The Disappearing Boundary Lines Between Public Non-Municipal Corporations And Government-Owned Private Corporations

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THE earliest common law conception of a corporation was a body politic organized and created for the carrying out of municipal, ecclesiastic or eleemosynary purposes only. Since then, the use of these artificial persons has been gradually extended to profit-making enterprises until, at the present time, it is through such organizations that a large part of the business of the world is transacted.

Chief Justice Marshall's classic general definition of a corporation has so far been the most accepted and approved—"a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." (*Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 518*). According to Section 2 of our Corporation Law (Act 1459), "a corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes and properties expressly authorized by law or incident to its existence."

Corporations have been variously classified, but the most fundamental division of corporations is that which divides them into public or private corporations. Section 3 of Act 1459 (Corporation Law) provides: "Corporations may be public or private. Public corporations are those formed or organized for the government of a portion of the State. Private corporations are those formed for some private purpose, benefit, aim or end as distinguished from public corporations which have for the purpose the general good and welfare." Corporations strictly private are those the direct object of which is to promote private interest and in which the public has no concern except the indirect benefits resulting from the promotion of trade and the development of the general resources of the country. They derive nothing from the government except the right to be corporations and to exercise the rights expressly granted. In all other respects, to the extent of their powers, they stand on the footing of natural persons, having such property as they may legally acquire and holding and using it ultimately for the exclusive benefit of the stockholders. (*Miner's Ditch Co. vs. Zellerbach, 99 Am. Dec. 300*).

The definition of a public corporation given by our corporation law is not comprehensive but limits itself to what is practically a definition of what are now known as public municipal corporations. A public corporation is one controlled by the State, solely as its own devise and agency for the ac-

complishment of part of its public work. Public corporations are of two kinds—municipal and non-municipal. The non-municipal public corporations may either be public quasi corporations or quasi-public corporations. A public quasi corporation is one which, on account of the limited number of its corporate powers, ranks low in the scale or grade of corporate existence. A quasi-public corporation is a private corporation affected with a public interest. (Elliot: *Municipal Corporations, 7;* McQuillin: *Municipal Corporations, 255-271*). In general, a non-municipal public corporation is one created by the state solely as its own device and agency for the accomplishment of some part of its own public work other than the local government carried on in designated areas by municipal corporations or quasi-municipal corporations. (*Elliot: Municipal Corporations*).

The distinction between public and private corporations has reference to their powers and the purposes of their creation. They are public when created for public purposes connected with the administration of government only and where the whole interest and franchise are the exclusive property and domain of the government itself. (*Yarmouth vs. Yarmouth, 56 Am. Dec. 666*). (1) Public corporation is created for political purposes, with political powers, to be exercised for purposes concerned with the public good in the administration of civil government; an instrument of government subject to the control of the Legislature, and its members officers of the government for the administration or discharge of public duties. A private corporation, on the other hand, is not municipal nor created for public purposes; it is not an instrument of government created for its own uses nor are its members officers of the government or subject to its control in the due management of its affairs, and none of its property and funds belong to the government. (2) Public corporations are to be governed according to the law of the land and the government has the sole right, as trustee of the public interest, to inspect, regulate and control the corporation, its funds and franchise. Private corporations on the other hand are to be governed by their articles of incorporation, and their by-laws, subject only to the visitorial powers of the state in certain cases. (3) The charter of a public corporation is not a contract whereas the charter of a private corporation, when accepted is a contract. (4) In the case of public corporations, the whole interest is in the public. The fact of the public having an interest in the works or property or object of a corporation does not make it a public corporation. All corporations, whether public or private, are in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public. (*19 R. C. L., 691; Maryland vs. Williams, 3 Macy's Cases*).

