the community and to modern inventions calculated to meet those needs. * * * These public uses or utilities embrace water, light and heat."² The term "public utility" has thus come to include enterprises designed "to furnish service to a community that is deemed by the community to be necessary or desirable for the public welfare; and the furnishing of which is commonly considered to be a proper public function."³ Among the generally recognized public utilities are railroads, telephone and telegraph lines, water-works, sewerage plants, and heating companies. Others are pine lines, river and lake navigation, wharves, docks, stockyards, roads, bridges (particularly those charging toll), the transmission of electric power by high tension lines, and even grain elevators, heating services and refrigeration.⁴

It may be said, however, that there are two kinds of public utilities; those that are owned and operated by private individ-

¹ Webster, *International Dictionary* (1923), pp. 1731, 2260.

² *Laughlin v. Portland*, 51 L. R. A. (n. s.) 1143, 1147.

³ William G. Raymond, *The Public and Its Utilities* (1925), p. 1, quoted in James G. Hodgson, *Government Ownership of Public Utilities—A Compilation* (1934), pp. 9, 44.

⁴ Hodgson, *Op. cit.*, Id.

uals and are subject to regulation by the government and those which are owned and operated by the government itself. The courts have drawn a distinction between the two concepts⁵ and have attached a different legal status to each of them.

2. *For purposes of governmental regulation.*

Public utilities are inseparably related to community needs and, when operated by private individuals, are subject to regulation by the government for the benefit of the public. Such businesses are said to be "clothed with a public interest."⁶ They come under the police power whether the interest of the public in the business is intended or not.⁷ Their main characteristic is that they furnish a service indispensable to the public.⁸ They are said to originate in the necessities and opportunities of urban life.⁹ They are the public utilities which have been generally considered as such.

It is not every business which satisfies public wants that is subject to governmental regulation as a "public calling" or a "business clothed with a public interest." A respect for the right of the private individual to manage his business as he pleases requires that, in order to constitute a public utility susceptible of public regulation, it must be so much of a monopoly as to endanger the public through exorbitant control. Hence, the business of the butcher or the baker is not a public utility in this sense, for although it furnishes an indispensable service, there is no danger of monopoly because he is subject to the competition of other butchers and bakers. He is not, therefore, subject to regulation in the conduct of his business.¹⁰

3. *For purposes of government ownership and operation.*

Since governmental activities must of necessity be public, a business owned and operated by the government may be considered a public utility when it furnishes a service or commodity essentially connected with the general welfare. Whether an enterprise is of such importance to the community that its ownership and operation may be undertaken by the government depends upon the particular conditions obtaining in the commu-

⁵ See 262 U. S. 536, 57 L. Ed. 1109.

⁶ *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

⁷ *Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92.

⁸ *Richardson v. State R. Comm.*, 218 Pac. 418.

⁹ Wilcox, *The Administration of Municipality Owned Utilities* (1931), p. 4.

¹⁰ *Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522, 67 L. Ed. 1103.

nity, and the decision is left to the legislature, its determination being usually upheld by the courts.¹¹ A bank, a warehouse, elevator and flour mill system, a home building association,¹² coal and fuel yards,¹³ the marketing of petroleum products¹⁴ have been considered public utilities¹⁵ which could be owned and operated by the government.

Public utilities in the sense of government ownership and operation includes therefore more enterprises than those utilities considered public for purposes of government regulation. They cover not only enterprises which directly affect the community needs but also those which ultimately, however indirectly, redound to its welfare. Since they are operated by the public for the public, they are public utilities in the true sense. Of such character are the industries that have been operated by the Philippine government and those which it may operate under the new Philippine Constitution.

B. *Government Ownership and Operation*

1. *Meaning of "government."*

For purposes of the ownership and operation of public utilities in the Philippines, the term "government" refers to the national government as distinguished from the provincial, municipal, city or other local governments. The national government is authoritatively defined as "the corporate governmental entity through which the functions of government are exercised throughout the Philippine Islands . . ." ¹⁶

Although in the United States government ownership and operation of public utilities is generally confined to local or municipal areas, rather than to the state or the nation, that activity in the Philippines has been undertaken chiefly by the national government. The reason is primarily historical. Since the purpose of government ownership in the Philippines has mainly been the economic development of the whole country, the national government rather than the local branches has been deemed more fitted to handle the undertaking.

Municipalities, however, are also authorized to own and operate public utilities. Aside from their power to pass ordin-

¹¹ *Wolff Packing Co. v. Court of Industrial Relations*, Op. cit., 536 (U. S.), 1109 (L. Ed.).

¹² *Green v. Frazier* (1920), 176 N. W. 11, 13 et seq., 253 U. S. 233.

¹³ *Jones v. Portland* (1917), 245 U. S. 217, 62 L. Ed. 252.

¹⁴ *Standard Oil Co. v. Lincoln*, (1937), 207 N. W. 172, 275 U. S. 504.

¹⁵ Willis, *Constitutional Law* (1936), p. 804.

¹⁶ Sec. 2, Administrative Code (1917), Act 2711.

ances for the general welfare,¹⁷ they are expressly empowered to operate water works, ferries, wharves, markets, slaughterhouses, pounds, cemeteries, irrigation systems and warehouses.¹⁸ But they may not engage in agriculture.¹⁹

2. *Forms of government control over public utilities.*

Government control over public utilities may take the form either of regulation, ownership with lease to private entities, or direct ownership and operation. Regulation of public utilities arises, not only from the police power, but also from the public interest inherent in them.²⁰ It extends both to the manner of their operation and to their rates of charges.²¹

Government ownership with private operation under lease has been developed as a compromise between public ownership and operation and private ownership and operation. The government furnishes the capital for the purchase or construction of the utility, which is leased to private entities. The purpose is to obtain the advantages of public ownership from the standpoint of the low cost of capital, while at the same time avoiding the difficulties regarded as incidental to operation by a public body such as political corruption and low efficiency.²²

Government ownership and operation may be undertaken either directly or through an agency or instrumentality, usually in the form of a corporation. A public utility may be operated as a special branch of the government or may be placed under a department or bureau or a board or commission specially created and organized for the purpose. The modern tendency, however, is to employ agencies incorporated by the government but regarded as distinct from it. The private corporation is the usual model, with the government as a mere incorporator,²³ a majority stockholder,²⁴ or sole owner.²⁵

¹⁷ Sec. 2238, Administrative Code.

¹⁸ Secs. 2317-2318, *Ibid.*; Act No. 2755.

¹⁹ *Tacloban v. Director of Lands*, 18 Phil. 201.

²⁰ *Sinco*, Philippine Government and Political Law (1936), pp. 498-499, 509-510.

²¹ *Op. cit.*, *Id.*

²² *Wilcox*, *Op. cit.*, p. 34.

²³ See *U. S. Bank v. Planters' Bank of Georgia* (1824), 9 Wheat. 904, 6 L. Ed. 244.

²⁴ Examples are the Philippine National Bank and the Philippine National Development companies.

²⁵ The National Power Corporation and the National Development Company, which are entirely owned by the Philippine government.

HISTORY OF GOVERNMENT OWNERSHIP AND OPERATION
OF PUBLIC UTILITIES IN THE PHILIPPINES

A. During the Spanish Regime

1. *In General.*

The policy of government ownership of instruments of economic activity is not new. It has characterized in some degree most of the economic systems of the world. Much of the building of antiquity, the manufacture of luxuries and the construction of public works was undertaken by early governments. The importance of government ownership today is chiefly due to its extension in fields formerly reserved for private enterprise.¹

Government ownership was initiated in the Philippines as early as the Spanish regime. These enterprises were conducted either for raising revenue or for stimulating agriculture and industry. The galleon trade² and the tobacco monopoly under Governor Basco (1778-1787)³ were conducted by the Spanish government primarily for profit and revenue. On the other hand the Royal Company of the Philippines was organized by the king for the purpose of enriching Philippine foreign trade and encouraging local production.

