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and Development 1

Law in the Political Economy of Public Enterprise

African Perspectives

Editor
Yash Ghai

Scandinavian Institute of African Studies, Uppsala
International Legal Centre, New York

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मेरी माताजी के लिए

To my Mother

Acknowledgements

This book represents the first results of the research project on Law and Economy in Africa. The project aims to examine the various ways in which the law and the economy interact. It has hitherto been limited to the study of public enterprises in a number of countries, namely Ghana, Sudan, Kenya, Tanzania and Zambia. The research is conducted primarily by African law teachers, and the project is coordinated by Yash Ghai at the Scandinavian Institute of African Studies, Uppsala. Some of the essays in this book were prepared for a workshop in Accra in September 1975 where the participants discussed the research themes and methodologies. The other essays were written subsequently to explore and elaborate these themes and methodologies.

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Uppsala, January 1977

Yash Ghai

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Introduction

This book is a result of an on-going research project on Law and Economy in Africa. Most countries in Africa make some efforts to direct and control the development of their economies, and formulate economic development plans. Yet the legal systems of these countries are based on the law of their former colonial authorities (with substantial sectors of customary law) which traditionally developed in response to private enterprise. As a result, the efforts at control and direction of the economy have posed a number of legal issues and problems, and have shifted the focus of a large number of economic decisions from private entrepreneurs to government administrators. The project aims to study some of these issues and problems through an intensive study of public enterprises in the context of national planning. Public enterprise plays an important role in the economies of most African countries, both in those which incline towards "socialist" development and those which are oriented towards "free enterprise".

One of the aims of the project is to broaden the perspectives of research in law. A serious deficiency of traditional legal research is its failure to study the rules of the law and the legal system in their social and economic context. A close textual analysis of the rules does not tell us a great deal about the effectiveness of the law or of its ability to solve pressing social and economic problems. Traditional research has proceeded on the assumption that the law is both effective and capable of solving these problems, and in so far as research has aimed at prescription, it has been concerned with improving the technique of the law. It seems to us that these assumptions need to be questioned, and that a meaningful process of law reform must proceed from a better understanding of the role and place of law in the wider societal system.

We consider that a study of the interaction of law with political and social factors can help towards an understanding of the social role of law. This is not a plea merely for more empirical research. The perspectives that one brings to the study of the interaction are crucial. These perspectives can scarcely be drawn from legal scholarship itself. It is necessary to study law in a framework which is broader than the legal system itself. One of the aims of the book is to suggest such frameworks. We believe that these frameworks will help us to understand better the role of law in the process of change and economic management. In order to use these frameworks, however, a researcher needs an understanding of various disciplines. From the beginning the project has been conceived as an inter-disciplinary project, although much of the research under way now is being carried out by lawyers. Prominent social scientists have helped us in the formulation of the research perspectives and frameworks.

Our frameworks are broad, but one of our recurrent themes is that law and legal institutions have to be studied within the political economy of a society. The manner in which the process of production is organised, the ownership of the means of production, the mode of the distribution of the products, the

way in which society is stratified, the relations between the modern and the traditional sectors of the economy determine very significantly the role and operation of the law and its institutions. We do not, however, see law merely as a variable. We do not underestimate the importance of the colonial legacy of the law, legal traditions, and the modes and ideology of legal discourse. All the countries in our study are operating legal systems which were established during their colonial period, legal systems which were in essence geared towards a pattern of economy which the governments are now trying to change. In such situations the burden of the inherited rules and institutions can be heavy. The governments in the countries we are studying have been attempting to increase executive control over the economy, and while the economy exercises a key influence on the law, we consider that the apparatus of the state, even in developing countries, is powerful, and the superstructure is not without influence on the economic base. The law and the state are closely intertwined, and few topics offer such rich possibilities of exploring the relationship between them, and their joint relationship with the economy, as public enterprise.

The focus on public enterprise enables us to broaden the range of our enquiry beyond the national system. It is difficult to understand the role and nature of economic processes and law in a developing country unless its place in the international system is grasped. Foreign influences play an important role in the formulation and operation of the laws in the developing countries. At the same time they constitute a severe constraint on the efficacy of domestic laws designed to bring about changes in the structure of the economy. The alliances and the contradictions between the international economic forces and the domestic elites are reflected and played out in sharp focus in public enterprises, which are often a legal device for the collaboration between foreign capital and the local state.

It is not easy to fashion a framework which would accommodate both the domestic and the international contexts, although the two are of course closely related. It is also easy to be seduced by existing models: either the simplistic undialectic division into the base and the superstructure, or the bourgeois notions of the law and the market. It is sometimes argued that law must undergo a qualitative change as a capitalist economy moves towards socialism as the legal infrastructure of a capitalist economy is quite different from that of a socialist economy. The main regulator of a capitalist economy is the market, that of the socialistic economy, the Plan. The former system functions through a multitude of decisions by a multitude of private parties, while the key decisions in the latter are made by public authorities. The dependence of the former system on private initiative and planning means that there must be predicability as to commercial behaviour as well as the facility to make decisions about the future. This means that there must be clear legal rules on the basis of which private parties can make their decisions and transactions—contract and private property being key in this regard. It also means that there must be a mechanism to enforce these rules—hence a coercive legal system, which both ensures that obligations entered by private parties will be enforced, and that the legal system will not introduce additional obligations, and thus the role of the state is restricted to

enforcement functions. Private law thus dominates public law. In a socialist system, since property is essentially socialised, and most parties in the productive and distributive sectors are public agencies, the restrictive role of the state must disappear so that private law is swallowed up by administration. Predicability premised on contractual obligations gives way to the fulfilment of the Plan, and the legal system intervenes by introducing additional elements. Private initiative cannot be relied on to the same extent as in the capitalist system to protect property, so that the state has to take the initiative, and thus liability for trespass and negligence comes to be enforced through the criminal process. It is clear that such a model is in the nature of Weberian ideal types, and its utility for our present purposes questionable. One may seek to rescue the ideal type approach by devising a third type: the mixed economy type, which partakes of both systems, but which is characterically an economy which is market based operating through private parties, but in which the state intervenes to regulate the behaviour of these parties, and its legal characteristic becomes the regulatory law.

Two objections may be raised to the approach of the ideal type outlined above. One stems from Karl Renner's theory about the persistence of legal forms through different economic and social periods.¹ His contention is that forms in themselves have relatively little significance: it is the way they are employed and manipulated that counts. They can be used for quite different purposes, and this explains their persistence from one historical period to another. While Renner illustrated his argument by looking at property and contract, one may raise similar questions about the corporate form. The corporate form therefore becomes a device which can be used to achieve capitalist as well as socialist ends. Instead of focusing on the different kinds of legal infrastructure, one should look at the underlying power relationship in society, and the interests for which state power is being used. The other objection arises from a more empirical point of view, but which reinforces Renner's thesis. It is that the model is factually wrong, at least as far as African colonies are concerned. Capitalism was nurtured there not through a system of rules for decentralised, private decision-making, with minimum state interference, but through a complex network of legal rules of special application and state power. The relationship between the law and the economy in a colonial state does not admit of any simple analysis in the mould of types outlined above. The same can be said of the post-colonial state. Public enterprise in many of these states may represent a new form of state intervention in the economy (and this may pose special legal problems), but this does not by itself represent steps towards socialism. A detailed examination of the forms, functions, modes of operation, and international linkages of public enterprises can help to illuminate the class character of the state.

The growing state intervention in the economy (of which public enterprise represents only one form) and the complexity of state regulation and

¹Karl Renner, *The Institutions of Private Law and Their Social Functions*, 1949, London.

management of the economy pose problems for the legal system. There are no simple choices between the Contract and the Plan, or the Private Company and the Public Corporation. It is doubtful how far the model of general rules—sometimes said to characterise a system of law—can cope with a situation of state management of the economy, especially when the domestic economy has little autonomy of the international system, where various modes of production co-exist in the country, and attempts are made to shift the economy in particular directions. The role of the legislature (quite apart from recurrent political crises) becomes problematic. It has little capacity to understand and deal with complex legislative proposals in the economic field, and public accountability declines.

Another aim of the project was to develop comparative perspectives in research in law. Law has an inherent tendency towards parochialism, and legal research is all too often a victim of this parochialism. The problems in law as well as other areas of development are so similar in the various post-colonial societies that a heavy price must be paid for not looking at experiences beyond one's national boundaries. Comparison is facilitated because there are similarities in the economic and legal backgrounds and differences in current policies in the countries under study. An essay on the law of public enterprise in socialist countries is included in this book for its comparative value. The comparative results of the project are yet to come, although some essays suggest points of comparison. The project has also hoped to develop a community of African scholars across national boundaries who see more to law than rules and who are committed to developing our understanding of the role of law in society.

The essays in this book take some of the themes outlined above as points of departure, but there has been no attempt to impose a uniform framework. The complexity of the subject and the newness of the approach counsel against a new orthodoxy. The essays are explorations of how to study public enterprise, what questions to focus on, what methodologies to employ in doing research. Most of the essays are based on on-going research and the authors do not pretend that their work represents their definitive conclusions on the subject. It may seem presumptuous to unload such a tentative product on the public. We thought that the publication was justified because of the paucity of the literature on the subject and that the approaches suggested in the essays may help both to guide other researchers in this area, and to stimulate others to pay more attention to it.

Part I

The Framework for Research

Yash Ghai*

Control and Management of the Economy:

Research perspectives on public enterprise

In view of the pervasiveness of public enterprise and the variety of uses to which it has been put in the developing countries, it is surprising that there has been so little research on it. Few law faculties teach the subject in any systematic manner, and there are few scholars whose basic interest is public enterprise. An important institution and phenomenon has emerged on the legal scene without being noticed by most lawyers. The emergence of public enterprise confronts legal scholars with various challenges: that of formulating an adequate theory of public enterprise; that of empirical investigations (for as we shall see, the law tells only part of the story); of systematization; and of policy formulation. At a purely conceptual level, the challenge is obvious. Public enterprise cuts across traditional legal categories. It is a public agency and yet often operates through the medium of private law, it takes different forms and shapes, sometimes arising from the realms of public law and sometimes the private. It modifies, and is in turn influenced by, the legal environment for private enterprises.

Public enterprise has been called into existence to achieve a variety of vital national tasks. As more and more of the burden of national development is placed on public enterprise, the question of its efficiency and democratic control over it, becomes crucially relevant for the progress and often indeed the very viability of a society. And yet we know from experience that the record of public corporations is often poor; not only have they failed to generate surpluses but have in fact often squandered scarce public funds, while at the same time (this tendency increases as the enterprises are financially successful) they may become empires unto themselves, resist any public accountability and become a breeding ground for corruption and nepotism. Most countries are engaged in the search for better policy and its implementation in the public economic sector, and many of the problems which have arisen are of direct concern to the lawyer, e.g., institutional structures, the relationships between institutions, the appropriate role of civil and criminal liability in new situations, the balance between autonomy and control.

Central though these issues might be to the world of law, it is argued that research on them will have to be cast in a broad framework that transcends

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law if a genuine understanding of these issues is to be arrived at. A legal-doctrinal study, preoccupied with forms and structures, is unlikely to provide an insight on how the enterprise functions, and therefore unlikely to suggest solutions or policy which have any real relevance. This is not to deride the value of intelligent doctrinal studies, for one problem is the lack of knowledge of the contours of public enterprise law. One has to look at the world of rules, and then the universe of action, and the relationship between the two, if one is to make a useful contribution to knowledge and policy about public enterprise. In a situation where the legal rules are inadequately developed, or not truly reflective of practice, or where legislative formulation can hide true purposes,¹ it is especially important to adopt such an approach. The framework within which research on public enterprise is carried out must incorporate the environment external to the public enterprise. The external environment must include but not be confined to the general political economy. The internal, formal and legislative provisions cannot be appreciated except in the general, larger, political-economy context. Public enterprise is a device capable of different uses, and these uses are determined by various factors. The key factors include the mode and the relations of production, the nature and alliances of the ruling classes, and the access to and control over the state apparatus. Ultimately, the functions of public enterprise must depend on the nature of the state. This helps to explain the apparent paradox that both countries with socialist as well as capitalist aspirations employ the device so extensively. There are wide-ranging similarities in institutional and structural arrangements, a factor which tends to mask the important differences in purpose. The political economy helps to define the purpose. But it does more. It explains the constraints within which public enterprise operates. To a large extent, public enterprises in developing countries reflect the weakness of the general economy (which they are allegedly set up to redress), and its inability to achieve an autonomous growth. But it is easy to see the weaknesses and failures as those of public enterprise, if not actually inherent in them, rather than as endemic to the situation of many developing countries. In particular the foreign external constraints are overlooked, although many of the problems of public enterprise are the result of the weakness of the national economy due to its dependence on the international system.² The external factors are also germane in that many public enterprises are really forms of joint venture with foreign private capital, and have come increasingly to constitute an essential component in the legislative and administrative regimes for foreign private investment. They are not all public enterprise. Just as in many western countries, the infusion of state capital and control in the economy through the organisational forms of private enterprise serves to hide the degree of state subsidisation and interference in economic enterprises,³ so in many developing countries, the use of public enterprise forms by private groups tends to hide the dominance of private and generally foreign interests.

It is important to bring another perspective to the study of public enterprise, as indeed of all legal phenomena. Laws call into existence particular institutions, and give them particular forms. But how these forms develop and how the institutions operate is not easily controlled or

influenced by the law. Much legal as well as social-science research is dominated by an instrumental view of law, with somewhat unidimensional notions of its purpose, agencies and sanctions. But once an institution has come into existence, it is subject to various pressures and pressure groups, and can often be co-opted by interests which it intended to fight or moderate. It is seldom possible to predict the consequences of a law, for it is difficult, if not impossible, to draw a complete map of the relevant universe. The dynamics of an institution or law have to be carefully observed and analysed. It is particularly important in research on public enterprise that a complex set of institutional relationships, ranges of decision-making, interest groups, and the changing political and economic complexion of ruling elites are recognised and taken into account.

The importance of public enterprises lies largely, although not exclusively, in their impact on the economic system. But it is of course not the only form of state intervention in the economy, although it is among the most visible. The building of the infrastructure through the use of state revenues, concessional fiscal rates and even the support of the freedom of contract are forms of state intervention. It will help us to arrive at a theory of public enterprise if one looks at it as one of the several forms of state intervention in the economy. In an interesting study, Seidman has tried to show how extensive state intervention, often through various forms of public enterprise, was necessary in Kenya for the exploitation of the colony by the British, while the same purpose was achieved in Ghana without such direct intervention, was indeed achieved through permitting the legal freedom to contract.⁴ Public enterprise for state participation in industry may be a new form, but it is a new form for old purposes: the intervention of the state to achieve certain social, political and economic goals. While this illustrates that the state is never neutral and that it encourages, promotes or induces certain forms of growth, favouring particular groups or classes, problems that public enterprise gives rise to are qualitatively different from those caused by other forms of state intervention. In such a context, it is worthwhile to examine the alternatives to public enterprise, and to make an attempt as to why this is becoming the preferred form.

It is suggested that research on public enterprise would profit from paying attention to the themes and propositions set out below. Many of the propositions are meant to start lines of enquiry, rather than be taken as definitive conclusions. Nor is it my purpose to suggest that most of the questions and issues traditionally discussed and analysed by lawyers are irrelevant or not worthy of attention. This paper is essentially a plea to place these problems and issues in a wider context, so that the relationship of legal to societal issues becomes clearer. The paper does not claim to cover all the issues which are relevant to an understanding of public enterprise in this broad context.

Public enterprise and other forms of control

Form and structure are happy hunting grounds of lawyers. In particular much ink has been squandered on whether the departmental, public corporation or the company form is the most appropriate form for public

enterprise. It is proposed that the debate about the form and structure should be cast in a wider framework. At least two dimensions need to be explored. One is the choice of the public enterprise form as opposed to other forms of state intervention (which will be discussed in this section) and the other is a set of issues internal or closely related to the public enterprise form (which is discussed in a subsequent section).

The question may be raised, why is public enterprise becoming (as it seems to be) the preferred form of state intervention in the economy? A variety of reasons are given for the establishment of public enterprises: to fill the gaps left in the economy by private enterprise, either because of the size of investments required or because of the unprofitability of the project, to provide a basic infrastructure for the economy, to promote greater national economic independence, to provide some measure of check over or at least competition with the private sector, to obtain greater control over the economy, to ensure a more balanced distribution of industry and its rewards. It may be argued that public enterprise is not a *sine qua non* for the achievement of these purposes, except in one case. If the policy is to create a socialist economy, there is likely to be little alternative to public enterprise, where it is a necessary but not sufficient condition. But in very many countries, the purpose is often the very opposite: paradoxically, state enterprise is used for the development and strengthening of the private sector.⁵ In so far as the general aim is the control or guidance of the economy, other tools are available. The "alternative approach" would look at the various kinds of control open to the government with a view to some cost and benefit analysis. Various regulatory or prohibitory methods may be able to achieve as much with greater economies of time or money. The "alternative approach" would emphasise the importance of clarifying the objectives of public enterprises, and establishing the criteria for evaluation of success.

One can draw two models of control of an economy. The first is where the state does not itself take over any sectors of the economy, but seeks through a variety of regulatory and other mechanisms to influence the conduct of the economic actors, who are private parties. The other model is where the state actually enters into production, and moves from control to the management of the economy. These models do not exist in isolation, one from the other, and indeed given the mixed economy of most developing countries, they exist side by side, sometimes reinforcing each other, and sometimes in some degree of confusion, it not actually in antagonism.⁶ But these models do approximate to two different modes of organising the economy, each with its own distinct characteristics, and it is worthwhile examining them as alternative forms of control over the economy. The regulatory model is characteristic of private sector economies in the developing countries, although the regulatory model can also be applicable in socialist countries.⁷ The regulatory model operates through a variety of controls on the private sector. These controls are administered by the government or its agencies. There is little systematic study of the controls or their operation, despite their pervasiveness. Myrdal has an interesting study on operational controls over the private sector in South East Asia, particularly India, and his suggestions and insights provide a good starting point for research in this area.⁸

Operational controls arise from the desire to control the development of the economy. In certain instances they also arise from the general weakness of the market mechanism, as in the industrialised enclave, or even the absence of the market mechanism, as in subsistence agricultural sectors. Finally, they arise from the existence of scarcities, of raw materials, foreign exchange, etc., requiring some method of determining and servicing priorities. In each case, the intention is not to let things take their own course, but to influence or control economic developments. Myrdal classifies controls into positive and negative, and discretionary and non-discretionary. Positive controls seek to promote some particular activity: examples are tax incentives, remission of import duties on raw materials, subsidisation through the price mechanism or more directly, etc. Negative controls seek to prohibit or restrict particular activities; examples are laws requiring licenses for investment, borrowing, expenditure of foreign exchange, excise duties, etc. As Myrdal recognises, there is no neat distinction between them, for what is negative control for one person may be positive control for another. As an example, one may take the now defunct East African Industrial Licensing system, under which production of certain manufactures could only be undertaken after a license from a licensing council. The effect of the system was to seriously restrict manufactures of the prescribed items, but the whole justification of the system was its positive character. By ensuring to a licensee a monopoly or semimonopoly position, it was hoped to induce him to undertake investments and production.⁹

Discretionary controls are those which depend for their application on a decision of an official or committee, who has more than one option. Non-discretionary controls by contrast, operate independently of the official: they are prescribed by law or some other general norm, and apply to and are available to all those who come within its ambit. Examples are bank rates, excise duties, tariff rates, and the general structure of tax legislation. They establish standards, and eliminate the need for decisions on individual cases or applications. Myrdal has a clear preference for the non-discretionary controls for they impose less burden on the bureaucracy, are easy to administer, give the parties concerned advance notice of the framework within which they have to make planning decisions, minimise opportunities for graft or corruption. In practice, discretionary controls tend to be the more common variety. Myrdal finds a basic reason for this in the desire of politicians and bureaucrats to abrogate power to themselves, and in an acquiescence of or collusion by the big business houses, who are able to manipulate the system to their advantage, at the expense of the smaller firms.¹⁰ Myrdal concludes that the system of operational controls do not achieve their purpose: there is little co-ordination of the various controls, so that often one tends to cancel another.¹¹ there is a cumulative tendency towards the discretionary controls, which leads to a complex and cumbersome system, and that the system is susceptible to manipulation by interest groups and is used for purposes different, if not actually contrary to those intended.

Myrdal's study points to the dilemma, if not the contradiction, of planning in a dominantly private enterprise economy. But more than planning is

sought; it is desired that there be some measure of control. In addition to the reasons that Myrdal gives, it could be argued that planning and control are difficult because we are talking of economies which are in no sense autonomous, and are subject to numerous foreign influences: capital, technology, markets. Under the circumstances, we may say that the search for control of the economy must lead us in different directions, one such direction being public enterprise. It is possible to explain the mushrooming of public enterprise in Tanzania in 1967 as a response to the failure or inadequacy of the regulatory mechanism. The Tanzania economic strategy after independence was the classic one of the state subsidising and regulating the private sector. Increasing dissatisfaction with the progress of the development plan based on that strategy led to a fundamental re-examination of problems and options, and resulted in the emergence of public enterprise. More than the control of the economy was, however, at stake in the Tanzania decision, as public enterprise was also seen as the key in the transition to socialism.

Public enterprise is, however, also used to bring about greater governmental control when there is no particular hostility to the private sector. In such cases public enterprise can be used to allocate resources on a differential or discriminatory basis, as in Kenya or Malaysia to promote the development of particular sections of the population.¹² In Kenya this has been combined with the regulatory method for in 1967 various laws were passed to prohibit or restrict the employment of or commercial practices by the non-citizens. The importance of public enterprise was at least twofold: the regulatory mechanism as set out in the trade licensing, immigration and employment legislation, was seen as a necessary but not sufficient condition for the emergence of African commercial classes. More positive material help had to be provided, like capital and technical services, which was done through public agencies. The second reason was that public agencies provided the government with additional centres of influence and power, for even within the general class of beneficiaries of the regulatory legislation, distinctions could be made on an administrative rather than strictly legal basis.¹³ In other words, public enterprise forms a basis of patronage and a more tightly controlled allocation of resources.

Public enterprise when married with private business in the form of joint enterprise may also provide a better basis for the control of the private sector. The government may thereby get increased access to important commercial information. It may minimize opportunities for over-invoicing, price-transfers, and tax evasion. It may be able to influence policy at the directly policy making levels. As Green has said, national capacity—whether in respect of financial mobilisation, technical and research expertise, or high-level manpower—depends on a host of decisions at firm level, it can hardly be enforced bureaucratically without a host of rules and of skilled personnel. "The latter at least are lacking in Africa and the former alone will prove either ineffective or economically damaging to the foreign firm and the host economy alike."¹⁴ There is the counter argument that joint ventures not only result in the private partner making the key decisions in the context of a weakened or less rigorously enforced framework of control, but that whatever

potential for control might exist by virtue of capital available to the government is squandered as joint ventures effectively de-nationalise state capital.¹⁵ We come back to this debate when we focus on the role of international capitalism in public enterprise.

Public enterprise is said to offer possibilities of control through providing alternative and competing institutions to those of the private sector. A vigorous and competitive public sector can establish new standards to which the private sector will be pressed to conform. Public enterprise can thus promote greater efficiency and competitiveness, and can be used to exact a greater responsiveness to national policies on the part of the private sector. It may of course be difficult to create a vigorous public sector with the capacity to discharge such functions, especially if it is to be treated on a par with the private sector, as it would need to if it is to establish a model for the private sector. The thinking behind Nkrumah's public enterprise was of this kind, and proved very difficult to implement, since the public sector starts with various handicaps.¹⁶

From a juristic point of view, somewhat simplistically stated, the difference between the regulatory and the public enterprise strategies is that the former is a method of control without ownership, the latter of management through ownership. It is true that the autonomous character of a public enterprise may mean that the method is still of control and not management, from the government's point of view, but the public ownership of the means of production very likely or perhaps inevitably leads to the blurring of the distinction. It is easy to believe in some circumstances that the only method of control is through management. In the regulatory control mechanism, the pull is towards generalised rules, even if there are large elements of discretion vested in the officials, whereas in the management method, broad discretionary power is essential. (It may be that when the public sector becomes large or dominant, 'management' has also to operate through generalized rules, as at this point there has to be a significant decentralization of economic decision-making). We spell out some of the legal implications of this distinction in a later section, but state here that public enterprise represents an aggregation of important resources under governmental control. It leads to the creation of direct economic power at the disposal of the government, whose essential purposes may be largely political. Whether political or economic, the creation of economic power poses a number of problems and issues for the investigation of which public enterprise provides a useful starting point. The concept of economic power is of course wider than that of public enterprise narrowly defined, for it would also include *ad hoc*, individualised, administratively determined interventions.¹⁷ One reason for the choice of the public enterprise form therefore over that of the pure regulatory method may lie in the additional levers it provides even if they are no more effective means of control. Just as regards the rest of the legal systems in Africa, the autonomy of the legal system is increasingly mitigated, qualified and eventually eliminated, by administrative and political directions and decision-making, so the public enterprise is seen to be more predictable, and more immediately controllable than operation through generalised standards.¹⁸

This is not to say public enterprise is necessarily more successful in the control of the economy than the alternative ways. Various studies in different parts of the world have shown that public enterprises have squandered scarce resources, led to new bureaucracies, and given little effective power over the economy. It may be that at bottom both the regulatory and public enterprise strategies suffer from the same basic problems and weaknesses: dominance of the external, largely foreign environment, corrupt and powerful local elites, who in collusion with foreign interests, manipulate the local economy for narrow class or group purposes, unresponsive political systems. The various implications of this position are examined in the following sections of the paper, including the alleged implication that law is exhausted as a category if this analysis is right.

The state, classes and public enterprise

It was argued earlier that as public enterprises are in a sense a direct emanation of the state, it is important to focus on the nature of the state for a true understanding of the purpose and operations of public enterprises. The focus on the state is important for various reasons. One, while public enterprise may give the impression of the state becoming involved in the economy, the fact is that the state is always involved in the economy, and the interesting point about public enterprise is why and when the state uses this form as opposed to other modes of intervention.¹⁹ Second, the state is no abstract or neutral entity; it is a politico-economic apparatus which is controlled and manipulated by certain groups; public enterprise would be used to enhance the interests of the groups which dominate the state, and may quite often be used to strengthen the capitalist system. Third, especially in the case of many developing countries, the state may be in the position of influencing the formation of classes and interest groups. The concept of economic power, which was developed earlier, is a key one here, for it is by use of the state apparatus that economic power is called into being in many developing countries, as opposed to the developed countries where the private economic power often created and used state economic power.²⁰

Various studies have looked at the class interest in the use and manipulation of public enterprise.²¹ The most extended study is Shivij's who has argued that the public enterprise has been used in Tanzania to break the economic strength of the Asian and foreign groups, and then used by the "bureaucratic bourgeoisie" to entrench itself as against both other elements of the petty bourgeoisie and workers and peasants.²² Leys has analysed the use of public enterprise in Kenya to show its crucial role both in the promotion of an African commercial class, and in the mediation with international capitalism. He has shown that merely protective legislation was not enough to promote African business; public enterprise was called in existence to provide more direct, operational assistance. At the same time he shows the limited role that has been ascribed to public enterprise, for public enterprise

functions within a framework in which the dominant role in the economy has been ascribed to foreign capital.²³ The first venture of Nkrumah's government in public enterprise, the Cocoa Purchasing Company, was used as an instrument to promote the ruling Convention People's Party. The resources at its disposal were used to buy votes for the party; those applicants who could show no affiliation to the party were denied any assistance. "In this way, the CPP took advantage of the small farmers' financial predicament to build a patronage machine. Politically screened farmers not only were given instant credit, but if their loans fell into arrears, no penalties accrued. Loans were given in excess of statutory limitations."²⁴ The use of public enterprise for patronage purposes in Nigeria has been well documented,^{24a} so much so that Udoji has declared seriously that it would be a good idea if governments were free to distribute a certain number of sinecures, to pay off political debts, etc., instead of using appointments within the public sector for this purpose.²⁵ Schütte has discussed the use by political and bureaucratic elites in Northern Nigeria of public corporations to further their own interests, and points out that the Nigerian corporations have been a device to extract a share of the profits of the peasants and farmers, to be used for the enhancement of other groups, particularly the commercial and industrial.²⁶

While it is thus clear that public enterprise has to be seen largely in political terms, there is unfortunately limited analysis of the nature of the state in the developing countries, of class formations, and of the precise uses of public enterprise.^{26a} It is important to distinguish the use of public enterprise as a minor spoils system from its use to systematically build up an economic base for a political or other group. There is similarly a tendency to lump too many of the elite groups together, as if they were a class with common interests.^{26b} Certain clarifications are necessary if more light is to be thrown on the issue.

The central importance of the state is well recognised. Both Leys and Shivji refer to the Bonapartist situation in many African countries, when the social groups are fluid, are in the process of formation, and where access to and even more, the control of, the machinery of the state is crucial.²⁷ Those who have the control of the state, the political and bureaucratic groups, are identified as the important groups, often as members of the same class. It is stated that these groups do not have an independent economic base, but use the state resources to build one, and hence are referred to as the "bureaucratic bourgeoisie".²⁸ This approach has been criticised by several writers. Green has argued that it is wrong to lump the bureaucracy and the political elites together, and that the power of the bureaucracy and the political elites considers "the important point about the higher echelons of the state apparatus is less their class origins or ambitions than their specific function in relation to the ruling alliance of classes and class strata. Concentrating on the tendency of state officials to try to acquire property is apt to divert attention from this more important point."³⁰ According to him, the Kenya bureaucracy understood the operation of modern economies, the aggregation of resources in corporations, the relationship between different modes of production, and their own key role as bureaucrats in determining these relationships. In other words, they were more involved in the classical

functions of the state and its bureaucracy, than that of a class of entrepreneurs. To some extent they determined the access of the latter to state resources. Perhaps the most striking criticism has come from Szentes who questions how far the elite can be called a class or even a class in formation, since it does not really have the means for the reproduction of itself as a group. "The real question is not whether the emergence of the elite is or is not a source of class formation, but rather: for what class it is a source and whether this is a new and independent one".^{30a} It can either promote capitalism, in which it will become part of the bourgeoisie rather than an independent class, while if it fights against capitalistic relations of production, as well as against socialistic development, the outcome is complicated, but unlikely to be that of a self-perpetuating bureaucratic or managerial elite.

The Bonapartist analysis leads to a conclusion somewhat different from Shivji: a fluid and somewhat changing constellation of interest groups. The dominant groups are seldom totally united on all points; they compete as often as they collaborate; the alliances shift; some ruling groups are more coherent than others. Green has proposed analysis in terms of "ruling coalitions" and suggested that coherence and consistency in policy will vary with the security which the coalitions feel and enjoy. Thus the Nigerian and Sudanese coalitions manifest confusion and inconsistency, as contrasted with the Kenya and Tanzania ones. The notion of "coalitions" also suggests that various groups have to be placated at various points, and that policy does not always have a sharp and unidimensional edge. Sometimes the coalition is unclear as to what it wants, or how to get it. This is one explanation of the mess of public enterprise under Nkrumah, at least in his early years. On the other hand, the establishment of a public sector, especially if it is justified by socialist or nationalist motives, may have a tendency to increase pressures for progressive policies, despite the intentions of the coalition. (Shivji recognises this as one of the few positive results of the Arusha Declaration and nationalisations following it.) Moreover, as the size and importance of the public sector increase, the stability of the coalition becomes tied to the success of that sector. Narrow and immediate class interests may then need to be sacrificed to "wider" progress and development to placate public opinion and to maintain credibility in the policies of the government. It is also possible to imagine an important or even a radical change in the situation which would change the purpose of public enterprise (as indeed of laws generally). In his later years as President, Nkrumah was beginning to use public enterprise in a more coherent manner with socialist aims, while Chile provides an interesting case study of the effect of a changed ruling group on the use of public enterprise. Chile has had for a long time a general development purpose public corporation (it is in fact the oldest general development corporation in an LDC). It was set up to help strengthen the free market system, and one of its important functions was to establish new economic enterprises and when they were successful, to sell them to private groups. But when Allende came to power, it was one of the principal means whereby he was able to bring banking, steel and other important areas under the state sector, since he was unable to get new legislation from the Congress. Similarly, the independent Kenya government has been able to use some

colonial legislation which was intended to prevent the economic development of Africans, to extent protection and indeed privileges to Africans.³¹

To get at some of the issues raised above, it may be helpful to look at the relationship of the public sector to the private sector. How far is the public sector in a subordinate position; how far are the modes of operation, remuneration, etc., defined by the private sector, for the public sector; what are the terms on which the public sector competes with the private sector. The contradictory nature of public enterprise in the Kenya type of political economy is well brought out by Leys in part through examining its relationship with the private sector. The conditions of equality between the two sectors in Ghana during Nkrumah's time ("the co-existence of the two sectors") gives some idea of how public enterprise was conceived. The changing relation between the two sectors in Tanzania, towards the superior position of public sector and its role in defining the modes of operation, is instructive and provides an indication of the trends. It is also important to look at the magnitude of resources allocated through the public sector. The small amounts that are channelled through the public sector in Kenya and yet its importance at certain levels of Kenya society and economy are both revealing. In fact it is only a handful of countries which allocate other than a marginal role for the public sector, even though the resources that are allocated may be of considerable political significance.³¹ It would pay to give some attention to the personnel of the public sector, and to examine the membership of the boards. It will be argued below that some attention needs to be paid to the decision-making process. The role that is found for the workers may be revealing, as well as the exact nature and extent of political as opposed to bureaucratic direction giving or of less overt interference.

The notion of economic power as outlined above both highlights the importance of political and general controls over and accountability of the public sector, as well as indicating directions in which control and accountability may most promisingly be sought. In the common law system, control over public enterprises is ultimately sought through control over the government. Political parties play little direct role. In the developing countries where there are dominating one-party systems, a major problem may be the establishment of political as opposed to bureaucratic controls over the public enterprise. Another problem is the control over the government itself, an aspect which tends to get neglected in the literature, but which assumes a major importance in our analysis of the state. One reason why control over public enterprise is weak is that control over governments is weak in most developing countries. The political and economic factors suggest that the search for control is no simple matter, as is sometimes perhaps assumed by lawyers. We need to pay more attention to the decision-making process, and we need to know more about the groups who share power and make decisions. In particular, worker participation issues have to be seen in the context of sharing power and enhancing enterprise accountability, rather than in terms merely of good industrial relations. How far worker participation does perform this function depends on the political consciousness of the worker.

The issues raised in this section cannot of course be adequately examined

in the purely national framework. They need also to be seen in a wider context taking external and international factors into account.

International capital, public enterprise and the domestic economy

It is clear that in Africa few economic activities can be divorced from the international capitalist system. Therefore the relationship between it and public enterprise, and through that, the impact on domestic economy must be one of the central themes of research. Much of the discussion on this point has centred on the question of management contracts, which are important, but perhaps not the most significant factor in the relationship. It is necessary to draw up a fuller profile—the impact of international and western financial institutions on the establishment and choice of public enterprise forms (e.g., for various reasons the World Bank may prefer to give loans to an autonomous public agency rather than the government as such; it may bring pressure on government to enter into particular transactions with the multinational corporations, as in the Volta River project in Ghana; terms of tied aid may force a developing country to collaborate with multinational corporations). It would be fruitful to examine the use of public enterprise form during the colonial period, especially since the second World War (particularly for the extraction of raw materials from the colonies). The analysis of the equity structure, control and management of public enterprises would help to indicate the role of private capital, and enable one to test the hypothesis mentioned earlier that where as in Europe the form of state intervention in the economy through private sector institutions helps to hide the extent of state participation, in Africa the converse is true, i.e., the use of public forms hides the extent or influence of private capital, although of course public enterprise may not have been set up as a camouflage.