Ordinarily, as between corporations owned by the government wholly for public purposes and corporations owned by private individuals for their own benefit, aim or end, though the object be one in which the public has an interest, there will be no difficulty in determining which corporation is public and which is private. If a corporation is owned wholly by a private individual, though the public may have an interest in its object, the corporation is still a

private corporation. The mere fact that the undertaking is one in which the state itself might enter upon as part of its public work does not make a corporation a public one. (*Maryland vs. Williams, Macy's Cases 3*). This is true even though the state may have granted an endowment to such a private corporation or bestowed upon it some special privilege or power (*Allen vs. Mechem, 1 Sumner. 276*) or declared such a corporation to be a public corporation. A state may not, by legislative fiat change that which in its nature is essentially private to a public institution and subject it consequently to all the powers of the government with respect to the latter corporation. Such a holding would be tantamount to an arbitrary taking of private property without due process of law. (*New State Ice Co. vs. Liebman. 281 U. S. 297; Charles Wolff Packing Co. vs. Court of Industrial Relations, 262 U. S. 522*)

Cases arise, however, where the proper classification of a given corporation has proved to be no simple matter. This is so in the case of government owned corporations. The power of a state to utilize artificial persons to carry out its purposes and policies is recognized. "The powers given to government imply the ordinary means of execution. the power of creating a corporation, though appertaining to sovereignty is not, like the power of making war or levying taxes, or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to the powers of government or used as a means of operating them. It is never the end for which other powers are exercised but a means by which other objects are accomplished . The power of creating a corporation is never used for its own sake but for the purpose of effecting something else." (*McCullough vs. Maryland, 4 Wheaton, 316*). Such corporations owned and created by the government may be either public or private corporations. Theoretically, where the power to be exercised by a corporation is of a character that it may be performed only by the government, the corporation organized by it is a public corporation. But government control and supervision and the field of government activity has so greatly expanded that it is now not possible to lay down a clear-cut distinction between purely governmental powers and purely proprietary powers of government.

Moreover, governments in the exercise of their powers, have found that the development of private enterprise is a necessary adjunct to the economic progress and well-being of the people the attainment of which is one of the ends of government. The Constitution of the Philippines in Art. XIII, sec. 6 provides that "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 private enterprises to be operated by the government." When for any reason, private capital is unwilling to take the risks of an essential business, the government will sometimes step in as an operator and continue and mantain the operation of the same in order to preserve the benefits that the enterprise affords society. A number of such corporations have been created in the United States.

Among these are the Federal Loan and Savings Association and the Home Owners' Loan Association created by Act of Congress of June 13, 1933. "Great confusion has arisen as to whether or not the corporation itself is a public one. There can be no question that the corporation is an instrumentality of government, engaged in a great undertaking affecting the public. The distinction failed to be recognized is that while the undertaking has the characteristic of a public enterprise, yet the acts authorized have to be performed through the arm of a private corporation rather than by means of the exercise of power by a government officer or by a legislative body itself. The authorities are uniform in establishing that such a corporation is private corporation. (*Gill vs. Reese, 1936; 63 Ohio App. 334*). The Home Owners' Loan Association is engaged in loaning money and in financing mortgages in real estate security, which is a business usually conducted by private persons. Though the government owns all the stock, it should be regarded as a separate entity. (*Central Market vs. King, 272 N. W. 244*). Although the Home Owners' Loan Association is expressly declared to be an instrument of government, it is nevertheless a private corporation subject to suits. (*McAllister vs. Drapeau, 1938; Cal. App. 85 [2nd] 523*).

The National Assembly has similarly found it necessary to create various corporate agencies to carry out the economic and political policies of the government. Typical of these corporate agencies are the National Development Co., Com. Act No. 182; National Produce Exchange, Com. Act No. 192; and National Power Corporation, Com. Act No. 120, all of which have been expressly classifield by the National Assembly as public corporations. The general purpose of these corporations is to act as instrumentality or agency of the state in the coordination of the productive forces of the country; they are generally made subject to the provisions of the corporation law (Act No. 1459) in so far as the same is applicable or not inconsistent with the provisions of their respective creative acts; 51% of their capital is subscribed by the government while the remainder may be offered to the provincial, municipal, or city governments.