2. *The Royal Company of the Philippines.*

The establishment of the Royal Company of the Philippines⁴ during the administration of Governor Basco by a royal decree of March 10, 1875 was an early example of a government enterprise in this country dealing to some extent in public utilities. The capital of the company was fixed at ₱8,000,000, divided into 32,000 shares of ₱250 each. The king bought 4,000 shares, the citizens of Manila were allotted 3,000, while the Government subscribed the remaining 25,000. The chief object of the company was to establish commercial relations between the different colonies and also between the colonies and Spain. The second important object was to encourage Philippine agriculture, as shown by section 4 of the company's charter, which required the company to invest four per cent of its net profits in extractive industries, chiefly agricultural. To aid the company, the products of the Philippines were exempted from all kinds of duties both in Manila and in Spain.

¹ Encyc. of Soc. Sciences (1932), p. 111.

² Benitez, History of the Philippines (1926), p. 203.

³ Op. cit., p. 315.

⁴ Benitez, Op. cit., pp. 316-320.

The Royal Company encouraged the production of Philippine crops instead of merely depending on trade with Oriental countries. It engaged in the cultivation of mulberry trees for the purpose of promoting the silk industry. It helped produce indigo, cotton, pepper and other spices, which were exported at considerable profit. The company also gave aid to manufacturing and promoted the establishment of textile factories.

In spite, however, of the special protection and privileges granted to the company, and the success of its early ventures, it gradually declined from year to year. Its losses were attributed partly to unwise investments and partly to the indifference of residents of the Philippines to the enterprise. In 1830 its privileges were finally revoked.

But in so far as the policy of government ownership and operation of public utilities was concerned, the Royal Company, notwithstanding its failure, had a significant bearing on present day activities. In a way it laid the foundations for government leadership in the economic development of the country. It is also interesting because its structure and activities are similar to those Government corporations organized both before and at the start of the Commonwealth period for the exploitation of the industries and natural resources of the country.

B. *During the American Régime*

1. *Under the early civil government.*

The policy of government ownership in the modern sense definitely made its first appearance during the American regime. To stimulate economic activity, which had been rendered almost moribund by centuries of subjection to Spanish rule followed by years of warfare and insurrection, government leadership by direct participation in, rather than mere regulation of, industry was necessary.

During the first years of the new government, the policy of government ownership was conservative in its scope. Following the American tradition of the maximum respect for private enterprise, government ownership was resorted to only where the facilities furnished by private entities were lacking or grossly inadequate. The government operated those services which were within the traditional scope of its functions

as recognized public utilities. For this reason the policy was generally acquiesced in by the public.⁵

a. The Insular Cold Storage and Ice Plant.

In 1901 the Government constructed a cold storage and ice plant for the benefit of its officers and employees in view of the inadequate service being rendered by private companies. Although the plant was constructed chiefly to furnish the Government employees with a prime necessity, nevertheless, its services were available to the public in general and because of this it has also served to regulate the charges of private manufactures through competition.

b. Government Vessels.

Since 1903 the government had been operating a fleet of small coast-guard cutters chiefly for the transportation of government officials on their inspection trips and for the prevention of opium smuggling. These vessels have also accepted private passengers and freight for carriage to places not touched by inter-island vessels and occasionally to some of their regular ports of call. During Governor General Wood's administration some of these vessels had to be disposed of in the interest of economy.

c. Government Ventures in Baguio.

The insular government has purchased in Baguio the site of a summer resort for government officials and for the public. It has built cottages, hotel buildings and dormitories, some of which have been leased to private parties. It also operates a water supply, an electric system and an automobile line on the Benguet road.

d. The Postal Savings Bank.

In 1906 the Philippine Commission organized the Postal Savings Bank as a new division in the Bureau of Posts. It was authorized to establish banks throughout the country for the purpose of encouraging profitable investment and stimulating thrifty habits. At present it has a considerable number of depositors from every part of the Islands. It extends loans on real estate security and has investments in bonds of the Manila Railroad and of the City of Manila. It is supported partly by its income and partly by annual legislative appropriations.

⁵ Apostol, *The Economic Policy of the Philippine Government: Ownership and Operation of Business* (1927), pp. 4-11.

e. The Metropolitan Water District.

The water supply system of Manila was constructed in the early days of the American regime with the aid of a private legacy known as the Carriedo fund.⁶ Subsequently the Legislature created a public corporation known as the Metropolitan Water District to take charge of the utility.⁷ The managing board of the corporation is composed of the city mayor as chairman and the president of the municipal board, the city engineer, the city treasurer, the Director of Public Works, the Governor of Rizal and a resident taxpayer of the city as members, all appointed by the President of the Philippines with the consent of the Commission on Appointments of the National Assembly.⁸

f. The Government Arrastre Plant.

On September 23, 1903 the Philippine Commission provided for the acquisition of the existing "Arrastre Plant," consisting of facilities for unloading cargo from overseas steamers on the customs wharves and tramways. The purchase of the plant resulted from the unsatisfactory service being rendered by the private firm operating it and to the prevailing belief that its operation was a proper governmental function. Public operation in this case showed improved service and steady profit, but on July, 1922 the plant was transferred to the Manila Terminal Company, a private entity, under Governor General Wood's policy of making the government evacuate what he considered its unwarranted incursions into the legitimate field of private enterprise.

g. The Friar Lands.

Finally the government in 1903 entered into a contract for the purchase of the so-called "Friar Lands," in order to settle the prevailing unrest of the inhabitants living on these estates, which were owned by the religious orders by virtue of grants from the Spanish government. After their purchase, these lands were then gradually disposed of to the public in small lots.

2. Under Filipino legislative policy.

Prior to 1907 government ownership in the Philippines simply followed the beaten path of tradition for the purpose

⁶ See *La Sagrada Orden de P.P.S.R.F. v. Metropolitan Water District*, 44 Phil. 292.

⁷ Act 2832, passed March 6, 1919.

⁸ Act 3109; Sec. 11 (3), Art. VII, Philippine Constitution.

of meeting the immediate needs of the community. But when the Filipinos began to assume control over the government, the policy assumed a wider scope. They believed in government ownership as a means "to prepare the people to take a more active part in economic pursuits, not only in agriculture, but also in industries, commerce and finance, economic activities which have heretofore been left in the hands of Americans and foreigners."⁹

The conditions of the time, from the nationalistic point of view, made government ownership of new economic enterprises imperative. The Filipinos had lagged behind in economic activity. The country had rich natural resources, but they were for the most part unexploited. Foreign capitalists could not be attracted, either because there was not sufficient prospect of gain or because the conditions they prescribed could not be met by Filipino leaders.¹⁰ The masses themselves, their initiative dulled by years of foreign servitude, were oblivious to the problem. These circumstances led the Filipino leaders to pin their faith on the government as the only suitable means to effect the economic resuscitation of the country.¹¹

The Legislature, composed entirely of Filipinos, took charge of operations by passing the necessary laws. At one time it made an express declaration of its policy to acquire public utilities whenever possible.¹² In this respect they were aided by the sympathetic attitude of the representatives of American sovereignty in the government. Governor General Harrison himself made the necessary suggestions in his messages to the Legislature. It was he who advocated the acquisition of the Manila Railroad Company.¹³ Neither did he question the right of the Legislature to control the agencies created by it for effecting the operation of government owned enterprises. To a lesser extent the same tolerant attitude was shown by the Supreme Court, composed of an American majority. In the cases involving such agencies,¹⁴ the policy of government ownership was accepted without question.

⁹ Apostol, *Op. cit.*, p. 25.

¹⁰ Apostol, *Op. cit.*, p. 24.

¹¹ *Ibid.*, p. 26.

¹² Joint Resolution No. 6, Feb. 6, 1921.

¹³ Message to the Legislature, Jan. 10, 1916.

¹⁴ *National Coal Co. v. Collector of Internal Revenue* (1924), 46 Phil. 583, 586; *Government v. Springer* (1927), 50 Phil. 290.

a. The Agricultural Bank of the Philippine Islands.

The first step was taken by the Philippine Assembly when, on June 18, 1908, it provided for the creation of the "Agricultural Bank of the Philippine Islands," the first of its kind under the United States flag.¹⁵ The establishment of the bank was necessary in order to provide capital for farmers whose resources were sorely depleted by the revolution and who were consequently unable to cultivate their lands.

The bank was able to operate for seven years, establishing agencies in the provinces for accepting current deposits. It proved to be inadequate, however, because its capital was limited, it could make loans only for strictly agricultural purposes, the real estate security offered for loans was insufficient, and the management was handicapped by the cumbersome rules of governmental procedure. Hence, in 1916 it was replaced by the Philippine National Bank, which absorbed its assets and liabilities.^{15a}

b. The National Bank.