The role of public enterprise in mediating between foreign capital and the local economy is important in significant part because there is now widespread feeling that international capitalism has been responsible for the underdevelopment of the Third World countries, and continued association with it on the part of these countries will merely perpetuate and entrench their dependency and underdevelopment.³² Even those who consider that foreign capital can deliver useful assets, recognise that these assets would not be automatically delivered; the host country has to be vigilant and negotiate with care. It is argued that a key to the understanding of the phenomenon of public enterprise (at least in the African context) is its relationship with the foreign capital.³³ The West has a continued need for investments in Africa, to procure raw materials, to find markets, and generally to ameliorate the contradictions of the western capitalist system.³⁴ On the other hand, the ruling elites of the developing countries perceive for one or another reason, that foreign investments are important for the development of their economies. So in the 1960s, under promptings from the World Bank and

similar institutions, most countries adopted codes of investment protection legislation, to attract foreign capital. While other legislation purported to provide some control over such investments, the general effect was to give a fairly free hand to foreign capital. Due to rising economic nationalism, the interests of the elites, the need for greater control over the economy, the shrewdness of the foreign capitalists, the mode of foreign investment changed from sole and direct investment to various forms of participation with local groups, prominently state institutions. The local elites were able to present an image of radical posture and policies by extending the public sector while foreign capital obtained more security, more favourable application of controls legislation, better access to local markets and finance, and a better public image. It is argued that while the modes of investment may thus have changed through the emergence of public enterprise, the reality has not, since the foreign interests continue to drain off the surplus in equal if not greater proportion; and often without the previous investment risks. Indeed, one can go further and say in that in so far the development of technology and the nature of the organisation of the MNCs now push them towards sale of technology and licenses, and occasionally consultancies, public enterprise provides an ideal form for their new activities, since in many countries there are few private groups with whom the MNCs could collaborate on this basis.³⁵

We explored the nature and interests of the local elites in the previous section, but here we notice that it does seem that public enterprise is well suited to marry their interests with those of foreign capital. (In some cases of course the MNCs may wish to operate on their own, and at other times the initiative for partnership, which often means the sale of part of an established MNC's equity to the government, comes from the government. As Leys says in his study of Kenya, "When foreign investors were confident of the profitability of new investment within the level of protection offered them, they often tended to prefer to do without government participation. When, however, they foresaw that further protection would be needed, or that whoever first obtained government participation in a still competitive field would tend to get special protection at the expense of the rest, they were eager to secure government participation." p. 133). Growing literature on management contracts, which constitute one of the main links between public enterprise and foreign enterprises, shows ways in which public enterprise, wittingly or otherwise, serves the interests of the latter.³⁶

It is, however, necessary to consider seriously the hypothesis that public enterprise is established to promote greater national autonomy and to moderate the ill effects of international capital. In Tanzania in 1967 the expansion of the public sector was inspired by such considerations. It is necessary to examine (a) how far such aggregation of state resources does succeed in this purpose; and (b) if it does not, why not. How do public enterprises which are set up for broad national goals get co-opted by international capitalism? What does it tell us about the nature of the institutions of public enterprises, their modes of management, etc. A historical perspective here may be important. When Tanzania and Zambia undertook their first important nationalisations in 1967 and 1969 respective-

ly, it was, and was so regarded, as a bold step, and potentially important on the road towards national autonomy. Subsequent experience showed that expectations from equity control were unrealistically high, due to continuing dependency on foreign technology and management skills, but also bad negotiations leading to the nationalisation measures. But the situation has not rested there, and each country has taken steps to re-negotiate old agreements, improve its own managerial capacity, and move towards a better overall planning process. Nor is it always necessary that there is a basic incompatibility in the interests of the foreign investors and the host country, at least in the short run. On the assumption that total disengagement from the west is an unlikely probability, public sector/private sector joint ventures may well provide a starting point for developing countries anxious to acquire new technological and managerial skills, as well as some measure of control over foreign investors.³⁷

The writing on management contracts, while it makes a forceful point, needs to be supplemented by a consideration of the dynamics of the situation. It is necessary to isolate a) poor expertise, negotiating skills and experience; b) the weak bargaining position of the developing countries; c) the corruption of local elites; d) technology dependence, etc., as factors explaining the deficiencies of such contracts. But it is unrealistic to assume that a developing country must remain helpless in the face of such difficulties. Given suitable social formations, the will and expertise, improvements can be affected. The question remains whether there are limits to such improvements. One needs to consider alternatives: is the importation of foreign skills, technology, capital likely to be on more favourable terms if this is done purely through the medium of the private sector? Is state leverage more effectively deployed through direct negotiations (i.e., public enterprise) than the regulatory mechanism (e.g., the general legal regime for foreign investments)? More broadly, it is necessary to examine how many ills of public enterprises can be blamed on international capital. Mismanagement, certain forms of corruption, and lack of co-ordination may arise from causes quite independent of foreign capital, and if any progress is to be made in dealing with these deficiencies, they ought to be recognised as such.

The criticism of the role of foreign capital assumes that in various ways its interests are in conflict with those of the developing country. It is difficult to talk of the interests of the developing country as a whole, for different groups in that country may have different interests.³⁸ As indeed is implied in the critique of foreign capital, its interests coincide all too comfortably with the interests of the dominant local elites. The criticism is therefore not that public enterprise is not successful, but that it is too successful. The real point of attack is thus the policies deliberately pursued through the public sector. Leys has shown how the Kenya elite is motivated by clear notions of the development of that country as a "periphery centre", or as sort of sub-metropolitan centre. Such a strategy obviously requires collaboration with international capital, in which collaboration with public enterprise plays an important though not exclusive role. The interaction between local elites and foreign interests goes a long way to explain the nature of public enterprise.

While much of the attack on the international capitalist connections of

public enterprise in developing countries is justified, there is however, a danger of overdoing the argument. In many countries in Asia and Latin America foreign participation is not the rule, while public enterprise has no better record than in Africa. Some studies of Nigeria and Ghana have argued that in fact the more successful of the public enterprises in these countries have been those involving foreign partners.^{38a} But more seriously, the attribution of the fault to foreign partners detracts attention from many internal problems. Inquiries into the performance of public enterprise in various countries show a record of inefficiency, corruption and maladministration. There is often a lack of sense of responsibility among the officials of public enterprises. Public corporations have not functioned as a form to draw persons with industrial and business expertise into the management of state enterprises; political leaders or civil servants have been the key officials, and have lacked the necessary management skills. If the management and negotiating skills could be improved, both the internal and external defects could be ameliorated. One tends to talk of foreign capital as if it were an undifferentiated category, but clearly there is room for competition among various foreign companies. Attention needs to be focussed on the precise mechanism and terms whereby the developing countries are exploited and attempts made to improve the balance in the favour of the latter.

Public enterprise, law and the plan

At one, general level, the justification for public enterprise in Africa is that the governments must actively promote development, move from the "law and order" approach to a mobilisation and development one. It must therefore plan economic development. Most developing countries engage in some form of economic planning, have special ministries for the purpose, and produce five or three year plans. Public enterprises is one of the key instruments to promote and manage change. The relationship of public enterprises to the plan and the planning process becomes a matter of particular significance. For one, it throws some light on the seriousness of the process and the plan, for public enterprise is one of the few directly operating agencies of the government, and if its activities bear no relationship to the plan, this is good evidence that the planning process is not a serious exercise. For another, the specificity in the plan in relation to public enterprises will tell us about the nature of planning and its scope: whether it is "imperative" or "indicative", whether it is partial or comprehensive, the mix between private and public sectors, etc.

It is probably true to say that in few countries is planning a realistic exercise, i.e., one which actually determines how their scarce resources are allocated, investments made, pricing and dividends policies declared, etc. Nor is it likely that any targets, quantitative or qualitative, are set by the plan for public enterprises. In few countries are the enterprises themselves consulted about the plans which they are supposed to implement.³⁹ A study of planning

in Africa would be useful to establish some points about the role of public enterprise in the national economy. It is now argued that planning does not mean setting of targets, but is a process, in which the resources available are examined and their use determined in relation to priorities, that errors are spotted and remedial measures taken, and that it is essentially a continuous exercise in projection, evaluation, and correction.⁴⁰

Apart from the general issues mentioned, how far the plan deals with and provides the agenda for public enterprise is important in its implication for law. Can it for example be argued that as the planning process becomes well established, as there is more centralisation of decision-making, and as more technical, economic and financial criteria are employed in resource allocation, there is inevitably a shift in power and influence away from courts and quasi-judicial tribunals, and lawyers, to technocrats? Advising private or public clients becomes less important than making a case to the bureaucrats (although it is possible to underestimate the importance of skills of negotiations by lawyers in the private sector economies). It is also likely that if the planning process is taken seriously, many of the controls over public enterprises would come less through general standards set out in legislation or regulations, than the budgetary and financial processes, especially in so far as finance is likely to be a scarce resource. As the plan process becomes effective, is the autonomy of the public enterprises reduced?

The relationship between law and the plan can be examined at another level. The imperative of the plan is often an argument for vesting discretionary powers in public authorities and officials. While the plan may call for discretion, how far does it structure the exercise of the discretion? In so far as the law is silent on the criteria whereby the discretion is to be exercised, how far does the plan provide guidance? If both the plan and the law are silent, how far are alternatives available, especially a national or ruling party ideology? The role of ideology in fashioning and structuring discretion is a much neglected topic. In so far as public enterprise is usually justified in terms of general policies and indeed of ideologies, one would expect that ideologies would provide guidelines to the exercise of discretion. It may be that in the early stages, when appropriate modes of operation are being worked out, legislation cannot be counted on to provide the standards, and there has to be a reliance on the general aims in ideology and the plan.⁴¹ Indeed, in so far as the general aims of an enterprise are concerned, legislation may be of little help, since the tasks of the enterprise are set out in broad terms. (A frequent criticism by lawyers and others of public-enterprise legislation is that it is not specific on the functions of the enterprise).⁴² Sometimes an enterprise is given too many things to do, some of which may seem to be in conflict. Goal articulation becomes an important matter. What is the relationship between law, ideology and the plan in this regard? What are the modes for the articulation of goals and the reconciliation of apparently conflicting goals?

How does the law go about translating the plan? Here a great deal depends on the nature and functions of the plan. At one extreme we have the Soviet kind of central planning where the plan is comprehensive, sets out firm production targets for the different enterprises, and is binding on the

enterprises. It thus enjoys the status of legislation, indeed of superlegislation. In some senses the implementation of the plan takes precedence over other legislation and legal rights, so that most transactions, contracts and liabilities are interpreted subject to the needs of plan fulfilment. The dominant status of the plan in law has given rise to various features of socialist legal systems: the arbitration of disputes between public enterprises by special tribunals; the emergence of the mandatory contract; the emphasis on specific performance as a remedy for breach of contract; division of property into various forms of ownership; the punishment of certain kinds of conduct through criminal rather than the civil process⁴³.

In African countries, the plan does not enjoy the status of law (although this does not necessarily mean that they are not influential or indeed decisive; the lack of legal standing may be more a reflection of the low status accorded to legislation or the legal process).^{43e} Few plans explicitly address themselves to problems of institutional development and implementation of its policies. This is only in part a result of the fact that the plans are indicative. More seriously, it may reflect the dominance of economists in the planning process, with their notorious neglect of institutional features of development. This does not mean that the plan does not have an impact on law, for various new institutions may be established, new laws enacted, e.g., to attract foreign investment, regulate the location of industry, control prices and wages, etc. But these do not grow directly out of the plan, as it were, and their implementation and interpretation are not necessarily controlled by the plan.

In spite of the absence of a direct relationship of this kind between the plan and the law, one may hypothesise that certain implications for public enterprise and its law follow from the planning process. It has already been suggested that the plan may lead to a diminution of the autonomy of the enterprises. It may also be stated that while public enterprise is said to follow from the needs of the plan, that it is in fact the proliferation of public enterprises (whose establishment is often not related to the plan) that gives greater urgency, relevance, and possibly coherence to the planning process.⁴⁴ Certain it is that in the absence of a substantial public sector, the plan can seldom go beyond exhortation. The existence of a substantial public sector creates the need to determine priorities and to allocate resources according to some rational plan. This process in turn has a major impact on the law. As the law responds, even in an *ad hoc* fashion, to the needs and problems of an emerging public sector, particular patterns begin to emerge, which become defined if the public sector maintains its position in the political economy of the country. Some of these trends will be touched on in the following sections.

Form and structure

Much of the debate among lawyers on structure has centered on the relative merits of different organisational forms, principally the government department, the public corporation and the company. Even though the earliest form of public enterprise was in most countries the departmental

form, there now appears to be a consensus that it is not a very appropriate form. The case against the department form is that it is too bureaucratic, prone to delay, has rigid financial regulations, and does not provide room for commercial initiatives that seem necessary in a business enterprise. Sometimes, particularly in Latin America, the case against the department is that it is part of the structure of administration which is corrupt and incompetent, and that it is necessary to set up new independent institutions which would be free from that machine. While the textbook case against the department form, and the case for more flexible, and autonomous institutions, is well-known, it is not obvious how the different forms actually operate and what the practical significance of the differences are. Certainly many of the strictures against the department form are not justified. It is possible to have separate budgets, extensive delegations of power and authority are possible, etc. To a large extent the textbook case is based on the European economies, where the basic system is well established and few people want public enterprise to introduce any qualitative change. Autonomous institutions, conforming largely to the modes of the private sector, but redressing the weaknesses of the market mechanism without challenging it, seem well suited. But the major objective of public enterprise in the developing countries, whether informed by socialist or capitalist aspirations, is not to make minor adjustments to the system; the overwhelming case for public enterprise is to transform the system. Given the odds which public enterprise must work against in these circumstances, it is important that it be strongly backed by the government. Equally, since the public enterprise is regarded as a key instrument of government policy, its autonomy has little constitutional or economic justification. The case for autonomy has to be based on considerations of efficiency and responsiveness to policy. A heavy price may be paid for the distance between the government and the enterprise. The adoption of formal autonomous institutions leads to *ad hoc* interventions, increasingly blurred lines of responsibility and thus to the evasion of responsibility.

The debate about the relative merits of the corporation and the company forms is likewise beclouded by *a priori* assumptions. Thus it is assumed that public corporations are more responsive to the broader governmental machinery, ensure a better accountability of the institution, are easier to operate since they are forms for public enterprise, while such use of the company is regarded as somehow improper, since the company belongs to the private sector. It is only if the government intervention is that of a joint venture with the private sector that it may use the company form. There may be no neat distinctions: public corporations often carry out their functions by establishing fully or partly owned companies, while the companies' code sometimes applies to public corporations.⁴⁵ It is in fact, as Hanson has said, extremely difficult to come to any conclusions on the relative merits of different forms. "Practically every known type of public enterprise is to be found working well in some circumstances and badly in others, and it is extremely difficult to say to what extent the performance of a particular enterprise has been affected by the form that the political authorities have given it, as to isolate this factor from all the others is usually impossible."⁴⁶

Nor is it easy to identify the criteria for the choice of form, and quite often the form seems to be an accident of history (although in some countries careful consideration has been given to form, as in India where the company form is preferred).

The debate is sometimes rephrased in broader terms of the relevance of form. A study of public enterprise in Ghana sought to answer the question whether Ghana's use of the public corporation form had been responsible for the poor record in the public sector. The author's conclusion is that the form contributed in some measure to the failure, but also that the adoption of the form by Ghana led to waste of legal and administrative resources.⁴⁷ Another point of view is that the form is irrelevant. Karl Renner, for example, has argued that the form of association is "merely an empty legal frame",⁴⁸ and can be used for different purposes. His editor, Kahn-Freund disagreed, and considered that the form was important and relevant, for it gave a qualitatively different character to the assets ("large numbers of shifting morsels of capital", p. 225) that were consolidated within the framework of the form.

The debate is tied to the wider, and more important, question of the impact of form (or "superstructure") on the content or the base. The question arises in different contexts: is it possible to bring about fundamental changes in society through law and institutional forms? how far can a society committed to socialist development continue to operate through economic institutions of the colonial or previously capitalist society? Underlying much of the debate among lawyers and public administrators and the structure of public enterprise is the assumption that the form is crucial, and a UN conference on public enterprise (1954) went on record that "the single most critical control point is the law, decree or other basic authority providing for the creation, of public enterprise. This is likely to determine in large measure all other organisational relationships."⁴⁹ At a subsequent UN conference (1966) it was concluded that the alleged decisive influence of the law regulating the public enterprise. . . "has proved illusory", and "that there is indeed no discoverable correlation between the legal rights and obligations of a public enterprise and the quality of the performance which it achieves."⁵⁰

It is inherent in the nature of the mode of debate that conclusive or even tentative answers are not possible. That there is some sort of relationship between form and substance is undeniable, but it is more difficult to explain the dimensions and details of the relationship. The form is not merely an empty shell; it is a device for an aggregation of resources; creation of bureaucracies; the pursuit of goals and a vehicle for entering into relationships with other groups. In time the form can define and elucidate the underlying problems, if only by discovering its own limitations. The dialectics between form and substance need to be studied carefully. In one sense much of social engineering through law proceeds on the assumption that forms, backed by state power, can change the economic base. Is the form often so far removed from the underlying reality that it has no impact on change? What is the minimum fit between form and substance necessary to set some interaction in motion? A historical dimension may be helpful here. Public enterprises are subject to different pressures and constraints, and

perform different functions at different stages of the growth of a country, and it is unhelpful to suppose that the same form, and the same set of relationships, should persist through all periods. Control may be more important in the early stages of an enterprise, while greater autonomy may be required once the contours of policy and programme are clear. It is also possible that institutions which begin with considerable autonomy are brought under increasing control in the course of time, not only for economic reasons. As Green has suggested, a series of studies of firms/enterprises exploring key issues over a period can provide a useful basis for the analysis of form in relation to its appropriateness for different activities, e.g., banking, commerce, transport, agriculture, manufacturing; and the degree of consistency at time and over time, and the nature of change over time.⁵¹ The National Development Corporation (N.D.C.) of Tanzania provides a good case study. Its forms and to some extent functions have been changing over a ten year period. It started in 1964 as a standard joint-venture investment institution, with a wide cluster of functions, promoting investments as well as entrepreneurship, as well as a holding company. In the absence of other industrial corporations, and in the absence of an operating planning mechanism, the NDC became a primary instrument of government policy, in formulation and execution, and this fact was recognised and underscored by having seven key economic ministers on its board. It received 7 of the 12 largest manufacturing companies in 1967 after the Arusha Declaration, and its own previous investments began to mature. It was now required to have a majority interest in joint ventures. It functioned during 1967-70 as a vague large-scale company-promotion centre, but with unequal planning and management for subsidiaries. Chaotic relations resulted because of overlap of several sector ministries in the activities of the NDC. The size of and power concentration in the NDC produced anger, and there was political disquiet at the degree of the lack of its responsiveness to state policies. The period 1971-74 saw the spin-off of all non-manufacturing units to separate central management and planning corporations, e.g., hotels, wood products, mining, as well as the spin-off of industrial areas which were large enough to justify it, e.g., textiles group. Its board was reconstituted to bring it in line with other corporations, consisting largely of civil servants from the relevant ministries, and to play down the ministerial dominance. It was brought under a single sectoral ministry, and tighter central parastatal control. The process came to a head in 1974 when the top management was shifted out, and one of its civil-service critics was appointed as the General Manager (following the appointment in 1972 of one of its main political critics as the parent minister). It is clear that form and substance were closely interlinked in this process. At first the form was not very clearly thought out because the functions were not, while the broad framework of the form facilitated the expansion of the scope and activities of the corporation. This expansion in turn led to the reorganisation of form, especially with extensive ministerial representation, which recognised and emphasised the pre-eminence of the corporation. New political developments in 1967 and the greater attention to the planning process within the governmental structure highlighted the size and strength of the NDC, and led to further reorganisation, this time in the

direction of limited functions, both in terms of policy and jurisdiction. The decentralisation measures highlighted the unprofitable enterprises of the corporation, which had been cushioned and supported by its more profitable mining enterprises, which in turn led to more stringent procedures for future investments.⁵²

Another method whereby one can get to grips with the question of structure is to focus on the decision-making process. This approach is useful both to elaborate and highlight the concepts and reality of autonomy and control, and to demonstrate by what group and in whose interests decisions are made. Our attention is directed to the ways in which the government intervenes, and the kinds of decisions and matters in which it intervenes. It throws some light on the questions of centralisation and decentralisation, both in the relationship of the enterprise with outside agencies, and in its internal organisation, especially the reality of worker participation. It can help to draw a fuller profile of the hierarchies of authorities concerned with public enterprise. The legislation on public enterprise generally defines only the relationship between the enterprise and the government, but tells us little about how the government organises itself to guide and control the public sector, e.g., the role of the minister, the role of the Cabinet, and the coordination of the public sector. Nor does the legislation often spell out the relationship between the Board (especially its chairman) and management, a source of much confusion, inefficiency and resentment. An examination of the decision-making process would get us into these areas. It can also help to categorise enterprises by reference to the degree of centralisation or autonomy (e.g., highly centralised, completely decentralised, and positions in between), and thus to test hypotheses about the relationship of centralisation or degree of autonomy to the degree of accountability and efficiency. A historical dimension tied in the decision-making approach would help to test what one might state as an hypothesis: that it is inevitable that the autonomy of public enterprises gets eroded over time; that the larger the public sector, the smaller the degree of its autonomy. A careful analysis of the motives behind decisions and the lack of articulated criteria might help us to understand under what political and economic conditions autonomy gets eroded.

Decision-making has to be more broadly defined than how actually a decision is made. Svendsen in his study of decision-making in the NDC in Tanzania says, "Decision-making inside the organisation cannot be analysed in isolation from the general framework in which the particular organisation operates. It is also useful to understand that "decision-making" covers all the functions of the organisation, i.e., not only those measures which are presented for decision, but also the functions based on past decision, or on customary behaviour. Now and then very important decisions affecting the future operation happen to be made by the decision-makers in an indirect way so that it is only later (if ever) realised that a "decision" was made at that and that time in such and such a way.

"To arrange thinking on decision-making in a particular organisation the following major elements of the process may be separated:

1. the content of the decisions, i.e., the objectives of the organisation;
2. the criteria on which to base the decisions;

3. the structure of the decision-making, i.e., the internal procedures in the organisation and its relationship with other organisations;
4. the capacity of the organisation and the other organisations with which it is related, i.e., mainly questions of staffing.”⁵³

Using this approach, Svendsen examines the relationship between the corporation and the government, between the board and management of the corporation, between the corporation and its subsidiaries. Apart from the formal legal provisions, he concludes that the factors which determine who in fact exercise power depends on the availability of information, the availability of time to analyse the information, the staff and planning capacity of the institutions, the need and availability of financial resources. During the period under study (1964–68), many of these factors favoured the corporation, and thus it achieved a high degree of autonomy. Only if such profiles are drawn, both in relation to key decisions and over time, is it possible to get some idea of the significance of structure and form, and more especially control and autonomy.

The form is not independent of the larger socio-political factors, although it is not easy to isolate the importance of traditional forms and the legal legacy from more direct political and economic influences. There is little doubt that the legal corporation form owes its appeal to historical factors: Britain evolved the form, and it was used in the colonies and ex-colonies. The legislation as well as the rhetorical justification of it was taken over from Britain, and little thought was given to the very different politico-economic environment and the very different underlying assumptions of public enterprise in the ex-colonies. And the continued influence of the common law and legal education system and policies ensures that the form remains dominant. A changed political situation may affect the choice of form; a conservative leadership may prefer the company form, while a radical leadership may be intolerant of the autonomy implicit even in the corporation form. And yet that the form can persist despite changes of regimes is well illustrated by the example of Sudan where the form of the public corporation has held sway under conservative as well as radical regimes.^{53a}

The choice of form could be dictated by the relationship envisaged between the public and the private sectors. The company form for the public sector may allow for a closer collaboration with the private sector; it is also the more convenient form if the eventual destination of public sector undertaking is private ownership, as the transfer of shares is the easiest way to transfer assets. The choice of form can also be determined or at least influenced by external forces. We have already noticed the preference of Western loan agencies for the public corporation form; equally, it has been alleged that the East European countries prefer to deal with public corporations because the Communists do not “want to deal with capitalist forms such as private companies”.^{53b} Foreign private interests may also influence the form. They may prefer the company form, since it facilitates collaboration with local governments, its ideological connotations are more congenial for them, and it is a form in the structure and operation of which they have special knowledge and expertise. It also connotes a particular distance from the

decision-making machinery of the government, and so allows a greater scope to initiatives by the foreign private partner in cases of joint ventures. But here again it is difficult to generalise; a foreign private partner may prefer a corporation form because it hides the reality of its own participation; in certain situations the easier access that a corporation or even a departmental body provides to the bureaucracy and so provides ways to by-pass red tape for governmental approvals of licenses, work permits, exchange control exemptions, may lead the foreign partner to abandon the company form for a closer embrace with the government. And since effective control depends less on the legal form than on knowledge and expertise of the subject matter, the internal organisation of the enterprise, and the contractual relations between the private partner and the government, the question of the form may not much exercise the private partner.

Public enterprise and the legal system

In so far as the legal system provides the ground rules for the conduct of enterprises and the resolution of disputes, the nature and content of the system may become matters of considerable significance to the parties concerned. For years developing countries have been under pressure to "modernise" their legal systems, which has meant in practice the approximation of their system to those of the western industrialised countries, and of the establishment of legislative and fiscal regimes which favour private investment. The emergence of the public sector, even if assimilated to the norms of the private sector, does undermine the assumptions of the private enterprise oriented legal system. The strategy of the private interests may then be to retreat from a frontal attack on the legal system, but seek to mitigate its full impact through contractual devices. In its most extreme form, the contract may nominate a foreign system of law as the law applicable to a particular enterprise and the disputes in relation to that. Thus the entire domestic legal system may be opted out of. Lesser manifestations of this tendency may relate to contractual provisions to exclude the application of fiscal controls, tax legislation, work permits schemes, and important sections of the companies' code, as well as require disputes between the private and the public authority partners to be referred to some form of international arbitration. Depending on the extent and frequency of such contractual provisions, the incidence of the domestic legal system on public enterprise may be rather marginal.

The focus in legal scholarship on form and structure has obscured the larger impact of public enterprise on the legal system.⁵⁴ The problem may be that we have started with a particular theory of the public corporation and have been overconcerned to see if the theory is working or workable. As was suggested earlier in the paper, public enterprise (on the present scale) is essentially a new institution with its own demands on the legal system, and from the legal system, and in the process a number of solutions are proposed and decisions made. What is the cumulative effect of these? One way to get at

this enquiry may be to proceed with the state of the law before public enterprise emerges as a significant factor, which is to say, largely the French or English based law. Unlike socialist legal systems, the common law or traditional civil law does not start with a clear theory of public ownership of the means of production and of its management.⁵⁵ Some of the central concepts and institutions of socialist legal systems are based on a publicly owned and managed economy, and so are able to accommodate public enterprise in a systematic and coherent way. This can scarcely be said of the common law, which has a heavy private enterprise bias. The major institution for commercial and industrial activities is the company, the rules for which have been developed on the premise that the essential responsibility of the management is to maximise profits, and while various rules have evolved to protect the public interest, there is a basic reluctance to interfere with the internal affairs of the company. The management thus has very considerable autonomy.

The rules of contract and tortious and corporate liability were to a large extent determined by the needs of the private sector and the company form, although there have been some problems in adapting the criminal law to the company. In so far as the common law recognised alternative forms of commercial or business organisation, it was the public corporation (with a lesser role for partnerships and co-operatives). While the power to establish corporations is a prerogative power, and was used from Tudor days onwards, the common law developed relatively few rules to deal with them. The public corporation in its present form is a device of recent times, and derived largely from legislative activity. While in its structural characteristics it owes much to the company analogy, autonomy achieved through a board of directors, courts have played relatively minor roles in their regulation. Legislative and administrative controls have been considered more important, although the two do not necessarily work towards the same ends. It is perhaps the relative paucity of common law rules to deal with administrative behaviour as well as controversy about the proper role of public enterprise that explains the absence of reliance on a model of rules and dependence on discretion and *ad hoc* directives. But in so far as public enterprise occupied a small place in a largely private enterprise economy, it was not surprising that the courts applied rules by analogy from that sector, in instances when their jurisdiction was exercised.^{55a}

Another aspect of the common law that is relevant here is its attitude towards administrative discretion. The common law is biased against administrative discretion. This is not surprising, since administrative discretion is seen as a threat to lawyers, and it is lawyers who formulated the rules of the common law. In the late nineteenth and the early twentieth century, the courts were hostile to administrative discretion, as vested in licensing, housing town-planning authorities, etc., and tried to frustrate schemes for social and economic reform which depended on the exercise of discretion. But since the legal sovereignty of Parliament in Britain is basic, it was possible by legislative means to curb the intervention of the courts. While the courts tried to get round the rules excluding their jurisdiction, it can be said that as a rule that the courts either intervene on a narrow set of grounds,

the rules of natural justice, or stay well clear of administrative discretion. Unlike the US, where constitutional provisions have enabled the courts to formulate broad and specific rules to regulate administrative behaviour, African colonies inherited the narrow and limited rules to regulate administrative behaviour.^{55b} Since public enterprises are in many respects administrative authorities, and operate to a significant degree through discretionary powers, it might be expected that the courts would not take an active stance vis-à-vis them, and that gradual development of judge-made rules in this area was unlikely.

It is worth noting some consequences which follow from this state of affairs. One, that the most developed form for business organisation comes from private enterprise, which gives considerable autonomy to management. Second, many of the detailed operating rules of the legal system, e.g., notions of property, contract, tort, adjudication, grew up around private enterprise. Third, the strong position of the common law and the courts, under the influence of Dicey's notion of the "rule of law" which argued against any special rules or institutions of dispute resolution for public authorities, ensured that there was little specialised law to deal with quasi-business activities of public authorities, e.g., the relatively underdeveloped law of public contracts. Fourth, the device of a distinct legal personality for public enterprises, in itself a response (in part) to the inadequacies of administrative law (e.g., rather wide immunities from liability or litigation of governmental authorities) took them out of the regime of governmental authorities, without specifying clearly their submission to the regime of private authorities. The ambiguity between their private form and public functions (of the government-owned company) or their public form and commercial function (of the public corporation) was seldom resolved, leaving considerable doubts about the status of employees, application of protective legislation, e.g., rent-restriction laws, tax liability, etc.⁵⁶ It is not always apparent how the rules of liability, contractual capacity, etc., which were established to govern private sector entities should be extended to public enterprises or, on the other hand, how far rules to govern public institutions should be applied to public enterprises, when they have explicit commercial or industrial functions. What is regarded as the more appropriate analogy (which in turn would depend on the political economy of the country, but may also be significantly influenced by the inherited legal tradition) would determine various rules of their operation, the role of lawyers, the provision of legal services, dispute settlement, and thus the larger impact on the legal system. The legal theory of public enterprise is insufficient to solve the problems. In so far as there is a legal theory, it may be out of tune with the goals of or expectations from public enterprise. This is particularly likely to be the case in a radically oriented country encumbered by a legal system derived from the "metropolitan" country. The legal theory then, instead of solving problems, adds new ones. The political response might be either to devise a new theory, with its attendant rules, tinker as best as one can with the old one, or try to operate without one. What course is adopted depends on a number of factors: the size of the public sector and its strategic importance, the participation of outside, especially foreign, agencies, the strength and

skills of the legal profession, both within and without government, etc.

In so far as existing institutions, i.e., the corporation and the company are used, what happens to them? Do they undergo a qualitative change? Do they widen the gap between law and reality? Do they lead to the progressive disregard of the law? In Tanzania the government has used the company form extensively for public enterprise. At first the forms and rules of the private sector company influenced the government company, and only minor amendments such as those dispensing with more than one shareholder, general meetings, etc., were made. As more, and more substantive amendments were made, e.g., powers to modify articles and memorandum, transfer assets, special procedure for winding up, etc., two streams of company law emerged, one dealing with private and the other with government companies. As the government companies tended to become more important, they began increasingly to constitute the norm by analogy with which private companies were regulated. Thus governmental powers over dividend policy, compulsory investment in specified securities, registration and winding up, over public sector companies were extended to private companies. The two streams are beginning to merge again, but the pattern is that of the government company. The developments in Tanzania are to be explained in terms of the size of the public sector as well as the government's attempt to control the economy. Other countries may prefer to let the public sector be regulated in large part by analogies with the private sector.

The manner in which disputes between public enterprises are resolved may be of some significance. By clothing them with legal personality and conferring full capacity, it is assumed that they are subject to the court's jurisdiction, as indeed they are. But it is unlikely that one public enterprise will sue another in court, unless the basis of the economy has altered dominantly in favour of the public sector. In practice disputes will be resolved in informal or bureaucratic ways. Apart from reducing the load on courts, and limiting the scope of courts to influence the development of legal doctrines in the relevant fields, the effects of informal dispute settlement may be to de-emphasise the importance of established legal concepts of liability and remedies and ultimately of negotiated agreements and the related documents. New criteria may emerge to determine the relationship between public enterprises, in which the plan may play a more important role than the existing rules of law and the mode of their interpretation. If, on the other hand, the plan is not clear or authoritative, the relative political strengths of the parties may become the decisive factor. The increasing government control of the activities of public enterprises may seriously qualify the exercise of full legal capacity, modify the concept of property, etc.

In this connection, it is worthwhile to look at the provision of legal services to the public sector. One way is to let the private legal sector service the public economic sector, with each public enterprise free to choose its own lawyers. Another is for them to employ their own lawyers, and rely on the private bar only for specialised services. Or public enterprises could be required to take all or part of their legal work to a government department, the office of the Attorney-General, or a specialised public law agency, like the Legal

Corporation in Tanzania. How the services are organised has an impact both on the organisation of the legal profession as well as on the operation of the enterprises. In Kenya, for example, the public sector appears to have channelled its work to private African practitioners, thereby facilitating the emergence of an African legal profession in an otherwise tightly competitive field dominated by Asian and European lawyers. The result has been paradoxical—to strengthen the private bar, but at the same time increase its dependence on the state. In Tanzania, on the other hand, the establishing of the Legal Corporation to which all legal work of public enterprises has to be referred, has resulted in gross reduction of business for the private bar, and has led to some form of socialisation of the legal profession. It has also forced a reconsideration of the question of the entire organisation of the legal profession, especially as the shrinking of the private bar also posed problems for the provision of defence counsel in criminal prosecutions. As for the effect on the enterprises, one may argue that, when legal services are decentralised, whether through the private bar or in the individual enterprise and to justify and interpretation tend to favour the interests of the enterprise and to justify its plans, and thus central control becomes difficult. On the other hand, if the legal services are centralised in an institution which is subject to government control, the lawyers do not identify themselves so closely with individual enterprises, and show more fidelity to central agencies. It is also possible that such an arrangement reinforces the image of the lawyer as a technician and reduces his role to putting into "legal shape" decisions which have already been made. It is questionable whether this does not ultimately reduce fidelity to law.

This raises another point, the role of the legal system in public enterprise, especially during a period when rapid changes take place, institutional relationships are fluid, the optimum modes of operation have not become clear. An additional difficulty is that much of the inherited legal system is not responsive to an active and "pattern-setting" public sector, many of its assumptions and rules being antithetical to direct state intervention in the economy. There are at the same time increasing pressures on the economy from domestic and international sources. The governments argue the need for maximum flexibility, and are intolerant of firm rules and standards, which bind them as well as other agencies. There is thus a trend towards broad discretionary powers to be granted to the government, both at the political and administrative levels. As wide discretion is vested in officials, there is less concern to define standards and criteria for its exercise, and therefore legislation is less and less of a guide to the exercise of power. The notion of law as a system of rules is under erosion. This is not to argue that discretion is necessarily bad. Firm and clear standards may not be possible in many situations, and if the economy is substantially in the public sector, may even be unnecessary. Some discretion is always needed, and part of the question is as to the proper division of it between the government and the enterprises, which is, to an extent, to restate the problem of enterprise autonomy. Another question is the generality and specification as between different legislative orders—parliamentary legislation, regulation, and rule books or manuals. While it is not necessary that acts of Parliament carry a

great deal of detail, some instruments ought to address themselves more specifically to modes of operation, so that the importance of process and procedure, and evaluation of data is emphasised, as well as that there is a clear allocation of responsibility for decisions at various levels (and hence accountability).

The strain on the legal system comes from another factor, and it is potentially more significant. The growth of a state sector which is not accommodated within the legal system—for whatever reason—poses a grave threat to the relevance and indeed viability of the legal system generally. A number of factors which tend to make it difficult to operate through the legal system have been mentioned, and so long as these are temporary phases, the damage to the legal system may not be serious. But if the optimum or acceptable modes of operation which emerge after trial and error, are not institutionalised through the legal system,⁵⁶ there is the danger that law will enter a period of attrition. The damage will be not only to the legal system described as some kind of autonomous activity, but also to the state and public sector itself. The role of the legal system to consolidate changes through rules and institutions, and to act as a source of legitimacy for the exercise of state functions and power, may be jeopardised. Already, in the area of political and constitutional activity, the autonomy of the legal system has been eroded or abolished.⁵⁷ We do not of course know enough about the effects of disregard of parts of the legal system on other parts or on the system as a whole, but if the legal system is not used in the management of political and economic life, it is somewhat doubtful if it can survive as a viable system to regulate other sectors of a community. Whether diminution of the role of the legal system is necessarily undesirable may be open to question.⁵⁸ If, however, the legal system is to be rehabilitated, more than political will is necessary. There needs to be a different emphasis in legal education on the skills to be developed in lawyers, and, on the other hand, a general and wider acceptance that there is more to law than rules and technique.⁵⁹ But what more there is to law is not always clear, or at least is not above controversy. Even apart from neo-natural law adherents, it is often argued that the values of the law are reasoned decisions based on a careful assembling of facts and their evaluation, the absence of arbitrariness, the provision of standards and criteria so that there is predictability of action on the part of state and other authorities. Such an elaboration of legal values immediately highlights the dilemma for the legal system. In the attempt to maintain the relevance of the legal system, lawyers may seek to make law more instrumental, a technique to further the aims of economic decision-makers. In this task, they either provide for wide and rather unregulated discretion, or end up with a large number of *ad hoc* rules and institutions, unconnected by any general principles. They are thus forced into a compromise with what are regarded as the basic values of the law.⁶⁰ Whether the situation need be quite so paradoxical or contradictory and whether a blend of skills, imagination and commitment can provide a combination of relevance and legal values is a question which cannot be answered here. But that public enterprises raise the question in an increasingly acute form cannot be doubted.

Noter

1. See Fedder, "Counterreform" in Stavenhagen (ed.), *Agrarian Problems and Peasant Movements in Latin America*, 1970. Fedder's study deals, inter alia, with public agencies charged to implement programmes of land reform.

2. It can be said in general that there are two schools of thought on why public enterprise has been largely unsuccessful. One looks at the structure of the enterprises, the lack of managerial capacity, and governmental interference and political corruption. For examples of this approach, see Pozen, "Public Corporations in Ghana: A Case Study in Legal Importation", in 1972 *Wisconsin Law Review* 802-844; and the essays on public enterprise in A.H. Rweyemamu and G. Hyden, *A Decade of Public Administration in Africa*, 1975. The other school attributes the failure to the negative influences of foreign capitalist interests and the dependency of the third world countries on the international economic system. Examples of this approach include Issa Shivji, "Capitalism Unlimited: Public Corporations in Partnership with Multinational Corporations", Vol. 3 *The African Review* (1973) 359-381; Kwesi Botchwey, "The Dynamics of Public Corporate Activity in Contemporary Africa" (unpublished paper).

3. See Friedmann, "Public and Private Enterprise in Mixed Economies: Some Comparative Observations", in W. Friedmann, *Public and Private Enterprise in Mixed Economies*, 1974.

