

of prescription) unless of course in the implementation of said law our judicial processes may be unduly hindered or inconvenienced.¹⁵

SIXTH STEP — THE PLEADING AND PROVING OF THE PROPER FOREIGN LAW

It is understood that any previous characterization already made may be rendered practically useless unless there is competent evidence of the foreign law on the matter, for in such a case, we shall have to use our own internal law. It will not be amiss at this point to state that if a duly proved foreign law has already been given a judicial interpretation in the country of origin, it must generally be given an identical interpretation in the Philippines, unless of course we already have a similar internal law, and said internal law has received a diametrically opposite construction before our own tribunals.

SEVENTH STEP — THE APPLICATION OF THE PROPER FOREIGN LAW TO THE PROBLEM

Once we have ascertained the pertinent facts, characterized the situation and the point of contact, made up our mind as to the proper conflicts rule, and been satisfied with the relevancy, competency, and admissibility of the foreign law or laws involved, nothing else remains except the application of the selected proper law to the problem on hand.

¹⁵ See GOODRICH, CONFLICT OF LAWS, 189.

DISTINCTIONS BETWEEN PROPRIETARY AND GOVERNMENTAL FUNCTIONS OF GOVERNMENT

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PRELIMINARY

Two great participants in the affairs of government have manifested their notions of what the proper function of government is.

John Quincy Adams pronounced that the great object of the institution of civil government is "the progressive improvement of the condition of the Government."¹ Lincoln defined the legitimate function of government as "to do for the people what needs to be done, but what they by individual effort cannot do at all, or do so well."² From said general statements to actual concrete cases, there lies an awning gap that has troubled lawyers in their attempt to distinguish between the proprietary function of government, on one hand, and its governmental function, on the other.

As observed by the Secretary of Justice, "the ever-increasing scope of governmental activities and the incursion by the government into fields of enterprise hitherto classically reserved for private initiative, has made the dividing line between purely governmental functions and private enterprise hard to discern."³

The difficulty is increased by the creation of offices by the legislature, which, while not organized as corporations under the Corporation Law, exercise some functions peculiar to private corporations. Private business has also invaded undertakings traditionally handled by the government, notably the postal and tele-communication services. Likewise, there are government entities or corporations created to accomplish some governmental policies.

* LL.B., U.P., 1950; LL.M., U.P., 1956. Solicitor, Office of the Solicitor General.

¹ SCHLINGER, THE COMING OF THE NEW DEAL, 315.

² LARSON, KNOW YOUR SECURITY, 12.

³ Op. No. 230, s. 1941.

VARIOUS TESTS USED TO DETERMINE WHETHER A GOVERNMENTAL ENTITY IS EXERCISING GOVERNMENTAL OR PROPRIETARY FUNCTIONS

1. *Test Used by the Secretary of Justice*

The Secretary of Justice has used the following test:

"When a corporation of which the State is substantially the corporator is created for the purpose of (1) furthering the policy of the government, (2) accomplishing a governmental program, or (3) performing functions which, in accordance with settled concepts of administrative law should be performed by a department, bureau, or office of the government such a corporation exists for governmental purposes and is part of the Government. xxx On the other hand, when a corporation of which the state is substantially the corporator, is created merely for the purpose of obtaining profit or gain, the contrary is true."⁴

A primary distinction is made between corporations merely controlled and those wholly owned by the Government. Those of the former class, being partly owned by private interests, are not considered within the purview of the term "Government". As to the latter class, a further distinction is made between those performing functions governmental in character and those performing proprietary functions.⁵

According to the Secretary, the word "government" may include a lesser or greater number of concepts depending on whether public policy demands a more liberal or more strict definition of the term, for it is a known fact that while originally the powers and the functions of government were limited and confined to the exercise of political authority arising out of sovereignty, the modern trend has been to enlarge the field of activities in which the government should interest itself not merely as a matter of privilege but as a matter of clear duty.⁶

However, application of the aforesaid principles to concrete cases met with difficulties and the Secretary had to admit that an all embracing rule on what is governmental and what is proprietary function cannot be laid down.⁷

Applying the test to specific cases, the Secretary has rendered opinions to the following effect:

(a) The distribution of water is a proprietary function and therefore the Metropolitan Water District does not perform governmental functions.⁸ Said agency, like any private concern, is required to pay

⁴ *Id.*

⁵ Op. No. 319, s. 1954; see also Op. Nos. 67 and 153, s. 1948.