The Philippine National Bank, a new form of government activity in the business field, was created to finance industrial and commercial, as well as agricultural, enterprises in the endeavour to improve on the defunct Agricultural Bank. Organized as a corporation, fifty one per cent of its capital stock was subscribed by the government, the rest being accessible to the public.¹⁶ The National Bank was the first government agency created to promote the economic development of the country. It assumed the role of furnishing needed capital for the exploitation of natural resources.

Most of the investments were concentrated in the sugar centrals and coconut oil mills. On account of faulty business management, however, the bank sustained great losses on these investments. Consequently on November 24, 1924, the Legislature passed Act No. 3174 for the rehabilitation of the institution. Its personnel was reorganized, the issuance of stock to private entities stopped and its accounts balanced. At present the bank has succeeded in getting on its feet and in regaining the confidence of the public.¹⁷

¹⁵ Act No. 1865.

^{15a} Apostol, Op. cit., 37-47.

¹⁶ Act No. 2622, as amended by Acts No. 2747, 3033 and 3174.

¹⁷ Apostol, Op. cit., pp. 49-63.

c. The Government Owned Railway System.

The Manila Railroad Company was at first a private enterprise, operating the Manila-Dagupan line under a royal decree of 1885. Extension of the line was obtained under the American regime together with certain advantages, such as a perpetual franchise and, from time to time, considerable financial aid from the government. Private management, however, so operated the railway at such a loss that the government, to recover its heavy investments, decided to take over the railroad.

On February 4, 1916 the Legislature approved the transfer of the Manila Railroad Company to the government and appropriated money to pay off the private stock in the company.¹⁸ Other reasons advanced in support of the acquisition were the inherent public interests in the railroad, the inefficiency of private operation, the pursuit of a similar policy in other countries and the supposed advantages of efficiency, economy and improved service expected from government operation. Opposition to the step came chiefly from Americans and from the native political opposition party.

Complaints regarding the inefficiency of the utility under its new management were common; nevertheless the financial reports of the company showed profit as against previous losses. The company has also succeeded in constructing railroad extension lines and improving the system generally. It also owns considerable stock in the Manila Hotel, which has been making good profit.¹⁹

The government under the early American regime subsidized the Philippine Railway Company, which was operating in Negros, Panay and Cebu. The losses, however, incurred by the company put it in the same situation as the Manila Railroad Company. Act No. 2923 authorized the Governor General to arrange the transfer to government ownership, but monetary difficulties and the subsequent reaction against government business enterprises prevented the consummation of the plan.²⁰

The Legislature, on February 21, 1921, passed a resolution authorizing the acquisition of the Manila Electric Company, which supplied electric light and power for the city of Manila and the suburbs and operated the city street car system. The move was in line with the policy embodied in the resolution to

¹⁸ Acts No. 2374, 2895 and 2960.

¹⁹ Apostol, *Op. cit.*, pp. 55-76.

²⁰ *Ibid.*, pp. 76-78.

obtain control of public utilities whenever possible, although dissatisfaction with the service rendered by the company may have been the more efficient reason. Again the proposed acquisition was opposed on the ground that the existing management was satisfactory. At any rate the check on government activity along these lines put a stop to further negotiations on the matter.²¹

d. The Development Companies.

The chief instrumentalities employed by the government for the control and exploitation of the economic resources of the Philippines were the National Coal Company, the National Petroleum Company, the National Cement Company, the National Iron Company and the National Development Company.²² The first was created in 1917 and the rest in 1919. In their varying capital stock, government participation was obligatory to the extent of fifty one per cent, while the rest could be offered to the public. The total authorized capital for these companies amounted to ₱52,295,000, sufficient to place the government in a commanding position in industry.

The control of these companies, including the Philippine National Bank, was vested in a Board of Control consisting of the Governor-General and the presiding officers of both houses of the Philippine Legislature. This board or committee represented the government as majority stockholder and cast the votes to which the government stock was entitled in the election of the board of directors of the different companies. Since the Filipinos controlled both houses of the Legislature, their representatives, who constituted a majority in the Board of Control, practically dictated the policies of the agencies incorporated by the government.

The high cost of coal give rise to the formation of the National Coal Company²³ to engage in mining the coal deposits of the Philippines. The first stages of mining operation showed losses and demanded an increase in the government investment. The National Petroleum Company²⁴ was not much of a success either. Since the discovery of petroleum in the Islands had already been undertaken by private individuals, the government desisted in its efforts along this line.

²¹ Ibid., pp. 78-79.

²² Apostol, *Op. cit.*, pp. 82-91.

²³ Act No. 2705, passed March 10, 1917.

²⁴ Act No. 2814, passed March 4, 1919.

The most powerful of these companies was the National Development Company.²⁵ It had an authorized capital stock of fifty million pesos and was authorized to enter in any kind of business undertaking "necessary or contributory to the economic development of the country or important in the public interest."²⁶ Its activities, however, were few and consisted mainly in the purchase of an extensive estate for resale to farmers in small lots and in investments in other companies.

The National Cement Company was organized under authority of Act No. 2855, passed March 12, 1919, to develop the cement industry in the Islands. The Cebu Portland Company was formed through funds furnished by the National Development Company, and a cement plant was constructed. The plant now supplies cement to the government and to private person at reasonable cost and has caused the former a good deal of saving. Successful operation has been facilitated by a rich deposit of raw material, accessibility to a coal mine for power, the lower cost of gypsum, and government protection in the form of doubled duties on imported cement. Nevertheless negotiations for the sale of the plant have been carried on with an eye to its eventual transfer to private hands.

The National Iron Company was created at the same time as the National Cement Company to exploit the rich iron deposits in Surigao and in Mindoro.²⁷ No actual operations have, however, been started.

e. Other Government Enterprises

Acting upon a resolution of the Third Agricultural Congress of 1917, the Legislature provided for the formation of a national merchant marine to own, construct and repair vessels for commercial purposes.²⁸ The company, for which ten million pesos were appropriated, had also power to own stocks in private shipping companies and to subsidize navigation lines.

Another suggestion of the Agricultural Congress acted upon by the Philippine Legislature was the establishment of stock herds and farms.²⁹ Here the government investment proved to be successful as shown by a continued surplus.³⁰

²⁵ Act No. 2849, passed March 10, 1919.

²⁶ *Ibid.*, Sec. 2.

²⁷ Act No. 2862.

²⁸ Act No. 2754.

²⁹ Act 2758, passed Feb. 23, 1918.

³⁰ Apostol, *Op. cit.*, p. 19.

At various times the government engaged in the purchase and sale of rice in view of the recurring shortage of this principal food stuff of the country and the consequent rise in price due to attempts of local speculators to corner the supply and amass great profit. To prevent widespread suffering and dissatisfaction among the people resulting from an unscrupulous private monopoly of this essential commodity, the government had to import rice from foreign countries and sell it to local inhabitants at normal prices.³¹

3. *The reaction to government ownership.*

In October 1921 Governor General Harrison, who had given much encouragement to activities in government ownership, was replaced by Governor General Wood. The policy of the new executive was to keep the government as much out of business as possible. Not only did he strive to impress this policy upon the Philippine Legislature, but he immediately made arrangements for the liquidation of government enterprises and their eventual transfer to private operators.

This was a setback to the aims of the Filipino participation in the government. Nevertheless they did their best to block the new administrative measures, opposing the attempts to transfer the ownership of the Manila Railroad Company and the various development companies to private firms. They also objected to the sale of the sugar centrals heavily indebted to the Philippine National Bank to American sugar interests. Governor Wood succeeded, however, in preventing the National Development Company from engaging in new enterprises and in stopping further loans by the National Bank.³²

The opposition to the chief executive's efforts at reducing government ownership to a minimum was aided by the fact that in the board controlling the government interests in these companies, including the Philippine National Bank, he was outnumbered by the two Filipino members. On November 20, 1926, therefore, he issued Executive Order No. 37, abolishing the Board of Control and declaring that "the duties and powers heretofore exercised by * * * (it) * * * shall * * * be exercised solely by the Governor General pursuant to the executive power vested in him by the Organic Act." Following this assertion of absolute control over government owned companies, the

³¹ Ibid., pp. 22-24.