4. R.B. Seidman, "Contract Law, the Free Market and State Intervention: A Jurisprudential Perspective", Vol. VII *Journal of Economic Issues* (1973) 553-575. Seidman probably underestimates the surplus retained by Ghana's cocoa farmers. There is some evidence that cocoa generated considerable income for a class of cocoa farmers. See Polly Hill, *The Migrant Cocoa-Farmers of Southern Ghana*, 1963; R. Fitch and M. Oppenheim, *Ghana: End of An Illusion*, 1966.

5. For a detailed study of how this has been done for Kenya, see P. Nowrojee, "Public enterprise and cooperatives in Kenya and Tanzania: Some comparative illustrations", Vol. 5 *Eastern Africa Law Review* (1972) 141-175. In the Gulf states, the availability of large oil surpluses has led to the establishment of several public enterprises, but their purpose is to create a private sector economy. See M. Sadik, "Public Enterprises and Development" in Bahrain, Kuwait, Qatar, the U.A.E., and Saudi Arabia (mimeo., 1976, Kuwait).

6. Various sub-issues arise. What is to be the mix between public and private sectors? Should a government aim at a 100 per cent ownership of a limited number of enterprises or a smaller share of a larger number of enterprises? How far should the regulatory mechanism be relaxed in its application to the state sector? For a discussion of some of these issues, see E. Penrose, "Ownership and Control: Multinational Firms in Less Developed Countries", in G. Helleiner, *A Divided World*, 1976, and R.H. Green "The Peripheral African Economy and the MNC", in C. Widstrand, (ed.), *Multinational Firms in Africa*, 1975.

7. Under the recent changes in economic systems of several socialist countries, there is now considerable reliance on the regulatory mechanism although the basis of ownership remains public. See Eörsi and Harmathy (eds.), *Law and Economic Reform in Socialist Countries*, 1971. There are indications that Tanzania, which has a substantial public sector, is beginning to employ the regulatory mechanism for the public sector, e.g., The Prices Act (1973) and the Companies (Regulation of Dividends and Surpluses and Miscellaneous Provisions) Act (1972).

8. Gunnar Myrdal, "Operational Controls over the Private Sector", in *The Asian Drama*, Vol. II, 1968.

9. Y.P. Ghai, "East African Industrial Licensing Council: A Device for the Regional Allocation of Industry?", Vol. XII *Journal of Common Market Stud* (1974) 265-295.

10. For a defence of discretionary controls, see R.H. Green, "Law, Laws and Public Enterprise Planning in Africa", in this volume.

11. As Myrdal puts it, this is like driving a car with the accelerator pushed to the floor but with the brakes on, p. 925, op. cit.

12. For Kenya, see Nowrojee; for Malaysia, see Jaginder Singh, "Public Enterprises and their Legal Structure in Malaysia", in *Law and Public Enterprise in Asia*. International Legal Centre, 1976.

13. In Kenya's case, the constitutional provisions of equal protection would render it difficult to apply the regulatory mechanism in the way it was really intended, i.e., to discriminate against

all Asians whether citizens or not. See *Fernades v. Kericho Liquor Licensing Court* (1968) E.A. 640, *Mahdwa v. City Council of Nairobi* (1968) E.A. 406; *Shah Vershi Dewji V. The Transport Licensing Board* 1970 E.A. 631.

14. R.H. Green, "Economic Independence and Economic Co-operation", in D.P. Ghai (ed.), *Economic Independence in Africa*, 1973, Cf. views in Penrose, op. cit. (footnote 6). Hanson argues that the proliferation of enterprises poses a problem of directive and co-ordination which "might well tax the capacity of the most competent of bureaucracies", *Public Enterprise and Economic Development*, 1965, p. 349.

15. See J. Saul, "The Political Aspects of Economic Independence", in D.P. Ghai, op. cit., Shivji, op. cit., G.F.A. Sawyerr, "Multinational Corporations and Development: The case of the Rubber Industry in Ghana" in this volume.

16. Fitch and Oppenheim, op. cit.

17. I am indebted to Professor T.C. Daintith for the concept of economic power, in a private communication. See his paper, "Public Law and Economic Planning", *Journal of Business Law*, Jan. 1974, 9-22.

18. The concept of the autonomy of the legal system is difficult and somewhat ideologically charged. I use it to mean not that the legal system is completely separate from and independent of the political and economic systems (which it clearly is not), but that a legal system is a form of decentralised decision-making in which by and large rules are established in advance and decision-making institutions apply these rules in coming to a decision. Although this is a simplified description, it suggests that once the norms have been established, there is little day to day, ad hoc intervention in the institutions. The autonomy of the system is reduced as the government relies upon more direct forms of intervention and direction.

19. This point has already been touched on. For a discussion of state intervention in colonial East Africa see E.A. Brett, *Colonialism and Underdevelopment in East Africa*, 1973.

20. For an attempt to formulate the functions of the state in capitalist development, see Robin Murray, "The Internationalisation of Capital and the Nation State", 67 *New Left Review* May-June 1971, 84-109.

21. See Saul and Loxely, "The Political Economy of Parastatals", Vol. 5 *Eastern Africa Law Review* (1972) 9-37, for an attempt to place the public sector in the political economy context.

22. Issa Shivji, *Class Struggles in Tanzania*, 1976. Shivji argues that it was necessary for the African petty-bourgeoisie in Tanzania to use the state to nationalize industry and to restrict activities in the private sector as a means of enriching and entrenching itself (as opposed, for example, to the situation in Kenya where the same class has been able to promote its interests through the private sector) because it was a weak group with a poor economic base due to the relatively limited colonial penetration in Tanzania. (John Saul has questioned this thesis, by arguing that the immigrant commercial and industrial groups in Tanzania were also correspondingly weaker than their Kenya counterparts, "The State in Post-Colonial Societies: Tanzania" (pp. 361-362) in Miliband and Saville (eds.), *Socialist Register*, 1974). What is more probable is not that public enterprise was used to entrench the group (class?) in question, but that once public enterprises were established (for nationalist or socialist reasons), elements of the bureaucracy tended to use them to enhance their own privileges.

The use by the bureaucracy of the mechanism of the state to enhance its own interests has also been noted by Claude Meillasoux in Mali. He writes, "Once established in a governmental position, this social body (i.e., the bureaucracy) had to take several steps, both to gain certain positions of control in the modern economy and to eliminate opposition spreading from the Malian historical classes. One of the first steps was to infiltrate the national economy through the creation of a nationalized economic sector. This was done under the label of "socialism" which provided them with a convenient ideology to bring the economy under their control, supposedly on behalf of the entire population. "Socialism" permitted them to put the bureaucracy into the position of a management board of a kind of State corporation", p. 106, "A Class Analysis of the Bureaucratic Process in Mali", *The Journal of Development Studies*, 1970, Vol. 6, No. 2 (97-110).

23. Colin Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism*, 1975, esp. chap. 5.

24. Fitch and Oppenheim, op. cit.

24a. The use of public enterprises for political patronage and other political purposes is the theme of many official enquiries and commissions in West Africa. One of the best known of these is the Coker *Commission of Inquiry into the affairs of Certain Statutory Corporations in Western*

Nigeria (1962), which alleged widespread use of public enterprise and their funds to support Chief Awolowo's Action Party. In the then Eastern Nigeria, Azikiwe was accused of similar practices, *Report of the Tribunal Appointed to Inquire into Allegations Reflecting in the Official Conduct of the Premier of, and Certain Persons Holding Ministerial and Other Public Offices in the Eastern Region of Nigeria*, 1957, London.

25. J.O. Udoji, "Some Measures for Improving Performance and Management of the Public Enterprises", in Rweyemamu and Hyden, op. cit., at p. 248-249. "A possible solution lies in the creation of a few sinecure posts which politicians can fill at their pleasure. What is being suggested is something like the post of the Keeper of the Tower of London or that of honorary chairman of the French parastatal bodies. The posts carry good salaries but hardly any responsibility."

26. Heinz Schutte, "Public Corporations and development: The case of the Northern Nigerian Development Corporation", Vol. IX, *East Africa Journal* (April 1972), pp. 21-27.

26a. But see Shivji, op. cit., Hamza Alavi, "The State in Post-Colonial Societies—Pakistan and Bangladesh", in *New Left Review* 74 (July-August 1972) pp. 59-81, and John Saul, "The State in Post-Colonial Societies: Tanzania", in Miliband and Saville (eds.), *The Socialist Register*, 1974, pp. 349-372.

26b. Thus Shivji treats the bureaucrats and political and party leaders as one group, although in 1970 in his *Tanzania: The Silent Class Struggle*, he had made a distinction between the bureaucrats and the party leaders. He had also made a distinction between the "economic bureaucrats", i.e., the managers of the public enterprises, and the civil servants, and had predicted that the former would dominate the latter. In Tanzania, as well as some other countries, the civil servants in fact have tried to keep a firm control over the managers of the enterprises, and have been among the chief groups to attack, and reduce, the privileges of the latter. On this point, see also M.F. Aly, *Public Enterprises and Development in Lebanon*, (Legal and Managerial Aspects) (mimeo., 1976, The Arab Planning Institute, Kuwait).

27. The reference is to Marx's analysis in the *Eighteenth Brumaire of Louis Bonaparte*, 1852.

28. Shivji, Saul, op. cit.

29. Green, "Law, Laws and Public Enterprise Planning in Africa", op. cit.

30. Leys, op. cit., p. 191.

30a. Tamàs Szentes, "Status Quo and Socialism", in *The Silent Class Struggle*, 1973, at p. 102.

31. See Nowrojee, op. cit. For an account of the structure of state institutions for help to European farmers in colonial Kenya, see Ghai and McAuslan, *Public Law and Political Change in Kenya*, 1971, chap. III.

31a. For an attempt to compare the size of the public and private sectors in Africa, see Charles Frank, "Public and Private Enterprise in Africa", in G. Ranis (ed.), *Government and Economic Development*, 1971.

32. For the growing literature on the subject, see A.G. Frank, "The Development of Underdevelopment", in his *Latin America: Underdevelopment or Revolution*, 1969; Walter Rodney, *How Europe Underdeveloped Africa*, 1972; Brett, op. cit.

33. See, e.g., Botchwey, op. cit., Shivji, "Capitalism Unlimited. . .", op. cit.

34. Samir Amin, in Widstrand, *Multinational Firms* op. cit., Jalee, *Pillage of the Third World*, 1968 and *Imperialism in Seventies*, 1972.

35. See Green in Widstrand, op. cit., for the point that many MNCs are moving away from direct physical investment.

36. See Shivji, "Capitalism Unlimited. . .", op. cit., Sawyerr, op. cit., Coulson, "Blood Sucking Contracts", mimeo., 1972, and "The Fertiliser Factory", *Maji Maji*, no. 8 (1972), p. 26; Simonin, "Nationalisations and Management in Zambia", *Maji Maji* no. 1 (1971), p. 23. For an earlier study of foreign investment in India, see Kidron, *Foreign Investments in India*, 1965.

37. If a coherent long-term strategy is devised, joint ventures can play a useful role in the transitional period. See the Andean Pact strategy on the eventual dissolution of joint ventures in favour of fully owned local enterprises.

38. This does not mean that one is not justified in choosing certain goals as desirable and using them as criteria for a critique of existing policies. Indeed it is in large part due to this approach that the true nature of public enterprise has been exposed. But an examination of public enterprises in a country with capitalist orientation does not tell us the limits of the socialist potential of public enterprises.

38a. This is for example argued in C. Frank, op. cit., and Gerald Helleiner, *Peasant*

Agriculture, Government and Economic Growth in Nigeria, 1966, p. 261. The argument is that the private partner is interested in profits, and therefore concerned about efficiency. It should be pointed out, however, that a great deal may depend on the precise formula for the division of profits between the government and the private partner, as well as other fees, etc, due to the latter. If the private partner is responsible for purchase of equipment, provision of management services, etc., it may seek to maximise its profits through exorbitant charges on these rather than through increase in the profits of the enterprise.

39. An ECA conference on the Role of Public Enterprises in Planning and Plan Implementation (E/CN. 14/463) (1969) concluded that planning agencies fail to conduct feasibility studies and fail to consult enterprises about projects they were to implement, para. 14.

40. It is unnecessary to refer to the vast literature on planning. For the discussion of planning as a process, see Helleiner, "Beyond Growth Rates and Plan Volumes—Planning for Africa in the 1970s" *Journal of Modern African Studies*, Vol 10, No. 3, 1972, pp. 333–55. For a view that "five year plan" planning should be abandoned, see Waide, "Planning and Annual Planning as an Administrative Process", in *Planning in Tanzania* ed A.H. Rweyemamu and B.U. Mwansasu, 1974.

41. For a preliminary discussion of the relationship between law and ideology, see Ghai, "Notes Towards a Theory of Law and Ideology: Tanzanian Perspectives", Vol. XI (no 2) *East African Law Journal* (1975).

42. See for example the report of the Asian Colloquium on Public Corporations (held in Colombo, 1974), footnote 12.

43. For a good account of the plan and its status in and impact on the law, see K. Katzarov, *Theory of Nationalisation*, 1964, Section IV. Katzarov deals with the system before the economic changes in socialist countries. For a recent account see Eörsi and Harmathy, op. cit. (footnote 7) and Sarkozy, "The Legal Status of State Enterprises in the Socialist Countries, with special reference to Hungary", in this volume.

43a. The situation in Tunisia may be a little different. "The objectives and the performances of the plan have a quasi-imperative character. The public enterprise, as well as all the rest in this sector, have to achieve their objectives except in case of a force-majeur. If the Tunisian Plan has a rather general character, it is nevertheless adopted by a law. The plan then becomes of quasi-imperative character in so far as it more or less contains definite obligations and objectives which may confront the economic operators", M.H. Taieb, M. ben Abdel Salam & M. Moalla in "Public Enterprises and Development in the Republic of Tunisia" at p. 11 (1976. Kuwait, mimeo.).

44. For studies of the relationship between the plan and the public sector in Tanzania, see Loxley, "Financial Planning and Control in Tanzania", and Packard, "Management and Control of Parastatal Organisations", both in *Towards Socialist Planning*, ed. by Uchumi Editorial Board, 1972.

45. See R. Turkson, "The applicability of the Companies Code, 1963 (Act 179) to Public Corporations" *University of Ghana Law Journal*, Vol. X, No. 1, 1973, pp. 65–73. See also the discussion on this question in Katende, Chesterman, Thomas and Mann, *The Law of Business Organisations in Eastern and Central Africa*, 1976, chap. XIV, esp. as regards the position of the Uganda Development Corporation.

46. Hanson, op. cit., p. 337.

47. Pozen, op. cit. It is probable that Pozen exaggerates the influence of the form, and he certainly underplays the significance of the economic factors. He also suggests that notions like the importance of the legal structure of public enterprise are responsible for drawing talented students to law away from other more useful subjects. The recruitment to the legal profession, however, is more likely to be determined by the market forces and the rates of compensation. The question of the legal structure of enterprises is a matter of concern largely to the "public sector" of the legal profession, which has always had difficulty attracting lawyers, as opposed to a rather large private practising bar. See a forthcoming study of the Ghanaian legal profession by Robin Luckham.

48. Karl Renner, *The Institutions of Private Law and their Social Functions*, 1949, page 217.

49. *Some Problems in the Organisations and Administration of Public Enterprises in the Industrial Field*, 1954, p. 18.

50. *Report of the United Nations Seminar on the Organisation and Administration of Public Enterprises*, 1967, p. 9.

51. Green, "Historical, Decision Taking and Firm Dimensions", notes at the workshop on

public enterprise, Accra, 1975. The following account of the National Development Corporation draws in large on from these notes. The notes in an elaborated form appear in this volume.

52. Some perspectives on form and substance may be gleaned from the study of the development of the company in the common law of England. Here to a large extent the development of the economic forces required particular forms, especially of incorporation and limited liability. The forms, however, were not immediately forthcoming, and various devices were used to get round the problems arising from their absence, some of which devices still remain in use, although better alternatives are now available. Eventually, however, the force of economic factors led to the establishment of the general principles of incorporation and limited liability. The force of the economic factors is also seen in the fact that it is now accepted that in the fast changing economy and its organisation, regular periodic reviews of the company form and law are essential. The contrast with the public corporations in the developing countries is that in the latter case, the form has emerged before the economic factors relevant to it have crystallised. For a brief account of the development of the company law in England, see LGB Gower, *The Principles of Modern Company Law*, 3rd ed., 1969.

53. K.E. Svendsen, "Decision Making in the NDC", reprinted in Cliffe and Saul, *Socialism in Tanzania*, vol. 2, 1973, pp. 89-96.

53a. See unpublished paper by Dina Sheikh El Din Osman, "Public Corporations in the Sudan" (1975).

53b. Pozen, op.cit., p 819.

54. For a good general survey of the legal issues around public enterprise, see W. Friedmann, "Public Enterprises", in *International Encyclopedia of Comparative Law*, 1974.

55. It is often hostile, at least to begin with. Cf. the provision in French law (of 1791) which has been interpreted to mean that the State and local governments may not create business enterprises the existence of which would result in a distortion of market equality. See R. Drago's chapter in W. Friedmann, *Public Enterprise in Mixed Economies*, op. cit.

55a. Patrick McAuslan has queried this formulation, and suggested an alternative hypothesis. "The analogy the courts used in developing rules about 'commercial' public corporations was drawn from uncommercial public corporations, i.e. corporate local authorities. These were 'inferior' bodies to courts and could be controlled via certiorari etc. These in turn derived from notions which came into being when the central government—courts, Council, etc—was extending its control over autonomous or would be autonomous local governments in the sixteenth century etc. Hence the public corporation was (and is?) seen as a governmental body which is 'naturally' subordinate to central government and its courts—it is not seen as an extension of government at all." (Private communication.)

55b. Since *Ridge v. Baldwin* (1964) A. C. 40, the English courts have extended the scope of judicial review over administrative discretion. The courts in many developing countries which inherited the common law still remain rather passive. Even in Britain, the courts have not become involved in many new areas of economic activity or planning. See generally, Sir Leslie Scarman, *English Law—The New Dimensions*, 1974.

56. In one sense the lack of a formal division between public and private law in the common law has facilitated the accommodation of public enterprise, esp. since it is not necessary to worry about jurisdictional problems. See Friedmann, op. cit., (footnote 54). On the other hand, there have been difficulties in the common law based courts in Tanzania in bringing special rules of liability for public servants for corruption and some other criminal conduct to bear upon the employees of the public enterprises. See James and Ligunya, "Organisational relationships and the control of parastatals in Tanzania", in Vol. 5 *Eastern Africa Law Review* (1972), esp. pp. 41-43.

56a. For such institutionalization is often possible. Although writing in a somewhat different context, Kenneth C. Davis' statement is apposite here. "Most new administrative subject matter, however, must at first be committed to discretion because no one is able to write rules or even meaningful standards. But as administrators exercise discretion, they solve some of the recurring problems. Then they naturally follow precedents, for they find it inefficient to rethink a question they have once resolved to their own satisfaction, in absence of special reason to do so. The precedents accordingly grow, the opinions are soon stating some standards or other guides, and the movement may go on toward principles and, for some subjects, rules.

"The normal progression from unguided discretion to some use of precedents to clarification of standards to greater use of precedents to discovery of principles and finally to formulation of

rules is a phenomenon of major importance." The quotation is from his *Discretionary Justice*, 1971, p. 108.

57. I have elsewhere argued that it is more realistic to look at constitutions in Africa as means and instruments of political manipulation than as autonomous systems of normative rules and principles. See Ghai, "Constitutions and the Political Order in East Africa", Vol. 21 *International and Comparative Law Quarterly* (1972) pp. 403-433.

58. This issue is discussed in Ghai, "Notes Towards. . .", op. cit., footnote 41.

59. On this point, see *Legal Education in a Changing World*, 1975, and *Law and Development*, 1974.

60. The point is put as follows by Daintith, "Public law provides, at one and the same time, the framework for the Governmental task of economic management, and one of the instruments with which that task is carried on. Between these two roles, the framework role and the instrumentality role, a delicate balance must be kept. Frameworks imply restriction; if this role is neglected, and the framework becomes unduly flexible or shapeless, then the values which the institution of the law itself protects—freedom from arbitrariness, predictability of State action—may be jeopardised. If, on the other hand we concentrate all our attention on these values, as Whigs like Dicey and neo-liberals like Hayek would have us do, then we may impair the capacity of the law to serve as an instrument of economic public policy and consequently hinder the achievement of our economic objectives", op. cit., p. 10. In many developing countries, the consequence in the second situation is not so much that economic objectives will be hindered, as that the law will be progressively disregarded and come under further contempt. For suggestions of a proper balance between the needs of planning and discretion and the values of law, see J.P.W.B. McAuslan, "The Plan, The Planners and the Lawyers", *Public Law*, 1971, pp. 247-275.

Reginald Herbold Green

Law, Laws and Public Enterprise Planning in Africa

Preliminary analytical notes towards more
productive interaction

The purpose of society is man; but in order to serve man there must be a social organization of economic activities which is conducive to the greater production of things useful for the material and spiritual welfare of man. This means that it may well be a function of society to organise and sustain efficient economic organisation and production techniques even when these are in themselves unpleasant or restrictive.

Mwalimu J.K. Nyerere
Uhuru na Umoja

Time that is intolerant in a week
Of a beautiful physique
Worships language and forgives
Everyone by whom it lives.

W. H. Auden

Twenty years. . .
Trying to learn to use words and every attempt
Is a wholly new start, and a different kind of failure
Because one has only learnt to get the better of words
For the thing one no longer has to say, or the way in which
One is no longer disposed to say it. And so each venture
Is a new beginning, a raid on the inarticulate. . .

T. S. Eliot

I. Substance and style: Law and legal instruments

Economic planning and public enterprises are primarily aspects of political economy — broadly defined — not categories for referencing laws. Therefore the prime requirement of legal instruments to provide for the creation, operation and regulation of public enterprises is that they contribute to achieving the political economic aims of the decision-takers calling for and enacting the instruments.

This in no way detracts from the importance of the professional legal input nor from the potentially crucial roles of wording and style. Simplicity in drafting at the price of complexity in operation is a danger lawyers should be particularly able to warn against and help to avert, as is the easy path of

creating structures which work well so long as nothing goes wrong but which have no provisions for dealing with contingencies because the time and effort to think through what could go wrong and how to deal with it was not invested at the formulation stage.

However, it is important to realize that economic planning legislation in general and that relating to public corporations in particular is—at least in Africa—unlikely to be tested by use in court as opposed to by useability in the hands of decision-takers, managers, workers, partners and clients. The use of a legal instrument in court is almost never a dominant and rarely even a central consideration.¹ Intelligibility to decision-takers and to managers—both in the civil service proper and in productive enterprises (public or private)—should always be given priority attention. The use of the legislative document as an ideological and educational device is also often potentially significant and requires that at least the basic provisions be intelligible to the “man in the street” (or “the farm”).

This approach presupposes a socio-political role for law as well as a narrowly functional one. In a mixed economy some framework of economic rules is needed for public-private sector relation ordering and even in a dominantly public sector economy some guidelines for individual transaction patterns and a set of lines of authority and interaction among institutions are needed to avoid either total confusion or endless reinvention of the underlying elements of contract and company law. However, these purposes could be served by administrative directives of a form similar to—say—the General Orders of the former colonial services of anglophonic Africa and of most of their successor national civil services. If one is to make a case for law, as usually understood, in the economic planning and management field something broader and deeper than administrative and managerial efficiency must be advanced. If economic law really is, or should be, a species of administrative directive formulation, and nothing more, then the present nature of the lawmaking process and the legal profession in Africa are—at least in the economic law field—quite whimsically and expensively grandiose, expensive, obscurantist and inefficient.

The role of providing a structure of predictability, order and presentation of some operational embodiments of socio-political and political economic goals is a broader one than that of giving administrative directions good for a particular time and place. It is not a role played solely by individual legal instruments as such but also by the totality of such instruments—a role of law as opposed to laws.

In a negative sense this role provides a set of parameters beyond which conduct will be penalized. Passively it sets out types of action which will be seen as formally correct. Positively it provides guidance as to forms and contents of conduct which are viewed as actively desirable. The positive aspect of this role is evidently overtly ideological (propagandistic if one prefers) and usually turns on preambles and broad guidelines intended to inform specified conduct more than on hard and fast provisions which can be adjudicated, e.g. the Tanzania Price Commission Act of 1973 sets out a series of political and socio-economic goals and another set of broad analytical procedures to inform the Price Commission's work. Except in case of really

gross abuse the principles (and even the procedures) are hardly subject to judicial review even in principle. Nonetheless, they have very clearly informed the way in which the Commission and its staff have approached their task and taken their decisions.²

This broader role of law is not a narrowly functional but a socio-political validating, legitimizing, institutionalizing one. It may be less critical in respect of economic planning and public enterprises than in some other fields but that is not self evident if economic planning and public enterprises occupy central roles in the economy and are pervasive in the society. If administrative regulations were public; formed a consistent, complete system; were promulgated and altered in known, standard ways by bodies whose legitimacy was accepted, *then* they could play this role but that type of administrative regulation system would be closer to being a system of law than to what one normally thinks of as administrative rules. Equally were single party political statements of principle to meet the same tests and that of being articulated to provide predictable guidance in specific cases they too could substitute for at least many laws (including those on economic planning and public enterprises) but again by becoming in themselves a legal system.³

This role of law requires some stability of the whole body of legal instruments. It does not mean that individual instruments may not be altered (and multiplied). The more rapid the socio-political change, the more rapid the legal embodiment of such changes required. However, it does require that the process and nature of change be intelligible and that at any one time a reasonably clear and operational set of legal instruments exists.

Equally it requires that those primarily affected by particular legal instruments (including the intended beneficiaries) be able to understand them to the extent necessary to comprehend their goals, avoid proscribed and adhere to prescribed conduct and appeal to the law if the benefits it is intended to provide them are being withheld by an individual's or a legal entity's not complying with the law. This does not mean every man "in the street" or "on the farm" must be able to read (or hear) and construe every clause of every legal instrument but it does require greater care to ensure that legal instruments themselves are intelligible and that accurate summaries of key goals and provisions are available in lay language. What is required varies from act to act and provision to provision. What constitutes unlawful pricing and how to report it must be intelligible to the broad mass of buyers if mass consumer goods price control legislation is to work. How to compute special capital allowances on investment in mining may be set out in language which requires professional legal interpretation so long as both the mining concerns and tax authorities involved are aware of the provisions (and their general import) and do have access to legal advice. Such provisions would not be suitable if a large number of individual prospectors and miners were covered by them; they do not have effective access to legal advice nor do the local level tax officers with whom they deal.

This is not to argue that economic law does not need to be functional in the narrow managerial/administrative sense. If it fails at that level, it is rather unlikely to be able to have any deeper or broader socio-political meaning or

impact. It is to argue that the tendency, not least among lawyers, to view the legal role in economic legislation as analogous to that of the computer programmer who translates a generalist language into a computer language and back is counterproductive, again not least for lawyers. Even at the narrowly functional level, different socio-economic and socio-political goals and systems have—or should have—much more formal and substantive impact on law than similar variations do on Cobal or Fortran. More generally if law—as understood in either the African branch of the Western legal tradition or in African historic settings—is to be integrally relevant to economic development and planning it will need to transcend the purely administrative/managerial functional level.⁴

II. Economic planning, structure and law in Africa

The nature of the probable inconsistency of present economic law with itself as well as its context is complex not simple. The situation is by no means one of a coherent, imported, European capitalist economic legal base.

First, much of the colonial legislation—perhaps more particularly in anglophonic Africa—is archaic in terms of its countries of origin's present legislation. Much of it—at least in ex-British colonies—is founded on British Acts of 1890–1939 with rather haphazard patchwork to update or adapt. It is rather doubtful whether the law is a good field for the use of “second-hand machinery”. If that is to be contended seriously, much more evidence is required.

Second, while the apparent imported legal framework—especially when archaic—is not only intended as the superstructure for a capitalist state but overtly for a basically unplanned one characterised by effective competition among capitalists,⁵ that never was the actual colonial economic structure. Mercantilist, oligopolist, oligopsonist and bureaucratic interventionist elements were always critical in African colonial economies. Similarly the relation of the business interests and the administration was rather different in the colony and the metropolis and complicated by the fact that the key African territorial actors (including the colonial state) had limited—albeit not negligible—autonomy.⁶

As a result a very large body of positive direct (e.g. requiring cultivation of particular crops), negative direct (e.g. forbidding cultivation), positive indirect (e.g. head tax to “induce” labour flows), negative indirect (e.g. forbidding debt enforcement against Africans and thus impeding credit availability to would-be businessmen), detailed, restrictionist licensing (e.g. limiting the number of—say—oil crushing mills to prevent “excessive” competition), and equally detailed, selective subsidies (e.g. crop income level guarantees to settlers *de facto* insuring against weather and price fluctuations) laws came into being. An administered economy of a neo-mercantilist pattern was the concept behind this body of law, albeit only in special cases

like the 1920s Guggisberg Plan in the Gold Coast was the macro concept explicitly stated at all and even then not in the legal instruments.

De facto this body of law sought detailed control of the economy and was administered on a discretionary basis with bureaucratic and political convenience critical factors in its application.

Third, this body of interventionist administrative economic law affected later economic legislation in three ways:

a. creating a setting in which micro-level state economic controls and incentives were the norm not the exception;

b. serving as the pattern on which many subsequent laws were drafted (not surprisingly since early colonial planning was usually a tidying up of micro-mercantilism not a radical shift to any new view of economic change);

c. facilitating a pattern in which state power and control over it was, and was seen to be, crucial for private sector economic success and thereby reinforcing tendencies to clientilism (including bribery in the narrow and corruption in the broad sense) by relatively small or weak groups or businesses and covert or overt reduction of the state to a client or junior partner role by strong (usually external) firms and interest groups.

In respect of economic planning legislation proper there is probably a divergence between francophone and anglophone patterns. The former appear to have much more specific codification and more legislated umbrella bodies and the latter to depend much more on adapting budgetary and fiscal legislation.⁷

Fourth, the ways in which inherited economic laws have been modified are both widely divergent and—on the face of it—puzzling. At one extreme Algeria has literally rewritten all its laws. In the middle, Tanzania has added a very large number of planning oriented Acts and Orders which radically crosscut literally unchanged or marginally altered company, contract, banking and insurance acts. At the other extreme some states—e.g. Senegal, Kenya—appear to have added more legislation formally at least well within the colonial neo-mercantilist tradition.⁸ Another group of states—e.g. Uganda, CAR—might be argued to have abandoned the content of a legal system though they continue to promulgate economic laws often very much in the imported colonial pattern.

At both extremes there is a danger of confusing form and substance. Algeria's economic legislation is still detailed code law (with the combined French and Islamic influences that is hardly surprising) and code law aimed at controlling or influencing the decisions of civil and parastatal service managers who have considerable discretionary authority. Kenya's lack of significant formal systemic change may mask rather greater alteration in content and in the intended beneficiaries.

Equally there is a danger of reading more into individual decisions than is justified. Tanzanian banking law *is* to all intents and purpose the Bank of Tanzania and the National Bank of Commerce Acts—the old Banking Ordinance is superseded so fully no one bothers to repeal (let alone amend) it. Labour legislation is scattered over half a dozen Acts, rather more statutory instruments and a number of paralegal documents because neither the Ministry nor the Chief Parliamentary Draftsman's Office has given top

priority to consolidating so long as the amalgam proved workable and the desired approach to converting the paralegal areas to legal instruments less than clear. The plethora of economic legislation (and the heavy Treasury, as opposed to Planning, involvement in micro economic and operational planning legislation) turns on the fact that the Treasury was "law oriented" because of its inherited British budgetary and fiscal procedures and micro and sectoral economic oriented again partly because of the British tradition. The degree to which it steadily promoted a series of Acts which in sum radically altered the economic law subsystem again is clearly a mix of ideological, institutional and personal outlook factors.⁹

III. Ownership, power and law

The purpose of public sector ownership of productive enterprises, as well as the share of public ownership, will logically affect the appropriate form of economic law. Colonial units often owned rather large chunks of the large scale productive sector even outside the "public utility" field. They never saw this as a transition to a socialist mode of production with evident, and logical, consequences for their economic legislation. If public productive enterprises are intended to serve—e.g. power, water, rail transport—and to fill gaps in—e.g. the Commonwealth Development Corporation and its African extended family—a basically capitalist mode of production, then a perfectly valid case can be made for operating all of the enterprises under the normal companies act and commercial law system.¹⁰

On the other hand a single legal form may serve quite different purposes. Government ownership of all land (i.e. abolition of freehold) is consistent with modified African hereditary "use" tenure and/or with European long term leaseholds. Security for improvements can be incorporated in either case. However, it is also consistent with a phased transition to communal agriculture with secure tenure for the communes, to rigidly controlled quasi-communal systems with tenure at administrative pleasure or to state operated collective farms.¹¹

Similarly the degree of decentralisation and/or of participation desired will logically affect the nature of economic law whatever the dominant mode of production and the micro-ownership of a particular economic unit. The more decentralised and participatory the intent of the decision-takers, the more allocation of authority—whether to parastatal boards or regional development councils—is logically required and the less detailed the appropriate central regulations (in law or administrative instructions). This is not a mode of production type ideological issue—the same contrast can be seen between Soviet and Chinese administrative and planning law.¹² However, the more etatist (socialist, mercantilist, corporatist) the policy, the more there will be a logical need for a binding framework within which decisions are to be taken and for means to intervene to reverse delegated decisions inconsistent with the framework.

The nature of the power shift implied in a greater degree of coordinated planning and broader public ownership is neither clearcut nor independent of the dominant mode of production and the makeup of the dominant political coalition. Whether it is a shift to administrative power is not by any means clear nor uniform. The national administration normally has less autonomy from national politicians than its colonial predecessors did from their metropolitan political masters. Lumping parastatal managers and the civil service proper as a single power group is not uniformly correct nor is the group relative to (or from) whom the parastatal managers have gained power identical in all countries—citizen businessmen, middle level expatriates (whether Asian, Levantine, petit blanc or foreign African), traditional colonial companies and/or major foreign enterprises (TNC's) are all represented.

Formally state power has been increased in most cases especially *vis-à-vis* large enterprises. It has been put on a more coherent pattern in almost all. Whether this represents a political or administrative power gain (or a tidying up of a dependent relation with continuing or new foreign economic units) is a question of fact not of legal phraseology. Further, while the wording of recent legislation may give some clues, determining whether a shift from an administrative to a managerial approach has taken place in either the civil or the parastatal service requires much more than textual study. These questions are critical to an understanding of the evolution of the meaning of laws and of economic law in African states. Purely textual study is likely to be misleading because of the already noted neo-mercantilist colonial heritage and its very gradual modification into the legal frame for late colonial planning. Form is more likely to be imported than substance and still more likely to be retained more or less intact.

IV. The legislative and planning processes

The role of legislative bodies in the substance of law-making is quite evidently in a state of flux (not to say crisis) over a broader range of topics than economic law and of countries than Africa. The underlying reasons usually appear to relate to the concentration of political power in a more limited number of hands and particularly in the hands of those politicians who control administration. Most parliamentarians are neither significant decision-takers or power brokers nor are they specialists able to influence the legislative process by specialised knowledge. Whether they are effective two way communicators who do, in that role, influence legislation is a different question and one which is not easily testable, because such a role may be played well off the floor of a legislative body and is unlikely to take the form of amendments from the floor especially in respect of technically complex legislation.

To suppose economic planning is actually controlled by technocrats (presumptively including lawyers), managers and/or administrators is usually erroneous. In many cases they may well be more influential than most

parliamentarians but only if most parliamentarians are not significant politicians. Planning—assuming one is defining it to include the operational goal selection, resource allocation, implementation and revision stages as well as the technical formulation and formal presentational ones—is dominated by politicians and the economic interest groups to whom they respond. The influential technocrat, administrator or manager is normally either committed to (for whatever reason) serving a key politician, political interest group, class, firm and/or economic interest group or he is in fact himself a politician, class, or interest group figure with a base beyond technocracy, administration and management. Technocrats, administrators and managers are critical because they can (sometimes and partially) bring political and business aims to reality or let them wither away, not because they are normally dominant decision-takers.

It is in principle true that an established technocratic-managerial-administrative elite could operate a state in its own class interests. The Chinese mandarin state is at times cited as an example. This is not a likely situation because such a class would normally find both legitimacy and charisma hard to come by and thus be very vulnerable to counter coalitions, unless of course one defines the armed forces-police hierarchy as technocrats and administrators.¹³ The apparent cases in Africa—e.g. Egypt or Kenya—are ones in which the bureaucracy is closely linked with domestic and foreign economic interest groups and sub-classes and with the politicians who speak for them. Evidently a technocrat whose proposals fit a major politician's goals and work out well will be able to exert major influence *so long as* his perception of what is wanted, possible and necessary remains acute, no external disaster overtakes proposals identifiable with him, the politician or political group he serves retains its power and no major political cost is associated with his influence.¹⁴ So long and no longer.

Whether Africa is cluttered with economic legislation which is not operational is one question. If this is the case (as it is), why is another. Defunct legislation nobody bothers to repeal, abortive experiments superseded by new attempts, formulations outrunning technical and managerial capacity, the daydreams of individual political or technical personnel which reached the statute book more or less by chance, serious legislation whose implementation has been blocked by vested interests and legislation passed as a substitute for action are all non-operational but they are hardly identical in their meaning in terms of political, legal, social and economic systems, institutions and realities.

Legislation which was never intended to be operational or was intended for selective use as a political weapon rather than general application is not—*pace* Myrdal—a good test of a "soft" state. Certainly a "soft" state will be likely to have such laws but so does the USSR, which is hardly a 'soft' state. Certainly widespread examples of this class of laws do carry implications about the attitudes of the dominant political coalition to law but not necessarily as to their ability to set and enforce codes of conduct in areas they see as critical.