⁶ Op. No. 23, s. 1948; Op. No. 230, s. 1941; Op. No. 66, s. 1950.

⁷ Op. No. 319, s. 1954.

⁸ Op. No. 285, s. 1951; Op. No. 79, s. 1954.

taxes for goods it imports under the Import Control Law,⁹ there being no express provision exempting it from payment of said taxes.¹⁰

(b) Vessels of the National Shipyards and Steel Corporation (NAS-SCO) are not "vessels owned or operated by the Government" and are therefore subject to the requirements of registration under the Customs and Tariff Code.¹¹

(c) The ACCFA, being an agency to effectuate a declared policy entirely governmental in nature, which is to place agriculture on a basis of economic equality with other industries to improve the standard of living of those engaged in agriculture, is a part of the Government and therefore exempt from payment of the legal fees under section 16 of Rule 130 of the Rules of Court.¹²

(d) The NARIC is exempt from payment of legal fees, it having been created for the purpose of developing and improving rice and corn industries and to act as an agency of the government.¹³

The defunct Rural Progress Administration, the PRATRA, and the National Airports Corporation have likewise been held exempt from certain fees and taxes as being agencies carrying out functions pursued by the Government.¹⁴ Obviously for the same reason, officers and employees of the PRISCO, another defunct corporation, were held subject to the same rules of discipline and protected from arbitrary suspension and removal as other employees of the Government.¹⁵

(e) The Manila Railroad Company is primarily engaged in the transportation business,¹⁶ and therefore cannot be considered a part of the government.¹⁷

2. *Test Used by the Supreme Court*

The Supreme Court has adopted the following tests to determine whether an entity is performing governmental functions and can be considered as an entity within the purview of Section 2 of the Revised Administrative Code of 1917:

⁹ Op. No. 2, s. 1952.

¹⁰ Cf. Op. No. 285, s. 1951; Op. Nos. 98 and 246, s. 1940.

¹¹ Op. No. 10, s. 1956.

¹² Op. No. 319, s. 1954.

¹³ *Id.*

¹⁴ Op. No. 193, s. 1954.

¹⁵ Op. No. 67, s. 1955.

¹⁶ Op. No. 230, s. 1941.

¹⁷ Op. No. (Sept. 27) 1947.

a. *Constituent or Ministrant Functions Test.* — In *Bacani v. National Coconut Corporation*,¹⁶ the Court, distinguishing between the constituent and ministrant functions of government, held:

"The former are those which constitute the very bonds of society and are compulsory in nature; the latter are those undertaken only by way of advancing the general interests of society, and are merely optional. President Wilson enumerates the constituent functions as follows:

- (1) The keeping of order and providing for the protection of persons and property from violence and robbery.
- (2) The fixing of the legal relations between man and wife and between parents and children.
- (3) The regulation of the holding, transmission, and interchange of property, and the determination of its liabilities for debt or for crime.
- (4) The determination of contract rights between individuals.
- (5) The definition and punishment of crime.
- (6) The administration of justice in civil cases.
- (7) The determination of the political duties, privileges, and relations of citizens.
- (8) Dealings of the state with foreign powers: the preservation of the state from external danger or encroachment and the advancement of its international interest. (Malcolm, *The Government of the Philippine Islands*, 19)

The most important of the ministrant functions are: public works, public education, public charity, health and safety regulations, and regulations of trade and industry. The principles determining whether or not a government shall exercise certain of these optional functions are: (1) that a government should do for the public welfare those things which private capital would not naturally undertake, and (2) that a government should do those things which by its nature it is better equipped to administer for the public welfare than is any private individual or group of individuals."

A cursory reading of the aforementioned decision may lead one to conclude that ministrant functions are not governmental functions. The import of the decision, however, seems to indicate that if the two conditions mentioned by the Court as determinative of the exercise of any of these optional functions by the Government are present, the exercise of said ministrant function becomes governmental.