In all these instances, the business conducted by the government is often monopolistic due almost wholly to the circumstances that brought about its participation in business. In other cases the prime motives of government interest in business is the regulation of private enterprise. The government has often found regulation of private enterprise through the usual government agencies ineffective. Corporations have been found highly successful in coping with the situation. Regulation here takes the form of competition with private enterprise, thereby forcing the latter to attain the level or standards established by such government owned corporations if they would maintain their existence. In view of the circumstances, these government corporations must necessarily take the form of commercial corporations and exercise powers commonly found in private corporations and perform their usual activities. Obviously, such corporations owned and controlled by the government, created to carry out a government function of regulation, are government

instrumentalities. How and on what basis may their nature be determined? The nature of the activities are essentially private and should ordinarily classify them as private corporations owned and controlled by the government. But in view of their being instrumentalities of government, a doubt arises as to their legal standing. Does this necessarily make them public corporations? "The Government is made the majority stockholder evidently in order to insure proper governmental control and supervision and thus place the government in a position to render all possible encouragement, assistance and help in the prosecution and furtherance of the corporation's business. The National Coal Company is a private corporation. The fact that the government happens to be a stockholder therein does not make it a public corporation. It is subject to all the provisions of the Corporation Law in so far as not inconsistent with the act of its creation. As a private corporation, it has no rights, powers and privileges greater than any other corporation." (*National Coal Co. vs. Collector of Internal Revenue, 49 Phil. Reports, 583*). The Legislature is empowered to create and control private corporations. By becoming a stockholder in the National Coal Company, the government divests itself of its sovereign character so far as respects the transactions of the corporations. But the National Coal Company remains an agency or instrumentality of the government. Public funds were appropriated to create the corporation. These funds were used to purchase stock. The government, the owner of the majority stock in the corporation, naturally dominates the management of its property. The government may enforce its policies and secure relief through the corporation as a stockholder. This situation will be better understood when it is recalled that, in addition to the National Coal Corporation, the Philippine Legislature has created the Philippine National Bank, the National Petroleum Co., the National Development Company, the National Cement Company and the National Iron Company. The Legislature has, in each of these instances, directed that a majority of the shares be purchased by the government and has appropriated money for this purpose. All these are conspicuous instances of a paternally inclined government investing large sums in business enterprises who after organization and acquisition have vitally concerned the government. (*Government vs. Springer, 50 Phil. 261*).

A not infrequent result of the use of corporate agencies and instrumentalities of government is the creation of corporations possessing a double or dual aspect and exercising both public and private functions. "As long as the defendant corporation was functioning as a government agency in relieving the distress of unfortunate people by making loans, it is difficult to understand what would be the basis of any suit against the corporation (the theory being that as part of the government it cannot be sued without the sovereign's consent.) It is functioning differently after its loans have been made and the distress relieved and the corporation begins to act in a proprietary way in taking title to the property and managing and controlling such property. The distinction between govern-

mental and proprietary function is reasonably clear. A private corporation could not have undertaken the work of refinancing mortgages in such great scale as did this public corporation. But when it comes to the ownership and renting of several pieces of property, the acts and duties of the corporation are those of individuals and private corporations involving no particular function of government. (*Gillen vs. Home Owners' Loan Corporation, 1939; 21 N. E. ed., 521; Mt. Hope Cemetery vs. Boston, 33 N. E. 695*).

It is with regard to corporations such as these, created by the government as an adjunct in its exercise of the regulative function and those created in furtherance of its paternalistic and economic policies that a difficulty arises in determining the character of the corporation as a public or private corporation. For with regard to corporations exercising functions in aid of what are essentially public and governmental powers such as the executive, legislative or in some instances judicial powers, they must of their own nature and effect be obviously public, and clearly distinguishable from government-owned private corporations.