The class of serious legislation blocked at the implementation stage (and, if pervasive,¹⁵ that of legal forms in advance of operational capacity) are a much

surer test of a soft state unable to identify, codify and enforce a uniform code of discipline and/or forced to buy off "special" individuals, companies and interest groups by giving extra (or il) legal exemption from the rules of law.

V. Automatic and discretionary provisions

Many lawyers tend to argue for maximum use of non-discretionary provisions on the basis that they increase certainty, reduce the possibilities for corruption and other abuses, speed the process of decision-taking, and by substituting a formal (does it fit?) for a substantive (what should be done?) decision reduce the workload on administrators, managers and politicians. In the field of economic legislation—globally as well as in Africa—they are fighting a rearguard action: delegated powers for subsidiary legislation, discretionary provisions and quasi-legal decision-taking bodies at least the substance of whose decisions are not appealable to the normal judicial process are expanding rapidly. Their growth is so general that the reasons can hardly be limited to contempt for the law, distrust of lawyers, individual or institutional will for power for its own sake or for an easy life even though these are sometimes only too evidently present.

Non-discretionary regulations are tools of external control pure and simple, not of management. At the extreme their legal advocates appear to be seeking to generalise the criminal law to make all managerial and administrative decisions either legally required or unlawful. That approach *may* be just practicable but it is neither an efficient way to manage change nor compatible with faith in and respect for law: it forces decisions which cannot be seen to be fair and which are not efficient in their results.

The rule book approach to economic law common in Africa has three origins: the criminal law, administrative regulations and the somewhat odd combination of order and neo-mercantilism purveyed by the colonial legal system. Particularly in the economic law area the system was by and large operated by administrators and not by lawyers, let alone by an independent judiciary. None of these heritages has much in common with modern economic planning or public sector management, let alone the requirements of a major public directly productive sector.

The discretionary approach seeks to set a framework within which judgement is to be used and genuine decisions taken. It is consistent with management both within the civil service proper and the public service more generally defined to include the directly productive sector. It is also consistent with genuine decentralisation and participation—to achieve them in a non-discretionary system would require a remarkable number of quasi-legislative bodies at various territorial and institutional levels and some means for coordinating the details as well as the principles of their enactments.¹⁶

The general use of non-discretionary legal provisions is in fact most appropriate for a polity which sees a very narrow state role in relation to directly productive activity or for one which wishes to give virtually complete autonomy to public directly productive enterprises to act in the same way as

they would if private. It is not plausible for a state whose role is perceived as including management of rapid change—social, political or economic—nor for a public directly productive sector envisaged as one of the main driving forces of nationally planned economic change.

The 1945–1965 Socialist European cases are not by any means adequate counter-arguments. The centralised analysis and communication capacity needed to operate material balances planning by directive are not present in Africa nor are the levels of surveillance and coercion necessary to enforce them. Further the costs of the centralised rule book system have been high and led to constant efforts to achieve basic revision which have been watered down or rejected for political, not technical or productive efficiency, reasons. The Chinese and Yugoslav systems show very clearly that at broad framework to guide decisions, substantial managerial discretion within the framework and a limited number of detailed controls are consistent with national economic planning in practice as well as theory. Finally, the Eastern European systems do not literally “enact” their rule books as law—a high proportion are in the intermediate range of administrative regulations and directives which at some level, usually below that of top political decision-takers, do become discretionary. Formally, for example, Hungarian public enterprise law is remarkably similar to what would emerge if existing Tanzanian statutes relating to parastatals plus paralegal planning procedures for them were codified on a comprehensive, consistent basis. Indeed, if anything, the Hungarian system provides wider discretion and places more obligations on the state. There is very little of the centrally set detailed instruction system of the earlier period remaining in the present legislative frame—which is not to say that it does not include lines of authority, controls and sanctions.

Many of the arguments for non-discretionary law as a general approach in the economic field are either romantic or unsound. Business is not a field in which certainty is usually attainable much as that might be desirable. Further certainty may *not* always be desirable even if attainable. There is no evident reason why state subventions should be any more certain and automatic than export markets even if it is possible to achieve that situation. Corruption and abuse can quite as easily take the form of violating, evading or avoiding non-discretionary provisions as of abusing discretion. Non-discretionary provisions do speed decisions *if* a decision can easily be taken within them though they may do so at the price of worsening the quality of decisions taken. They do *not* speed decisions if they require complex activating procedures or complex avoiding procedures.¹⁷ For the same reasons and the additional one that checking rule books and meeting formal procedural requirements takes time there is no guarantee lawyers, managers or administrators workload will be reduced. If political decision-takers’ workloads are cut by rule book law it is likely to be for the wrong reason—escape from realising that decisions with a substantive political content need to be taken.

That said, there are a series of cases in which nondiscretionary provisions are appropriate:

a. setting a clear general framework e.g. requiring annual financial and physical plans of public enterprises or forbidding private business activity by

politicians and senior public sector employees;

b. achieving uniformity when discretion would be likely to produce anarchy e.g. tax rates, prohibition of dealing in foreign currencies;

c. speeding and simplifying genuinely uniform and routine transactions e.g. some aspects of the law of contract;

d. deliberately making exceptions very hard to grant when a class of politically or economically sensitive micro claims for waiver would be hard to resist individually but would be likely cumulatively to abort the purpose of the legislation.

The issue is not one of either or but of appropriate selection and mixture. Basic goals, once adequate stability of formulation and articulation is achieved, do need to be legislated if the law is to be seen as a basic socio-political framework. For example, the enactment over 1967-74 of almost all of the provisions of the Arusha Declaration and the recognised, but through 1975 only partially met, need for new basic legislation in respect of the participation and Ujamaa aspects of the 1971 TANU Guidelines and 1973 rural development declaration in Tanzania fall in this category. Anything seen as essential (or antithetical) to the basic principles should be required (prohibited). At the other extreme genuinely uniform and routine activities should not be turned into pseudo-judgement decisions. However, in such areas both the appropriateness of legal versus administrative instruments and the possible uses of a review procedure backed by a discretionary power at the reviewing level require attention. Filing procedures need to be uniform but are hardly an optimal area for legislation; every house tax collector cannot be given discretionary power to waive tax but an appeal procedure to a single officer or body who can is not impossible. Between these two extremes the needs for participation and uniformity, certainty and judgement, consistency and relevance must be balanced.

A special point is that broad delegated discretionary powers combined with mandatory information flows do allow review and reversal. Without the information flow and review even mandatory provisions are unlikely to work well in the presence of bad judgement, laziness or a desire (for whatever reason) to go outside the rules. Because management requires judgement on how to relate goals to objective realities on a case by case basis, it normally requires discussion and negotiation. These are perfectly possible within a decentralised discretionary system. They are harder in one in which one party must issue directions to the others and well nigh impossible if nobody has the power to use his best judgement without recourse to the full legislative process.¹⁸

Discretionary provisions raise a further problem—that of review. In the case of non-discretionary action it is, at least logically, legally clear whether an action was or was not in conformity with the governing legislation. In the case of discretionary provisions no such simple test normally exists. The Tanzanian grocer who charges Sh 1.50 for a half kilo loaf of bread when the ceiling price is Sh. 1.30 has committed an offence; the Price Commission which evaluated proposals and analysis and set a ceiling price of Sh 1.30 not Sh 1.50 as asked or Sh 1.00 as previously existing is not open to any equally straightforward test of the propriety of its decision. It may have misunder-

stood the aims set out in the Prices Act, or misunderstood the figures submitted, or failed to follow the procedures set out in the Act, or misdirected itself in a manner resulting in an absurdity,¹⁹ or been bribed. To say bad judgement and—less clearly—inability to understand their duties are matters for political review and action rather than judicial is perfectly plausible but what of the other possible errors? Is a review process needed? Can and should it be judicial?

Normal judicial processes are often argued to be unsatisfactory for reviewing discretionary decisions (at least in substance)²⁰ because:

- a. courts lack adequate technical expertise;
- b. the decisions have a mixed political-legal content and the former is not properly within judicial review.

The first plea is often literally true at least in courts of initial jurisdiction. When it does not flow from any basic objection to the rule of law, it is consistent with the creation of a specialised court (a device which is after all by no means unknown in the countries with a firm tradition of the rule of law) which ensures adequate technical expertise is associated with a genuine judicial review, e.g. by a bank of judges of different technical expertises or by specialist assessors who cannot be overridden on matters of fact (as opposed to law) and who are more permanently and integrally related to the special court than a normal jury or assessor. Appeals from such a special court to Appellate Courts pose few logical problems—normally an Appellate Court is dealing primarily or solely with law, not fact, and also has more experienced and technically qualified personnel than a court of initial jurisdiction.

The second objection is more intractable. It can be totally valid. The Tanzanian Prices Act lays down guidelines for price decisions and provides for political instructions and review. Because the guidelines do relate to political economic operating criteria for the economy, and because these are in part alternative in any particular case, the ultimate review of any decision must be its political efficiency. It is hard to see how a court could sensibly evaluate the need for a cash flow surplus for reinvestment in a petroleum company against the need to avoid undue increases in transport, power or cooking costs especially when the decision involves a series of price changes most of them greater than zero and all of them different from initial company proposals. To make the attempt would logically be to assert not simply that economic management was inherently an integral part of the rule of law—which is doubtless valid—but also that it was an integral part in the same way as prevention of corruption or registration of vital statistics—which is palpably implausible. No government could accept turning over the ultimate economic management power to the courts nor would any court system seriously concerned with maintaining a rule of law accept such a poisoned chalice.

Questions of procedural propriety or of palpably improper decisions should be open to some type of review. However, the Ombudsman rather than the court form of review may be more effective. An Ombudsman can more easily call in question the spirit as well as the letter of procedure and suggest redress for a proper but inequitable decision. He cannot equally easily rule a decision on the face of it improper but he can more easily query

consistency and appropriateness which may be a more useful contribution. After all if a major palpably improper decision has been taken wilfully the chances of a court *forcing* its overturning (as opposed to its *ex-post* legal validation) are slim.

VI. Ideology, comprehensive planning, laws and law

The concept of ideology²¹ as a substitute for laws or law is a peculiar one. If an ideology really does have an ordered structure of values and goals it may well set them down as a body of "rules" which are, in effect, laws e.g. Canon Law: Thus on the face of it a clear ideology would seem likely to lead to a coherent body of laws with the basic principles (values) of the ideology the pillars of the law. A pervasive ideology would be likely to result in administration (legal, paralegal, managerial) consistent with the ideological/legal system even when particular laws were somewhat inconsistent or lacking but also to lead to a fairly speedy process of revising individual laws and filling gaps in cases in respect of which the existing legal codification appeared ideologically inappropriate.

However, the foregoing argument really deals with a relatively stable situation not one of rapid transition. In the latter case almost by definition there will be serious gaps and inconsistencies in laws. Whether management, administration and interpretation will compound or partially rectify these inconsistencies and gaps does depend on the nature of the law and the presence of an articulated common commitment—e.g. ideology—by decision-takers. In that sense an ideological commitment—especially if broadly embodied in the legal system, many major laws and a flow of new legislation—probably would be a complement to an inadequate body of legal instruments. Presumably the depth and generality of the commitment to the ideology and of the transmission of changes in its operating form could be tested in part by seeing where and at what levels serious inconsistencies in micro-decisions arose.²²

The relationship of direct controls and ideology is not a simple one. Calvin and Stalin certainly did see detailed direct controls as an integral part of their ideologies. Chairman Mao and President Nyerere are opposed to detailed centralised controls on ideological grounds because of the fact that ideologically both place high priority on decentralisation and participation.²³ Adam Smith also had ideological as well as more narrowly practical objections to direct controls (and to large business enterprises or enterprise groups public or private) but very different ones.

Equally, the quasi-theological juxtaposition of detailed, physical central controls with "markets" as a form of economic classification is not very useful. The Stalinist centralised material balances planning system designed to maximise independent national defense capacity is *not* a general model of socialist economies and the special characteristics of a modern industrial capitalist economy are hardly adequately summed up by saying it has

markets. A planned economy (which could mean a mercantilist, corporate state or populist as well as a socialist one) can be operated by price, tax, and credit intervention with very few direct physical control orders. To a very large degree Chinese economic planning is coordinated at micro level precisely by credit and price intervention i.e. via capital and goods markets.²⁴ Evidently some areas are not very amenable to indirect control via markets—the critical point is that economic planning and general use of detailed centralised physical controls are separate decisions.

VII. Law, public sector corporations, planning

In Africa public sector corporations predate planning by a considerable time span with the partial exceptions of Zaire in which the immediate post-Leopoldian colonial state construction did in effect operate an economic plan jointly with the major private and mixed companies and of Ghana which did have a coherent overall economic plan under Governor Guggisberg at approximately the same period as public corporations were emerging clearly from their semi-departmental chrysalis stage. With those exceptions territorial economic development planning in Africa is a post Second World War phenomenon.

Public sector corporations and companies in Africa have been influenced heavily by metropolitan precedents. The *ad hoc* nature of the precedents as well as their *ad hoc* utilization has often resulted in the lack of any very evident coherence between particular purposes and institutional forms even in the same state.²⁵ On the whole the French heritage appears the more orderly but the less oriented to creating productive sector institutional forms appropriate either to state led mixed economies or transitions to socialism under African conditions.²⁶ Special purpose public corporations have a tendency to be structured to serve rather than to undertake main lines of productive activity and, therefore, not to be seen as surplus generating (nor in a majority of cases as surplus collecting) institutions.

The British heritage is rather different but not necessarily more relevant. The British public directly productive sector has tended to have three basic functions: to service a basically capitalist core of productive enterprises (power and transport); to shore up the sinking sands of mismanaged or declining industries (e.g. coal, ship-building) and to pump funds into ventures seen as unattractive by private sources of finance (e.g. various aspects of aviation, computers, atomic energy, automobiles). This approach has led to a realisation that state ownership goals were not the same as private. However the form of that realization is one appropriate only if the state productive sector is secondary and the private dominant. It has existed in an uneasy juxtaposition to an awareness that the British civil service approach was not one very well attuned to managing (a point even truer in 1945) leading to a belief that broad discretionary power should be vested in public sector productive enterprise management.²⁷ Finally because of the servicing, lame-duck-rescuing, gap-filling role of the British parastatals the idea that an

investible surplus should be earned (or even a serious target financial outturn—whether a profit or a ceiling loss—set) has been late to arise and has rarely received top priority.

These characteristics have applied to many anglophonic African parastatal sectors and institutions. Admittedly the Colonial (now Commonwealth) Development Corporation—though not many of its African descendants—has placed a higher priority on surpluses and a lower one on generalised gap-filling but probably largely because its reliance on borrowed interest bearing capital has required it to earn significant overall operating surpluses and to balance capital losses with capital gains.

However, the fairly typical approach of analysing the form of public productive sector units before analysing their function is itself somewhat backwards and its use without any prior analysis of purpose is likely to be both fruitless and confusing.²⁸ Different purposes and combinations of purposes should lead to a variety of structures and procedures.

The following list of possible purposes of individual parastatals and/or a parastatal sector is illustrated purely by Tanzanian cases to demonstrate that diversity of purpose is likely over time and within a country at any given time not because it would be difficult to find Kenyan, Sudanese, Ghanaian, Senegalese, Nigerian or Algerian examples for most of the categories:

a. serving a basically private directly productive sector e.g. Tanganyika Railways and subsequently East African Railways and Harbours prior to 1967;

b. consolidating an economically weak sector which for national reasons could not be allowed to disintegrate or contract on the basis of purely private enterprise decisions, e.g. the Tanzania Sisal Corporation.

c. fill gaps in private initiative in entrepreneurship or finance within a basically private directly productive sector e.g. the Tanzania Development Finance Company to 1967; Tanganyika Packers when set up in the 1950s;

d. provide future sources of government revenue, e.g. the acquisition of 50 % of Williamson Diamonds prior to independence;

e. increase the domestic share of economic activity and the overall rate of growth of output with no clear objectives as to the degree of economic independence or mode of production sought, e.g. the Tanganyika Bank of Commerce over 1964-67;

f. perform certain specific services not considered appropriate to the private sectors, e.g. the Bank of Tanzania (central bank) and the 1966 life insurance nationalisation proposals;

g. provide a framework for achieving a dominant national *and* a dominant public sector position in the large scale directly productive subsectors e.g. the 1967 and (subsequent) nationalisations and negotiated purchases in commerce, finance and insurance, manufacturing, petroleum-refining and petroleum-products distribution;

h. generate a significant and growing proportion of national investible surplus to allow a more rapid expansion of the economy and/or of communal consumption with lesser dependence on external finance and domestic taxation;

i. allow decentralisation of public sector ownership to geographic and/or

functional groups, e.g. the District Development Corporations, Nyanza Industrial Corporation (co-operative union owned) and (former) Co-operative Bank;

j. integrate production orientation into the centre of government decision-making and productive unit planning into the overall national development planning process, e.g. the 1969-1972 parastatal capital budget exercises and the 1974 onward move to coordinated financial and physical annual parastatal planning (budgeting);

k. promote economic cooperation and efficient joint resource utilisation with neighbouring countries, e.g. the Tanzania-Zambia pipeline, road transport and railway ventures and the East African Corporations.

l. achieve overtly social objectives, e.g. the entry of the state owned sector into baking as a means to prevent adulteration and short weighting of bread.

These roles are by no means necessarily exclusive—in most cases several are played by the parastatal sector as a whole and also by some individual parastatals. Further there is no particular reason to assume *a priori* that institutions can make more progress toward one end *only* at the expense of another—e.g. in the Tanzanian public sector actual²⁹ surplus generation and real cost reduction has overall been positively correlated with improved quality of (micro) service and sensitivity (and sometimes creativity) to broader government development objectives (e.g. the National Bank of Commerce in respect of decentralisation, worker participation, credit allocation and investment banking).

Further some roles are basically aggregated, i.e. the overall sectoral impact is not a simple sum of individual parastatal decisions and results. The latter areas require a good deal closer working relationship and a more clearcut structure for micro level control than do the former in which a broad initial framework, communication and sanctions (e.g. change of management, limitation of funds for expansion) for poor performance are more likely to be adequate.³⁰

This suggests that analysis of the structure and operation of law and laws in relation to parastatals should:

a. identify sectoral and firm objectives and priorities as seen by both state and institutional level decision-takers;

b. sort out the formal and operational provisions of instruments to identify the real—as opposed to surface—homogeneity, articulation or inconsistency of state-parastatal legal relationships;

c. operate both on micro (firm) and macro (sectoral) levels.

VIII. Some selected issues

The relation between *public sector contract law* and statute law in Africa requires analysis. It is not true that major parastatal or government contracts are in fact simply events governed by normal contract law. Both their size and nature³¹ prevent that. In some sense they do seem to form a body of subsidiary

legislation. That may suggest a need to organise form and procedure and to coordinate negotiation and content in ways quite different to what would be appropriate if public sector contract lawyers really were normal company solicitors and the fact that their client was a public sector unit was incidental.

However, the other extreme view that such contracts are an overriding type of law seems equally unreal. Unless a contract is literally legislated *and* specifically states that its provisions govern "notwithstanding the provisions of any other written law" it is difficult to see how it can be more than subsidiary legislation. Granted that, unlike normal subsidiary legislation, a contract is not unilaterally revocable without legal consequences the fact that it can be overridden by statutory law (and subsidiary legislation made under statutory law) is still not only formally valid but often of considerable practical significance.³²

Further confusion often arises between legal powers and their effective use. This is illustrated by the contention that most management agency contracts nullify formal state control over parastatals. In practice this is often true but the reasons are not necessarily closely linked to the contract's legal content. A normal contract places the managing agent in the position of a managing director. A managing director clearly is subject to Board and shareholder control and can be removed (granted often only with compensation or damages). Further, exchange control, credit allocation, fiscal and other legal or administrative instruments for exerting pressure on a management usually do exist and can quite lawfully be brought to bear.

The problem is only rarely primarily legal in the sense that control has been legally ceded without recourse. (This is not to say that the legal analysis of many such contracts has been any more adequate than the economic or the political. Many are remarkably unbalanced and unsound.) The form of control usually remains—even in the contract—it is the substance which has not been gained. It rarely was held before so lost, as opposed to not gained, is usually not the best statement of the situation. This can be because public servants do not know their powers and do need a lawyer to advise on them or because they are lethargic or corrupt or see their interests as nearer the managing agent's than the state's (a broader variant of corruption). However, the most usual reason is that the state lacks, *or believes it lacks*, the knowledge, personnel and finance to operate the company. To the extent that is the case, laws will not help except to the extent they contribute to a greater awareness and use of actual public sector power and capacity which had not previously been perceived to exist but was revealed in an intellectual-cultural decolonisation and self reliance exercise in which law and laws played symbolic and educational roles.

The assumption that *public sector ownership* is less efficient than *public sector control* of private units is one which is widespread but rarely analysed. In the first place "efficient" in this sense must relate to the aim of the state. If these centre on collecting a share of surplus for selected citizens and for the public budget, then quite possibly the assumption is valid and joint or state ownership may reduce not only the total surplus generated and reported, but also the public sector's share, through creating a false belief in total mutual interests. However, collecting or allocating a share of surplus to the budget or

to individuals is by no means the only reason behind state productive sector investment.

If detailed economic goals are to be promoted, the case for controls as opposed to ownership rather than for a combination of ownership and controls is much less convincing:

a. in some cases a control relationship (other than that of ownership) is virtually unworkable. This appears to be true of detailed credit allocation so that the case for public sector ownership of key financial institutions is quite independent of any commitment to socialism (*vide* France);

b. outside control tends to create adversary situations which are not conducive to effective management; ownership can lead to more cooperative, problem-solving ones;

c. the day to day contact and communication needed for coordination of management among different institutions is more often attained in ownership than in regulation type situations.

As with discretionary and non-discretionary controls the logic of the argument is not usually for one or the other. Ownership does not eliminate the need for certain broad outside controls designed to ensure consistency with national priority implementing policies (e.g. exchange control, the Tanzania Limitation of Dividends and Surpluses and Audit Corporation Acts which regulate parastatal allocating and reporting, annual planning and use of surpluses) nor for other controls designed to achieve functional uniformity and save time (e.g. some elements of the law of contract). The setting up of control and ownership as alternatives is in fact likely to be a problem to be analysed rather than a contribution to analysing the legal and institutional relationship problems of the governmental and directly productive sectors.

The growth of *para-legal procedures and instruments* requires attention over a broader range than major contracts. The somewhat ambiguous nature of relatively broad and relatively permanent administrative instructions which appear to overlap subsidiary legislation in role, use and sometimes substance and procedure has already been noted. Planning and parastatal sectors have often given rise to new and diversified variants of this type of para-legal system.

Para-legal systems may be means to implement powers which clearly do flow from legal instruments but are not themselves such instruments. The Tanzania annual credit plan is an example. The Bank of Tanzania, Treasury and National Bank of Commerce have not merely the legal power but the legal duty to allocate and manage bank credit. However, to do so by orders would be hopelessly cumbersome. To do so on an *ad hoc* basis would be inefficient. Therefore an articulated (down to quarterly major firm borrowing limits) annual plan is prepared by the NBC-B of T-Finance-Planning, approved by the Economic Committee of the Cabinet (and in some sense by the Central Committee of the Party), implemented, reviewed and revised. To say that none of this process is formally embodied in legal instruments is as true as to say each has operational limitations. To argue from that starting point to the conclusion that it is in no way part of the legal system is no more convincing than to claim its operational limitations make

it of no actual significance. The issue is a general one because a large share of economic planning in many African states proceeds on precisely this basis with the formal legal instrumentality of the vote of funds in a Budget hardly the whole, or even at the substantive core of, the decision process even if it appears to be the only legal validation or check point.

In other cases para-legal procedures while consistent with the intent of existing legal powers shortcut them in ways which are more alegal than para-legal. The Tanzania Standing Committee on Parastatals (which deals primarily with the salary, wage, fringe benefit and participation aspects of the sector) is an example. Its instructions could be made legally binding thorough Presidential instructions to ministers, ministerial directives to parent parastatals and parastatal directions to their representatives on subsidiary boards. To do this would be perfectly consistent with the intention as well as the formal powers in the relevant legislation. However, that procedure has never been used presumably because of its cumbersome nature.

The result has been a vague feeling that the directives were unlawful combined with levels of formal compliance and also frequent specific case of evasion analogous to what might have been expected in response to formal legal instrumental direction. The feeling of unease did lead to a stating of the implicit legal basis but not to its broad publication nor to an Act giving the Standing Committee (or the Principal Secretary to the President who is its Chairman)³³ power to issue directives.

In some cases procedures of this type may be interim devices (like the two week *ad hoc* "Board" of the "National Bank of Commerce" between nationalisation and implementation of the NBC Act). These are used until a more permanent procedure can be articulated and given legal status. However, in the SCOPO case the nature of the Committee's work has been relatively clearly defined and stable from 1968 onwards so that the normal argument for transitional forms and fluidity would no longer seem to apply. It may well be that this—and similar examples—survive because in the absence of serious challenge and the presence of general compliance neither political nor drafting priority is given to formal regularisation.

Finally some para-legal procedures are patently unlawful. Whatever the potential use of existing legal powers to carry out *Ujamaa*isation in Tanzania, the forms used until 1975 contravened the law (and hardly consistent with the intent of the laws) and they have been legally challenged. The judicial response of postponing (apparently *sine die*) all the cases on the ground that the law clearly conflicted with politically properly adopted national policy and any possible legal decision would undermine the rule of law—because it set the law courts in conflict with legitimate political decision-takers on a basic policy issue—is difficult to describe as other than unlawful however accurate its perception of the costs of deciding a case might have been.³⁴

This type of situation is not uncommon. What is unusual about the Tanzanian case cited is the amount of publicly available information and analysis. Paralegal action of this type clearly constitutes either a general erosion of the legal framework or the construction of a *de facto* parallel one in a way which can hardly be conducive to the efficient functioning of the legal

system or to its serving as a framework for the socio-political and politico-economic systems.

The evolution (or non evolution) of *effective planning and parastatal coordination and control* requires attention in terms of the relationship of legal and other factors. In Tanzania economic crises (whether endogenous or, more usually, exogenous in origin) have been followed by more articulated and effective control within existing legislation, led to an extension of para-legal procedures and given rise to new legislation (some of it formalising para-legal initiatives). That is *not* a pattern which has typified all African states nor does the interaction of the development of legal powers and of their use appear to be uniform. One can argue that scarcity of resources leads to more need to coordinate and to control and to greater need to secure funds or other allocations from the state thus strengthening state power and the power of the Treasury within the state. That appears too facile. In the Tanzanian case a more plausible interpretation is that the search for coordination and control predated the crises and that the crises demonstrated the validity of the case for change made earlier, weakened the ability to resist of its opponents, and altered priorities in favour of planning and parastatal reform in the legal as well as the technical, procedural and political fields.³⁵ In Ghana over 1963–1965 increasing resource scarcity led to a deterioration of planning, of coordination, and of control and to the rise of *ad hoc* expedients and gestures with parastatals in fact probably becoming less, nor more, effectively within any governmental framework of policy setting and operation control.

Identifying key elements and interactions and interpreting them needs to start at country level but its fuller interpretation for any one country as well as for Africa requires a number of studies in different countries.

IX. The legal profession

The evolution of laws and law relating to the political economics of the public sector is not an adequate base for analysing the evolution of the legal profession. A number of areas of procedure—e.g. enforcement and appeals provisions, role of specialised courts and Ombudsmen—while very relevant to public sector political economic law are inherently part of rather broader legal questions. Some fields of law—e.g. criminal and civil—are very secondarily or indirectly connected with central political economic law so that their appropriate nature cannot be derived from planning and public enterprise codes or statutes.³⁶ The appropriateness or otherwise of the inherited “trial by combat” or “by inquisition” procedures of European law is certainly relevant to the development of the legal profession, system and procedure in African states and may be posed in terms of public political economic legislation but turns ultimately on more general value and procedure questions including how to achieve genuine equality of access to the legal process, how to ensure effective redress for improper, and proper but inequitable, managerial and administrative decisions and how to sanction negatively antisocietal acts by individuals without also sanctioning positively micro and macro oppressive acts by officials.

A series of areas in which the legal profession in Africa could contribute more effectively³⁷ to the formulation, operation and evolution of public sector political economic legislation and legal systems in African states can be identified:

- a. drafting
- b. legal framework reform
- c. legal "details" reform
- d. contracts and their negotiation
- e. international organisation law
- f. institutional structure and procedures

Drafting is not a mechanical process—a view apparently contrary to the belief of most non-draftsmen judging by the relative unpopularity of the field. Nor is it one that can be carried on in isolation from those able to give clear statements of the social, political and economic goals sought and the technical requirements flowing from the interaction of technology, economics, sociology, administration, management etc. with objective conditions.³⁸

Unless the draftsman (or legal drafting team) is able both to communicate directly and repeatedly with political decision-takers *and* has technical expertise in all relevant area, an inter-departmental and inter-professional approach is critical. This is not likely to be achieved by written instructions and brief meetings; in some cases a team approach with long joint working sessions involving personnel from several bodies will be needed.³⁹ Not incidentally such an approach would lead to a much deeper understanding of the nature, role, and limitations of laws and law by the other departments and professionals involved.

Legal framework reform, like drafting, should be seen as a joint attack on a problem which is "legal" in the sense that basic socio-political and political-economic goals, systems, institutions and procedures are at the core of law but *not* in the sense that it is a matter of arcane formulas. To treat it in the latter way is either to treat the lawyer as a modern oracle or, more probable on the part of non-lawyers, as an analogue to a computer programmer.⁴⁰

In the absence of such an approach, lawyers are singularly likely to "correct" surface flaws and miss main substantive issues or to identify main issues but not the technical (i.e. non-legal technical) requirements of the field. For example Tanzania land law prior to 1975 was evidently not in a form well adapted to serving as a framework for *Ujamaa* or Development Villages. However, the real problems were not fitting land acquisition and compensation, membership rules, legal status of villages and village/village member land tenure into the existing code. Oddly enough that could have been done using only existing Acts and provisions but the procedure would have been both tedious and inconsistent with village responsibility for decision-taking. By concentrating on legal technical solutions to narrowly defined sub-issues instead of working systematically from *Ujamaa*-Decentralisation-Participation-Self Reliance through a broad goal framework to institutional and procedural structures and finally to detailed codes *re* takeover or tenure or the legal status of villages, lawyers totally put off both politicians and non-lawyers working in the area and concerned with almost precisely the same issues that led to the lawyers' concern. The

result was a para-legal patchwork, a suspension of the existing legal provisions and a reinforcement of suspicion that law was either inherently anti-modern, inherently anti-socialist or inherently authoritarian and anti-participatory.

Legal "details" reform is a legitimate field and one largely separate from legal framework reform. Any competent professional—not least a lawyer—should be able to identify technical changes in his area of special competence which are consistent with the broad goal and means parameters set by the decision-takers to whom he is responsible. In such cases he should feel responsible for initiating proposals for change.

For example a number of rent control and price control acts make *paying* more than the legal rent or price an offence. Thus the payer is an accomplice. Taken with British criminal law provisions, this makes convictions of price or rent control violations almost impossible to obtain. A lawyer should be able to consider how to reform this type of procedural flaw.⁴²

Contracts and their negotiation are a branch of commercial law but, in the special context of peripheral economies (or their economic entities) dealing with large foreign (or in some cases domestic) economic units, it is a branch whose macro importance for public economic policy far exceeds that traditionally given to it. Here too the confusion exemplified in the archetypal non-lawyer's question "Is this legal?" or request "put it in legal form" is serious. Without both at least a general knowledge of macro political economic goals and a more detailed understanding of the intended purposes of a particular contract, a lawyer cannot possibly apply his judgement to proposed provisions intelligently nor select particular forms and clauses appropriate to the case in hand.

The problem is even clearer when—as should be the case—the lawyer is part of a negotiating process. He cannot advise on alternative provisions without some working knowledge what his client's priority of goals and rough trade-off ratios among particular benefits and costs may be.⁴³ As with drafting, the solution presumptively lies in a team approach in which the lawyer is integrally involved in evaluating the probable operational meaning of alternative provisions throughout and not merely in "translating" the working language of the negotiations into "law".

More broadly, international and national institutions pose many of the same problems as major contracts plus additional ones of internal organisations, control and procedure. The lawyer should be able to avoid the trap of the administrative reformer⁴⁴ (or builder) who starts with his formal structure, then pops in his substantive provisions and finally slaps on some links with the system of which the institution is a part. He should—again as a member of a team—insist on its being clear what substantively is sought, what costs and benefits are acceptable and/or vital, what areas are secondary and open to flexibility. The worst possible result is a debate between administrative experts and lawyers both speaking as to form but bemusing other professionals and political decision-takers into believing that substance is being covered adequately.⁴⁵

These areas clearly are not minor ones; they do constitute a field of significant professional and national concern and one which is properly

within the ambit of the legal profession. However, they are areas in which traditional legal training centred on knowing laws and legal procedures—and knowing them in a way designed to prepare for an adversary proceeding in court—is inadequate.

The cure can hardly lie in lawyers mastering all other technical knowledge. Life is too short and operational involvement too much a part of applied technical knowledge for that route to be promising. Some possible points for a prolegemon can be made:

a. more attention to law (as opposed to individual legal instruments) in legal training;

b. more study of basic decision-taking and implementation and their implications for the role, content, form and procedures of law by lawyers (and other professionals);

c. use of team approaches grouping different technical knowledge and experience with the legal member integrally involved from an early stage;

d. a combination of some political economic grounding in legal training (perhaps including case study work as an assistant to one or more teams) with formal and informal in-service training;

e. realisation that the implication of the need to know enough about substantive areas other than law to be able to relate their needs to laws and law and to apply ones judgement to proposals involving them will normally be the need to accept either a narrower or a shallower knowledge of laws. The contract and institutional specialist whose basic discipline is law does not normally need to have a broad and deep knowledge of criminal law—there are both reference works and criminal law specialists he can consult and understand.⁴⁶

Notes

1. This is particularly true in respect of public sector bodies. It requires rather bizarre assumptions to suppose a government would frequently sue parastatals to enforce compliance. Granted the criminal provisions (for gross violation) need to be drafted with a more court directed eye, but they are not the central theme of the legislation and are normally quite incapable of causing sound, as opposed to penalising improper, management. Granted further that on an issue not involving public policy it is conceivable two public sector bodies might litigate (e.g. under normal contract law), this will almost by definition be in an area peripheral to the concerns of economic management and planning law *per se*. Even in respect of economic policy legislation covering public sector-private sector relationships litigation, except in cases which are not of much concern to the state, is unlikely to be of major future significance. The potential for retrospective legislation, the possibilities of negotiations for change and the dangers of an open adversary (as opposed to an open or hidden persuader) stance all suggest that. Granted litigation could be used to control officials operating the law in a way contrary to its actual content if their actions really had no significant state backing, the circumstances under which actual prosecutions would be a necessary, sufficient and efficient way of doing so are hardly common.

2. Oddly because the principles are genuinely fairly inclusive—i.e. income distribution, surplus generation, promotion of national production all appear—there has been academic criticism that the objectives may conflict. That criticism is halfway—but only halfway—to wisdom. Any serious political economic decision requires balancing (“trading off”) among several objectives (goals) which are almost never either totally complementary or totally

incompatible. Either academic or legal formulations which posit purely binary choices, let alone ones between good and a seen evil, can only reduce the accuracy of decision-taker's perception of the issues involved in a decision.

3. In practice such a development is unlikely. The processes of articulating, testing for consistency and providing for dealing with future contingencies are not readily integrated with those of setting forth broad strategies, policies and goals or calling for remedies to specific problems. It is not accidental that in Tanzania where the single party—TANU—is constitutionally supreme, the obligation is for the government to articulate and the assembly to enact laws implementing Party decisions *not* for the Party's decisions to be legal instruments in and of themselves.

4. This need not apply to every legal instrument. Nor does it imply that General Orders might not benefit from legal drafting—some most certainly would gain from application of some form of coherent, consistent, logical framework. Most economic analysis and most management decisions at micro level do not include a complete initial statement of socio-economic and socio-political goals and only then proceed to argue from these to the case in hand. No more will, can or should every legal instrument. The basic question is, if one likes, the role of the "role of law" and the framework set by that role within which secondary instruments are produced.

5. To say this implies no judgement on the general desirability of such a system nor does it imply perfect competition. *De facto* Marx viewed—correctly—capitalists as contending against each other and joining forces only in defense of their common interest in retaining (or extending) economic and related political power; a situation now superseded or at least mutated in industrial economies too.

6. This applies to African as well as external actors albeit in different ways. Only the African actors were uniformly responsible to a local base—even the settlers had quite mixed bases and the administrators and businessmen clearly metropolitan ones.

7. This is not an ideological division in the normal sense. If that were the case one would expect Tanzanian and Algerian legislation to be broadly similar structurally and to diverge from Senegalese and Kenyan. In practice the reverse seems nearer to being an accurate representation, i.e. Senegalese legislation is formally more similar to Algerian and Kenyan to Tanzanian.

8. Evidently the groups favoured and the particular restrictions and incentives have changed. In itself that might mean *plus ça change, plus c'est la même chose*. This is especially true if one interprets the structure of political economic power in Kenya as centering on a dominant foreign (TNC) and a partially client, partially partner local elite.

9. In 1975 Tanzania combined Finance and Planning. The examples in this paper relate to the earlier period in which so far as both short and medium term policy decisions and legislation were concerned the words of a decision-taker integrally involved in both Ministries pertain "There was a real world of planning at the Treasury and an unreal—but nonetheless logically important—world at the Ministry of Planning."

10. This was rarely done in respect of public utilities partly because they did not pay, partly because of British and French domestic precedents but was quite common for other companies.