Applied to specific cases, the Civil Aeronautics Administration, the successor of the National Airports Corporation, has been held by the Court as not performing governmental function. While the tribunal noted that the prime objective of said entity is not the raising of revenues but the promotion of travel and the convenience of the travelling public, still it ruled that "it is engaged in an enterprise, which far from being exclusive prerogative of the state, may, more than the construction of public roads, be undertaken by private concerns."¹⁷ The Metropolitan Water

¹⁶ G.R. No. L-9657, Nov. 29, 1956.

¹⁷ *National Airports Corp. v. Teodoro*, CA-G.R. No. 5122-R, Apr. 30, 1956.

District has likewise been held as not performing governmental function, the providing of water being more like the supplying of ice, coal and gas by private firms.²⁰

This test puts emphasis on the classical functions of the State, i.e., to protect the country from foreign invasion, to maintain peace and order, administer justice, etc., which are exclusive prerogatives of the State and which private concerns will not or cannot engage in.

b. *"Duties Imposed by Constitution" Test.* — In the same case of *Bacani v. National Coconut Corporation*, *supra*, the Supreme Court held that functions which our government is required to exercise to promote its objectives as expressed in our Constitution and which are exercised by it as an attribute of sovereignty are governmental. Following this test, the University of the Philippines can be considered as performing governmental functions because the Constitution²¹ imposes on the State the duty to maintain a complete system of education, including State universities.²²

Under this test, a function not traditionally reserved to the government may be considered governmental if the Constitution says so.

c. *The Corporate Personality Test.* — This test is reflected in the very same case of *Bacani v. National Coconut Corp.*, *supra*, where the Court held the National Coconut Corporation as not constituting a government entity within the purview of Section 2 of the Rev. Adm. Code of 1917, for, although it was organized to promote the coconut industry, it was given a corporate personality separate and apart from the government. On the same ground, apparently, the Agricultural and Industrial Bank has been held a business organization like other corporations capitalized by the government.²³

Conversely, the Angat Irrigation System, the Metropolitan Transportation Service, and the Bureau of Printing have been considered part and parcel of the government, largely on the theory that they were not organized as a separate corporation.²⁴

Under this test, the mere fact that the Government happens to be a majority stockholder does not make the corporation a public corporation.²⁵ Neither does the fact that a government corporation performs cer-

²⁰ *MWD v. MWD Workers' Union*, C.R. No. L-4488, Aug. 27, 1952.

²¹ Art. XIV, Sec. 5.

²² See *University of the Philippines v. CIR*, G.R. No. L-15416, Apr. 25, 1960.

²³ *Asociacion Cooperativa de Credito v. Monteclaro*, 74 Phil. 281.

²⁴ *Metropolitan Trans. Service v. Paredes*; *Angat River Irrigation System v. Angat Workers' Union (PLUM)*, G.R. Nos. L-109443-109444, Dec. 28, 1957; *Bureau of Printing v. Bureau of Printing Employees Ass'n.*, C.R. No. L-15751, Jan. 28, 1961.

²⁵ *National Coal Co. v. Collector*, 46 Phil. 586-7; *Government v. Springer*, 50 Phil. 288.

tain functions of government give it the status of being a part of the government.²⁶

d. *Pecuniary Profit Test.* — Illustrative of this test is the ruling of the Court declaring the Government Service Insurance System as not engaged in inherently or exclusively governmental function, it being in essence and practice "of a private nature and interest",²⁷ since, according to the Court, insurance is not only a business but the entity invests its money and distributes the profits to its members in the form of dividends and other benefits.²⁸ To the same effect is the ruling holding the Price Stabilization Corporation, operated by the government like an ordinary corporation which may realize profits and incur losses, subject to the laws and regulations governing the relation of labor and management.²⁹

In contrast, the Angat Irrigation System has been held to exercise a governmental function not only because it is a mere office under the Department of Labor, but also because the nature of the duties performed by it does not show that it was intended to bring to the government any special corporate benefit or pecuniary profit.³⁰ So with the Bureau of Printing, for while it is allowed by law³¹ to accept private jobs, the volume (1/2 of 1%) is infinitesimal compared to government jobs.³²

3. American Precedents

A test applied by American courts in determining the nature of the functions exercised by government corporations or entities is whether said corporation or entity concerned is aiding the government in the exercise of any of its sovereign functions, legislative, executive or judicial.³³ Another test is whether the corporation is engaged in a business of a sort heretofore engaged in by private persons or corporations for profit. If it is so engaged, such a government corporation would be deemed engaged in a private function.³⁴

²⁶ Bacani v. National Coconut Corp., *supra* note 18.