³² Apostol, Op. cit., pp. 93-103.

board of directors of the National Coal Company and the Philippine National Bank were reorganized.³³

Upon the refusal of the members of the board of directors who were so replaced to give up their posts, *quo warranto* proceedings were instituted against them to determine their right to office. The Philippine Supreme Court in two lengthy decisions sustained the position of the Governor General, declaring the composition of the Board of Control a usurpation of executive power under the Jones Law.³⁴ All except one of the Filipino justices dissented. Although the appeal to the United States Supreme Court was in vain,³⁵ the side of the Filipinos was supported by the dissenting opinion of two eminent liberals, Justices Holmes and Brandeis.

4. Subsequent attitude toward government ownership.

These decisions naturally slowed down interest in government ownership. Although the power of the Legislature to organize government enterprises was not questioned, yet its inability under the new definition of its prerogatives to put the control and management of such enterprises in the hands of Filipinos discouraged further legislation in this direction.

At the same time Governor Wood's desire for a general evacuation from business enterprises did not materialize. Although no new government ventures were formed, those already in operation continued despite the intention to liquidate them. The Manila Railroad Company, the National Cement Company, the Philippine National Bank and other similar enterprises continued in existence. Apparently the importance of their activities in promoting the national welfare was realized. The Governor Generals succeeding Wood did not follow his stringent policy. These utilities were left to operate until the inauguration of the Philippine Commonwealth when their activities were extended.

5. The Power of the Philippine Government under the Jones Law to own and operate public utilities.

Although the wisdom of the participation of the Philippine Government in economic activities has sometimes been doubted, the legality of its action in that respect has never been

³³ Apostol, *Op. cit.*, pp. 103-105; 50 Phil. 270, 348.

³⁴ *Government v. Springer*, 50 Phil. 270; *Government v. Agoncillo*, *Ibid.*, 348 (April 1, 1927).

³⁵ *Springer v. The Philippine Islands* (1928), 277 U. S. 189.

seriously questioned. A recognition of the power of the Legislature to operate utilities for the general welfare has grown by tacit acceptance and has grafted itself into local tradition. The general opinion has also been encouraged by the passive attitude of the Philippine Supreme Court. In none of the cases involving government enterprises were their purposes criticized even in the *obiter dicta* although the decisions were penned by American justices presumably imbued with American traditions of individual initiative. The Court simply recognized the objects of the Legislature and then, passing over their validity *subsilentio*, went on to discuss the other issues of the case.³⁶

In the United States, on the other hand, attempts at government ownership have not been permitted to go unchallenged. Time and again the legality of such attempts were vigorously contested by private entities fearing government competition. The inquiry into the constitutionality of legislative acts permitting the creation and operation of government enterprises under the Jones Law might, for practical purposes, be of more historical interest, but it also raises the question as to whether, in the absence of the provision in the Commonwealth Constitution expressly providing for government ownership of public utilities, it would also be valid under established principles of constitutional law.

The Philippine Legislature under the Jones Law possessed general legislative power.³⁷ It was the same in extent as that possessed by State legislatures in the United States.³⁸ The general grant includes the police power.³⁹ This power to pass all sorts of laws for the general welfare is said to be broad and comprehensive.⁴⁰ Nevertheless limits have been set to its exercise. It authorizes government regulation but not government ownership. It has been held that the police power is the power "to regulate business, not to engage in it."⁴¹ Government ownership must derive its validity from some other power, although there is opinion to the contrary.⁴²

³⁶ *National Coal Co. v. Collector*, 46 Phil. 583; *Government v. Springer*, 50 Phil. 259.

³⁷ Sec. 8, Jones Law.

³⁸ *Sinco*, Op. cit., p. 178.

³⁹ *Ibid.*, p. 520.

⁴⁰ *Commonwealth v. Alger*, 7 Cush. (Mass) 53, 85.

⁴¹ *State of Ohio v. Helvering* (1934), 292 U. S. 360.

⁴² See IV College of Law Theses (1935-36), p. 94, 103-104.

It may be said with more justification that the power of the government to own and operate enterprises of an economic nature under a general grant of legislative power is an exercise of its sovereign prerogative of taxation. The power to tax is unlimited except by constitutional provisions⁴³ and authorizes the legislature to raise and spend money for any public purpose connected with the national welfare.⁴⁴ It is inherent in legislative bodies,⁴⁵ and, as far as the ownership of instruments of economic activity is concerned, the only limitation imposed by the due process of law clause is that such ownership must be for a public purpose.⁴⁶ There is such purpose in the ownership and operation of public utilities.⁴⁷ Such utilities are not simply those which under private ownership would be subject to regulation, but they include all services and commodities of which the community is in need.⁴⁸

This application of a comparatively new doctrine is not free from criticism. Mott, for example,⁴⁹ believes that the operation of all kinds of public utilities is not a public purpose within the established meaning of the term. According to him, public purpose is coterminous with governmental purpose, and to permit the government to validly engage in the ownership and operation of any public utility would be to extend its functions beyond those properly belonging to it. For this reason he maintains that the decision if the United States Supreme Court in *Green v. Frazier*⁵⁰ upholding the validity of state ownership was not well founded in law.

Nevertheless the tendency of the courts is to respect the general desire to have public utilities operated for the common benefit. In a subsequent case⁵¹ the United States Supreme Court followed its tolerant attitude in *Jones v. Portland*⁵² and *Green v. Frazier*⁵³ by upholding the validity of government management of the sale of gasoline. And in a very recent de-

⁴³ Cooley, *Constitutional Limitations* (1927), pp. 986-988.

⁴⁴ 33 Mich. Law Rev. (Feb., 1935) 473, 506-511.

⁴⁵ See *De Villata v. Stanley*, 32 Phil. 541, 556.

⁴⁶ *Loan Association v. Topeka*, 20 Wall. 655.

⁴⁷ Willis, *Constitutional Law* (1936), p. 804.

⁴⁸ *Jones v. Portland* (1917), 245 U. S. 217, 62 L. Ed. 252; *Green v. Frazier* (1920), 253 U. S. 233; *Standard Oil Co. v. Lincoln* (1927), 275 U. S. 504.

⁴⁹ *Due Process of Law* (1926), p. 505 et seq.

⁵⁰ 253 U. S. 233 (1920).

⁵¹ *Standard Oil Co. v. Lincoln*, supra.

⁵² Supra.

⁵³ Supra.

cision⁵⁴ the control of a water system has been recognized as a governmental function in view of its relation to essential public needs. Despite the distinctions drawn by the court between this kind of governmental activity and other business conducted by the government, it seems apparent that the inclusion of the ownership and operation of public utilities within the legitimate sphere of governmental activity is inevitable. It may be concluded, therefore, that under the Jones Law the Government had ample power to own and operate public utilities.

GOVERNMENT OWNERSHIP AND OPERATION OF PUBLIC UTILITIES UNDER THE PHILIPPINE COMMONWEALTH

A. *Activities*

Under the Philippine Commonwealth the policy of government ownership and operation of public utilities has been put to full play. Given by the Tydings-McDuffie Act the fullest control over internal affairs consistent with a recognition of American sovereignty, the government under the constitution framed under the Philippine Independence Act has given ample room for the activities of enthusiastic nationalism seeking economic fulfillment. Free from the restrictions of the governmental system under the Jones Law, government ownership has at last come into its own in the hands of Filipinos.

The Philippine Constitution has given full expression to the nationalistic aspirations of the country. The development of the economic resources of the country is made the concern of the state. The scheme of nationalization finds expression in the provision authorizing the government to engage in any industry for the national welfare. So ingrained has been the tradition of government leadership in industry that very little opposition, if any, was made to the incorporation of this far reaching provision.

Public utilities organized under the early years of American government have survived to this day. Some of them are the government ice plant, government vessels, government utilities in Baguio, the Postal Savings Bank and the Metropolitan Water District. Those that have survived the constricting effects of Governor General Wood's policy are the Philippine Na-

⁵⁴ *Brush v. Commissioner of Internal Revenue* (1937), 81 Adv. Op. (U. S.) 443.

tional Bank, the Manila Railroad Company, and the Cebu Portland Cement Company.