11. In principle tenure and compensation provisions would differ widely but in reality this is less certain. In the absence of a procrustean regulation book (literally in terms of length) mechanically enforced, the meaning of tenure and compensation provisions in law as well as in administration will be the broad sum total of decisions and will be alterable over time even in the absence of legislative (or delegated statutory) action. *Stare decisis*, equity and authority derived from non-binding parallel cases are relevant here both in their formal English legal tradition sense and more broadly.

12. Law is taken here as a body of systematic, institutionalised practice flowing from and implementing the state's political (in this case political economic) decisions. To argue it is not law because it may not have been legislated or (particularly in the Soviet case) conflicts with "constitutional law" is possible but somewhat unrealistically formalist in this context.

13. There is something to the argument that a military government led by technocratically oriented officers may give power to other technocrats in their particular fields. However, for the legal or economic technocrat or manager this really represents delegated authority from a different set of politicians not a dominant position.

14. Technocrats, managers and administrators are usually seen as readily replaceable. Thus few politicians will (or if the person is actually readily replaceable should) spend much political capital on maintaining them unless the real issue is one of the power of the politician not the

influence of the technocrat, administrator or manager.

15. In a genuinely developing country one would expect *some* such laws calling for action beyond present capacities and thus initially only partially implemented. Whether setting targets of this type in statutory form—with or without flexible time of implementation clauses—is desirable is debatable though in practice the question is one of degree since no complex economic law is ever fully implementable on its effective date. To argue for no statutory powers in advance of full implementation capacity is, in practice, to encourage even less consistent non (or anti) statutory substitutes.

16. The means could not be judicial review in any normal sense. Many conflicts would need to be solved *rapidly* (e.g. on grain movement under conditions of food scarcity) or *by compromise* (e.g. on use of parastatal surpluses) which are hardly among the strengths of formal judicial review processes.

17. In practice a good deal of time is often spent by government lawyers and officials in finding ways to avoid their own laws in cases in which everyone involved is agreed that an exception is needed. If this is a rare activity it is perhaps better than having unintended loopholes for the use of all and sundry, but it casts a somewhat ironic light on the earlier attempts to ensure that no loopholes existed while failing to consider the possible need for discretionary waiver provisions.

18. For example, the Tanzania Treasury over 1969-74 made use of its formal powers to direct parastatals responsible to it on not more than half a dozen occasions. This was because, not despite, its keeping in much closer contact with the parastatal management than a majority of ministries. Discussion and exchange of views was a reasonably continuous process at several levels so that the need for "management by fiat" was radically reduced—potential divergences of policy were normally identified and resolved long before a directive demanding or forbidding a given action was needed.

19. This is *not* impossible. Both Kenya and Tanzania have at times set series of grower, marketing board, miller and baker grain and grain product prices that simply made no sense unless there was a desire either to bankrupt millers or force them and subsequent sellers to violate the law.

20. Formal examination of whether procedures were properly followed and/or whether the decision is on its face such as no one properly applying his mind to the legislation could have taken are rather more commonly accepted albeit an Ombudsman is perhaps a more appropriate review format than a court *if* he has effective ability to secure redress.

21. Ideology is *not* properly equatable with socialism. There are capitalist ideologies—the Ivory Coast's and Kenya's ruling political coalitions certainly have ideologies. There are populist and religious ones as well. Ideology was not invented by Karl Marx nor are ideological variants flowing from his ideas the only ones with real power in Africa today. The substitution of ideology for socialist ideology and pragmatism for capitalist ideology is a mystification.

22. It is not irrelevant that illegal, improper and/or inappropriate decisions are relatively more numerous in lower levels of rural administration in Tanzania than at "higher" central or regional ones nor that private/public business links of a type which are both ideologically improper and literally unlawful are most significant in districts characterised by above average income and inequality levels.

23. To argue that there are purely functional cases for decentralisation and participation and that neither China nor Tanzania fully achieves either participation or decentralisation is valid but beside the point. The ideological commitment does not rule out the functional case but goes beyond it and any ideological goal is by definition less than fully achieved during a period of rapid transition.

24. By standard Soviet criteria one could contend that neither China nor Yugoslavia were planned economies. While this may be true given the criteria, the logical implication is that rather more general criteria for defining planned economies are needed.

25. e.g. in Tanzania there are statutory corporations created by Act and others by instrument, companies created under the Companies Act, Statutory Boards and Authorities quasi renovated into operating companies, self accounting commercial departments within governmental units and other more exotic forms within the parastatal sector. Further while there is a clear principle that basically directly productive, basically self financing units should be parastats, the converse appears not to hold, e.g. the University and most other tertiary educational institutions (on grounds of desirability of decentralization and participation) and the Central Hospital (on rather less clear grounds) are also statutory corporations.

26. French economic planning is more coherent than British and the French state owned directly productive sector larger. The planning is centred on consultative committees and the use of credit control greatly facilitated by state ownership of the largest banks. Most enterprises are seen as functioning within a joint state/private capitalist system with the state's control role in regard to specific firms not radically different from those of some other institutional shareholder. This pattern—apart from its use of credit planning and credit institution ownership (which has not been copied very much in francophone Africa)—is not really relevant in the context of a basically foreign owned large scale directly productive sector nor is it geared to using public directly productive institutions as major macro and micro policy tools in a way determined by the uniqueness of interests of the state as opposed to other owners.

27. The two strands can be reinforcing. If the state owned ventures are to operate within the rules of a capitalist system with few special goals flowing from the specific character of their owner (the state) then their managers can be given the same powers as normal business management and expected to act and be judged by market criteria. However, if the state wishes to operate a productive sector precisely because it is necessary to other enterprises but not in itself fully viable very serious problems arise as they also do in the cases of state owned "natural" monopolies and of enterprises or sub-sectors whose operation must logically be part of a broader state policy (e.g. coal, electricity and gas companies and national energy use-price-production policy in the UK).

28. For years economists analysed the West African Marketing Boards on the basis of the *a priori* premise that long run grower unit price stabilisation was their dominant or sole goal. On that basis it was very difficult to understand and remarkably easy to criticise their policies. Later examination starting from studying the Board's roles as defined in their charters and envisaged in statements at the time of their establishment and as demonstrated in their actions and in subsequent Board and Government statements quickly revealed that the Boards had a) been seen as multi purpose bodies and had acquired new goals over time and b) never were seen (or acted as if they saw) long term unit price stabilisation as an overriding (or in some cases even as a major) objective.

29. Verbal is often different. Tanzania's National Development Corporation over 1966–1973 certainly claimed to be seeking profit maximisation and did use evaluation procedures formally consistent with that end. However, in respect of its new projects and some established companies its actions and the assumptions incorporated into its analysis strongly suggested that maximum growth of output, capital and power was its target and that positive investible surplus (let alone maximum) was not even a consistently applied constraint much less an overriding goal. This particular instance seems fairly typical of British tradition parastatals in many African states. There are exceptions—the Uganda Development Corporation clearly did (until 1971) have serious investible surplus as well as growth targets; the Tanzania Development Finance Company did use surplus flow constraints at both project and portfolio level as part of a target of achieving maximum contribution to territorial growth over time which it believed required a financially viable TDFL with a sound enough internal cash flow to attract continued flows of outside funds.

30. This oversimplifies—a badly run parastatal will require detailed intervention if it is large enough for its failure to have a major national impact. The 1970–72 State Trading Corporation weaknesses in Tanzania were in inventory control, sales forecasting, credit control, cash flow management and cost control/pricing. In principle a new management plus a technocratic team could have been used to deal with these problems in that technical failure in respect of agreed goals, not confusion as to goals or pursuit of inappropriate goals, was the core problem. However the macro foreign exchange, credit allocation, investible surplus and recurrent shortage impact of STC's failure were so serious at the national political economic and political level that detailed state intervention in analysis, formulation and implementation of reconstruction was seen as vital. For a smaller company—e.g. Tanganyika Diamond Cutting—with less spread effects, this has been much less true.

31. For one thing they often have a form which is an odd cross between a normal contract, a legislative instrument and a treaty. For another the fact that a state can amend laws does create a special status for (or uncertainty in regard to) contracts to which a state (or a major state owned enterprise) is a party.

32. True, a state determined to alter a contract and with both the will and domestic power to do so might not be deterred by the formal correctness or otherwise of its conduct. However, both very

practical international considerations and a commitment to orderly procedures and rule of law domestically could act as deterrents to revocation but would apply far less to use of existing statutory powers which had the effect of modifying or nullifying the contract.

33. This form might have been more likely. Tanzania drafters have a clear preference for avoiding statutory official level bodies though not to delegating specified powers to individual statutory posts.

34. A postponement for a limited period with a formal notification to the President of the apparent danger of a conflict damaging to the rule of law would perhaps have been lawful and would have given time to sort out the legal, political and procedural framework. In 1975 legislation was finally taken first to provide for compulsory transfer of land use rights to villages and later for village internal political, managerial and operational powers, processes and procedures.

35. The Tanzania case taken alone is certainly not typical because the advocates of coordination and control (both at the political and technical levels) tended to be the advocates of generalised decentralisation and participation. This was—for them and in Tanzania—a logical combination but it is not a general one.

36. They do bear a relationship to socio political and political economic values and power structures but the route from these to most civil and criminal law is direct, not via the body of laws and law of central concern to these notes.

37. Effectively is used here in the sense of building laws, procedures and systems consistent with and useful in implementing dominant decision-takers goals. If a lawyer considers these goals to be invalid e.g. because for him the decision-taking group lacks legitimacy, he logically does not wish to participate effectively in this sense. However it is very doubtful that any such overt and general denial of legitimacy underlies most of the problems of politician-technocrat-manager-administrator/lawyer relationships in respect of the area in hand.

38. The draftsman is presumptively able to supply the knowledge of both goal and technical requirements form the legal side.

39. There is no intention to suggest that the rarity of such procedures is the "fault" of lawyers; it is a problem which requires rethinking by politicians, administrators, managers, lawyers and other technocrats on the basis of arriving at workable solutions not casting first stones.

40. The latter view is not very accurate, betrays either a misunderstanding of law or a view that it is solely a set of functional operational rules set out in specialised language and often masks a very real lack of respect for the law and lawyers.

41. There is an oversimplification here because the decision-taking group is never monolithic. This creates serious problems at the technical/professional level only if the diversity extends to inability to decide, constant reversal of decisions or the Myrdalian "soft" state in which many decisions are blocked by internal contradictions.

42. It is true that some payers may be colluding with the taker but the analogy with bribery is not really very close. Furthermore, to secure a conviction of a renter or buyer is most unlikely to be possible. The basic evil is overcharging (not conspiracy, much less being overcharged) and legal forms which, in practice, actually prevent pursuit of the evil have little to be said for them.

43. *Per contra* an economic or managerial professional cannot readily evaluate alternative arbitration clauses because he lacks the legal expertise and experience to know their probable implications under a variety of contingencies.

44. Unfortunately this caricature is often a fair summary. Institutional reform experts very often start from organisational principles and only subsequently refer to what the institution in hand is supposed to achieve and eventually make passing reference to the particular context in which it is to operate.

45. Evidently structure in both the administrative and legal senses is *part* of institutional substance; the point is that it is by no means the whole.

46. This trade-off is not unique to the law. It applies just as much in—say—economics, sociology or administration. Nor can it be avoided by new specialities e.g. all aspects of housing. That specialisation would pose the same "boundary" problems with respect to city planning, urban-rural planning, transport, fiscal policy, income distribution, criminal law, mode of production, civil engineering, industrial location to mention but a few. Quite possibly such new disciplines cross cutting traditional boundaries are needed but as complements much more often than substitutes and not as "cures" for the complexity of reality.

Two Variants of a Research Project

I. Assumptions

1. The public corporation is not purely a legal structure and is not isolated from the entire socio-economic system. It has to be treated as a part of the entire system.

2. As the public corporation is a socio-economic phenomenon, it would be preferable to conduct research on an interdisciplinary basis: lawyers should be assisted or advised by economists and political scientists.

3. Public corporations in various African countries show both similarities and differences; therefore the bulk of research should be carried out within the national boundaries, complemented by comparative studies based upon the findings of the research carried out in the different countries.

4. A research project needs a broad and solid framework and a flexibility within this framework. Some kind of a framework is necessary for the purpose of obtaining comparable results and of reaching conclusions which are meaningful in the African context. Flexibility is needed because the countries involved are in many ways different and the issues of interest and the possibilities of the research workers vary.

5. The broadness of the framework depends on the available research capacity and the stretch of time for research. If the research capacity is small and the time available is short, a very broad framework might not serve as a framework in reality and the result might be scattered patches of research, uncomparable and not fit for a theoretical synthesis. As these variables are not quite clear for the moment, two variants of a research project are presented: one with a *broad framework* and the other which might incorporate a relatively large number of issues into the study of *one topic* of central importance; that of decision-making and implementation in respect of directly productive public enterprises.

II. The variants

A. *The broad framework*

1. Description of the economic, social and political background in its historical context; orientation and goals pursued by the state; the general description of how the entire economic system works, e.g.:

ownership system (socialist or bourgeois orientation as publicized and in reality), social classes

machinery of planning, the impact of planning

the role of the market, the profit-motive

efficiency and integrity on all levels

infrastructure and communication system

in what fields do public corporations operate (production, banking, trade, etc.).

2. Three interconnected yet separable spheres providing a broad uniform framework for research

(a) relations between the state and the public corporation (vertical relations—state direction)

(b) structure and internal relations of public corporations (internal relations—structure)

(c) relations between public corporations, between public corporations and the private sector, between public corporations and foreign capital (horizontal relations—market).

3. Within each sphere the following recommendations are made in respect of specific spheres of research to serve as alternatives for research workers in different countries:

ad a. (vertical)

aa. Policy decision in respect of public corporations, possible conflicts between the goals and the way they are treated

bb. Distribution of the power of decision between the state and the public corporations, between Parliament and the government

cc. The impact of planning on the public corporation

dd. Creation, merger and termination of public corporations, the definition of their scope of activities, reallocation of assets

ee. Decision-making through the law, through administrative instructions and through economic regulators (credit-, wage-, tax-policy, etc.) The problem of discretion on the state level

ff. Control mechanism and practice

gg. Sanctions (dismissal of manager, criminal law, etc.)

hh. Party influences

ad b. (internal)

aa. the legal structure used

department—public corporation—company: is there a need for a statute on public corporations, should this depart from the traditional structure?

the impact of the legal forms on the functioning of the public corporation

bb. Decision-making

Board and manager

State interference with the autonomous sphere of the public corporation

The problem of discretion on the level of the enterprise

cc. The status of the workers; trade unions; workers' participation

dd. Accountance

ee. The problems in respect of subsidiaries

ff. Results and causes of major failures

ad c. (horizontal)

aa. The contract law and settlement of disputes between public corporations

- bb, The same between public corporations and the private sector
- cc, Public corporation and foreign capital
 - purchase of technology
 - management contracts
 - joint ventures
 - decision-making according to the law and in reality
- dd, control mechanisms

4. A general evaluation, summary of theoretical propositions.

B. Decision-making and implementation in respect of directly productive public corporations

1. Description of the economic, social and political background; orientation and goals pursued by the state; the general description of how the entire economic system works, e.g.:
 - ownership system (socialist or bourgeois orientation as publicized and in reality)
 - the impact of planning
 - the role of the market, the profit-motive
 - efficiency and integrity on all levels
 - infrastructure and communication system
 - in what fields do public corporations operate (production, banking, trade, etc.⁷)
2. Distribution of the power of decision between the state and the public corporations, between Parliament and Government.
3. Decision-making and implementation on the level of the state
 - a, Policy decision in respect of public corporations, possible conflicts between the goals and the way they are treated
 - b, The impact of planning on the public corporation
 - c, Creation, merger and termination of public corporations; the definition of their scope of activities, reallocation of assets; the legal forms used: department—public corporation—company
 - is there a need for a statute on public corporations; should this depart from the traditional structure?
 - the impact of the legal forms on the functioning of the public corporations
 - d, Decision-making through the law, through administrative instructions and through economic regulation (credit-, usage-, taxing-policy, etc.). The problem of discretion on the state level
 - e, Control mechanisms and practice
 - f, Sanction dismissal of the manager, criminal law, etc.)
 - g, Party influences
4. Decision-making on the level of the public corporations
 - a. Board and manager; management contracts' impact on decision-making
 - b. State interference with the autonomous sphere of public corporations

- c. Decision-making and the subsidiaries
 - d. The role of trade unions, workers' participation.
5. Conclusions
- a. Evaluation of the decision-making and implementation process
 - b. Goals set and results achieved.

III. Operational remarks

1. As the public corporation is not purely a legal structure (see I:1) it would be a serious mistake to confine the research to the description of the legal devices. This is necessary for two reasons: (a) the law in the books may be completely misleading if it is not contrasted to reality and (b) the deviation of reality from the written law may lead to very important conclusions in respect of the functioning of the system and the legal framework. What is important is not merely the fact of such deviation or its extension but also the ways and means resorted to in reaching a result differing from the result which would be attained by the strict observance of the law and above all the reasons for such deviation.

2. Within the context of the above the declared policy goals should be contrasted to the goals in fact pursued by public corporations. The eventual difference of the two may be traced back to inadequate measures taken in the pursuance of such goals, to a contradiction between the declared goals and the real goals or to both. The research might try to analyse the social-ideological effects of the difference between the apparent and the real goals.

3. Another crucial problem is the organisational relation between the State and the public corporation. This problem seems not to be resolved in a satisfactory manner in most countries. The reasons thereof may be of a legal and of an extra-legal character. So far as the first is concerned the suspicion arises that the British pattern shaped according to the exigencies of a system of private ownership and of an important industrial power and which is nevertheless in a way archaic does not suit the needs of developing African countries. It should be endeavoured to outline a new structure which might be more effective in the domestic context, while pointing out the eventual difficulties in switching over from a fairly well known structure to a new one. The extra-legal reasons may be—among others—lack of experience and routine and the vested interests of public officials and corporation managers which do not always coincide with the declared interests of the country.

4. The next problem to be coped with is the merits of decision-making. Abstractly speaking the optimal solution would be a comprehensive national economic plan, in respect of which the main targets and means would be decided centrally, leaving a fairly broad margin for corporation initiative. There are, however, doubts about the feasibility of such a comprehensive national plan; the possibilities and the factors defeating or hampering such a possibility should be investigated. Anyway, some possible steps into this direction should be examined. In this context it is necessary to look into the

combination of central and local decision-making. Here—abstractly speaking—the lack of sufficient number of experts or a serious lack in goods or an unstable political situation may advocate for a higher degree of centralisation and the lack of infrastructure, communication system for a lower degree of centralisation, etc.

5. A very serious consideration should be given to the relations of the public and private sector, and in particular, to the relation between the public sector and foreign corporations. The main question is whether it is the public corporation which, on the whole, serves the well-being of private and foreign corporations or it is the private or foreign corporation which is influenced by the policy and activity of the public corporation. The reasons for the eventual subordinated position of the public corporation should be analysed; in respect of foreign corporations it is hardly sufficient to conclude that the domestic public corporation has a weak bargaining power on the market. Recommendations to remedy the situation are welcome. Typical standard and individual contracts should be investigated, in particular in order to find out the balance of risks established by such contracts as well as to point out frequent oppressive terms in such contracts. Thought should be given how to remedy onesided contracts (for instance the practicability and feasibility of a control of standard contract forms used in the country, legislation defeating oppressive terms, obstacles to such a legislation).

6. It is of utmost importance that the rank and file in a public corporation should feel like a “member” of and not only a hired labourer in the public corporation. Therefore it might be useful to look into the position of the rank and file to find out whether they are simply hired hands or rather persons integrated into the enterprise; are they informed what is what they produce used for, what are the goals of their production, do they have training schemes—a possibility to enter into higher ranks, do they have any say in respect of their working conditions and in respect of management, are their rights protected, etc.? Here again, shortcomings of the law and of reality should equally be investigated.

7. Law is one of the social tools which gets its impulses from the society and affects society in concordance with other social factors. Therefore law should not appear as an isolated phenomenon and should not be dissolved in economy or sociology. A legal research of this kind should develop a very important by-product: theoretical findings through careful generalisation and integration, on the basis of practice. Conclusions based upon individual phenomena have in most cases a certain value also beyond the phenomenon investigated: they may become building stones of theoretical findings. Therefore the research should not stop at conclusions concerning questions of detail but should make efforts to reach to theoretical conclusions (a) affecting the entire complexity of the problems of public corporations and (b) contributing to the construction of a new legal system and theory of law.

8. There are two main ways to conduct the research work: (a) case study covering practically all the issues in variant A or B, or (b) a study of one or more important issues concerning public corporations as such.

James C. N. Paul

Law, Lawyers, and Decision-Making in State Enterprise

Laws establishing state enterprises in anglophone Africa delegate larger realms of discretion. This power is shared, in loosely defined ways, by various officials whose "accountability" to the "public" is more illusory than real. Delegation of discretion may be inevitable, but lawyers concerned with development administration will be interested in the way in which the abstract powers given to corporations are converted into concrete decisions—into plans, programs, budgets, contracts, commands and other transactions. Many of these decisions can be seen as official acts which allocate scarce public resources, and cumulatively they may tend to benefit one social interest or another depending upon how discretion is exercised.

Other papers in this volume emphasize the importance of understanding the "political economy context" in which this power over resources is exercised. The assumption is that in socially stratified polities, the distributional decisions of state enterprises will tend to reflect the particular values, economic interests and power advantages sought by dominant groups in the polity. The importance of identifying these groups and their interests and the sources and means of their power seems obvious, but it should hardly come as a surprise that the operation of some public corporations, those which wield power over important resources, will almost always tend to become politicized, sometimes corruptly so. What we may wish to know, in more detail, is how these institutions are governed, how they may be manipulated, who attempts manipulation and by what means—and whether it is possible to subject corporate governors to a greater measure of legal control, to regulate their decision-making without imposing undue costs on efficiency and creativity.

Towards this end it was suggested at the Legon workshop, that we need more case studies of public corporations which focus on decisions and decision-making. This paper, in a summary fashion, sketches some ways of looking at decisions and at the process by which they are made. I will suggest that, for purposes of analysis, there are several types of decisions to be examined and, therefore, several ways of analyzing their content and social impact. I will suggest that the process of making decisions can, for purposes of study, be broken down into several elements; and analysis of each element helps us to understand the particular social context of the corporation and the particular influences which come from this context and affect the content and outcome of important decisions. I will further argue that the process by which a decision is made is, itself, a factor which may, independently, affect

the decision's content. Finally, I think these several propositions suggest a number of legal implications, and I will sketch a few of them. The overall purpose is to develop some ideas which may help researchers to describe the workings of an institution and analyze what is described.

I. Types of decisions

Decisions are the raw materials for a socio-legal history of an enterprise. By analyzing them we can study the avowed theory and objectives of the enterprise, the means taken to implement various objectives, to monitor the results of implementation and to impose accountability. Thus, there are different types of decisions, and, arbitrarily, for purposes of the research approach discussed here, I suggest three categories of decision-making though each of the types may overlap.

There are, first, what we may call *redistributional* (i.e., highlevel) decisions. These may express some theory of distributive justice concerning the development and allocation of the resource, some set of values and social goals to be realized. Redistributional decisions, in the form of policy and planning statements and legislation, are nominally made by political executives, central planning agencies or legislatures—and in some polities they may be made by official organs of a ruling party. Of course, there may be other important but less visible actors (and institutions) in the process, influencing the terms and content—e.g., particular politicians and government technicians, private interest groups and individuals, bureaucrats who will be expected to implement the policies expressed. Redistributional decisions may, perforce, be highly politicized, for they can (ostensibly) affect the interest of significant groups, a whole class. We might expect them to be made (though they may not be) in highly visible political arenas and by institutions and processes designed for that setting.

Second, there are decisions concerned with *implementation* of distributional policy. These come in many forms: micro-planning and budgeting specific projects, awarding contracts, rule-making, allocating, and many other transactions. In studying an enterprise, we may be particularly interested in identifying and studying implementational decisions which have a significant impact on people, or on resources committed to the corporation, or which interpret distributional policies in a significant way. In studying the enterprise, we will want to know who, within and without the institution, participate in making these decisions, and how.

Third, there are *regulatory* decisions—those which independently review the “legality” or wisdom of implementational (and occasionally redistributional) decisions. Schemes of regulation exist both within and without a public corporation. Its directors “regulate” when they review the decisions of managers and others, and company lawyers perform such tasks when they advise on the “legality” of an implementational decision. Regulation also takes place outside the institution proper: Ministers, cabinets, organs of political parties, parliamentary committees or questioners and, occasionally,

courts may engage in regulation; and these tasks should become important when—and to the extent that—the corporation is implementing a scheme of distribution which affects social interests—e.g., when it is dispensing resources (such as credit for farming or housing) which people need, or when the implementational decisions affect the economy as a whole or the interests of particular groups in particular ways. Regulation can be used as a means to vindicate redistributive decisions where implementation has failed to achieve that purpose; but it may also be used to manipulate or frustrate redistribution. Thus, again, our attention is directed to how particular actors use or attempt to use various structures for different kinds of decision-making.

II. Institutions, norms, and actors

So far I have suggested that in order to study decisions reflecting the theory and history of a corporation, we might assume that there are a variety of different kinds of them (redistributive, implementational and regulatory) coming from different centers of decision-making within and without the institution. Thus, to get at the history of these decisions, we may want to examine a variety of institutions, norms and actors. In that way we can start to see who (and what) drove the corporation in the directions it has taken.

We might start by looking at the structure, norms and actors of the corporation. We can first map the legal and formal organizational structure of the institution. Laws, directives and manuals define it and allocate responsibility for tasks and decisions. But these formal rules do not tell us how the structure is in fact used, who are the key actors in its governance. A board of directors may have extensive legal power. But we may hypothesize that to the extent that the board's membership is drawn from other agencies of government and to the extent that the primary duties of these appointees lie elsewhere, this structure may not be used in precisely the way contemplated by law. As some studies of institutions show, the time, energy and loyalties of some directors may lie elsewhere. They may meet infrequently and be badly briefed when they do. The structure may be used to subvert corporate decision-making (e.g., because powerful directors from Ministry X are jealous or hostile to various corporate activities), or the board may tend more to ratify managerial decisions than to perform a creative, directive role. Thus, decisions of consequence may be made *de facto*, by the manager; or they may be generated in other offices; or there may be inaction because roles are confused. The point is to try to locate actors who actually influence the content of decisions which we think are important.

Those who act within the corporation are presumably supposed to be guided, in part, by norms, manuals and general policy declarations perhaps by ideology in some polities. Thus, we would expect implementation actors to act in accordance with redistributive decisions given to them from superior authorities. We might expect their behavior to conform to the rhetoric of the public service, e.g., to notions of selfless service to the public

and loyalty to institutional goals. But we may suppose there is, inevitably, deviance between "ideal" behavior and actual behavior. In part the deviance may be the product of a sort of "sub-culture" which exists within the organization—a set of attitudes and perceptions which affect motivation (e.g., perceptions of the promotional system) and communication and interaction of actors. The "sub-culture" may reflect pathologies within the institutional bureaucracy which are the product of environmental factors such as class interest, ethnic or regional loyalties, patron-client relationships, educational experience and entrenched institutional customs.

Of course, the actors and structures within the institution may also be affected—sometimes dominated—by institutions and actors outside it; e.g., the responsible ministry, other official agencies (such as the planning body) which have an interest in corporate decisions. There may also be attempts to influence by private firms or individuals seeking to affect distribution. Some outside actors may have more influence than others, e.g., because they enjoy superior wealth or status, knowledge and technology, access to intermediaries. Their capacity to influence may also be enhanced because they are able to operate at low levels of visibility or because accountability for decisions is blurred or because substantive criteria for important decisions are susceptible to *ad hoc* manipulation.

III. The content of decisions

So far we have noted ways to describe types of decisions and institutional settings which may enable us to put some of the flesh of social history around the dry legal bones of a parastatal. We may now note a few ways to analyze the content and social impact of decisions which characterize the life and work of the institution.

A. *Goals.* In part, we can analyze corporate performance by comparing the goals ascribed to it by redistributive decisions with implementational and regulatory decisions and their social outcomes. Accordingly, we could look to the aggregate of relevant redistributive decisions—policy statements, plans and legislation—to identify avowed goals and see the extent to which more general statements of aspiration and prescription have been converted, at various points, into more concrete concepts which can be used to evaluate operations.

Thus, one function of goal articulation may be to provide explicit guidance to decision-makers engaged in implementation and regulation. In theory, the more precisely we have explicated our social and economic objectives, the more we may have narrowed the range of subordinate administrative discretions. Another function of goal articulating decisions may be to provide functional criteria to measure the achievement or efficiency of the organization (or a part of it). Some goals, to some extent at least, may be expressed in quantitative terms; e.g., in terms of units of social needs for the resource, or units of production or distribution of it over units of time to units

of people, groups or locales to be benefitted. Again, to the extent possible, some goals might be expressed in qualitative terms which enable some evaluation of the deeper social impact of the program. Still another function of goal articulation may be to express some theory of power in regard to the resource administered—to distribute rights between people affected and bureaucrats in regard to implementational decisions, to determine rights to participate in these decisions, and to share in the use of and benefits from the resource.

As noted, goals are articulated in the basic redistributive decisions (e.g., development plans, legislation); they are also articulated—often more precisely—in lower level plans and subordinate rules. To a large extent goals may appear, to the extent they do, in planning-type decisions, in decisions to launch various kinds of projects and activities.

There are many textbook statements (and platitudes) about the function and techniques of planning and goal articulation, but there may also be many difficulties in developing these decisions within institutions. The basic redistributive decisions may be the product of a political process and political actors, and their content may be deliberately unclear or unrealistic. An agency may be empowered or commanded to pursue several different, or conflicting goals; e.g., a public corporation producing food may be told to maximize employment and at the same time minimize its prices, or realization of the goals of one organization may depend on the planning and output of some essential service by another. Further, goal articulation may be seen as a continuing activity penetrating the system, not simply a result of a single exercise. In part it is a process of sorting out and assigning different tasks, monitoring and revising them in light of experience. Thus analysis of goals must look, not only to the content of decisions which express them but to the institutions, actors and processes which produced them for the latter analysis may lead to explanations of the former.

B. Outcomes. Analysis of redistributive decisions and others expressing goals may not yield a very precise set of criteria and prescriptions to measure performance (a failing which may be a serious problem in itself). We may lack very satisfactory tools to evaluate implementation and regulatory decisions. Nevertheless, we can seek to determine the allocational effects of these. They are the “output” of the corporation, and the problem may be: who benefits from them? What has been their social impact?

In some agencies, e.g., one which provides urban housing to the poor, it may be possible to look at decisions which actually allocate a resource to individual recipients. But in most instance these allocational decisions, or the social impact of the institution may depend, in part, on the content and the effects of a wide range of other decisions: micro-planning, rule-making, budgeting, deployment of personnel and other, diverse transactions—plus regulatory measures. The problem is to see how, cumulatively, these aggregates of decisions may relate to each other in terms of expressing and effecting a coherent policy of resource use or distribution. For example: to what extent may an agency's personnel or budgeting affect its allocational work, e.g., by causing deviance from redistributive goals?

Depending, in part, on the nature of the resource, the tendency of these implementation and regulatory decisions may be to benefit one social interest or another, some advantaged groups at the cost of others less advantaged. Or the resource may have been inadequately distributed to intended beneficiaries (e.g., in amounts too small); or there may have been a failure to distribute (e.g., because the anticipated program was never initiated). Or there may be some admixture of these types of allocational failures. We may wish to go further and examine the social effects of these allocative decisions and the social impact of the system as a whole upon various groups. In some cases, there may have been re-allocations—more or less as anticipated by redistributional decisions, but the benefits realized may be marginal because distribution of this particular resource (e.g., credit for farmers) has little value unless other resources (e.g., land or technology or markets) are also made available. Or the program may have failed to achieve the social impact sought because the target group of beneficiaries failed to relate to the corporation and to use the program ostensibly established to help it. Or allocative failures may have produced other kinds of reactions: frustration, resentment and politicization of new demands or, conversely, alienation and “exit”. Analysis of the outcomes of decisions will try to ask a number of questions, e.g., about perceptions which different groups of people have of the corporation and its people, about “usage” or failure to use its programs, about changes in the quality of life of target groups which are—or might be—ascribed to the corporation.

IV. The decision-making process

The process of making a decision can be analyzed in terms of five elements: *identification* of the problem to be resolved; *search* for (and analysis of) data relevant to framing possible responses; *choice* of a response, usually a course of action; *communication* of it to those affected; and *evaluation* of the results. It is important, of course, to note that these “elements” are not discrete, severable forms of activity; they are simply analytic tools; we can use them to look more carefully at the various, related behavior which goes into decision-making. Further we should note that decision-making goes on continuously at all levels in an organization. We are concerned here with inter-related modes of behavior, not a single act of choice nor even a discrete set of acts. We are concerned with behavior which produces deliberate courses of action having some significant social impact, e.g., in terms of the number of persons affected, the quantum of publicly controlled resources allocated for some purpose. The more an institution’s choices have these implications, the more our concern with the process which produces the choices made.

A. *Problem identification.* The first step might be to see how the need for such decisions gains recognition. We might start with the notion that organizations develop “agendas”, and our concern is to see how those agendas come to be fashioned. In one way or another, situations, demands and apparent

"troubles" are either ignored or brought forward and converted (just as a lawyer converts a client's raw data) into a problem for decision. Thus, we may want to study who participates in the process of articulating the problems and agendas which we think are important; how priorities for attention are established. In one way or another a large organization may have officials who are asked to monitor one or another activity or to scan the environment (or parts of it) to scout situations which may beget the need for decisions. How is this scanning process organized—if it is? We may be interested, too, in the question of access for persons outside the agency. How easy is it for farmers, confused or dissatisfied over the Agricultural Bank's credit policies, to express the grievance and secure reasoned attention? Access to agendas may shape the terms in which problems are expressed and influence perceptions of the enterprise environment.

As lawyers well know, the terms in which problems are stated may well affect the response. It thus becomes interesting to see who formulate what kinds of issues presented for decision. The dynamics of problem identification and agenda formulation are complex—but they tend to shape the ultimate choices made.

B. *Search.* To the extent that a situation is perceived as an occasion for a decision there may follow some process to search for clarification of the issues and possible responses. To the extent that there is no search and posing of choices, there is no real decision—only a reaction. Thus, search leads to perception, clarification and evaluation of choices, to premises for choosing. In an ideal world decision-makers might search for and evaluate all alternatives, seeking to know the risks and utility of each. Sometimes commentary on decisions assumes such a world. But of course reality is different. The data for framing choice may be limited, all the more so if the search process is inadequate or incompetently staffed or organized, or if there is pressure to search quickly. Searchers live, not in a perfectly rational world but in an environment of "bounded rationality", and often an environment of strong "irrational" pressures. Thus, decision-makers are tempted, or compelled, to "satisfice", i.e., to choose from among the apparently *available* alternatives rather than all possible alternatives, to restrict both aspirations for an ideal solution and the search for one. Various dynamics impel this "satisficing behavior": limitations of time and resources, laziness, prejudices or ignorance which blinds or skews perceptions of the implications of the problem. In developing processes for decisions of consequence, it may be important to optimize the search process. Lawyers who counsel on decisions—and on organizational structure and procedures to facilitate search—will want to focus on how this work is organized and how pieces of information and viewpoints are communicated, put together and evaluated in the formation of alternative premises for decisions. Further, law-trained counselors with a more sophisticated view of the fiduciary nature of public enterprise may be sensitive to the need to consult interests affected by putative decisions. We do not make legal decisions without hearing the parties, and any search for all relevant evidence is often improved by deliberately encouraging disagreement.

C. Choice. The core of the process is the authoritative selection, from among alternatives, of a response to the problem. The possibilities are reduced to a prescribed course of action. While conceptually this may seem obvious, it may sometimes be difficult in practice to see exactly whether and what choice was made, when and with what finality: the decision-maker may, in fact, choose to "hedge his bets", to obfuscate, to make a "symbolic" decision or a promise of a later decision, or to defer choice without appearing to do so. If this in fact is the choice made, lawyer counselors will seek to know why—the reasons may be persuasive, or they may reflect some problem in the process of governance.

D. Communication. The choice made must be converted into an outcome. In the situations which usually concern us here, it must be converted into an exertion of power—often a set of prescriptions regarding some sector of activities and social relations. Thus, to be meaningful the decision must be communicated effectively. The communication may fail to produce behavior sought unless its premises are articulated. Perhaps the Light Brigade had no need to know "the reason why" it was ordered to charge, but the implementation of complex decisions in a large organization may call for a different outlook on commands: further choices must be made and subordinate policies and practices developed as a result of the decision; the purposes of the decision must be realized; the choice made today may be considered later—and possibly distinguished—as a precedent. People affected must know. All of these possibilities bespeak the importance of analyzing the communication element.

E. Evaluation. A final set of steps is concerned with gauging the effects of the choice made. These may include selection of means to monitor and review the outcome, and means to undertake new decisions in view of the consequences of the first. If we view decision-making as a continuing process—an aspect of organizational behavior rather than a discrete episode—we may better appreciate the significance of evaluation. Outcomes produce new situations usually calling for new decisions. Thus, we are led back to the processes of problem identification. Frequently the effectiveness of evaluation may depend on the ability of evaluators and problem identifiers to see that earlier formulations of the problem to be addressed (by search and choice) were defective. The tendency may be to stick to the original statements of the issues and decisional premises and to look to new means to carry them out. But, from the vantage of hindsight, scholars will ask whether the better course would be to re-examine all the steps which produced the original decision, including, notably, those which defined the problem.

The process described above may provide a prism which may help us analyze and explain decisions and decision-making behavior.