²⁷ Abad Santos v. Auditor General, 79 Phil. 190.

²⁸ CSIS v. Castillo, 52 O. G. No. 7, 4219; see also Manila Hotel Employees Ass'n. v. Manila Hotel Co., 73 Phil. 374; Land Settlement & Development Co. v. Caledonia Pile Workers Ass'n., G.R. No. L-4877, Feb. 2, 1952.

²⁹ PRISCO v. CIR, G.R. Nos. L-9797 & 9834, Nov. 29, 1957.

³⁰ Angat River Irrig. System v. Angat River Workers' Union (PLUM), *supra* note 24.

³¹ Sec. 1654, REV. ADM. CODE.

³² Bureau of Printing v. Bureau of Printing Employees Ass'n., *supra* note 24.

³³ Central Market v. King., 132 Neb. 380, 272 NW 244; Haines v. Lone Star Building Co., 268 Pa. 92, 110 A. 788; McAvoy v. Weber (Wash.) 88 P2d 448.

³⁴ Commonwealth Finance Corp. v. Landis, (D.C.) 261 F. 440; Standard Oil Co. v. United States, (D.C.) 25 F. 480.

NECESSITY FOR DISTINCTION

The grouping of government corporations or entities according to their functions, governmental or non-governmental, is not mere idle task. Serious problems are common which require for their solution the proper identification of a corporation as one performing governmental or proprietary functions or as one which is a part of the "government".

For example, it is necessary to ascertain whether a governmental entity is performing governmental or proprietary functions to determine whether its employees can demand collective bargaining and can declare strikes without penalty of dismissal.

Section 11 of the Industrial Peace Act³⁵ provides:

"The terms and conditions of employment in the Government including any political sub-division or instrumentality thereof are governed by law and that it is declared to be the policy of this Act that employees therein shall not strike for the purpose of securing changes or modifications on terms and conditions of employment. Such employees may belong to any labor organization which does not impose the obligation to strike or to join the strike: Provided, however, that this section shall apply only to employees employed in governmental functions and not to those employed in proprietary functions of the Government including but not limited to governmental corporations."

The foregoing provisions are reproduced *verbatim* in Section 28(c) of the Civil Service Act of 1959 (Rep. Act No. 2260).

Under section 16 of Rule 130 of the Rules of Court, the Republic of the Philippines is exempt from paying legal fees required by said Rules, which include payment of docket fees, *etc.* If an entity is part of the Republic, it can claim the said exemption.

If a government corporation is performing proprietary functions, it is covered by the Eight-Hour Labor Law, Commonwealth Act 444, and subject to the jurisdiction of the Court of Industrial Relations.³⁶

Agencies of the State performing governmental functions and which do not have a separate juridical personality can invoke immunity from suit of the State in cases involving money claims against them.³⁷

Much difficulty can be avoided if the law itself specifies whether government corporations are included within the term "Government".

Republic Act No. 3019, the Anti-Graft and Corrupt Practices Act includes expressly in its definition of "Government" government-owned and government-controlled corporations and all the other instrumentalities or agencies of the Republic in addition to the national and local govern-

³⁵ Rep. Act No. 875.

³⁶ PRISCO v. CIR, G.R. No. L-9797, Nov. 1957.

³⁷ Metran v. Paredes, 45 O. G. 2835; Director v. Concepcion, 43 Phil. 384.

ments.³⁸ In defining who are not considered as employers covered by the law, the Social Security Law includes in the term "Government", corporations owned or controlled by the Government.³⁹ Commonwealth Act No. 186, creating the Government Service Insurance System, includes government-owned corporations in its definition of "Government".⁴⁰ The Civil Service Law of 1959⁴¹ provides that the Philippine Civil Service embraces all branches, subdivisions and instrumentalities of the government including government-owned or controlled corporations⁴² without distinction as to whether the corporations are performing governmental or proprietary functions.⁴³

³⁸ Sec. 2.

³⁹ Sec. 8, (c).

⁴⁰ Sec. 2, (a).

⁴¹ Rep. Act No. 2260.

⁴² Sec. 3.

⁴³ Op. No. 238, s. 1959.

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