New government enterprises have been formed in recent months. There is the National Power Corporation organized for the development of all sources of power in the Philippines¹; the new National Development Company created "to serve as an agency of the Commonwealth * * * in the furtherance of its economic policies"²; and the National Rice and Corn Corporation formed by the government to buy and sell essential food commodities to the public at cost; the National Produce Exchange³ incorporated to facilitate the marketing of agricultural products; and charity lotteries, almost a national institution are now under the direction of the National Charity Lottery.³ All these companies are under the control of the President of the Philippines.⁴ The Philippine National Bank and the National Development Company are authorized to establish and maintain warehouses for tobacco, copra and other marketable products.⁵ The latter has also been empowered to stabilize the prices of buntal fiber by fixing a minimum unit price for each class.⁶

Still more activities on a national scale are being planned. Industries for utilizing sugar, for meat-packing, canning and fishery development are contemplated. A government power plant, a central bank, a government petrol company, government owned transportation lines are being proposed. The merchant marine idea is again being revived, and the government would lead in the exploitation of the rubber industry. The foundations of state socialism are slowly being laid.

B. *The Policy of Government Ownership*

There is much to be said for the ownership of public utilities by society for the benefit of its members. Public and private operation have their respective advantages and disadvantages, but a variety of circumstances have arisen which sustain a logical case for government ownership.

Public utilities may be operated by the government for its own benefit without competing with private entities. Such has

¹ Commonwealth Act No. 120.

² Sec. 1, Commonwealth Act No. 182.

³ Commonwealth Acts Nos. 192, 227.

⁴ Commonwealth Act No. 11.

⁵ Commonwealth Acts Nos. 95, 50.

⁶ Commonwealth Act No. 147.

been the nature of the activities during the early years of civil government in the Philippines.

Governments may also, without hostility to the principle of private enterprise, enter into the ownership and operation of utilities furnishing essential goods or services to the citizen consumer under a variety of extraordinary conditions.¹ Government operation of a utility which is of great importance to the community welfare is necessary where private capital is not readily available for its undertaking. This was the condition chiefly responsible for the formation of national development companies including the national bank prior to the Commonwealth period.

There are certain utilities which, although unprofitable under private management, are too valuable for the community to forego. Such are transportation, communication and power systems. Under private operation, the Manila Railroad was a loss, but it could not be taken away from the community without depriving it of an essential service in peace or in war. Hence, government ownership.

It is also the peculiar responsibility of the government to engage directly in the operation of utilities where the exhaustion of resources which are impossible or difficult to reproduce threatens the welfare of future generations. Such commodities as coal and oil have to be nationalized because, besides being essential ingredients in industrial activity, they are in special need of conservation, a duty which for obvious reasons can not be left to the initiative of private enterprise.

Government ownership is necessary in utilities where the profit-making motives of private operation may lead to practices harmful to the public which they serve. Thus the government usually assumes the management of the community water supply, where assurance of purity from contamination is of vital importance to the community. The same is true of essential staples, like rice, corn and other foodstuffs, where variations in price due to private speculation may cause widespread suffering.

Moreover, public utilities are such that the public interest in them makes them peculiarly ill adapted to organization through the workings of vigorous competition. The conflict of private interests is too often apt to put the public good at a disadvantage. Since public utilities concern the whole com-

¹ 7 Encyc. of Social Sciences (1932) 112-133.

munity, they should be operated for the benefit of such community, and the most logical agency for this undertaking is the government.

Government ownership has been advocated as a substitute for private operation of public utilities under government regulation. The latter, it is said, has become a failure. The success of private utilities in evading governmental efforts to control their organization in the public interest has made direct public ownership a more satisfactory alternative.¹ "The place where governmental regulation today is proving a failure is in relation to the obligation to furnish utility service and facilities for reasonable compensation. Here the failure is so great that many feel, and probably rightly, that the day for cheap gas and cheap electricity, so essential to our prosperity and progress, has in the United States passed forever."²

Aside from the modern conditions which have made government ownership a necessity, social advantages have been claimed for the policy that are not possible under private ownership.³ Long range policies in utility operation, hardly feasible under private management, may be pursued by the government. While private industries must make an immediate return on their investments and cannot wait years for profits, the government can afford to sacrifice temporary gain for more permanent social advantages.

Moreover, utility development under government ownership can be coordinated with other projects for community betterment. Since public utilities are inseparable from public welfare, any plan toward this end cannot succeed without full control of such utilities. Under the coordination of public activities, cooperation with related branches of government could be arranged and the utilities could be organized into a program of community service without the interference of outside political or economic interests.⁴

Under government ownership, profitable expansions of utility service for social benefits could be carried through. In the exploitation of electric power, for instance, rural electrification for the purpose of providing better living conditions for the less fortunate can be carried out even if such an extension would involve losses incident to the small number of residents in rural

¹ Wilcox, *Op. cit.*, pp. 6-7.

² Willis, *Op. cit.*, p. 779.

³ Hodgson, *Op. cit.*, p. 15.

⁴ Wilcox, *Op. cit.*, p. 42.

districts. Low domestic rates could also be offered to eliminate drudgery in the household.⁵ Since the loss involved in such activities redounds to the public good, it should be absorbed by the public in the taxes paid by them. Public operation is thus superior to private management in that, under the former, there is freedom to give the best possible service as its primary object, without having to yield to capitalist owners whose first demand is financial profit or lucrative jobs for themselves. It is true that the full cost of service, under any plan of operation, must ultimately be paid by somebody, but under public operation the cost may be shared between the consumers and the taxpayers if public policy demands it.⁶

Government ownership would also put an end to the unfavorable influence of utility interests in politics, consisting in bringing external pressure to bear on the commission or other regulatory body to which they are subject, either in the appointment of its members or in its rulings. Placing the utilities under government ownership would also make their immediate welfare more closely connected with governmental efficiency and stimulate in them more interest in good government.⁷

The advantages traditionally claimed for private ownership could be duplicated, if not surpassed, in government ownership. The added expense in public operation incident to the furnishing of necessary service at a loss would be more than balanced by the economy resulting from the merger of the body regulating and the object regulated under private ownership. Lower interest rates on bond issues would cut transportation and upkeep charges, and permit more rapid retirement of capital. No returns would have to be paid on over-valued common stocks. Costs of regulation and suits over rates, now charged to the consumer, would be eliminated.⁸ Taxes on the utility would also cease, resulting in lower rates.⁹

Although unable to pay the enormous salaries often paid by private companies, the publicly owned enterprise can enlist in its management trained and able minds because of its appeal to public cooperation and of the opportunities that it offers for public service. Improved conditions of work, reasonable hours and adequate wages can also be obtained under public operation, and favoritism can be eliminated through civil service rules

⁵ Hodgson, *Ibid.*

⁶ Wilcox, *Op. cit.*, p. 42.

⁷ Hodgson, *Ibid.*

⁸ Hodgson, *Ibid.*

⁹ Wilcox, *Op. cit.*, p. 44.

regulating appointments, promotions and dismissals. The independence which private enterprise boasts can be obtained under government ownership through appropriate organization. All the advantages of private endeavour are within reach, while at the same time the utility may be transformed "from a sordid enterprise based on the exploitation of labor to a cooperative enterprise based on a recognition of the dignity of public service."¹

In brief, public operation offers the community an opportunity for self-help on a cooperative basis, free from the sordidness of public service operated as a private monopoly for profit.² But the government utility may also serve as an agency for regulation of private utilities, if the government prefers to allow them to compete with it in preference to monopoly. By setting up standards of efficiency, economy and quality of output, the government enterprise can determine a plane of competition which must be met by the private enterprises if they hope to remain in business.³

Against the policy of government ownership and operation, on the other hand, arguments to the contrary supported by equally weighty evidence, have been invoked.⁴ A consideration of the arguments for and against government ownership must arrive at the neutral proposition that each particular case must be determined by its own peculiar conditions. Results from another locality are of no avail in determining which policy should prevail.⁵

It has been said that the organization of utilities, whether under public or private agencies, has been determined, not by any of the theoretical advantages or disadvantages claimed for each, but by "the play of bargaining strengths of entrepreneurs, workers and consumers and by the turn of rival political fortunes within a given community." While the bulk of public ownership can be explained and justified on one or more theoretical grounds, the explanations in any specific case may not actually be the efficient causes of the collective action but merely sufficient reasons for it. So that "when historical chance has entrenched either public or private enterprise in a given field, then the theoretical justification for the action is de-

¹ Wilcox, *Op. cit.*, p. 44.