1. *Goal articulation* has already been identified as an important task, and an examination of process may show, e.g., how the premises for one decision are (or are not) related to another and to development and refinement of values, objectives and standards for ongoing decision-making, efficiency, and

accountability. Thus, we can look to the elements of problem identification and search to see what rules, data and situational perceptions were used to make choice, and whose perspectives influenced that behavior. We may also look to the communication and evaluation elements to see how choices were converted, in part, to planning criteria for measuring achievement.

2. *Visibility and Accountability.* Use of the prism of process may show who was informed—and in what way—about problematic situations, about the need for search and the implications of putative decisions. Processual analysis may show how a number of people have cumulatively, contributed to a particular decision, and where responsibility for particular judgements may be fixed.

3. *Participation.* Processual analysis may enable more careful study of important questions concerned with who participates, at what stage and how in decision-making; e.g., who (within and without the organization) has access to and influence in agenda-making, forming decisional premises, reviewing them. This analysis may help us to identify the roles of intervenors and intermediaries. Focus on the communication and evaluation elements may direct attention to the way in which an organization relates to people and groups affected by its policies—and vice versa. Processual analysis should provide a means of assessing the costs and benefits of participation in different kinds of decisions. We may see more clearly possibilities for different kinds of participation to achieve different ends.

V. Some speculation about the legal implications

The analyses sketched here may illustrate and reinforce some propositions developed more fully elsewhere in this volume. They suggest, perhaps, the need for much more thinking about the underlying *theory of the public law* concerned with public resource development and distribution; the *roles of lawyers* in administering it and their *training*.

More and more the machinery of the state, in all types of political economies, is used in theory, to enable “public” actors and institutions to control or participate directly in producing and allocating resources which affect well being. Dependency on these state-managed systems grows. Public corporations are simply institutions which are a part of these broader systems of resource production, use and distribution.

The law establishing systems of resource distribution may be important not only for what it provides but for what it fails to provide. The law creating planning agencies, state enterprises and important regulatory agencies may vest great discretion in public officials. Discretion is power which becomes all the greater when standards and procedures for its exercise are unprescribed; when the decisions are at a low level of visibility and do not have to be explained publicly; when participation in the decision-making and the range of persons consulted is limited—often to those who have superior status and

means of access; when articulation of policies which should inform more particular decisions is defective—and when there are no prescribed avenues of review or redress. Further, the law may pay too little attention to other aspects of the business of decision-making in allocative institutions, e.g., to processes for making subsidiary rules and codification of policies and practices; to timing of decision-making steps so that there is opportunity to gather and analyze information. Further the law may permit, indeed encourage, much secrecy about communicating the content of many decisions. (Thus in many African countries, the contracts of public corporations with TNCs are negotiated by government with limited or no consultation with groups which may be affected by the decisions taken; and the contracts themselves—which may be seen as very important pieces of *ad hoc* legislation—are treated as state secrets). In ruling coalition polities (where political parties are non-existent or largely controlled by elites), there is a lack of institutions which represent concerns of those with less voice and advantage in society. There is a lack of institutions which are empowered (or have resources) to enforce, independently, some system of “public interest” accountability. Courts play marginal roles as agencies of review and accountability. In part, this is a legacy of the inherited legal system—which provides limited judicial jurisdiction and is culturally hostile to the kind of judicial power we are talking about here. In part it is because the judiciary and other “independent” tribunals which might be entrusted with regulatory roles may find themselves in an environment which is politically hostile to their intervention. Cumulatively, the legal rules (or non rules) structuring decision-making—and regulation of it—may significantly affect the way in which problems are perceived, issues defined and agendas for official programs developed. Again, these structures may create an environment which is more conducive to corrupt or unprescribed allocational decisions. Research on particular public corporations, particularly on decisions and processes for decision-making may tend to support or modify this view of the public law of distribution.

It is possible to contrast this kind of public law of resource distribution—which seems to establish new forms of “state capitalism” as a “new feudalism”—with another model. In this model state control of resources is seen as a means not an end. The end is distribution in accordance with theories and formulae which stress both equity and other, new kinds of human rights concerned with sharing resources directly or sharing power over them. This theory is concerned with people’s rights in the new property which is created by the law of public corporations. Implementation of the theory will call for legal inventiveness—finding new ways to make bureaucrats fiduciaries. One important way may be decision-making.

Lawyers may want to look more closely at the aggregate of redistributive decisions and legislation relevant to some system of resource distribution. Laws creating public corporations are a part of this aggregate. Perhaps we can develop more critical tools of analysis which ask questions about why the law fails—to the extent that it does—to provide rules directed at, e.g., the processes of explication of goals; modes of participation in different stages of decision-making; visibility and accountability; regulatory mechanisms.

If law is to be used in accordance with a theory about resource distribution which puts more emphasis on people's rights, we may be concerned with analyzing more carefully the roles of lawyers in the system. For example, the counseling role may be far more important than presently envisioned. While it may be impossible to develop very precise formal rules governing decision-making, it may be possible to develop, in practice, counseling techniques and criteria which encourage more attention to each stage of decision-making.

The implications of this to the teaching of public law also seem important. It is hardly enough simply to study the legal forms of public corporations. Students may need to know more about how these forms are used, how power is in fact exercised, how decisions come about. They may need to understand decision-making as a complex process, and one which may be manipulated. They need to see how process affects choice and outcomes, how particular kinds of legal skills can be used to make that process reflect a more coherent theory of the role of law in the management of public property.

Reginald Herbold Green

Historical, Decision-Taking, Firm and Sectoral Dimensions of Public Sector Enterprise

Some aspects of and angles of attack for research

Since the basic nature of public enterprises is not independent of the underlying socio-economic and politico-economic nature of the particular State in which they exist, any operational planning or budgeting in relation to public enterprises must start from an analysis of the purposes and goals the enterprises are intended to serve and achieve. It is very rare for any enterprise to have only one relevant goal or for the balance of goals for all public enterprises in any one country to be the same.

*Budgeting And Planning For Development
In Developing Countries*
(Expert Group Reports, United Nations)

I. Research, form and practice

Research as well as operational planning and budgeting needs to be grounded on a perception of what a public enterprise or public enterprise sector is actually intended to be, to achieve and to become. Otherwise it is likely to be formal and utopian at best and misleading and counterproductive at worst. Reading of formal texts and declarations is a step toward answering questions of purpose but only one step—one form will often do (not perhaps equally satisfactorily) for several purposes. The nature of the actual decisions taken by, and in respect of, public enterprises and the public enterprise sector are—when adequately analyzed—the best single test as to what decision-takers have intended.

If the pattern of decisions appears to be incoherent that too requires analysis: fragmented decision-taking by persons or groups with divergent interests? A very divided or unstable decision-taking coalition? A low priority by central decision-takers to the sector or enterprise allowing secondary decision-takers to dominate? Similarly a gross and systematic divergence between legal formulations and norms and operational institutional forms and practices requires examination not merely a statement of fact or a criticism of practice as “irregular”. Why has the divergence arisen? Why is it allowed to continue? Are the formulations appropriate to the intended purposes? Could they be operational? To whose benefit and at whose expense? Could a set of formulations and norms consonant with real practice be drafted? Would these be acceptable to major decision-takers? For what reasons?

Public enterprise research—especially in Africa—is not a very well established field. However, it already suffers from a remarkably high proportion of studies which formulate questions and problems which—however entrancing to the researcher—are both rather far from the concerns of decision-takers for, operators of, or those affected by, public enterprises and also rather out of any veridical context of time and place. For example much research on the Ghana Cocoa Marketing Board has treated its primary (or sole) objective as long term grower price stabilization—at most a very secondary theme in its statutes, decision-takers' statements or Board practice. Equally some studies of Kenya and Tanzania parastatals apparently assume that the two states' decision-takers have the same goals for the public directly productive sector—a view which is rather inconsistent with legal instruments, public statements, the size and scope of the two sectors and a large number of individual decisions. Finally, at the applied level several consultancy studies—e.g. those of McKinsey in Tanzania—have not merely been based on at best artifactual rendering of state objectives for the units studied but also on astounding assumptions as to what was possible in terms of organization, communication, manpower procurement and data processing in the countries affected.

These weaknesses are not unique to any one discipline—economists, political scientists, political economists, sociologists and lawyers are, in their several ways, all perpetrators and sufferers. Indeed one very clear weakness is the failure to develop cross disciplinary approaches and team efforts in public enterprise studies. Related is a general absence of joint work by practitioners (i.e. managers, consultants, planners) and academic analysts. A practitioner is both unlikely to see the full forest *because* he knows some of the trees and interlaced creepers so well and always tempted to write apologia for his own past decisions and advice and to refight internal debates of the past in ways which as often conceal as throw light on key issues of intention, judgement and objective constraints. The academic analyst—especially if he has not had prior operational experience—is all too likely to see the forest as a monolithic mass or to study one tree and to hypothesize a forest of nearly identical trees from it. He is very prone to underestimate objective constraints on both decision-taking and implementation, especially in the sense of assuming that the particular institution or problem he is studying was seen as of adequate importance to have a priority call on scarce manpower, analytical, institutional, bargaining and financial resources.¹

There is no unique approach to research on public enterprises. Several different angles of attack are capable of yielding significant results. The most promising appear to be Historical, Decision-Taking, Firm and Sectoral² based analyses. No one is optimal for all questions, all countries, all enterprises. Since no single study will be adequate for any one country's public enterprise sector (nor over time for any one enterprise unless the first study is already an autopsy) there is value in different researchers and research teams pursuing different approaches and still others developing syntheses from the insights gained through differing angles of attack.

II. Efficiency, multiple goals, errors, constraints

Before proceeding to sketch the four selected research frames a digression on four issues which bedevil many studies on public enterprises may be in order. These are efficiency, multiple goals, errors and constraints.

Efficiency is not an abstract concept. It is relative to some goal or goals. If, for example, a public works programme is primarily designed to maximize bribes to ministers and civil servants no analysis which does not take account of that fact will be fully satisfactory. Take account of need not, of course, mean approve of. However, criticism of such a system as not minimizing costs nor maximizing "useful" roads-bridges-ferries-buildings is simply evading the primary "problem".

To know all is not, in this field, to forgive all even within the context of the operational goals. Over 1971-74 Tanzania held urban meat prices down to benefit urban wage earners and attempted to alter grade price structures to benefit the poorer consumers. The latter aspect created endemic shortages of low-cost *vis-à-vis* high-cost cuts until partially reversed, but to the extent consistent with balanced supply and demand for all grades and cuts it was efficient in terms of egalitarian income distribution goals. The former aspect was potentially *inefficient* in terms of a real strategic priority to raising rural incomes especially for poorer peasants (and herdsmen) in poorer regions because most cattle growers fell precisely into that classification. Thus no attempt was made to hold down grower prices—quite the contrary.

Unfortunately this strategy was not workable. Urban demand rose very rapidly, supply response was sluggish (for reasons not readily reached by short term price incentives). Export availability (profitable to the 50-50 packing joint venture) fell, domestic sales (at a loss given the price structure) rose rapidly and the bankruptcy of Tanganyika Packers was clearly a question not of whether but when and how. Clearly this was not efficient for ensuring urban meat supply (shortages arose), maintaining public enterprise sector surpluses (a priority goal for the sector and not one often waived for an amenity good like meat), or concentrating cattle sector attention on ways and means of raising output (and more specifically offtake) together with improving marketing, transport and processing facilities.

By 1974 100 % nationalization ending the joint venture was seen as essential to achieving a coherent price structure as well as for tackling long term problems. Joint ownership had *in this case* proved inefficient because it obscured the true constraints on pricing policy articulation.

Evidently in evaluating efficiency care must be taken in ascertaining goals guiding decisions. For example Tanzania's automatic bakery decision is frequently analyzed on the basis that it was initiated by the National Milling Corporation to generate surplus (or shift it from the private to the public sector). In fact both the NMC and the Treasury were quite agnostic as to surplus potential and, far from initiating, both queried and cut back the project. The actual goal was socio-political, protection of low income urban bread consumers from adulteration and shortweighting by small private bakeries. The Minister of Agriculture (who sat for a Dar es Salaam constituency and had very close contact with his constituency party leaders)

believed this to be a major problem not soluble by inspection procedures and also saw small public sector bakeries run by a municipal development corporation as unlikely to be practicable.

Whether the decision to build the automatic bakery (whose bread is more costly than that of the smaller bakeries, as its doubters feared)³ was efficient is of course still debatable even when the actual goal pursued is correctly identified. Was no system of spot checking backed by prosecution workable? Were co-operative or municipal small scale bakeries really impracticable? Even if such approaches were less effective in attaining the goal directly sought what were the opportunity costs in terms of other goals e.g. alternative uses of investment, e.g. NMC planning and project preparation capacity?

Multiple goals

The concluding comment on the bakery case poses a standard problem for public enterprise operation and analysis. How does one proceed in a context of multiple goals which are partly complementary, partly independent, partly substitutable (on the goal and/or the performance side) and partly contradictory (in terms of enterprise contribution to attaining them)? The older academic analytical stance that such a situation was itself evidence of faulty goal setting is melting on exposure to the practical reality that almost all serious decisions do involve balancing results in terms of progress toward several goals. Politicians, civil servants and managers—and for that matter private businessmen⁴ and consumers—are perfectly used to taking decisions which involve tradeoffs among goals or allocating limited resources so as to meet at least minimum levels in respect of multiple requirements even if they usually use different phraseology to express what they do.

To pose this problem is easier than to resolve it. To treat any decision or action as efficient if it serves *any* goal is much too extreme and even adding the constraint “so long as it does not seriously threaten the continued existence of the enterprise (or sector or state)” still gives inadequate scope for evaluation. Nor is it possible to rank goals (whether cardinally or ordinally) to any operational purpose because the normal question is not either/or but how much of each with none fully achieved.

The question is one of marginal tradeoff ratios but these are almost never reduceable to exact quantitative terms even at any one time and place much less over time and space. To ask how many rural clinics are worth as much as a consultancy hospital may be comprehensible and answerable but to ask how many yards of textile capacity now should be traded off against a probable reduction of how many bilharzia cases in 1985 is almost certainly neither. In any event the objects cited are not goals but particular projects which in practice still serve more than one goal. To ask—how much growth of output should be traded for how much greater equality in personal and communal consumption power is on the face of it more intelligible but cannot be answered outside a specific existing context nor acted on except in terms of a pattern of concrete policy, institutional and project measures affecting more goals than these two.⁵

In practice decisions evidently are taken and necessarily imply more or less explicitly considered tradeoffs. Whether they are taken consistently or with adequate knowledge is a very different matter—indeed it is a critical area for research. Practically at least two methods are used at technical level. One is iterative—first arrive at some possible allocation of enterprise (or sector or state) resources while keeping underlying basic goals and some more quantifiable surrogates for them (e.g. patients treated for curative health, health education classes and vaccinations for preventive) as set out by decision-takers in mind. Second experiment with the more evident major and minor alterations which are possible to see how this affects probable balance of goal attainment.

Third, present the basic allocation pattern and most likely (in terms of their impact on goal balance) variations to decision-takers. Repeat until a set of decisions is taken. A variant at enterprise level is to present evaluations of output, investment or other options in terms of several criteria linked to basic goals e.g. net addition to real national output, net contribution to national investible surplus, direct and indirect balance of payments impact, firm profitability, overall effect on tax revenue, employment by skill and pay levels. The decision-takers then can make their own *ad hoc* weighting of the tradeoffs if option ranking is radically different on different criteria.

An alternative approach at micro level is to receive (or set, subject to approval) minimum targets in respect of all relevant goals but one and maximize in respect of that one, e.g. a firm subject to output, foreign exchange, wage, price, and quality of service constraints could seek to maximize profit (investible surplus). In practice a rather less systematic variant of this approach is common among the more successful African public enterprises and underlies much of their short and medium term planning. However, it requires that initial targets set as constraints can be alterable (in reality as well as on paper) if no operational solution exists at their initial levels.

In research one key question is whether there is an articulated decision-taking and implementing process flowing from goals thorough targets to particular policies, products and projects and whether it operates in an integrated (or coordinated) way at enterprise, sectoral and national levels. A second is whether some set of iterative or minimum achievement techniques is used to make decision-takers aware of the real goal achievement implications of, and tradeoffs related to, alternative policies and projects. A third is whether the processes and techniques result in a reasonably coherent and consistent pattern of choices and whether weaknesses in this regard relate to inadequate information, faulty projections, external uncertainties beyond decision-takers' control or projection or faulty (incompetent, misinterpreted, deliberately warped, non) implementation of decisions.

Errors

One bias of research—as of mass communication—is to see errors and failures as more interesting than correct decisions and successes. Practitioners when engaged in serious analysis (not public relations or apologia) often seem to

exhibit the same tendency but for a different reason—what is going well is not usually perceived as a problem requiring analysis to resolve it.⁶ This bias is unsound. The successes of one enterprise, sector or state may well on analysis reveal means to tackling the weaknesses of that enterprise, sector or state as well as being of value to others with different patterns of strengths and weaknesses. Analysis of success can reveal as much about genuine operational goals, attitudes and decision-taking as that of failure.⁷ Success is usually both partial and at the same time a basis for potential further advance—without analysis it may well slip away but informed by analysis prove susceptible to extension.

That said, the analysis of errors is critical. The problem is often one of classification. A single mistake in selecting machines for one project, a bias in favour of complex technology with little systematic comparison of alternatives and a capital programme designed to maximize contracts of a type facilitating the payment of bribes, kickbacks and “participations” are all open to criticism but they are not even remotely similar types of error. The same applies to secondary inefficiency in deployment of mechanics in a factory which does function at capacity, endemic inability to maintain equipment leading to 40–50% of machines (or vehicles) being “normally” unserviceable, and a total lack of formal and in service training facilities for mechanics, foremen and shop floor engineers. All are performance errors and all relate to the maintenance aspects of management but they vary in seriousness, in micro versus macro nature and in probable causal factors and routes to positive change.

Evaluation in a framework allows distinction among several types of decision-taking performance weaknesses:

a. *Micro-errors*—inefficiency in achieving goals by individual parastatals relating to action or inaction subject to a significant degree to firm influence or control;

b. *Sectoral-errors*—inefficiency in meeting individual unit and sectoral goals relating to action or inaction either at the sectoral level or in the interactions between the sectoral and individual unit levels;

c. *National errors*—inefficiency in national policy action or inaction limiting the ability of the parastatal sector and its units to pursue national goals effectively;

d. *External context*—constraints and events which impinge on a-b-c but including, the way in which flexibility and response (including positive reaction as well as passive adaptation) are or are not built in at unit, sectoral, national levels;

e. *Mismatch inefficiencies*—clear unresolved conflicts of goals (not including tradeoff problems in general but including failure to perceive and deal with them with reasonable degrees of speed and effectiveness) which hinder the working of parastatal units or sectors;

f. *Unresolved contradicions*—basic conflicts of interest within and between decision-taking groups (and the institutions for which they decide) and also between segments, formations and classes of (or acting in—e.g. MNCs) the polity which impair specific or general goal attainment;

g. *“Inappropriate” goals*—goals which from some stated point of view

(e.g. the author's) are inappropriate and whose attainment is *from that perspective* an "inefficiency".

A particularly serious problem is confusing the last with other categories. There is no obligation on an analyst to approve a goal framework or an agreed tradeoff (or balance) mix of goals, but there is an obligation to separate criticism of performance *within* an institutional or systemic goal framework; criticism of the *absence* of a coherent framework; and criticism positing the need for a *different* goal framework and to make *explicit* in the last case what the posited framework is, on whose "behalf" the author advances it and why it is more "appropriate" than the existing one i.e. who is to gain what from it.

The mirror image of the schematic categorization outlined can be used for successes. It is not less critical there because a case of micro success can be paralleled by macro failure. For example the Zambia-Tanzania Road Services Company, the Dodoma Regional Transport Company and the long distance national bus company in Tanzania are on a number of criteria successful, however, sectorally, the public enterprise road haulage sector is a disaster area and one increasingly threatening attainment of national, regional, local and public enterprise decision-takers' goals. To take an even more extreme case of the potential macro inefficiency of micro success, were the Tanzanian perfume and cosmetic company a public enterprise and were it to produce for a very narrow high income elite⁸ then no matter what its enterprise level success in surplus generation, worker participation, low differentials between wages and salaries, increases in output etc., its existence as a resource user would pose unresolved macro level contradictions. Indeed a lively debate—not perhaps informed by much analysis—has been in progress for some years in Tanzania on the question of what types of production are inherently errors (no matter how micro efficient the enterprise on any criteria) because they are only consistent with income distribution, perceived inequality of consumption and resource allocation patterns totally inconsistent with Tanzanian Party and state goals in respect of egalitarianism.⁹

Analysis should take specific account of objective *constraints*.¹⁰ Otherwise it runs the risk of being utopian. Constraints may be material or in terms of goals. For example in respect of Tanzania Acquisition of Buildings Act the answer to why rented buildings worth less than Sh 100,000 per owner were excluded was on the one hand that administering tens of thousands of one room, Sh. 30 per month tenancies was objectively quite beyond the bureaucracy's capacity. On the other it was unnecessary to break the real and (even more) the perceived power of large scale landlords (the basic political economic aim) and would have alienated a very large number of rather small landlords. The answer to why the earlier route of an annually raised tax on rental income (not shiftable to the tenant and not deductible in computing taxable income for normal tax) was abandoned relates to a political (but no less objective) constraint—it could not be seen to end the power of large scale landlordism and to do it at once.

One key constraint which needs to be analyzed in the terms which faced the decision-takers is knowledge. The Tanzania fertilizer plant decisions have been criticized as not perceiving (a) the 1967-71 fall of over 50% in the landed

price of imported fertilizer and (b) the 1973-74 400% rise in phosphate rock prices. Since the first line of attack suggest *no* plant was justified and the second that a plant *and* a local phosphate mine were called for, they can be made consistent only by arguing that in 1967 the decision should have been to build a plant and a mine to come into operation in mid-1973 (when import prices began to rise). *Ex post* this is very true, but in 1967 few fertilizer companies expected the subsequent price fall and nobody projected the 1974 Fraco-Americo-Sharifian phosphate "market price agreement" or the size and timing of the 1973-74 OPEC price and supply control actions.¹¹

At a less severe level the knowledge constraint becomes one of cost—to get more knowledge requires both liberal financial expenditure and—usually much more costly—delay. The major water pipeline to Dar es Salaam completed in 1976 was known by 1969 to be essential as of 1974 if major shortages were to be avoided. It was known that 2-3 years construction time would be required. Over 1969-1973 four separate expert studies were carried out to secure more information on the lowest cost method of construction. Possibly they saved some funds on water capital investment account (or, realistically, limited the cost escalation from inflation of 1974-76 over 1971-73 project implementation).¹² Certainly they had the price of scores of millions of shillings lost industrial output, of millions of waterless or watershort peopledays and of acute shortages of textiles and beer. Knowledge can be bought at too high a price.

Similarly knowledge creation and acquisition is a scarce resource. If the capacity to collect or acquire it is used for one purpose it can often not be directed to others. Therefore an opportunity cost arises. No one decision, project or firm will have as much knowledge as could theoretically be provided because to do so would radically reduce the knowledge available for others.¹³

The opportunity cost constraint is, of course, broader than knowledge. High level manpower, negotiating capacity, foreign exchange, institutional capacity, training facility places and many more could often be provided to a particular public enterprise on an ample scale were it the only priority user. If a country has 500 qualified accountants and needs 1 500, any one public enterprise's accounting needs can be met fully but—except perhaps in special cases like an Audit Corporation or Central Bank—to do so would be irrational viewed from a national perspective. Effective criticism beyond noting the constraints as they apply to enterprises and sectors will need to relate relative allocations to relevant priorities, sequences of supply to patterns of demand expansion and clear bottleneck areas with action intended to increase supply and/or allocate it more rationally and systematically.¹⁴

III. Historical

By an historical approach more is meant than a pure description of events or a series of basically unanalyzed comparative static snapshots at different points

in time. Both may be useful raw material for analysis—just as a current descriptive snapshot may be—but neither is in itself a critical analysis capable of explaining, predicting, evaluating or providing inputs into amending and altering. If the purpose of historical analysis is to comprehend present reality in order to achieve greater power to alter future reality—a reasonable purpose for the applied social scientist, whether operational or academic, to posit—both are incomplete.

However, as used here an historical analytical framework need not necessarily be a marxist or marxian one. For example, much of Hla Myint's, Oswaldo Sunkel's and Samir Amin's dynamized structuralist analysis of the political economies of Burma, Chile and Africa would meet this definition of historical, even though only the latter is normally (and by no means universally) categorized as a marxian. Equally the emphasis on analysis of the past to explain the past and present and to project the possible futures and ways in which they can (and cannot) be altered does not imply a lack of concern with particular facts as to past and present events and situations. To hypothesize or deduct the specific facts needed to justify a set of conclusions can be a valid starting point to seek out facts to test the conclusions: it is not a method of proof. To test various new patterns of ordering facts against new hypotheses as to their meaning is also valid but not selectively including, excluding and "adjusting" them to fit.¹⁵

Historical analysis is necessarily contextual. It must encompass the nature and goals of the state within which the public enterprise sector exists and, at least in some sense, the world structure within which that state exists. The degree to which these are analyzed in a particular study is a different issue but at the least stated premises (whether analytical, "factual", or descriptive) as to context are important to interpreting public enterprise studies.

Context has a temporal as well as a spatial and a social dimension. Neither goals nor institutions nor performance are static over time and the trend is often both more illuminating and more important than the snapshot at one point in time. e.g. until about 1972 the "high level" expatriates in Tanzania grew in absolute numbers—especially in the parastatal sector. However in 1961 they occupied 90% of all high level manpower posts and in 1971 about 50% (say 95%–60% in parastatals). In 1971 the total numbers of "high level" Tanzanians exceeded the total 1961 posts, i.e. most 1973 expatriates were in posts created by development and often quite different in content from any existing in 1961. The trend requires study—what are its limits? How critical are the remaining expatriate posts? Are the new posts phasing into Tanzanian hands like the old? It does alter the impression the raw 1971 high level foreign manpower figure gives and leads to a more fruitful basis for inquiry.

Similarly, some evaluation of the timing sequence and priority of individual unit, sectoral and polity goals is needed to evaluate progress toward them. Otherwise one ends comparing utopia with reality and is utterly unable to make priority judgements or to criticize them. For example to argue that worker self management¹⁶ has not been fully articulated, much less implemented over 1967–1976 and leads to struggle in Tanzania is true, if trite. The same—if one is to believe Chairman Mao among others—is true of

China or—from the very different perspectives of President Tito and Milovan Djilas—of Yugoslavia. It is not much more informative to know it has made unequal but not insignificant progress since 1971 and that the labour dispute incidence is amongst the lowest in Africa (in itself a “fact” subject to radically different readings, possibly each correct for one or more specific public enterprises). More precise analysis of what TANU’s Executive is seeking, over what time span, how and why set beside more detailed unit and more coherent sectoral studies is needed for serious explanation and evaluation of what has happened, what options are realistically open to decision-takers and which ones are likely to be followed with what results.

Three examples may illustrate historical frame studies in African public enterprise: Zambian copper, Kenyan middle sized business, Sudan public sector banking.

Zambian copper strategy (i.e. the strategy of Zambian decision-takers in respect of copper) has centered on its crucial importance in respect of surplus generation, foreign exchange earning, and wage-salary employment. It has been within a framework of a definite trend toward etatism in the economic sphere and a combination of a declared strategic commitment to economic egalitarianism with one of the most rapid actual trends toward growing inequality in Africa (a trend largely fuelled by state wage and salary policy).

Initially (literally on the days surrounding independence in 1964) Zambia nationalized (for relatively nominal compensation) the land rights in respect of minerals previously “held” by the British South Africa company thus recovering the full right to control prospecting and mining and to receive rents and royalties. In the first years after independence action was taken to raise the level of African wages and to reduce special payments to (non-African) expatriates and to require Zambianization of skilled and managerial posts on a phased basis.

In parallel various exchange control, dividend limitation, credit ceiling and tax policies were formulated and applied at least in part to increase state leverage over decisions on output, pricing and use of surplus by copper companies. By the late 1960’s these measures had achieved an increase in Zambian copper workers real incomes (with a rather unsatisfactory effect on overall citizen income distribution and, via spread effects, on the expansion of wage employment in other directly productive sectors and on local government ability to extend services) but only a limited speeding of Zambianization beyond the foreman level. Government revenue from copper absolutely and as a share of total surplus generated in the copper sector had risen, but uncertainty as to government policy had probably led to mining company reluctance to expand production and especially to do so by reinvesting a high proportion of after tax profits.

Following the Mulungushi declaration (a Zambian statement of strategic commitment to national economic determination and Zambianization of production) Zambia carried out 51% nationalization of copper. It did so on terms (including tax structure and exchange/credit control alterations) which effectively left the former sole owners with all of the profits for 8–10 years (as dividends plus interest on, and retirement of, stocks issued as compensation) and the government with half thereafter. The management

remained largely in the hands of the mining groups under term contracts albeit they became, at least in principle, subject to state appointed majorities on the mining company boards. As part of the package a major expansion programme was agreed—largely to be financed out of the effective reduction in taxes on copper surplus.

By the early 1970's the Zambian state had come to see the package worked out half a decade earlier as inadequate. Zambianization remained slow, while the investment on enhanced output proceeded net output (partly, but only partly, for wholly exogenous reasons) did not, effective control of mining and marketing was increasingly perceived to remain in expatriate hands and beyond the control of the relevant ministries, MINDECO (the umbrella mining sector public holding company) and the Zambian majorities on the operating company boards. Thus over 1974–76 the compensation loans were paid off prematurely (via an expensive Eurodollar loan placement) and the general management contracts were terminated, albeit replaced with a set of special contracts and arrangements. This set of measures was believed to give MINDECO the power to use its increased personnel and experience to control copper sector strategy and policy.

Kenyan small and middle business strategy has consistently been one of supporting Africanization and doing so in ways likely to maximize the strength of social formations committed to, and clients dependent on, the central decision-taking group. Access to wealth was to be and, at least equally critical, to be seen to be open to the African who made use of public sector support and cooperated with the African political-managerial elite.¹⁷

Since independence a series of regulations and institutions have both steadily decreased the scope for small and medium scale foreign business activity and facilitated both African entry and African acquisition of foreign assets and businesses. The various land acquisition settlements involving Kenya and the United Kingdom are the best known (and the initial ones the earliest) examples but they are by no means the only ones.

Restrictions on licensing of other than Kenyan African (in principle often non-citizen but increasingly overtly applying to citizens of non-African ancestry as well) businesses as to location, commodities and choice of personnel have been steadily broadened in coverage and tightened in application. The intended and actual beneficiaries have been African businessmen—some full time and some salaried employees of the public sector or politicians.

Public sector financial institutions—including the ICDC in the long term and the public sector commercial banks in the short and medium have increased their emphasis on serving African clients setting up and expanding small or medium scale businesses and backed by adequate commercial or political references. Taken together with fairly relaxed (until 1974) overall credit and exchange control policy this has allowed foreigners to sell out for substantial sums and either emigrate with their capital or redirect their energies to new fields in which Kenyan policy still encouraged foreign investment.

Similarly the Kenya State Trading Corporation—like the Ugandan but quite unlike the Tanzanian—was created and given monopoly import and

dealer appointment rights in selected lines of goods to facilitate the growth of an African commercial strata above the small retail shop level. When "excessive competition" threatened this goal, the STC added limitations of dealerships to the numbers consonant with a "reasonable" profit for each to its basic operating duties.

This strategy has gone a very considerable way in medium and small scale rental properties, hotels, transport, commerce and construction as well as middle and large scale commercial farming albeit less far in manufacturing, highly specialized services and professional firms. It has been phased to avoid massive dislocation from non-African exit prior to at least reasonably effective African entry and, as noted, consistently backed by the public enterprise sector. To describe it as political in the sense that only established politicians achieve entry is clearly far too simplistic but to assert it is political in building up public sector salariat, full time African middle business and middle level politician support for the existing decision-taking group, dependence on it for continued services and ability, in return, to deliver the backing of their own clients is almost certainly correct both as to result and intent.¹⁸

Sudan public sector banking strategy is rather harder to formulate in terms of continuing trends or themes. There has been consistent support for greater Sudanization (not always with a public sector preference) and for some public sector presence beyond the Central Bank and specialized investment banks, but beyond that oscillations appear to be more evident than trends.

At independence all banks were basically foreign private sector owned (to be strictly accurate foreign private or foreign public enterprise owned). The first major public sector venture in commercial banking was a joint venture with a French bank probably instigated by the private partner as a way to expand its business share and profits. That bank was at a micro level successful. With preferences as to public sector deposits, good links to the Sudanese private sector and highly competent Sudanese senior personnel (who fairly rapidly replaced most of the expatriate staff) it raised its volume of business and profits. At the macro level it did to some degree reallocate credit to Sudanese owned ventures and to agriculture and manufacturing—albeit its deposit, loan and profit record over the period suggest it was good business for at least one bank to do this even on micro grounds. It certainly did not become a vehicle for promoting public enterprise or joint ventures nor for the implementation of overall credit allocation. Nor could it have, its resources were never large enough for it to play a leading, let alone a dominant, role in the Sudan's commercial banking sector. If it did have real macro significance it was in facilitating the growth of not inconsiderable strata of medium scale Sudanese commercial, construction and agricultural businessmen and a handful of large scale entrepreneurs in the same fields and manufacturing.

By 1969 serious discussion of bank nationalization began at the political decision-taker level. At least apparently this was on general economic nationalist grounds. Certainly at that level it was not linked with a transition to socialism nor—on the face of it—to any particular commitment to substitute state for private capitalism. Domestic private entrepreneurs were apparently seen as the intended direct beneficiaries i.e. the envisaged public

commercial banking sector was to be the existing joint venture bank written large.

The actual 1970 nationalization of banking—along with most other large scale economic activity including significant Sudanese owned firms—was on different premises. At least initially it appeared to be a first step toward a transition to socialism. Certainly the then decision-taking group was formally committed to such a course, included members who certainly did favor it and made some initial legal and institutional steps toward such a transition.¹⁹

From 1972 onward this strategy was reversed. Full and partial denationalization of commercial banks was carried out, not because they had proved impossible to operate, but as part of a strategy of broadening the role of the private sector and more particularly of reopening it to foreign private investment. Since the Sudan had never, in fact, attracted much of the latter, the reopening was accompanied by declarations and codes implying very generous incentives and very flexible regulations.

Recently the Sudan has attracted more foreign investment and more foreign commercial banks but from the foreign exchange surplus Arab states not from Western firms. The latter have largely confined themselves to technical and management services and contracts. In general this upsurge in foreign investment seems to have bolstered the Sudanese public more than the Sudanese private enterprise sector. The reasons are on the face of it practical and technical more than ideological²⁰ and the public enterprise sector as a whole appeared to be state capitalist not socialist in trend.

Each case is deliberately set out sketchily and schematically. In any actual study the implicit hypotheses (alternative hypotheses in at least several instances) would require spelling out to test adequately. However, even as presented the first two cases appear to illustrate successive steps toward coherent and evolving (rather than oscillating) goals while the third does not. In addition, the Zambian case poses the question as to whether the later steps were the result of the failure of the earlier ones or built on their successes as well as their limitations while the Sudanese raises questions about how a public enterprise can operate efficiently if—as appears to be the case—the overall political economic goal framework within which it must act alters radically at frequent intervals and in divergent directions, not in a sustained transition to socialism, national capitalism, subordinate interaction with transnational corporations, or integration into a pan-Arab economy.²¹

IV. Decision-taking

The study of a set of decisions with a common element can be used to help identify the presence (or otherwise) of broad principles and procedures and the nature of changes in decision-taking principles, reference frames and goals over time. The common element might be a critical institutional choice e.g. management contract, limited technical service contract, direct hire

expatriates, citizen management, a set of criteria for substantive choices e.g. elements considered and weights implicitly applied to them in selecting or rejecting proposed public sector manufacturing plants, an underlying technical base e.g. in respect to logging, sawing, wood products production and timber distribution. Evidently a complete picture of the decision-taking process at all levels in respect of the public enterprise sector will require more than one such study both because the process may not be uniform at any one time nor constant over time, and because a single study would tend to be too long and diffuse.

A decision-taking based research angle of attack should go beyond the actual decision to examine its implementation and results. First the way in which a decision is implemented often tells one a good deal about the actual nature of the decision. Certainly it is usually more informative than the bare statement of the decision and the recorded reasons and normally it also helps interpret even fairly detailed records (or recollections) of the issues considered, materials adduced and dominant reasons. This may be especially critical in cases characterized by decisions supported for quite divergent reasons but implemented by one of the parties to the decision on the basis of his reasons alone. Second a decision is normally taken on the basis of certain expected results. Therefore, the attainment (or otherwise) of these results is in itself integral to evaluating the decision-taking process. If an approach appears to use consistent criteria for relating decisions to goals and to collect and utilize the best available data, but repeatedly actual results are negatively and grossly divergent from those sought, the process is not satisfactory. Third for many (not all) purposes separating decision-taking, implementation and its overseeing, evaluation of results and modification is an unsatisfactory approach. Conceptually the distinctions are real, institutionally they are rarely clear cut; operationally they usually require some type of ongoing coordination and unification if acceptable results are to be achieved.

A possible area for a decision-taking angle of attack would be centralization/decentralization in the Tanzanian public enterprise sector using the decisions taken in respect of the National Bank of Commerce and the State Trading Corporation over 1967-76.

NBC was created by statute in 1967 as a unitary body taking over the business of eight previously private and one previously joint venture banks. It rapidly developed a strong head office (albeit with substantial departmental delegated powers) and welded its components into a single working whole. Branch autonomy had been relatively limited previously but became still more so.