When is a government corporation public and when is it private? The purpose of the corporation, though of importance, is not decisive of the question. In the first place, it is admitted that most corporations, public or private are in contemplation of law founded upon the principle that they will promote the interest of the public. In the second place, it is difficult to conceive of a purely private or proprietary purpose to be subserved by the government without the injection to a certain degree of some public interest, for any purpose, though private, of the government must naturally affect the public interest. Neither does the status of being an instrumentality of government subject to its supervision and control furnish a satisfactory basis of distinction. The decisions of the United States Supreme Court (*U. S. Ex Rel Skinner Corporation vs. McCarl 275 U. S. 1; U. S. Shipbuilding Board Emergency Fleet Corporation vs. Chase, 264 U. S. 586; Providence Engineering Corporation vs. Downey Shipbuilding Corporation, 294 F. 641; Keifer vs. Reconstruction Finance Corporation*) have established that an agency or instrumentality of the government may be either a public or private government corporation. The corporations created by the National Assembly as agencies of the government to carry out economic and political policies have been either public or private corporations. In many of them such as the Agricultural and Industrial Bank (private corporation), National Coconut Corporation (private), National Power Corporation and National Development Company (public corporations) the officers and directors are either in the government or are appointed by the President of the Philippines with the consent of the Commission on Appointments of the National Assembly, subject consequently to the general executive power of supervision. Some of them are also made subject to the provisions of the general corporation law in so far as the same is applicable. Both classes of government corporations are to be governed primarily according to the law of the land, the government having the sole right in both instances to inspect, regulate, con-

trol and direct the corporation, its funds and franchises.

The distinction existing between public corporations and private corporations with regard to the nature of their charter is of no importance in the case of government corporations. In the latter case the government may amend, alter, or repeal the charter of its corporations at will, subject only to the general constitutional limitations in the cases where such action may affect the private rights of individuals. There does not seem to be left any substantial or marked demarcation line between public and private government corporations except the question of legislative intent. If the Legislature intended to create a public corporation, then it will be so considered *prima facie;* otherwise the corporation may be private, though still a government instrumentality. The effect of all these is to base the determination of corporate character on mere legislative pronouncements by the creation of a legal fiction. Is the National Assembly authorized to create essentially private corporations and invest upon them the character of public corporations without pronouncement? Section 7 of Art. XIV of our Constitution provides: "The National Assembly shall not, except by general law, provide for the formation, organization and regulation of private corporations unless such corporations are owned or controlled by the government, or any subdivision or instrumentality thereof." This section together with the previously cited section of the Constitution reaffirms the power of the government to own and operate private enterprises through the medium of corporations, owned or controlled by it. But it does not give any power to invest such private corporations with the character of public corporations. In creating the Boy Scouts of the Philippines, Com. Act No. 111, and the Girl Scouts of the Philippine, Com. Act No. 542, as public corporations, the National Assembly has not furnished any reasonable basis for the classification. The purposes of both corporations are, admittedly, public, but from the charters of both, it is evident that their funds are their own private funds though a portion may be endowed by the State or any subdivision or instrumentality thereof; their officers are private individuals and in no case subject to government supervision and control, except the general visitorial power to which all privately owned corporations are necessarily subject in the interest of the public. To create a public corporation, two requisites must concur, namely: (1) that it be founded wholly for public purposes, and (2) that the whole interest in it be in the public. In these two cases while the purpose is public, the whole interest in private. Essentially, therefore these corporations are private corporations made public merely by legislative investiture. Decisions of the United States Supreme Court have repeatedly denied to the Legislature the exercise of such a power. (*Michigan vs. Duke, 266 U. S. 570; New State Ice Co. vs. Liebman, 281 U. S. 297*). Moreover, to allow the Legislature to create private corporations as public corporations would pave the way to an evasion of the constitutional prohibition directed to the Legislature from creating private corporations by other than general laws.