² *Ibid.*, p. 44.

³ *7 Encyc. of Soc. Sciences* (1932) 113.

⁴ Hodgson, *Op. cit.*, pp. 16-19.

⁵ Splawn, *Government Ownership and Operation of Railways* (1928), pp. 296-311.

veloped and added as an academic accolade. Once established and justified in the public mind, either private or public ownership is generally accepted as right or even inevitable and any suggestion for change must run the gauntlet of a storm of popular protest.”⁶

Government ownership in the Philippines has been adopted because of lack of private capital. Direct governmental action was necessary to develop the economic resources of the country. The necessity will continue as long as no sufficient private initiative has been built up to run economic enterprises independently. The nationalistic desire for economic betterment, incompatible with the demands of foreign capital, has regarded government ownership as inevitable. And so in the Philippines the policy has come to stay.

C. The Power of the Government to Own and Operate Public Utilities.

1. The Constitutional Provision.

The Constitution of the Philippines, approved by the Constitutional Convention on February 8, 1935, expressly authorizes the Philippine Commonwealth Government to own and operate public utilities. Article XII is entitled “Conservation and Utilization of Natural Resources” and contains six sections. The last provides: “The State may, in the interest of national welfare and defense, establish and operate industries and means of transportation and communication, and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the government.”

This part of the Constitution is said to be “an openly socialistic provision”.¹ Yet its far reaching implications did not seem to arouse any curiosity when it was presented for approval before the Convention. On the contrary the meaning of the section appeared to have been taken as a matter of course. If there was any doubt at all as to the propriety of the provision it was as to its lack and not as to its excess. It was asked whether the power to acquire the means of industry included the power to dispose of them; this was answered by Delegate Roxas in the affirmative. This was the only point raised in connection with the provision; the section appears to have been considered as a minor detail in the scheme of nationalization,

⁶ 7 Encyc. of Soc. Sciences (1932), p. 114.

¹ Sinco, Op. cit., p. 405.

although upon analysis it will be found to clothe the government with almost dictatorial powers. Its approval without a dissenting vote showed that the tradition of government ownership as a policy has been well established.²

In the Constitution of North Dakota we might find a counterpart. It provides that "the state, any county or city, may make internal improvements and may engage in any industry, enterprise or business * * *" It will be noted that none of the foregoing provisions contain any limitation as to the purpose of the enterprise or business in which the government is empowered to engage.

Sec. 6 of Art. XII is in harmony with the nationalistic tenor of the Constitution. The preamble declares that one of the aims of the fundamental law is to "establish a government that shall * * * conserve and develop the patrimony of the nation * * *" as well as "* * * promote the general welfare." The Declaration of Principles² states that "the promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."³ Article XII provides that "all agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State * * *"⁴

2. Governmental Powers.

The powers expressly granted to the National Assembly are two: first, the power to establish and operate industries and means of transportation and communication; and, second, the power to transfer to the public ownership utilities and other private enterprises to be operated by the government. The first is derived from the power to tax; the second is a specific grant of the power of eminent domain.

The power "to establish and operate" implies independent construction by the government as distinguished from acquisition by eminent domain. It extends to industries which, for purposes of governmental regulation, have been traditionally considered as purely private in character, as well as to recognized public utilities. The two terms cover all existing forms

² Journal of the Proceedings of the Constitutional Convention (Jan. 29, 1935), pp. 43-46.

¹ 176 N. W. 13.

² Art. K1.

³ Sec. 5.

⁴ Sec. 1. .

of economic activity. "Means of transportation and communication" are recognized public utilities when operated by private individuals. Among the most common examples are railroads, motor vehicles, cars, telephones, telegraphs and broadcasting stations.¹ They do not include other public utilities like gas, electric light and ice plants. These are included in the term "industries."

"Industries" refers to public utilities as well as traditionally private enterprises. It may well fit Chief Justice Taft's description as "any purpose in which the state may engage, and this covers almost any private business if the legislature thinks the state's engagement in it will help the general public, and is willing to pay the cost of the plant and incur the expense of operation."²

The terms "utilities" and "other private enterprises" cover practically the same ground, although the distinction is more logical. In so far as they are the objects of expropriation by the State, the provision is a mere restatement of the right of eminent domain under which "all kinds of property, and every variety and degree of interest in property may be taken * * *"³

3. *Limitations.*

The power of the government under the Philippine Constitution to own and operate all means of economic activity through broad and comprehensive, is not without limitation. First of all the enterprise must be "in the interest of national welfare and defense." The words of limitation are found before the enumeration of the powers granted. They may therefore be considered to operate equally upon such powers, whether to establish an industry or acquire it from private individuals by expropriation.⁴

The requirement that the establishment or acquisition of industries be either in the interest of the national welfare or the national defense is an express delimitation on the extent of such powers. As has been noted, it is not found in the corresponding provisions of other constitutions authorizing government ownership. Undoubtedly in the absence of express provision, the powers granted would be, by the very nature of the government established by the Constitution, still subject to limitation.

¹ Public Service Law (C. Act No. 146), Sec. 14; Hodgson, *Op. cit.*, pp. 9, 44; 12 *Encyc. of Soc. Sciences* (1934), 674-675.

² 262 U. S. 522, 536; 67 L. Ed. 1103, 1109.

³ *II Lewis on Eminent Domain* (1909), p. 743.

⁴ *Sinco, Op. cit.*, p. 405. 33 *Mich. Law.*

Due process requires that the power to tax be exercised only for a public purpose, and the right of eminent domain can only be asserted for a public use. But there is a difference.

The limitation of the national welfare is broader than either public purpose or public use. National welfare may be considered synonymous with "general welfare."⁵ While it has been suggested that the term goes "further than public purpose and requires that the powers granted be exercised "for the general welfare of the people of the whole country as distinguished from local welfare * * *", the interpretation has encountered reasonable doubt.⁶ On the other hand, respected authority has it that "public purpose" as a limitation is narrower than "public use."⁷ And it has been said that since the power of eminent domain "is by its nature limited to such purposes as promote the general welfare, it is evident that the words public use, if they are to be construed as a limitation cannot be equivalent to the public welfare or the public good. They must receive a more restricted definition."⁸ The limitation of the national welfare, therefore, gives the government greater freedom of action than either public purpose or public use.

The national welfare requires that the objects of the acts of the National Assembly in the establishment or acquisition of industries "must be general, and not local; its operation extending in fact, or by possibility, throughout the union, and not being confined to a particular spot * * *"⁹ Its determination, as in the case of public purpose¹⁰ and public use,¹¹ should not be exclusively vested in the National Assembly. The courts, as the guardian of the people's rights should be allowed to pass on the question when appealed to. The more susceptible the power is to abuse, the greater should be the right of the courts to see that its exercise is kept within proper bounds.

National defense as a justification for the power of the government to operate industries, while expressly specified in the constitutional grant, may come within the scope of the national welfare. The activities of the government in controlling industry for the purpose of providing for the common protection from external attack is comprised under what is known in Amer-

⁵ Willis, Op. cit., pp. 806-807; Rev. 506.

⁶ Willis, Ibid.

⁷ I Cooley on Taxation, p. 385 (1924)

⁸ I Lewis, Op. cit., pp. 503-504.

⁹ 33 Mich. Law Rev. 506.

¹⁰ I Cooley, Op. cit., pp. 395-398

¹¹ I Lewis, Op. cit., pp. 497, 499.

ican Constitutional Law as the war powers. Under these broad powers the state may construct ships, command the railroads and other means of transportation and control the facilities of communication.