By 1970 the NBC was a smoothly working, highly centralized body with good internal communications. In that year it took over the Co-operative Bank—a move which ended a minor attempt to turn the latter into a competitive public sector commercial bank. That exercise was related to the institution of annual bank credit planning with overall and sectoral targets ultimately determined at cabinet level and articulated to and operated at enterprise level by the NBC.

In 1971 the NBC's term loan division (build up over 1968-71) was spun off to create a specialized Tanzania Investment Bank. This was part of an exercise

which over 1971-74 also created Rural Development and Housing Banks, brought the CDC local affiliate (Tanganyika Development Finance) into a close relation with TIB and limited the National Insurance Corporation's investment activity to government paper and financial institution term deposits as a means to creating a more articulated and coordinated investment institution pattern.

The NBC in 1972 carried out an internal restructuring delegating very significant powers to zonal and branch management, thus radically reducing the number of decisions sent to head office. More or less at the same time it opted for a decentralized upgrading of its data processing to large accounting machines in branches, zones and departments thus deciding against a centralized computer based system. At the same time it established an elaborate system of branch, zonal and national Workers Councils whose deliberations have centred on key bank policy issues and appear to have had a significant impact on decisions taken.

In 1973-74 further decentralization was carried out and a phased shift from zonal to regional coordination of branches instituted along with an accelerated programme to establish a branch in each district. These measures were clearly seen by NBC as complementary to the 1972 decentralization of government and of some directly productive activity. Parallel creation of semi-autonomous savings and foreign transaction divisions in the bank was carried out on technical grounds and with a clear realization that they might at some future stage lead to independent Savings and Foreign Exchange banks.

The State Trading Corporation was also created by statute in 1967 but as a holding company for a dozen former private sector and two former joint venture import/export and wholesale companies. While it shifted business among its subsidiaries to achieve some degree of specialization, it did not consolidate them as divisions for more than three years and the new division managements often reflected and continued the differing styles and accounting systems of their predecessors. Each subsidiary was highly centralized both in management and in physical operation; the upcountry branch system was sparser than the NBC's and was less rapidly extended.

By 1969 STC was *de facto* a centralized company albeit with uneven degrees of departmental autonomy and procedural unity. Unlike NBC it had no monopoly of import/export activity, much less wholesaling, and no coherent set of relationships with other public, let alone private, enterprises active in these fields.²² It appeared to be operating moderately satisfactorily as to services provided and surplus achieved. However, with the termination of the contract of its managing agents there was some doubt as to whether it could follow consolidation by innovation and development. As a result McKinsey and Company were secured as consultants on medium term strategy and structure.

Over 1969-71 the McKinsey team formulated, proposed and partially implemented a set of structural changes intended to transform STC into a highly centralized,²³ streamlined trading company heavily dependent on central computerized analysis of branch data for purchasing, transport and

distribution, stock control and finance. Oddly no new, uniform accounting system was included in the formulation or implementation nor were computer programmes to run the central data system ever made operational.

STC promptly began to malfunction. Data for decisions were not available at the centre, prompt decisions were not taken, coordination was notable by its absence. A combination of enormous inventories of some goods and endemic shortages of others (especially upcountry) developed. The first—along with a shift in financing of stocks apparently resulting from overdraft and supplier interest charges falling under different units—turned a weak bank credit and foreign exchange position into a crisis; the second led to massive complaints and a Parliamentary Commission of inquiry. STC staff morale and routine operating efficiency plummeted.

In 1972 a nationally based state commercial sector strategy consultancy group was created. Apart from a series of interim holding operation measures it proposed: a) to abolish STC; b) to create 17 (later 20) Regional Trading Companies to undertake wholesale functions; c) to create 6 (or counting similar independent public enterprises 10) specialized import/export/wholesale units to service the import/export needs of the Regional companies and to do wholesaling of highly specialized (e.g. drugs) products or those requiring special after sales maintenance (e.g. household appliances); d) to involve the (new) Regions in the Boards of the Regional Trading Companies; e) to create a Board of Internal Trade to coordinate, oversee, provide special services to and intervene in cases of gross mismanagement²⁴ but not to own or control the new public sector enterprises.²⁵

These proposals were decided upon by the Cabinet and—as contained in them—a nationally based Implementation Group (in effect the nucleus for the Board of Internal Trade which was created statutorily at a later date) was set up to implement them over 1972–75 and also to provide interim control over STC operations. The implementation was completed on schedule. The new system—despite the impact of the 1974–76 foreign exchange crises—has operated with increasingly satisfactory service and financial results.²⁶ The availability and use of data—at the enterprise and the BIT levels—appears sharply better than that in STC at any period, let alone 1970–71. In 1976 the RTC's were seen as strong enough to take over the wholesale cloth trade (formerly in a specialized national company) and to set targets of achieving at least one branch per district and ideally per ward in preparation to creating District Trading Companies. Interaction of RTC's and Regional government appears uneven, as are unit performances, while coordination among ex-STC and other public commercial enterprises still appears somewhat fragmentary.

Even these brief sketches suggest a number of questions for further analysis. Why did NBC and STC decisions and their implementation diverge in the ways they did? What was the interaction between government and parastatal decentralization in the minds of political decision-takers? Of enterprise managers? Was there by 1972 a general decision-taking shift toward decentralization? If so why? Is the technical justification advanced for preserving the national unity of financial institutions—albeit with functional specialization and significant decentralization of powers—a

compelling one? Would it have been seen as such had NBC undergone a crisis in 1972? What does the STC experience tell about the uses and limitations of specialized foreign consultancy operations in basic decision-taking? About domestic ones? Is there a consistent substantive pattern as to types of decision decentralized in finance and in banking (e.g. are RTC credit decisions within the Regional NBC management's powers)? Why was NBC much quicker to move to extend its branch network than STC? These questions can also be viewed in a "comparative firm" study frame but intent here is to use them as examples of means by which insight can be achieved into the decision-making process.

V. Firm

The firm or enterprise as a research frame requires little preliminary justification. It is, after all, one of the most common approaches already. However, firm studies—not simply in relation to public enterprise or Africa—have often been marked by several shortcomings.

The first is a tendency to general descriptions. As in historical studies, the collection and ordering of facts is a beginning not an end. Unless questions are posed and hypotheses constructed, not only is an answer not likely to leap forth but it is unlikely that all of the needed facts will be collected or ordered in a way facilitating analysis.

The second is a proclivity to generalize from one firm. In the absence of other firm historical, decision-taking or sectoral studies, this is a strong temptation. As a route to framing tentative generalizations or hypotheses it has much to be said for it. However, dangers do exist—one public enterprise, even at one time in one country, can be a very unrepresentative sample of the universe from which it is drawn. For example, generalizations on the 1960-65 Sudan public enterprise sector based on a firm study of the commercial bank would have been quite different from ones based on the (appallingly inefficient)²⁷ railway.

The combined value of a series of selective firm studies addressing recurrent problems, decisions, issues over time is, therefore, likely to be greater than the sum of its parts. Such a set of studies, if on relatively similar premises, or a synthetic study based on them, even if the micro studies use approaches which are superficially highly divergent, can provide the data and analysis for:

- a. identifying differences appropriate to (and/or associated with) different activities—e.g. banking, commerce, transport, agriculture, manufacturing;
- b. testing the degree of consistency at any one time and over time e.g. ways different enterprises tackled similar problems at one time and same enterprise at different times;
- c. investigating whether certain issues (e.g. decentralization), techniques (e.g. annual physical and financial planning/budgeting), and problems (e.g. internal data flow) were perceived as critical by most enterprises at particular periods when they received less emphasis earlier and subsequently and, if so, why;

d. seeking to determine whether particular firm development (or its converse) has been sequential, random or cyclical and the division between incremental and structural change and also examining whether a broad pattern or patterns in this respect holds true across enterprises.

e. examining the interrelationships and time sequences of changes in relevant legal instruments and in firm structures—procedures—internal regulations with underlying activities and problems.²⁸

An example of a possible firm angle of attack can be set up for the (Tanzanian) National Development Corporation—a holding, planning, coordinating and establishing parastatal—over 1964–1974.

NDC was created by statute in 1964 as a central holding company for government investment in the productive sector beyond the scope of public utilities and finance. It inherited a substantial portfolio dominated by two 50–50 joint ventures in diamond mining and meat tinning for export. The 1964–69 5-Year Plan envisaged a significant but secondary state role in production and within that role appeared to favour joint ventures to 100 per cent public sector enterprises partly to secure access to knowledge and experience and partly to make available funds go further. Formally NDC was enjoined to operate commercially and to achieve overall surpluses but its commitment to initiating new enterprises and filling gaps and its direct link to the Economic Committee of the Cabinet (almost exactly the same Ministers constituted the NDC Board) at least cast grave doubt on any interpretation that political decision-takers wished it to maximize profits—let alone short term profits—as a sole or overriding objective.

Over 1964/67 NDC entered into a number of new joint ventures ranging from import-export through plastics and textiles to cement. It sought to project an image of itself as a dynamic promoter and entrepreneur and devoted relatively little attention to management or analysis of existing ventures.²⁹ A few wholly owned enterprises date to this period—notably a textile mill and a farm implements factory—but more usually government negotiated aid projects neither initiated nor much welcomed by NDC.³⁰

Expansion of group size not profitability, selectiveness in respect of what areas to enter, nor effective control over group enterprises, seemed to be NDC's central aim. When no partner was available at the start, NDC handed project preparation and (at least in tourism and agriculture) even operating units as divisions added on to its holding and promotion company care. By and large the General Managers (the first expatriate, the second Tanzanian) determined NDC decisions. Late distribution of voluminous Board papers, inadequate Ministerial briefing backup and acceptance of any project already negotiated by the government combined to make Board supervision relatively nominal. At the same time the multi-ministry Board effectively insulated NDC from action by any single Ministry with the partial exception of Finance which had more leverage because of its control over funding.³¹

In 1967 seven of the twelve largest manufacturing companies were partially nationalized and their shares transferred to NDC. This transformed NDC into a position of dominance in manufacturing. At the same time the Arusha Declaration's commitment of Tanzania to a dominantly public enterprise productive sector and to a transition to socialism made the concept of a single

government agent for productive enterprise promotion and management unviable. However, while the second point was recognized in respect of milling, commerce, finance, petroleum (at this stage refining and pipeline but later also distribution and exploration) and sisal which were placed in specialized parastatal groups, NDC remained with a manufacturing plus mining plus large scale agriculture (other than sisal) plus tourism plus construction portfolio. This perpetuated the difficulty of making it responsible to any single parent Ministry.

Over 1967-70 NDC continued to concentrate on promotion usually as a majority partner with the minority partner as managing agent. More attention was paid to group company supervision, planning and management but unevenly and with limited success in the case of ailing enterprises. Overall cash flow deteriorated partly because Williamson's Diamonds profits had fallen but largely because equity investment (plus propping up of ailing group company) requirements had expanded radically. A combination of external direct borrowing loan funding via the development budget and intra-group loans from strong to weak members filled gaps rather than creating a medium term financial plan. Expansion remained the central operational goal despite a somewhat meretricious attempt to present project analysis convincingly projecting moderate to high profits.³²

The ineffectiveness of the NDC Board because of lack of adequate and timely data and of independent analytical backup became increasingly widely perceived. Friction over projects and procedures grew—especially as NDC was markedly reluctant to release or discuss data even when a clear common interest between it and the concerned Ministry could be identified. Particular acrimony arose over certain contracts with foreign managing agents, finance arrangements and demands for *ex post* government funding. By this point the Treasury had become alarmed not simply as to NDC's autarchic tendencies, but also as to its commercial and financial judgement and was placed in a position of some strength by the Group's growing need for governmental financial backing.

At the end of the 1960's NDC—which was aware of the weakness of its knowledge of and control over group companies—secured the services of McKinsey and Company to advise on its structure and operations. The report—which concentrated on data collection and analysis—was implemented selectively and by a changed Group so that an evaluation of its impact is difficult. At least in stimulating thinking and action about sources and uses of knowledge plus enterprise and group planning techniques it probably was both more influential and more positively so than is immediately apparent.

Over 1971-74 three sets of measures affected the NDC. The first was a systematic application of the principle of specialization—large scale agriculture, construction, tourism, mining, wood products and textiles were spun off as separate parastatals or groups. While still the largest single non-financial parastatal, NDC was no longer dominant, was directly responsible to a single Ministry and no longer had a Board composed of Ministers.³³ The second was a tightening of coordination and control in respect of the public enterprise sector. The creation of the Tanzanian Legal Corporation (replacing in house parastatal and directly hired private counsel) and the

Tanzanian Audit Corporation; the virtual ending of direct parastatal external borrowing; the banning of intragroup deposits and loans; the institution of a detailed annual credit plan; the initial attempts to achieve annual central review of parastatal capital and operating plans as part of a coherent national annual planning exercise are among the main elements.

The third was a set of general strategic emphasis changes—in particular decentralization/participation—flowing from the 1971 TANU Guidelines.³⁴ These marginally affected NDC's location of new projects (already shifting toward less Dar centrism under earlier, *ad hoc* pressures) and resulted in Small Industries Development being hived off as a separate organization. Unlike STC or NBC, NDC was not perceived as easily decentralizeable on a regional basis, either as a group or by individual enterprise, and failed to develop much real coordination with regional government bodies. Participation via Workers Councils and TANU branches has certainly become general in form but with very uneven substantive reality and—with the exception of one or two group enterprises—has had less apparent impact than in the NBC.

NDC, perforce, accepted these changes. It cannot be said to have welcomed the first set even though (potentially at least) it offered a chance to refocus on promotion and development of a more coherent set of industrial subsectors and avoid being bogged down in heterogenous managerial chores for an odd assortment of weak companies.³⁵ In respect of coordination, control and joint state-enterprise planning it must be said that NDC complied with the letter of the regulations better than many other enterprises. However, ongoing cooperation beyond that required and full interpretation of data supplied was not easily obtained; NDC³⁶ clearly did not see the procedures as exercises in coordinated solving of common problems but as unwelcome limitations on its freedom.

Internal group information collection and analysis procedures improved consistently. For a number of companies—usually the strong ones—serious annual planning/budgeting exercises with physical and financial targets for operations and investment were begun. However, Head Office-Enterprise management tensions grew, partly because some enterprises took an even dimmer view of Head Office effective central than NDC did of governmental. Several managing agents were phased out or substituted for with a fashion developing for Indian and Pakistani replacements but European-American-Japanese knowledge and personnel package purveyors.

Over 1974-76 most NDC top management was changed with a technically highly competent civil servant noted for his criticism of "rogue elephant" enterprises assuming the general managership. More or less contemporaneously power was formally taken to provide for detailed scrutiny of all parastatal physical and financial annual plans/budgets with a special Treasury unit created to serve as secretariat and provide ongoing liaison during the year.³⁷

NDC had, on the face of it, achieved cooperative relations with the central planning bodies and with its enterprise managements by mid-1976. Annual planning was—in most cases—more articulated, more jointly formulated and carried out, more closely monitored during evaluation and more evidently reflected in results. The more limited number of enterprises had

been used to concentrate on a limited number of promotions and expansions (particularly in the metal and metal products field) and on restoring sick companies to health (with uneven but in some cases dramatically positive results). The Group had restated its strategy as one of building up new enterprises and enterprise clusters and then seeing them spun off as specialized parastatals—a result readily foreseeable for metal and metal products by the early 1980's. Although surplus generation has improved—and the annual planning and the health restoring areas of activity clearly pay detailed attention to it—there appears to be less overt emphasis on profitability as *the* justification for NDC and for individual projects. Equally with a stronger internal set of managerial and analytical competences, there appears to be both less general acceptance of managing agents as necessary and less fear of dealing with them on a normal business transaction basis.³⁸

Evidently this sketch is both more descriptive than overtly analytical and more impressionistic than taxonomic. However, it does illustrate both that selective description can illuminate areas for analytical questioning and that the impressionistic sketch of a person closely involved with an enterprise will raise issues which were perceived as critical, even if not in a "balanced" nor wholly systematic fashion.

The NDC case illustrates two quite divergent problems of firm studies. To study NDC alone without at least some examination of the operating companies in its group runs the risk of losing much of the substance of the exercise while to analyse each of them in detail would raise the research resources requirement to a daunting level. Equally, as a major public enterprise, NDC has been significantly affected by a series of broad national and public enterprise sector strategic decisions. To examine only their effects on NDC—without some grounding on an earlier or parallel study of the rationale and genesis of these decisions—may be to miss much of their significance even at micro level.³⁹

VI. Sectoral

Two basic sectoral angles of attack can be distinguished. The first treats public enterprises as a sector and is, in practice, often a large scale comparative firm study. However, it can, and should, be rather more than that. It is quite true that such a study can and should identify what is "typical" and the distribution of results, procedures, approaches around it. Beyond that there are fields of coordination, planning and goal implementation which are not micro and cannot be studied at firm level.

A good example is income distribution. On the one hand a firm's indirect impact on income distribution may be much more critical than its direct, e.g. a plywood mill's own wage and salary bill may be much smaller, less equally distributed and more directed to already richer than average households than that of the forestry activities feeding it with logs. On the other hand one can hardly direct enterprises—public or private—to devise their own income distribution policies even if general guidelines like "greater equality" and

“more emphasis on rural areas” are given. To do that is to confuse a public enterprise with a state and a manager with a political decision-taker responsible to some base. The direct and indirect impact of the public enterprise sector and the policy framework within which it operates (if any) can only be analyzed effectively at sectoral, not firm, level.

Another type of sectoral study focuses attention on a production sector (or sub-sector) e.g. iron and steel, textiles and garments, construction. Assuming public enterprises are central or significant in that sector, they will also be among the central or significant aspects of the study. However, as opposed to the other sectoral approach, this one is likely to place greater emphasis on overall sectoral structure and policy and on the interaction between parastatal enterprises and other sectors.

An example of the second type of study would be the textile and garment sector in Tanzania. For purposes of the example the cotton growing-spinning and the cottonseed oil—oil products—oil cake sector is not included, albeit its existence has been one of the factors leading both government and enterprise decision-takers to view the textile industry positively and from a sectoral production relationship point of view cotton growing, not cotton yarn production, is the logical starting point.

As of 1964 one integrated textile mill existed in Tanzania. It had been created by a merchant house jointly with European textile exporters to avert loss of the Tanzanian market to the Nyanza Textile Factory in Uganda which enjoyed tariff free access to the Tanzania market and benefitted by a relatively high East African tariff on textiles. Another two non-integrated dyeing, printing units also existed. Apart from a surprisingly small informal sector garments were produced by a growing number of resident Asian (largely non-citizen) owned medium sized factories. A handful of large (European) and some scores of smaller (Asian) importers overlapped perhaps five hundred wholesalers who in turn overlapped perhaps 3,000 retailers specialized in, or significantly oriented to, textiles and garments.

Public policy on textiles and garments was centred on various aspects of Tanzanianization. For cloth this meant encouraging (by various tariff and investment allowance linked measures) local production based on local cotton and for garments a somewhat random set of minor import restrictions. In respect of textile and garment trade it went further, interlocking with the first attempts to create a public enterprise preserve in the import/wholesale field albeit only after a disastrous experience with one firm (COSATA) as an apex unit for a consumer co-op shop chain. This public sector emphasis was, at that period, paralleled by a secondary theme of assisting Africanization (including private sector Africanization) of the retail trade but very little was actually done compared with other African states.

1964-67 was marked by changes. Four new integrated textile mills moved into (or approached) production. Two were public sector (one 100 per cent NDC and one 80 per cent NDC and Co-op) and two private (largely domestic Asian financed). The public enterprise sector's share of textile capacity became at least two fifths, while imports were confined to a public sector commercial body albeit more to ensure its financial viability than to exert planning guidance on textile sources and uses. The medium sized garment

plant sector—with very minor public enterprise involvement and near 100 per cent use of imported fabric—grew like a green bay tree and developed a capacity in shirts and socks of probably treble the domestic market. A parallel but slightly earlier development in Kenya meant that it faced dumped competition from inside (as well as from outside) the East African tariff wall. Apart from a modest growth in public enterprise wholesaling activity, the distribution sector was little altered.

Public policy shifts were in the direction of more active encouragement of local production. The public enterprise lead was an exercise in building production not socialism. Additional protection was provided and, indeed, among the industries most clearly in the Tanzanian negotiator's mind in respect of Kampala Agreement quantitative restrictions and East African Treaty transfer tax protection to regulate East African Trade were textiles and garments.⁴⁰

No textile or garment companies were nationalized in 1967, but sectoral changes did result from the implementation of the Arusha Declaration. NDC set up a subsidiary to take over all textile and garment importing, exporting and (later) first stage wholesaling. At first seen as a way of distributing NDC group mill production and engrossing import and wholesale surpluses, this company began to be seen as an instrument for determining and allocating domestic demand and supply. NDC developed a specialized textiles division in its head office which had acquired substantial sectoral planning and management capacity by the time it was spun off as an independent textile parastatal in 1972.

Over 1967–72 the government view on extending public control was for NDC to utilize its import/wholesale control to this end and also to undertake any new mill construction with very little priority given to buying out the existing private enterprises. NDC viewed this as unworkable and initiated the acquisition of a controlling interest in two mills (Kiltex and Tasini) and their merger into a single unit. The textile parastatal was to take the same view acquiring a majority interest in Sunguratex, the last major private unit, in 1974.⁴¹

Protection was sharply increased in 1970—dumping had reached a point at which some Indian and Pakistani fabrics made of East African cotton had prices c.i.f. Dar es Salaam lower than the f.o.b. price of the cotton they contained. In addition cotton and rayon were *de facto* protected against other fabrics by the use of different sales tax rates. These were justified partly on grounds that wool—acrylic—silk—nylon were luxury fibres and partly that cotton was, and rayon could become, an integrated industry from raw material to finished product.

Until 1972 there was very little public sector participation in garment manufacturing. While importing and initial wholesaling was virtually 100 per cent public enterprise second stage wholesaling and retailing remained private. Indeed the number of retailers had grown to 10,000—with marked downward pressure on their incomes and upward on their gross margin charges—partly as a result of the arrival of traders from Zanzibar. In 1971 reaction to the Acquisition of (Rented) Buildings Act caused a chaotic withdrawal of wholesalers and retailers but this was reversed within a few

months.

From 1972 the textile parastatal group moved steadily toward sectoral planning. It made use of a number of external consultancy studies and at least two domestically based ones. Its 10-Year Sectoral Plan completed in 1974 was dealed by the 1974-76 external resource crisis but, of its main elements, the doubling of Mwatex capacity, building of a new integrated mill in the cotton growing area and partially reequipping Kiltex-Tasini were under implementation by mid 1976 and additional elements were under consideration including an export keyed yarn mill.

The relationship of the actual sectoral plan formulation and implementation to the parallel national industrial strategy's textile component is unclear. The sectoral was formulated first and its implementation began before the delayed appearance of the 1976-81 (originally to be 1974-79) draft plan. However, so far as domestically oriented production is concerned the two were in agreement at the textile level. They diverged in respect of exports and of garments.

The textile parastatal (and less clearly the Ministries of Industry and of Finance) viewed cotton products as a logical area to weld an export manufacturing business on to a large, domestic market linked sector largely fed by local raw materials. The objective reality of unfillable export orders from Kenya, and to a lesser extent other countries, encouraged them in assessing such an approach to be financially viable at enterprise level. The industrial strategy documents were not integrated with a balance of payments plan and tended to be biased against industrial activity based on existing raw material exports.⁴² The issue remains open as present expansion projects will probably about meet 1980 demand so that further expansion can be considered in a joint manufacturing/export promoting context.

While post-1972 decisions (including a pair of worker takeovers of small, oppressive and/or abandoned private firms) have broadened the public enterprise stake in garment sector it remains largely private. Given its initial overcapacity the industrial strategy's proposals for rapid, small unit, decentralized public sector (District Development Corporation or Ujamaa Village or Workers' Co-operative), labour intensive expansion may have been optimistic. They posed severe organizational and managerial problems. The sectoral parastatal's view that it should move into the sector by creating or acquiring a dominant interest in large units was based on probably more realistic estimates of capacity gaps and potential for reorganization. However, it runs counter to attempts to achieve decentralized public enterprise units linked with decentralized governmental units in sub-sectors in which economics of scale are of secondary significance.

Over 1973-74 the textile sector was a major focus of government attention in terms of price control and over 1974-76 of output expansion to meet basic needs and to conserve foreign exchange by expanding output (as opposed to cutting demand). Both exercises suffered from a gross underestimation of underlying 1970-72 demand levels and trends and of the massive impact that 1969-74 income redistribution was having on textile demand.

Domestic and some imported textiles and garments formed a major chunk of the comprehensive basic goods (rather loosely defined)⁴³ price control

instituted in 1973. The sectoral parastatal was in fact eager to have a set of pan-territorial prices for major centres (basically regional "capital" towns) and of fixed mark ups and wholesale, sub wholesale and retail prices for major products. Problems arose over margins—these were in practice reduced by price control probably especially at retail levels.⁴⁴ Further snags arose because mill costs for nearly identical goods varied widely. Initially this was partly absorbed by the wholesaler (parastatal) receiving different markup margins and by retail price differences but by 1976 there was a clear drive to standardize retail prices and markups and place the unit cost differential burden (or gain) on the textile enterprises. Similarly general cross-subsidization (at mill level) was operated to hold down prices of two or three basic lines while allowing higher surpluses on others, an exercise made difficult by the fact that mill output mixes (actual and potential) were by no means identical but rendered somewhat easier when all were majority public sector enterprises.

Despite shortages (especially after imports were cut to the bone in late 1974) price control has worked. Despite much higher sales taxes than pertaining in Kenya, retail prices of some lines have been lower in Tanzania while the textile mills and the importing/wholesaling company have achieved surpluses. Part of this may relate to the 1974-76 working out of annual supply quantity and price agreements with the Cotton Authority, but these tend to stabilize price and increase the potential for definite annual budgeting more than they subsidize it, so that such gains are probably more time efficiency ones than farmer to consumer transfers.

Output growth became a government priority in 1974 before the scale of the 1974-76 terms of trade shift which cost Tanzania in the order of Sh 1,500 million a year (10% of TDP) or even the 1973-74 drought (a once for all loss of perhaps Sh 2,000 million) were fully known since in 1973 about Sh 300 million of textiles and garments had been imported. As a basic consumer good linked to domestic rural inputs and with a low recurrent impact component the textile sector was seen as a means to overcoming the external debacle by increasing (not cutting) output growth.

1974 results were not impressive. A private sector expansion was salvaged by taking over the company but too fine tuned negotiation on a loan package may have contributed to an eighteen month delay in getting two public sector mills from design to construction.⁴⁵ In 1975 major attention was devoted to procuring new external financial sources (including the Kuwait Development Fund) and achieving 1976 starts in significant expansions of installed capacity.

In 1976 wholesaling was decentralized to Regional Trading Companies which also did a substantial share of the sub-wholesaling. Import-export and some aspects of plant to regional wholesale transaction (including the transport equalization funding aspects of pan-territorial pricing) remained with a smaller specialized company. Retailers with a significant cloth business were well below the 10,000 of the early 1970's though well above 1964's 3,000. Perhaps 200 to 300 were decentralized public sector enterprises; excluding village co-operative shops some of which do carry cloth but not to date normally as a major line.

The textile mill sector has been the subject of speculation (coherent research is too strong a term) on productivity. On the one hand by 1976 it was producing between 80 and 90 million metres a year i.e. above rated capacity.⁴⁶ On the other hand, on the 3 1/2 shift basis now worked an output of 110 to 120 million metres is theoretically possible and the labour force levels appear remarkably high compared with those associated with comparable technology elsewhere and their fluctuations appear to bear no very clear relation to output, employee having fallen in some mills over 1970-74 when output rose sharply and risen sharply in 1974-75 when output did not show any comparable surge.

An in depth mill by mill and period by period analysis is required to say much more because homogeneity is lacking. Several mills—notably Friendship and Mwatex—were heavily overmanned from the start because their organisers (respectively Chinese and French) either underestimated Tanzanian labour's potential productivity, overestimated training time and turnover (non replaced dropouts) during it or (in the Friendship case) assumed workers who became surplus as standards rose with experience would be transferred as cadres to new mills.

At other mills—notably Mwatex and Kiltex—at least until 1974, production and associated field management was very weak. In one case a team of 60-odd expatriate managers literally had no common language to speak to each other let alone their semiskilled workers. At both of these mills shop floor and foremen level training was weak or worse. A series of equipment problems also embrangled the mills. Kiltex had a bottleneck-ridden plant with some quite unsuitable machinery.⁴⁷ Friendship suffered from an imbalance between spinning and weaving capacity not consistently cleared by sales to Kilter—Tasini until these became public enterprises. Sunguratex had become entangled in delayed yarn deliveries (casualties of the 1967 Israeli invasion of Egypt) after its spinning plant was complete. Tasini's problem was different—built up in stages with a variety of not wholly compatible machinery over a decade, it had minimized capital and initial unit cost but at the price of being very badly laid out and hard to operate smoothly as an integrated, 20 million metre mill.

Until late 1971 demand constraints held back output. Following a fairly smooth rise toward full capacity to mid-1974, the mills were confronted with a requirement to go on a 3 1/2 shift (160 hour a week production) basis to knock out the 1972-73 import rise which could no longer be met during a foreign exchange crisis. The demands this placed on preventative and emergency maintenance would have been severe in an industrial economy with few supply bottlenecks.

In the Tanzania textile case, they combined with tighter regulations on imported dyestuffs and spares and endemic power and water shortages. On the face of their own claims the mills taken together lost up to 20 million metres of output a year in 1974 and 1975 from "down time" attributable to these causes. From mid 1975 power became dependable⁴⁸ with the completion of Kidatu dam, from early 1976 foreign exchange licensing became somewhat looser, by mid 1976 initial steps to fabricate standard spares locally had begun and by the same date at least the Dar es Salaam based plants (but not

necessarily the other two) had dependable water supply again with the long delayed completion of the main new water pipeline. Thus the second half of 1976 and especially 1977 will be some test of what portion of relatively stagnant outturn in 1974-75 was exogenously determined.

These data do not answer questions about spinning-weaving-dyeing-printing sector productivity. They do suggest that simplistic linkages of "low" productivity and public enterprise status are unsound and simplistic solutions such as retrenchment or non-hiring⁴⁹ unlikely to yield results except in a broader reference frame. First the relevant standard of productivity against which to measure performance varies depending on the time span used: say 6 months, 18 months, 5 years for short, medium, long. Second it varies depending on whether the focus is on what the enterprise, the sector, the state, or (unrealistically) the world economy could achieve. Third, for each time period and set of actors complex packages of instruments and targets would need to be set out related to the complex underlying factors. None of this of course denies that there is a productivity problem (albeit quite probably not of the severity sometimes asserted) but it does imply that "lazy workers" and "stupid managers" are mystifying slogans, not basic explanatory variables.

VII. Concluding comments

As the preceeding examples should suggest, form and procedure are not unimportant. Means chosen do inform how and to what extent which ends are actually achieved. While perfect legal instruments, institutional structures and technical procedures are no substitute for clear objectives which relate the necessary and the possible nor for the sustained will to approach them, defective instruments, inappropriate structures and erroneous procedures can prevent any goal's attainment. In many enterprises the particular—sometimes unexpected—results achieved have been significantly, even if usually still secondarily, affected by questions of form and procedure including the sub-category of such questions usually described as legal.

The examples also suggest an overlapping, interplay and complementarity among the focuses. Just as a sectoral study can provide a frame of reference for firm level analysis, so an historical study can throw light on approaches to decision-taking. The more micro and detailed event oriented the study, the greater its need for comparable work on the broader interpretive framework level and vice versa. Indeed, in logic all four approaches can be combined in a single piece of work. In practice the case against this is the enormity of the task unless what is attempted is a synthetic exercise based on a firm foundation of earlier single focus micro, sectoral and national studies—a foundation still either absent or gap-ridden in all African countries.

They probably also illustrate a very real "public relations" problem. To be useful analysis must point to areas of potential improvement and, in many cases, past shortcomings. Further if one is studying history in order not to

repeat it, then virtually by definition one is “judging” on the basis of evidence not available to decision-takers at the time. If one is a practitioner, one is—if honest—implicitly or explicitly taking positions different from one’s advice or decisions at the time.⁵⁰ This is at the least conducive to misunderstanding and irritation—being omniscient long after the event is not an amiable quality.

To avert or minimize this danger research needs:

a. to take a problem identification and solving plus opportunity identification and use stance, not a blame casting one;

b. to emphasize that problem solving is a common interest which requires identification of weaknesses as a step to common solution designing effort, not as a demonstration of “our” wisdom and “others” foolishness;

c. to pay adequate attention to strengths and successes both because generalizing and building on them is important and because citing them is critical to building viable relations with decision-takers and practitioners;

d. to recognize that anyone who has given advice or taken decisions involving judgement (and applied research by its nature offers advice and incorporates decisions) has on occasion been wrong.

Throwing problems at others like hand grenades, ignoring achievements as below serious analytical concern, casting first stones at individuals and pretending to omniscience from an Olympian pinnacle above the battle are not ways to maximize research opportunities, research impact nor researcher acceptability. They *are* disturbingly prevalent in applied research on and in Africa.

Notes

1. The author does not claim that his having been a practitioner as well as an academic analyst and having worked closely with lawyers and politicians renders him immune to these weaknesses and dangers. Rather, at most, it helps him identify all of them in his own work at least as much as in that of others.

2. These are not the only possible frames for research. For example textual exegesis and criticism, as a dominant approach as opposed to a sub-element, is not listed because the author doubts its suitability despite its relative popularity especially in traditional francophone studies.

3. Admittedly the Treasury contributed to this result. Because Canadian capital aid was proving hard to use to an extent that prejudiced future allocations and was available on 90% grant terms, the Treasury (over NMC objections) insisted on a turnkey Canadian project which was known to be likely to cost up to twice as much as commercially financed European machinery and skill purchases on a more selective basis. Nationally the present cost on 90% grant terms was still lower *but* to NMC, who were expected to make a commercial return on the nominal cost, matters were quite different. Under the circumstances special terms to NMC to reduce its costs to those which would have pertained had the lowest price plant been bought would appear to have been more appropriate.

4. Economists often are trapped by their own pedagogical devices. The capitalist of Adam Smith, Karl Marx, Alfred Marshall or Paul Samuelson does *not* have a single goal of short term profit maximization. A businessman who really operates on that basis is in practice a species of confidence trickster (such businessmen do of course exist) and even he has a second goal of limiting the risk of attracting effective civil or criminal sanctions. The standard types of

capitalist have multiple goals including present and future profits, enterprise growth and image, cash flow and risk, relations with key clients, controllers and competitors, public image and avoidance of intra-firm friction. Doubtless these are not so wide or varied as those facing political decision-takers, but the problem of achieving an acceptable balance as to planned and actual results in respect of each goal is basically the same.

5. It can also be argued that it begs a question—is there necessarily or probably such a tradeoff in most African countries? On the whole that is a valid operational point—there is little evidence Tanzania would grow faster by following an inequalitarian strategy or Kenya slower by pursuing one less inequalitarian. However, the cases of Gabon and the Ivory Coast do suggest that in some instances the tradeoff would have been a real one. Furthermore, the question needs to be posed broadly if only to create a frame of reference for micro level uses in which it is real—certainly it has been posed and answered (albeit in rather imprecise terms i.e. a significant amount but by no means an unlimited) in Tanzania.

6. e.g. in Tanzania achieving a tax effect of a quarter of monetary GDP is not a problem so far as a practitioner is concerned because the ratio is already about 35%.

7. e.g. the fact that Tanzania has succeeded in sharply reducing personal consumption power differentials in the public service but Zambia (on the face of it committed to a similar policy) has one of the most rapid post-independence increases in these differentials is as much a starting point for Tanzanian analysis of success as for Zambian failure (at least in respect of stated objectives). In fact both the Tanzanian success in this field and in the level and progressivity of tax effort appear to justify much more serious analysis of causes and methods than they have received.

8. Both conditions contrary to fact. It is an indirect subsidiary of Boots and turns out relatively cheap products probably largely bought by consumers in the top third (but not the top 1-2%) of the household income distribution. The public sector airconditioning factory would be closer to the case cited except that the bulk of its output is apparently for factory, commercial and office use.

9. The clear case is private automobile manufacturing. The most inherently vexed is tourism because it is a luxury export which is consumed in Tanzania with evident demonstration and Tanzanian elite consumption implications. The more expensive types of radios and phonographs and perhaps residential airconditioners logically appear open to question. Beer and cigarettes are often cited, but on the face of it incongruously given that the former is probably consumed by at least a third and the latter by over half of all households. Clearly beer and cigarettes are not necessities but a good so widely consumed is an amenity (in these examples a mass market amenity) and the case against it can hardly be rested on egalitarianism or ostentatious status symbol consumption.

10. To do so does not necessarily imply suspension of criticism. To attempt what is—and can fairly readily be seen to be—objectively impossible is very rarely an efficient decision.

11. This is not to argue that the decisions were particularly adequately articulated or tested; they contained numerous flaws which could and should have been perceived and a major risk in choice of partner which should have been evaluated more carefully. However, 1971-72 fertilizer and 1974 phosphate rock price level projections are not really on this list of errors and omissions.

12. The final method of using concrete pipe cast in a specially created local unit doubtless was superior to the initial proposal for imported steel pipe and the interim idea of an open ditch system. It was probably better than the other option of large steel pipes fabricated in a specially created local factory. Each study was of reasonable competence, each added to knowledge, each was probably completed expeditiously. As micro studies each made sense, it is the macro decision to delay construction until “adequate” information was to hand which is in question.

13. This argument can be overstressed. First, knowledge acquisition and development time is not usually very systematically allocated and for historic reasons public enterprises often receive an irrationally low share. Second, a good deal of rather useless knowledge is collected and analyzed despite lack of users—if this were halted some priority demands could be met more fully. Third, developing capacity to acquire and create knowledge (and of rough and ready shortcuts to doing so) rarely receives adequate emphasis although experience in several African countries and enterprises suggests it can produce surprisingly large and speedy results.