Broad as is the war power, its limits are narrower than those of the national welfare. While it is probable that the Constitution intends to distinguish between government ownership during war time and that during normal periods, there are certain acts of the government which may be justified as related to the national welfare, although having no reasonable connection with the national defense, irrespective of the time during which they are performed. Thus the government under the war power may form a corporation to operate a railroad for the transportation of troops. But it would doubtless be improper to use such corporation to transport goods for persons to be used in their private affairs. The purpose might be related to the national welfare but certainly not to the national defense.¹

The Constitution further provides that the transfer of utilities and other private enterprises to the public ownership should be made "upon the payment of just compensation." The consent of the owner to the transfer is not necessary.² Just compensation means a fair and full equivalent for the loss sustained from the act of expropriation. It is the reasonable market price of the property taken.³

4. Competition with private enterprises.

In the ownership and operation of industries the government inevitably comes in conflict with the activities of individual citizens based on rights believed to have been already vested in them. Not only may government owned and operated plants compete seriously with privately owned and managed business, but at the same time the government may also, through the power of taxation, compel the individual citizen to support his competitor.

With respect to the power of the American federal government in this respect, it has been said that government competition with private enterprises in the exercise of its legitimate powers is compatible with "the ubiquitous hurdle of 'due process'."⁴

¹ 33 Mich. Law Rev. 492.

² II Lewis on Eminent Domain, p. 121.

³ *Sinco*, Op. cit., pp. 565-566.

⁴ 83 Penn. Law Rev. (March, 1935) 662, 669.

“While the supreme court has never passed upon the problem specifically, the probability is that immunity from governmental competition is no more a matter of right than immunity from private competition, particularly where the government is engaging in a constitutional function. It is true, of course, that government possesses a plethora of funds and the right of eminent domain, as well as incidental privileges as the obtaining of preferential telegraph rates * * * Yet disparity of opportunity, position and practical abilities is too marked a characteristic of the existing economic system to excite particular attention. That certain individuals will, as taxpayers, help finance competition offered to them would seem to carry as little weight. The situation is no more anomalous than that which exists when taxpayers finance governmental imposition of restrictions not at all to their taste. As was remarked in one case, ‘generally * * * no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage.’ * * * On the authority of the same case, however, it appears that the government may not, as a rule, create by legislative *fiat* a monopoly for itself, even of an enterprise in which its right to engage is unquestionable. If the state is to compete with private enterprise, it must suffer private enterprise to compete with it.”⁵

The protection of the due process clause and the prohibition against impairing the obligation of contracts has likewise been invoked without avail in municipal ownership, where the municipal corporation had been duly authorized to engage in a particular field of endeavour.¹ In such a case there is no “promise to private adventurers that they shall not encounter subsequent municipal competition”² they engage in business at their own risk, and “an appeal to the 14th amendment to protect property from a congenital defect must be in vain * * *”.³ These principles are also applicable to state ownership.³

Although the Constitution does not impair vested rights, we have already seen that the Philippine government before the Constitution had power to operate industries for the general

⁵ Ibid., pp. 669-670.

¹ 34 Col. Law Rev. (Feb., 1934), pp. 324-332.

² *Madera Waterworks v. Madera* (1913), 228 U. S. 454, 57 L. Ed. 918.

³ *Mott, Due Process of Law* (1926), p. 535.

welfare. Private individuals cannot therefore claim that their property is taken from them without due process of law when the government exercises its constitutional powers to establish industries or acquire private enterprises by eminent domain.

Nevertheless we have also seen that the Philippine government has engaged in industry because of the unsatisfactory service rendered by private enterprises. Hence, it may be reasonably expected that it will not, as a matter of policy, engage in an enterprise which is already being satisfactorily handled by a private entity and that it will withdraw from the industries which private individuals can adequately undertake. On this point, Sec. 3 of Commonwealth Act No. 182 is expressive of the governmental attitude. It provides that the National Development Company, "unless the public interest so requires, * * * shall not engage in such activities as to bring it into competition with private enterprises."

D. Organization of Government Owned Public Utilities

1. In General.

The Government may acquire public utilities in four ways.⁴ First, it may purchase existing privately owned plants by direct negotiation. Second, it may acquire the public utility under the option of franchise contracts or indeterminate permit laws. Third, it may institute condemnation proceedings against the utility. The last method is acquisition by original purchase of land and materials and construction of utility plants.

It has been previously mentioned that the government may operate a public utility either directly, through one of its departments or bureaus or through a board or commission specially organized for the purpose, or indirectly, through a corporation in which it owns at least a part of the stock. The government may also create what is known as "a corporate municipal instrumentality." Such an instrumentality is subject to the control and direction of its sovereign principal, the state, but it possesses the characteristics of corporate form, especially that of limited liability. The state in this way, by a limited appropriation, encourages the development of a public enterprise without assuming legal obligation for the cost.⁵

2. Direct government operation.

⁴ Wilcox, Op. cit., p. 13.

⁵ Hodgson, Op. cit., p. 139.

Examples of public utilities directly owned and operated by the government in the Philippines are the ice plant, the postal savings banks, the government vessels and the government utilities in Baguio. They were established in the early years of American rule and were operated directly by the government in the exercise of its traditional functions as shown by governmental practices in the United States.

Public utilities owned by the government as such are subject to the same rules and limitations which operate on ordinary governmental activities. As a department of the government, the utility possesses all its privileges and immunities. At the same time, as an economic enterprise run by the government, it is subject to the many disadvantages of government procedure. It is dependent for its continued existence on annual legislative appropriations, it cannot borrow money or pledge its credit even in an emergency, and it is hedged in by auditing and civil service restrictions.⁶ These disadvantages may be endured by public utilities run by the government on a small scale or purely for its own use. But the degree of permanence and freedom of action required for public utilities destined for nationwide service requires a less constricting organization.

3. Use of government corporations.

a. Reasons for Organization.

The modern method of operating government—owned public utilities is by the use of the corporation patterned after an ordinary private corporation. In view of the extensive and complicated activities of present day government—owned utilities, the corporate form has been adapted in order to apply to the problems involved in the control and administration of these economic enterprises the advantages of private business management, while at the same time subordinating the profit motive to public purposes. As was intimated previously, existing forms of governmental organization are inadequate in effectively handling complex economic activities. They were intended primarily to assure the orderly conduct of routine affairs and did not lend themselves to enterprises where flexibility and continuity are of prime importance. Sudden upsets in a change of administration give little opportunity for the development of permanent policies and of effective interrelations with non-

⁶ Van Dorn, *Government Owned Corporations* (1926), pp. 258-269.

governmental economic enterprises. The government-owned corporation is one of the most recent devices for solving these difficulties.¹

b. Constitutional Basis.

In the exercise of its express power to establish or acquire industries,² the National Assembly may create a corporation for the purpose as an incident necessarily implied from the powers expressly granted.³ The existence of such implied power is recognized by the Constitution when it provides that "the National Assembly shall not, except by general law, provide for the formation, organization, or regulation of private corporations, unless such corporations are owned or controlled by the government or any subdivision or instrumentality thereof."⁴ Nevertheless the powers granted to such corporation must bear a reasonable relation to the powers granted to the National Assembly.⁵

c. Concept and Nature.

The agency modeled after the private corporation through which the government operates its public utilities is called by Van Born "a government owned corporation"⁶ and by Willis "a government proprietary corporation."⁷ Such a corporation is defined as "one engaged in the operation of an economic undertaking in which the government holds either the entire or a controlling interest."⁸ Such a corporation may have the same form as an ordinary private corporation and may be engaged in the same activity as any privately owned utility. Its position, however, as an agency or instrumentality of the government in the exercise of its legitimate economic functions subjects it to rules of law different from those which govern private corporations or privately owned public utilities.⁹

d. Corporate Organization.

Existing government corporations in the Philippines have been established as such by an act of the National Assembly defining its powers and limitations and declaring it to be a body

¹ 7 Encyc. of Soc. Sciences, p. 106.

² Sec. 6, Art. XII, Phil. Constitution.

³ McCulloch v. Maryland, 4 Wheat. (17 U.S.) (1819), 316.

⁴ Sec. 7, Art. XIII.

⁵ 33 Mich. Law Rev. 473, 488-490.

⁶ Van Dorn, *Ibid.*

⁷ Willis, *Op. cit.*, p. 766.

⁸ *Ibid.*

⁹ *Ibid.*, p. 766.

corporate. The National Power Corporation is created as a "public corporation"¹ and the National Development Company² and the National Produce Exchange³ are termed bodies "corporate and politic in deed and in law." But the power to create such corporations may also be delegated by the National Assembly to any executive officer, generally the President, in carrying out the provisions of a law passed by it.⁴ A corporation so created is the National Rice and Corn Corporation. Government corporations are generally incorporated under the provisions of the Corporation Law (Act No. 1459, as amended).

The management of government corporations is entrusted to a board composed of members, either ex-officio or appointed by the President with the consent of the Commission on Appointments of the National Assembly and holding office for some specified period.⁵

The capital necessary to carry out the corporate purposes is either obtained by a sale of stock to the government, as in the case of the National Development Company, or, where it is a non-stock corporation like the National Power Corporation, by the sale of bonds guaranteed by the Philippine government. Other corporations are supported by legislative appropriation.⁶

The voting power of stock owned by the National Government in the National Development Company is vested in the President or in such person or persons as he may designate, and that of stock owned by provincial, municipal, or city governments is vested in the chief executive of such respective governments.⁷ The Commonwealth Government is entitled to at least 51 per cent of the stock, while the rest may be offered to provincial, municipal, or city governments.⁸ There is thus no longer any private participation, as was the case of the National Development Company under the Jones Law. The powers of the former Board of Control are now vested in the President or his legal representative.⁹

¹ C. Act No. 120.

² C. Act No. 182.

³ C. Act No. 192.

⁴ 83 U. of Pa. Law Rev. (Jan., 1935), p. 348 and notes.

⁵ Sec. 3, C. Act No. 120; Sec. 4, C. Act No. 182; Sec. 3, C. Act No. 192.

⁶ Sec. 9, C. Act No. 192.

⁷ Sec. 2, C. Act. No. 182.

⁸ Ibid.

⁹ C. Act No. 11.

The Corporation Law (Act 1459) fixes the maximum life of a private corporation at 50 years. The same length of succession is given to the National Development Company.¹⁰

e. Legal Status.

Incorporation generally gives the resulting entity a personality distinct and separate from that of its individual members.¹ In general, the government corporation is considered an entity distinct from the government itself; but since the corporation performs governmental functions, the relation of principal and agent often comes into play.

The legal status of a government corporation in which the government is only a majority stockholder is different from that in which it is the sole owner of the stock. The government corporation, being created by the National Assembly, possesses only such powers and liabilities, privileges and immunities as may be inferred from the express or presumed intention of the legislative body. Since the government can act only for public purposes, it is presumed that the legislature does not vest in a corporation of its own creation the privileges and immunities of the government when it permits private interests to be present, except as expressly provided. The distinction between the corporation and its stock is enforced to the fullest extent.²

But a different role operates when the government is the sole owner in a corporation created by it. Here the relation of principal and agent is recognized. The government corporation in such case possesses all the powers, privileges and immunities of the government itself in accordance with the express or presumed intention of the legislature, except as the government is presumed to waive in recognition of the implications traditionally pertaining to the private corporate form. This is the rule which can be gathered from the cases on the legal status of government corporations when read together, in spite of their apparent conflicts and inconsistencies.³

¹⁰ Sec. 1, C. Act No. 182.

¹ I Fletcher on Private Corporations (1917), p. 43.

² Bank of U. S. v. Planters' Bank of Georgia (1824) 9 Wheat. 904, 6 L. Ed. 244; Commercial Pacific Cable Co. v. Phil. Nat. Bank, 263 Fed. 218 (1920); National Coal Co. v. Collector, 46 Phil. 583; 275 U. S. 425-426.

³ Fleet Corp. v. Harwood. 281 U. S. (1920) 519; Fleet Corp. v. Rosenberg Bros., 276 U. S. (1927) 202; U. S. Grain Corp. v. Philips 261 U. S. 106; Crane v. U. S. (1932) 55 F. (2d) 734, cert. denied, 287 U. S. 601; U. S. Fleet Corp. v. Western Union Tel. Co. (1928) 275 U. S. 415; 8 Minn. Law Rev. (April, 1924), p. 427, 430-431; 27 Mich. Law Rev. (May, 1929), p. 786, 790.

OBJECTIVES IN GOVERNMENT OPERATION OF
PUBLIC UTILITIES

No matter what their form of organization might be, government enterprises in the operation of public utilities are faced with a choice of objectives: whether to operate the utility for revenue or to render service at cost. They may be run at a profit as great as that of similar private enterprises; or their rates may be kept so low as to barely meet or fail to meet costs, the deficit to be made up by taxation.⁴

To render service at cost, the rates should be fixed as to make the enterprise self-sustaining with only enough surplus to constitute a reserve against unforeseen contingencies and lean periods. If lower rates are necessary to encourage the use of the commodity or service furnished or to further any other defined social purpose for which the maintenance is believed to be helpful, the deficit will have to be made up from other sources. But if the utility be operated for profit as a means of reducing taxes, the rates will vary between the maximum level which the consumers can afford and the level representing the cost of service. As the consumers have a voice as voters in determining the policy of the government utility, unreasonably high rates would not be politically expedient. Service at cost may also be rendered by getting enough from the revenues of the utility to amortize its original cost and to provide for future capital requirements out of earnings.⁵

Operation on a strictly-at-cost basis would seem to be most in line with the purpose of a government-owned utility, but circumstances may demand the adoption of a different policy. Under some circumstances, it would be proper to subsidize socially advantageous rates by taxation. But in other cases, operation at a profit might be necessary to reduce taxes or aid other services of the government. The best policy probably would be to fix rates so as to provide sufficient revenue to make the utility not only self-sustaining but also self-amortizing and self-expanding. While it might be necessary or expedient in most cases to issue bonds for original purchase or construction, the utility should build itself up and pay off its debt out of surplus earnings so far as practicable.⁶

⁴ 7 Encyc. of Soc. Sciences, p. 117.

⁵ Wilcox, *Op. cit.*, pp. 62-63.

⁶ *Ibid.*, pp. 63-64.

The fundamental aims of public operation are both positive and negative. Positively, it should give adequate service at reasonable rates, order and stimulate the expansions of the utilities for public benefit, limit and distribute the cost of utility service for the benefit of the consumers, and stimulate civic interest in cooperative endeavour as well as offer careers for those interested in public service.⁷ Negatively, public operation should aim to remove from public life the evil and corrupting influences of private interests in search for profit; and eliminate the expense of public regulation, including valuations, rate cases and propaganda.⁸

CONCLUSION

It is believed that the following points have been sufficiently demonstrated by the preceding discussions on various aspects of government ownership and operation of public utilities in the Philippines:

First. Every enterprise conducted by the government in the interest of national welfare *ipso facto* becomes a public utility.

Second. Government participation in economic activities in the Philippines has become an established tradition.

Third. The Philippine government under the Jones Law had power to organize the economic enterprises conducted by it for the development of the country's natural resources.

Fourth. The leadership of the Philippine government in industry will continue as an active policy for some time to come.

Fifth. The ownership and operation of public utilities by the government has inherent social advantages which make it preferable to private ownership and management.

Sixth. Under the Philippine Constitution, the government has full power to establish or acquire economic enterprises for the national welfare.

Seventh and Last. In the organization of government-owned and-operated public utilities, the creation of government corporations is preferable to direct operation by the governments both from the business and legal standpoints.

While this exposition has aspired to completeness as well as breadth, the subject of government ownership and operation of public utilities is still fraught with possibilities for future deve-

⁷ Wilcox, *Op. cit.*, pp. 79-80.

⁸ *Ibid.*, p. 80.

lopment. This is particularly true of the legal status of government corporations, which are becoming numerous in the Philippines and regarding which only brief comment has been made here. At present they are operating in peace, and their legal status can only be determined by a few decisions of the Philippine Supreme Court under the Jones Law and from theoretical principles derived from American cases. But as their activities increase, they will inevitably conflict with the rights of private individuals, and the Philippine Supreme Court will have occasion to pass squarely on their legal nature.

At the beginning of this exposition it was characterized as a journey in the paths already blazed by previous writers who have seen in governmental activity a means for achieving the welfare of each and every member of society. This work has endeavoured to throw a little more light on the subject. It is possible that others may in the future, guided by the same inspiration, carry on where this thesis ends. In that event it is hoped that the discussion in the preceding pages will furnish some basis for more mature thought on the relation between the government and the citizen.