14. e.g. in Tanzania until 1972 one could argue that adequate allocation of resources was not being made to increasing training of accountants and auditors as well as that existing cadres were unevenly allocated. Over 1972-75 the situation on the first count changed radically (with the

implication that 1976–80 would see an improvement in trained personnel in place in relation to what was required). The legislation in respect to training, registering and regulating accountants and auditors was a reflection of a growing perception that a unified focal point for evaluating quantitative and qualitative requirements, training and performance was needed. Its operation has, in turn, increased the perceived need to expand and reorient training albeit not precisely in the way apparently envisaged in the Act.

15. This “historical didactic novel” approach is uncomfortably common in political economy in general and public enterprise studies in particular. It is a real risk to all analysts because not all data can be used—selection is necessary—and not all data normally fit neatly into any analysis—to seek that is to defer results forever. Unfortunately it is also particularly dangerous because, unless the reader also knows the facts, he will be mentally testing the hypotheses and conclusions and assuming both that the data given are correct in themselves and give a relatively undistorted picture of known facts. There is no particular correlation between the ideology of the analyst and “systematic” historical romance as a vice, neo-laissez faire and neo-Marxist work both provide numerous examples; indeed authors who have turned from the first basic worldview to the second sometimes show the same “selectiveness” (albeit with different selections and deduced “facts”) in both phases.

16. Not *ownership* of large scale units by their employees which is not a Tanzanian goal and would, if it were, be remarkably inconsistent with either socialist productive and reproductive efficiency or egalitarianism.

17. The issue of the decision-takers’ strategy *vis-à-vis* transnational corporations is a related but different one. TNC’s could not provide an adequate domestic support base nor a satisfactory image of access to the elite for Africans, so that the creation of a domestic “middle bourgeoisie” would be necessary even to a strategy centered on accepting TNC dominance in large scale production and international economic relations and much more for one seeking a more balanced quasi partnership role with TNC’s with Kenya a Third World sub-centre or “relay station” dominating other Third World economies (“appendages” as a Kenyan minister recently termed two of them).

18. This is a criticism only if one rejects the approach of building a national capitalist state with an increasing middle class business stratum and of creating interlocking common interests among businessmen and politicians in support of that pattern of national socio-economic and socio-political construction. Such a rejection is likely to be ideological—just as acceptance is likely to be. Kenya’s decision-takers are highly ideological. However, it might be rejected on narrow practical grounds e.g. that only state capitalism or socialism is objectively capable of constructing a nationally oriented and controlled economy in a small poor state in the last quarter of the 20th century. Similarly, acceptance might be equally narrowly based on the ground that small and medium scale business should be left to the private sector for several decades because the public sector should concentrate on a transition to socialism (or state capitalism) in the large scale productive sector.

19. This statement is deliberately nuanced. One portion of the coalition remains in power and can hardly be said to have pursued a transition since 1972. However, those most committed to such a strategy had by then been eliminated in a series of events of which the 1971 attempted *coup* was the most dramatic albeit it can be read as an attempt to reverse a post-thermidorian trend as readily as it can as an attempt to accelerate the pace of radical transformation. Equally the Sudanese Communist Party was not at all times an advocate of anything stronger than a New Economic Policy variant and Soviet planning advice (literally up to the day of the nationalizations) was for a productive sector development based on private—and to a large degree foreign—investment.

20. It is possible that the continued attempts of the two basically pro-national capitalist former parties (Mahdist and National Democratic) to regain power and in particular the 1976 *coup* attempt could give rise to a more ideologically based emphasis on state capitalism and a concomitant attempt to limit Sudanese (albeit probably not foreign Arab) business scope and power. That, however, remained hypothetical as of late 1976.

21. This question is not unique to the Sudan. Granted most African *coups* and other changes of regime do not lead to a basic alteration of socio-political or political economic systemic goals, a number have done so e.g. Sudan (at least twice), Somalia, Ethiopia, Mali, perhaps Congo, Benin, Uganda, Egypt (probably twice), Ghana (perhaps more than once).

22. *De facto* there was a good deal of specialization and *de jure* many lines of import and export

were confined to some public enterprise. However, the degree of clarity, coherence and above all communication leading to coordination of the financial sector was absent.

23. Somewhat ironically at the same time another McKinsey task force was working on implementation strategy for government decentralization. The incongruity of this did not strike McKinsey—in fairness it also did not really strike Tanzanian decision-takers until STC became a disaster area.

24. On one occasion the BIT has *de facto* assumed management of an RTC but only for a relatively brief period.

25. As produced, the proposals also contained a rather more centralized variant with Zonal Companies and a central Holding Company; an option probably personally favoured by a majority of the working group. However, the group was aware that if the RTC—Specialized Company—BIT variant was cited by it as practicable it would be the one adopted because of the political will to achieve decentralization wherever technically workable. The responsible minister and a minority of the working group preferred the more decentralized variant on technical efficiency grounds as well—in each case a change from their position prior to 1970.

26. This cannot be related to price increases. The new system has operated in a context of articulated price controls—STC until 1973 did not. Indeed, if anything, gross margins have been somewhat lower so the transition from STC losses to new system profits does appear to relate to greater commercial efficiency, albeit from a low base level.

27. Sudan Railways incurred losses, failed to maintain its line and rolling stock, was unable to keep track of its operational equipment, used scarce investment funds and foreign exchange lavishly to avoid total breakdown, was increasingly unable to move goods or passengers as and when required and was not notably corrupt. Thus it is fairly certain it was very inefficient from the optic of any set of goals. As Nigerian and East African Railways over slightly later periods exhibited the same symptoms, and in each case the railways were the least efficient major public enterprise and were quite impervious to attempted corrections, a case might be made out for a multifirm study to identify the special enterprise problems and pathology of railways.

28. These are not likely to be simple nor is a single pattern likely to emerge, e.g. referring to the NBC-STC examples, in the NBC case legal firm changes (even including the statute) tended to flow directly from substantive changes formulated and in the process of implementation by the Board in consultation with its parent Ministry. Furthermore problems were those of success e.g. the term loan division had become large and specialized and thus a new institution was justified. In the STC case, the problems until 1974 tended to be those of failures; the changes instituted from outside STC and without its effective participation; the legal instruments often equally lagged behind the actual implementation of change. *Per contra* the Tanzanian Housing Bank Act and the Workers and Peasants Housing Development Fund (its major low cost housing initiative tied to housing cooperatives, villages and input loans) were both drawn up before the bank and the Fund came into operation but in consultation with those who were to manage them. In these cases the sequence has been formulation of aims—legal instruments—internal procedural guideline drafting and institutional structuring—substantive operation—modification within existing legal instruments.

29. On the record diamonds appear to be an exception but in this case the initiative came from a Minister and from the Attorney General's Chambers and the major analytical and negotiating inputs were from their institutions not NDC.

30. In part this was understandable. If NDC was the central productive sector operating agent of the state, it should have been involved more fully in project identification and negotiation. Further at least one project was structurally defective (albeit when a Ministry sought to push this point NDC—though privately agreeing—was unwilling to back it up or produce proposals for restructuring). However, the opposition went deeper, the Friendship Textile Mill was treated as an ugly duckling by NDC long after Friendship was making profits, operating near capacity and under largely Tanzanian management—all in contrast to a joint venture textile mill NDC regarded much more highly.

31. At this stage even that control was weak. NDC was negotiating local and external loans directly, had some of its initial capital in hand and had a large cash flow from its inherited investment portfolio relative to its new project needs. Desire to steer well clear of Treasury control probably influenced a tendency to minimize NDC capacity in any venture both through maximizing the debt/equity ratio and bringing in partners.

32. The Group was achieving significant surpluses. However, these were largely on initial

portfolio and nationalized companies not new ventures. Few of the latter achieved (or could reasonably have been expected to achieve) profits until the third or fourth year of operation and several more to become endemic loss makers.

33. From 1974 on it has had no Ministers on its Board. The Chariman was the chairman of another parastatal and the Board members civil servants, parastatal officials and persons associated with the Party, the former Co-operatives and Trade Unions.

34. It would be quite unfair to say all of these flowed from perceived coordination and control problems involving NDC or parastatals in general. A quite independent set of influences flowed from the desire—particularly by the Treasury—to create a more articulated, informed and flexible decision-taking—implementation—review structure for planning in general and public enterprise planning in particular and yet another strand related to the tight control over resource allocation required by a growing perceived shortage of scarce resource availabilities compared to potentially desirable and operationally practicable uses.

35. As of the date of spinoff none of the new groups was clearly profitable on a consolidated basis albeit textiles was clearly about to become so. Even by 1976 tourism while making progress had a large group loss and mining (plagued by two disastrous companies inherited from NDC) a significant one; construction remained a disaster area in both physical capacity and loss generation terms. Textiles and sugar were flourishing and the livestock and general large scale agriculture groups were near breakeven but only after massive institutional efforts and major new investment in the last three cases.

36. Some NDC senior personnel and several group companies on occasion took a more positive view. However, the latter cases represented enterprises bypassing the NDC Head Office to deal direct with Ministries and thus created a different, but very real, set of coordinated planning problems.

37. The review was initially to involve the enterprise, the parent ministry, Finance and Planning. Since then Planning has been merged with Finance and the NDC and Bank of Tanzania are likely to be added to the review body to integrate parastatal—credit—foreign exchange planning more fully at micro level.

38. The NDC had previously been almost morbidly convinced that a managing agent was the *sine quo non* of successful enterprise management. At the same time it deeply distrusted many of the agents and on occasion declined to act on perfectly sound proposals because it feared being tricked.

39. E.g. the NDC group has been a focal area in rather low keyed struggle to make Workers Councils and firm TANU branches effective instruments of participation by workers in enterprise (WC) and the interaction of enterprise/state (TANU) policy. To study this simply in terms of plant level worker/TANU initiatives (often more grievance than policy oriented—at least on the face of it) or NDC response (at least until 1974 largely consisting of passive retreat, diversion of attention to grievances and attempts to co-opt WC and Branch leadership) may mislead as to the nature and seriousness of the micro struggle and certainly will not give many clues as to the purposes, advances and limitations of the 1971–76 drive for Party supremacy in strategy nor for judging its implementation and the degree to which this achieved collective management and worker/peasant direct participation in working and community unit decisions of major direct consequence to their lives.

40. An East African licensing agreement existed for textiles and had by 1965 given Tanzania the largest share of licensed capacity. However, the licenses issued were far in excess of even the 1970 market and the existing rayon and nylon capacity was virtually solely in Kenya so that in the short term the agreed licensing did not avert frictions about interstate trade.

41. In part it did so to protect its expansion plans which were about to be thwarted by inadequate finance but largely to achieve a near monopoly in textile production and thus a freer hand in allocating production of different types and grades of cloth to particular mills. Sungurates, had earlier received special fiscal assistance when the timing of its yarn imports and spinning plant building had come unstuck as a result of the 1967 Middle East War. That such assistance was given without any attempt to tie in a public sector stake in ownership, strongly suggests that the Treasury did not view acquiring existing textile mills as a high priority in 1970; its support for TIB involvement in the 1974 takeover suggests a priority shift by that date.

42. This was truer at technician (largely expatriate) than Planning Commission (largely parliamentary), Cabinet, or—apparently—Party executive levels. Leather, cashew nut processing and sisal twine were treated as dubious in early technical work but feature much more

strongly in the Tanzanian reworked drafts.

43. Butter (several brands), brandy (also several brands), refrigerators (at least the larger sizes) are examples of clear upper amenity or luxury goods covered. It would appear that in practice the officials were free to add almost any product so long as they did not do this at the expense of excluding items political decision-takers considered to be basic and so long as the resulting system proved at least reasonably operational.

44. The key debate was over a 10 or a 15 percent gross retail margin on piecegoods and involved perhaps Sh 60–70 million to retailers. The Price Commission personnel eventually took the view that while 15 per cent might be necessary if 10,000 retailers were to prosper that number was excessive and that to charge workers and peasants Sh 60–70 million to featherbed 5,000 retailers was neither equitable, socialist nor plausible commercial practice.

45. The case is not clear—first the loan might not ultimately have been approved by the leader and second the final designs and procurement procedures were improved during the interim. What is only too clear in retrospect is that if it had been possible to tie up finance and move to construction in 1974—even on the unimproved design and procurement—the final cost of the mills would have been lower and their output available earlier.

46. Most of the partial studies are at earlier periods when sectoral output was a third or more lower and that for some enterprises a half or more.

47. This is a private sector case of a promotion, machinery sale agreement which at best involved reckless lack of concern with the suitability of the package by the seller and quite inadequate independent analysis and checking by the buyer.

48. Kidatu feeds into a national grid serving all the plants except Mwatex. By doing so it freed thermal plant at Dar for transfer to Mwanza to enhance its generating capacity which serves Mwatex.

49. Non-hiring may be particularly facile. To argue that some public sector workers in Tanzania have zero productivity is valid (as in almost any public or private sector!). To call these the marginal workers may be analytically acceptable. However, there is no presumption they are the last hired or the first to retire voluntarily. A rather non-random sample in one ministry's headquarters suggested 10% totally unproductive staff, largely in middle and lower ranks. It also suggested an average length of service of over ten years and an average period of retirement of at least as long. Further many were unproductive because of near total lack of training, experience and basic education not because the posts they "filled" were unneeded. Thus nonhiring would not even attack the underlying problem and compulsory retirement would need to be selective and relatively discretionary, not based on a rule book formula of "last in first out" or "retrench these types of posts by a fifth".

50. The author is only too aware of several instances in the examples of the present paper in which he no longer agrees with his own past views and others in which he was too easily convinced by arguments he would now reject.

Part II

Social Science Perspectives on Public Enterprise

Public Enterprise and State Capitalism

Large-scale participation by the state in production and trade in Africa and elsewhere in the third world raises important questions about the nature of the political economy as a whole and the class character and functions of the state. Quantitatively and qualitatively this state intervention goes far beyond what is normal in advanced capitalist countries. Still, it takes place within societies which in most cases are integrated into the world capitalist economy, without the state planning and control normally associated with socialist countries. In recent years, the level of state intervention has been stepped up. Nationalisations of foreign capital are common.

Is this some kind of proto-socialist development, preparing for a transition to socialism? This is what certain marxists (notably Soviet marxists) claim for some countries, where they see prospects for a "non-capitalist" or socialist-oriented road of development. In Africa, countries like Algeria, Angola, Congo-Brazzaville, Nasser's Egypt, Nkrumah's Ghana, Guinea-Conakry, Guinea-Bissau, Mozambique, Tanzania and Somalia have featured in those discussions.¹

In many of these cases, as well as in more obvious ones, other students have claimed that state participation in production should be seen as preparing the way for capitalist development in a situation where local private capitalist forces are too weak and underdeveloped to perform this task. In certain cases this has even been the expressed purpose of colonial as well as post-colonial public development schemes. In Ghana, for instance, public enterprises established by the Agricultural and Industrial Development Corporations in the 1950's were supposed to be transferred to the private sector, once brought on to their feet.² Some of the nationalised foreign plantations in Zaire stayed only temporarily under "public" control before they were allotted to private fiefholders. In other cases, the privatisation of public enterprises have followed on the growing political strength of the private capitalist class forces. See, for example, the attempt to dismantle the public-enterprise sector in post-Nkrumah Ghana.

In some cases it has been clear that the state not only expanded the public sector of the economy but also actively discouraged the growth of a local private capitalist class, at least beyond the level of small-scale entrepreneurship in farming and the "informal" sector. This, however, has not necessarily been taken as evidence of socialist-oriented development but has also been seen as a form of capitalist development, where a bureaucratic bourgeoisie takes on the role of collective owners (and prime beneficiaries) of public enterprise. An intense argument in relation to the Tanzanian and Ghanaian (Nkrumah) cases has been developed along such lines.³

The three perspectives on public enterprise indicated above—the socialist-oriented, the private-capitalist, and the bureaucratic-capitalist—all focus on *internal* forces engaged in the expansion of the public sector. A crucial issue, however, is their respective links to the *external* capitalist forces which are generally assumed to dominate the orientation of these economies. To what extent is public enterprise merely an appendix or even a bridgehead for continued foreign penetration? This has been argued, for instance, in the case of the numerous jointly owned parastatals of East Africa.⁴ But also entirely state owned enterprises have been described as performing the same “service” functions to the primary advantage of foreign capital. In cases where state investments are in public utility companies such as power-stations, mainly supplying foreign firms, this service-function may be particularly apparent. (Compare the argument over the Volta hydro-electric scheme and Valco, the US-controlled aluminium company.)⁵ But state ownership may serve foreign interests also in less obvious ways. State control over the extraction and marketing of primary produce, for instance, may ensure steady supplies and the suppression of costs (e.g. the suppression of wage demands by local labour), which may be less easily achieved through direct foreign ownership or participation. The case of the Zambian copper industry has been mentioned in this context.⁶

Most importantly, however, it is the *interaction* between internal class forces promoting their interest through public enterprises and in most cases still dominant foreign interests which complicates the picture and calls for a close study of concrete public economies, preferably on a broad comparative basis. It also calls for solid theoretical work. The present paper reflects neither. It is a warming-up exercise in preparing for a more systematic attack on the problem. My own independent research in the field is limited to Ghana and, in particular, to state and party intervention in the cocoa trade.⁷ I have done preliminary work on the agricultural sector in general and I have touched on some of the theoretical issues involved in a previous paper on the class orientation of the state in Ghana and Tanzania.⁸

State capitalism: a conceptual point of departure

This paper is a revised and expanded version of one presented to a Nordic conference on “The state in the third world”, organised in Uppsala in November 1976 by a research group, of which I am a member.⁹ The main session and the bulk of the papers (mostly in Scandinavian languages) were devoted to the theme “State interventionism and class struggle”. A related conference was held in Helsinki earlier the same year on “Non-capitalist development”, organised by the Scandinavian Institute of African Studies.¹⁰ On both occasions, questions of public enterprise were discussed in terms of “state capitalism”. At Helsinki, for instance, the case of the Tanzanian parastatals in the manufacturing sector was subjected to a penetrating discussion.¹¹ Two general papers on state capitalism in the third world by James Petras and Archie Mafeje were circulated and were later used as basic

background reading for the Uppsala conference.¹² My paper at the latter conference was primarily designed as a discussion of Petras' paper, which was later published in the *Journal of Contemporary Asia* (VI:4, 1976). Mafeje's contribution is discussed more briefly. Both papers are rich in imaginative propositions and are, as far as I know, among the few attempts in this field to discuss third world "state capitalism" as a general phenomenon. They constitute therefore a natural point of departure for further discussion.

Petras' argument focusses on state capitalism as the special political-economic project of a national state-bureaucratic class, nationalist and even anti-imperialist but ultimately reintegrated into the world capitalist economy. Mafeje, on the other hand, is more concerned with long-term potentials of state capitalism to develop in a non-capitalist direction. Although neither of the two discuss concrete cases, their analysis is clearly marked by their recent research experience, Peru in Petras' case, Tanzania in Mafeje's. In both cases, state capitalism is seen as break with neo-colonialism: a serious attempt to build a national, industrial economy, in the absence of a national bourgeoisie capable of carrying out this task and in reaction to the well-documented failure of imperial capital to create conditions for sustained, integrated national growth. While fully agreeing with the relevance of their analysis to *some* instances of state capitalism, I wish to stress the *limitations* in viewing state capitalism as an essentially nationalist or even anti-imperialist phenomenon. It will be argued below that the bulk of state investments in productive enterprises in Africa (including most nationalisations) have been undertaken within a framework of continued and often intensified foreign penetration. A "nationalist" interpretation of state capitalism runs the risk of obscuring the wider function of state enterprises in the interaction between local and imperial capitalist forces.

The concept of state capitalism does not have its origin in the analysis of the third world. Although there are antecedents, it is only recently that the term has been more commonly used in that context. There are two other major contexts, however, where it has been widely used for some time. The first relates to the advanced capitalist countries where a wide variety of state interventions are undertaken to smooth crises, hasten structural changes, regulate monopolies etc. Compare, for instance, the notion "state monopoly capitalism" used in certain marxist analysis. But state capitalism is also used more generally and within different theoretical perspectives (including liberal ones) to indicate the complex interplay of state institutions and private firms under advanced capitalism.

The second context is quite different. State capitalism has been used to designate a degenerated form of socialism, where state production and economic planning is not subjected to the effective political control of the working class and where surplus is appropriated by a class of state and party functionaries. This, for instance, has since long been the view of the Soviet Union by groups close to the Fourth International. It has also been used in Social Democratic analysis of Communist-governed societies.

The discussion of state capitalism in the third world contains elements from both these earlier notions. On the one hand, there is the state intervening increasingly in the economy in order to compensate for the weaknesses

and inefficiencies of private capitalism. On the other hand, there is state-ownership and the bureaucracy establishing itself as a dominant force. Some students have contrasted the regulative and supplementary role of state capitalism in advanced capitalist societies with its more strategic role in the development of productive forces in the third world, "substituting for the non-existing capitalists, performing actually the function of 'collective capitalism'" ¹³ There is no case, however, for treating third-world state capitalism as a unique phenomenon, unconnected with the other two, even though it may have its distinct features. The state in the capitalist periphery certainly performs "regulative" functions *vis-à-vis* private capital (foreign rather than local) similar to those in the capitalist centres. Above all, state capitalism in the periphery should be studied in relation to the internationalisation of capital, a process where the state plays an important role at the centre as well as in the periphery. Similarly, it would probably be useful to approach the question of the bureaucratisation of some third-world political economies (including the degeneration of leadership and popular control) within a framework which allows us to draw on the discussion of related phenomena in the advanced socialist countries. It has been suggested, for instance, that the Tanzanian case may be usefully discussed in such broader comparative perspective both with respect to state interaction with foreign monopoly capital and bureaucratisation. ¹⁴

As far as I am aware, there has not been any attempts to examine these various conceptions of state capitalism within one theoretical framework and there will continue to be some confusion caused by the ambiguity (and specific political-strategic functions) of current usages. I think that we are well advised, in the meantime, to abstain from committing ourselves to the term state capitalism as a theoretical concept. I prefer to use is here as shorthand for a rather loosely defined phenomenon, for which a satisfactory place is yet to be found in the theory of capitalist and socialist development.

What about "state interventionism"? Is this not a more flexible term which permits us to discuss the same phenomena without getting bogged down in a struggle over words? State interventionism clearly refers to societies where the private sector dominates. The term has been used primarily in the analysis of advanced capitalism. It makes less sense in a context where the state is the dominant force in production. In the third world context, state capitalism and state interventionism are often used as meaning roughly the same. Petras objects to this. He sees the latter term as designating a phenomenon common in liberal and neo-colonial regimes where "the state functions as a handmaiden of the private sector. . . providing credits, subsidies and cheap services. . ." Under state capitalism, on the other hand, the state acts as an active competitor and substitutes for the private sector in its capacity as the owner of productive firms. Petras' distinction on this point fails, in my opinion, to take account of a major sphere of interaction between state and private capital, supportive as well as competitive. State ownership, as will be argued further below, may not only be compatible but actively conducive to the development of private capital. It is therefore confusing to build a notion of competition with the private sector into the very concept of state capitalism.

It is probably wise to wait to make conceptual distinctions within the general sphere of state-capital interactions until the area itself has been better charted. The focus of the present discussion is *large-scale, direct state participation (ownership) in production and commercial services*, which is a prominent feature of a wide variety of third world countries. Whether such participation is best described as state interventionism or as state capitalism or by any other term will be left open.

Petras: State capitalism and the third world

Petras' point of departure is the rejection—at least in the short and medium-term perspective—of a simple dichotomy of, on one hand, neo-colonial directed exploitation and, on the other, revolutionary socialist development. He focusses on the state bureaucracy as a dynamic class force capable of pursuing an independent, national, anti-imperialist strategy, although he foresees its reintegration at some later point in the world capitalist system. In view of the weakness of other internal class forces—the local bourgeoisie as well as the organised working-class and peasant movements—the state bureaucracy “remains the last barrier to total subordination and fragmentation in the new international division of labour”. National state capitalism is an effort to achieve integrated industrial development, in opposition to the fragmented, dependent development enforced by foreign capital. Neo-colonialism is superseded. Petras entertains no illusions about the socialist character of this state capitalist development, despite “socialist” forms and rhetoric. The purpose is the realisation of profit within a class society. He sees state capitalism as the “dominant mode of nationalist capitalist development in the third world”, engaging even “the most retrograde type of political rulers”.

Its class basis is provided by “intermediate strata”, functioning under these conditions as an independent class. A principal feature is the expropriation of multinationals. Historically, Petras relates the rise of this social formation not only to internal conditions of third-world societies but also to the declining power of US imperialism and growing inter-imperialist rivalries, which facilitate national economic emancipation. There are a number of other useful (sometimes debatable) observations which cannot be discussed here, including those on the position of the emerging state-capitalist class *vis-à-vis* the military and its ability to mobilise, temporarily, working class and peasant support for its nationalist strategy, despite the basic tendency of the bureaucrats to disarm and “discipline” the independent organisations of these classes.

On the whole it is easy to recognise the overall relevance of Petras' analysis in individual cases. Nor is it difficult to see elements of such national-bureaucratic state capitalism in a broad variety of third-world regimes, including the radical African ones, listed earlier. The general relevance, however, is restricted by the fact that he does not relate this decisively nationalist or even anti-imperialist type of state capitalism to a wider state-

capitalist framework including, perhaps even more prominently, accommodation or outright subordination to foreign capital. Nor does his emphasis on its bureaucratic class basis allow for a proper discussion of the interaction between the bureaucracy and other internal class forces, bourgeois as well as working class or peasant. National-bureaucratic state capitalism may, for instance, have been a conspicuous feature in Nasser's Egypt. But the subsequent resurgence of private bourgeois, imperial and neo-colonial class forces under Sadat must be understood in terms of the wider class connections of the bureaucracy also in Nasser's period, if an exaggerated independent weight is not to be attributed to factors of personal leadership.

State capital and foreign capital

The national or anti-imperialist character of state capital (including nationalisations) is by no means striking in most African countries. Public enterprises proliferate and it is no doubt true that they substitute for weak or uninterested private capitals, internal or foreign. On the whole, however, most public investments and nationalisations continue to take place within an overall framework which is highly open to the penetration of foreign capital. In most cases, the problem of governments seems rather to be one of enticing foreign investors to overcome this disinterest. A prominent way of doing this is to establish joint ventures. With the state as a partner, foreign capitalists can be protected from risks related to the smallness of the market. Local monopolies are ensured through licensing and tariff policies without exposing the foreign companies to the political risks facing private monopolies. As joint share holders governments are usually not very demanding as they are anxious to have some resemblance of industrialisation at any cost. Unlike capitalist financial institutions they will therefore readily accept that returns are low (or negative) while the foreign partners with their exclusive control over management, technology, market information etc. are in a better position to ensure their own adequate returns. There are many more reasons why state capital is a preferred partner for foreign capital, including its superior ability to discipline the labour force, regulate wages and prices, provide banking, housing and other services, all heavily dependent on the central bureaucracy in its allocation of the scarce external resources (imports and foreign exchange), on which the "modern" sector is so excessively dependent.

But also where foreign capital ownership is not involved state capital performs vital functions in furthering the penetration of foreign capitalist interests. The expansion of public enterprise provides a principal avenue for expanding the market in advanced capital goods, patents, consultancy, management and financial services. The exploits of the West-German based Drevici group in Ghana in the late Nkrumah years may be a particularly outstanding example of such foreign penetration through the state sector.

More generally, public enterprises may provide a principal means for the expansion of "locally" manufactured goods where the real profits remain

outside the country. This is, of course, most apparent in the case of the numerous state-owned assembly plants. But it is equally true for the bulk of the African state-owned manufacturing industry, which continues to rely on imported materials and components should be emphasised that these enterprises are not only dependent in a technical, material and financial sense, but also firmly geared to the extraction of profit by a metropolitan bourgeoisie.

State capitalism, under these circumstances, cannot be treated as the political-economic project of the state-bureaucracy alone, nor can its "national" character be taken for granted. Its often highly dependent nature does not, of course, exclude a national orientation: an attempt to reduce dependence within existing structures. Still, the manifest foreign interests in the "national" state sector makes it necessary to explore carefully the interaction of state and foreign capitals in order to understand the class character of this state capitalism. In certain cases we will find that state capital may in fact—despite the nationalist and socialist ideology of public speeches—be essentially performing the functions of a comprador class, providing the local "middlemen" required by foreign capital. In other cases, the state bureaucracy may have assumed a more independent role in the economy although still a junior partner *vis-à-vis* foreign capital. It has been argued, for instance, in comparing the Zambian and Tanzanian state bureaucracies in this respect, that the former—although highly heterogeneous—shows strong comprador elements, while the latter is more independent in its dealings with foreign capital.¹⁵

State capital and the internal bourgeoisie

The class orientation of state capital, however, must also be explored in relation to other *internal* class forces than the intermediary stratum of bureaucrats, to which it is most directly linked. The weaknesses of internal, private capitalists as a vehicle of national industrialisation are apparent in most African countries and this is of course a main reason for the proliferation of public enterprises. It is also clear, however, that in many African countries the state sector provides an umbrella under which local private enterprise is flourishing. In some cases, the lines connecting the state and private sector are very direct. State financial institutions invest in private enterprises, state-owned capital equipment is engaged. A recent example is the expansion of rice growing in Northern Ghana where public enterprise and state capital play a vital role in building up large, privately owned plantations.¹⁶ Although it may seem as if, for the time being, the balance between private and state capital in these undertakings are heavily weighted in favour of the latter, it is nevertheless clear that state capital is deployed in the interest of a weak but expanding internal capitalist class, whatever the benefits simultaneously reaped by the state bureaucrats themselves. In some countries, for instance in Nigeria and Kenya, this internal bourgeoisie has grown strong enough to become an increasingly effective local partner of

foreign capital, alongside state capital itself. The role of the state bureaucracy in such circumstances is therefore also to create the institutional preconditions for such alliances. These arrangements can take numerous forms. A public enterprise may, for example, place a contract with a foreign firm on condition that it joins into partnership with a local private firm.

The failure of internal private capital to make a significant contribution to national development (except in cash crop farming) does not mean therefore that the growth and orientation of state capital is unrelated to the aspirations of the internal bourgeoisie. The top bureaucracy in a number of African countries is also closely involved in the private sector although relations of ownership and control are concealed through the use of various intermediaries. When old regimes fall and new ones take over, these relations are occasionally exposed through public inquiries if it suits the new rulers. Profits from private enterprise supported by state capital are added to official salaries and unofficial benefits. We may therefore speak of a "bureaucratic bourgeoisie" not merely with reference to the control of public enterprise but also in order to highlight the influence of private entrepreneurship on the administration of state capital.

So far, I have sought to relate the emergence of state capitalism in Africa to the requirements and aspirations of both foreign and internal private capitalist forces. This is to complement, if not to correct, the perspective employed by Petras, where state capitalism is seen as the special political-economic project of the state bureaucracy as an independent class of its own with interests opposed to or largely incompatible with those of private capital, foreign or internal. This does not mean that we should ignore the possible separate "class" identity of the bureaucracy and its impact on the administration of state capital. It is inevitable that the control over public capital and state enterprises must influence the class character of the top bureaucracy. It is equally natural that the presence of a large public sector will affect the nature of the political economy as a whole. There is therefore no reason to exclude the emergence of a "state-capitalist class", seeking to entrench itself in the control of state institutions, monopolising economic opportunities in the "modern" sector at the expense of private capital, foreign as well as local. In most African countries, however, this "class" develops alongside and often in mutually beneficial interaction with imperial and internal capitalist forces. Only a close study of individual cases will be able to determine the relative impact of each of these on the nature of state capitalism and to what extent it is justified to speak of the bureaucracy as an "independent" social force rather than one mediating the interests of other classes.

State capitalism and socialist-oriented development

To Petras, third-world state capitalism, however nationalist or anti-imperialist, is just a special form of capitalism, unable to transcend its own basic logic, the realisation of profit in a class society. My own argument so far

has not questioned this capitalist orientation but has sought to broaden the perspective by bringing in the connection between state capital and private capitalist class forces. What about its relation to class forces in society which are not committed to a capitalist road or which find themselves in contradiction to the owners of capital?

This is where we may bring in Mafeje's discussion of state capitalism and the prospects of socialist-oriented development. There is much common ground in Mafeje's and Petras' papers, including the emphasis on the nationalist element in state capitalism and the way in which it compensates for the weakness of the nascent internal bourgeoisie. Mafeje, as Sachs and Szentes quoted above, stresses, however, the distinction, between such state capitalism which coexists with the internal bourgeoisie and such which is directed towards the liquidation of this class or which actively blocks its growth. Mafeje mentions no examples but the Tanzanian case is clearly one which is close to his own experience.

Unlike Petras, Mafeje is concerned with the anti-capitalist aspects of state participation in production. He is interested in the long-term progressive potential of state capitalism. He does not believe that the state-capitalist stage can be jumped as long as the working class is small and poorly organised. It is therefore not a question of by-passing but of transcending state capitalism. He enumerates certain elements in progressive state capitalism which may be conducive to such future developments. They include the reduction in the rate of external predation, the extension of state planning, the growth of a working class and the "partial negation of the law of value". Still, these factors, except the last, may all occur also within Petras' national bureaucratic state capitalism, without holding out more prospects for transcending the capitalist stage than any other kind of capitalist development. The point about the partial negation of the law of value is a tricky one. It is not compatible with Petras' view of the basic logic of state capitalism. Leaving this point aside, I agree, however, with Mafeje, on the need to look beyond the passing progressive features attributed by Petras to national state capitalism and to identify such elements which may sustain a more permanent transformation in a "non-capitalist" direction. There is clearly a need to distinguish between such state capitalism which leads primarily to the consolidation of the state bureaucracy as a capitalist class and that which permits the development of political organisations among workers and peasants and a radical leadership capable of restraining and ultimately superseding the political domination of the bureaucracy. In the countries which have liberated themselves from Portuguese colonialism we can see elements of such political structures. Whether they will survive the consolidation of the post-colonial state will depend on the outcome of the struggle between the different class forces which seek to control the state in their own interest. Even if the democratic structures fostered by the liberation struggle do not survive, we are still likely to encounter a different kind of state capitalism with a stronger commitment to a socialist-oriented road. The problems faced by these countries, however, will partly be the same as those experienced by others where state capital has been given a leading role and where there will be the need to strike bargains with foreign capital as

well as with local entrepreneurs. We may be well advised to remember the point of departure suggested by Petras about the need to avoid superficial dichotomies of either neo-colonial or socialist regimes.

Notes

1. For references see Mai Palmberg, "Literature on Non-Capitalist Development", Paper to the Seminar on Non-capitalist Development in Africa, Helsinki 1976 (Scandinavian Institute of African Studies, Uppsala).

2. Tony Killick, "The State Promotion of Industry: the Case of the Ghana Industrial Development Corporation", *The Ghana Social Science Journal*, II:1, 1972.

3. Björn Beckman, "The Post-Colonial State: Autonomy and Social Determination", Paper to the Nordic Political Science Conference, Århus 1975. Revised version (in Danish) published in *Politica* VIII:2-3, 1976 (Århus). This paper discusses the Ghanaian and Tanzanian debate.

4. Bhagavan in comments to earlier version of this paper. See also papers submitted by Bhagavan a.o. to the Helsinki seminar (see note 1, above) on the Tanzanian state sector.

5. This argument is well summarised in Judith Marshall, *The Political Economy of Dependence: Ghana 1945-1966*, Institute of Social Studies, The Hague 1972, (mimeo), pp. 259 ff.

6. Mai Palmberg, "The Political Role of the Workers in Tanzania and Zambia", Paper to the Seminar on Non-Capitalist Development, 1976, see note 1, above.

7. *Organising the Farmers. Cocoa Politics and National Development in Ghana*, Uppsala, Scandinavian Institute of African Studies, 1976.

8. "State Intervention in Agriculture: Ghana 1951-1976", Paper to the conference on Agricultural Change in Africa organised by the African Studies Association of the United Kingdom, Durham 1976. For the second reference see note 3, above.

9. A report on the seminar can be ordered from the Working group for Studies of Development Strategies, c/o Sc. Inst. of African Studies, P.O. Box 2126, S-750 02 Uppsala, Sweden.

10. For a report write to the Institute, address as in note 9, above. See also Jeremy Gould, "Socialism in the Future of Africa—Report from a Seminar on 'Non-Capitalist Development in Africa'," University of Helsinki, Institute of Development Studies, *Occasional Papers* 1/1976.

11. Main contributors on this point were Bhagavan and Mafeje. See also papers submitted to the seminar by Bhagavan a.o.

12. James F. Petras, "State Capitalism and the Third World", *Journal of Contemporary Asia*, VI:4, 1976. Archie Mafeje, "The Role of State Capitalism in Predominantly Agrarian Economies". Paper prepared for conference on An Appraisal of the Relations between Agricultural Development and Industrialisation in Africa and Asia, Tanarive, July 1975.

13. Tamás Szentes, *The Political Economy of Underdevelopment*, Budapest 1971, p. 312, Ignacy Sachs, *Patterns of Public Sector in Underdeveloped Economies*, London 1964, pp. 68-9. Quotation from Sachs.

14. Comments by Bhagavan on earlier version of this paper.

15. Same.

16. My paper, as in note 8, above.

Reginald Herbold Green

Public Directly Productive Units/Sectors in Africa and Political Economy

Some notes on methodological pitfalls

The purpose of society is man; but in order to serve man there must be a social organization of economic activities which is conducive to the greater production of things useful for the material and spiritual welfare of man. This means that it may well be a function of society to organise and sustain efficient economic organisation and production techniques even when these are in themselves unpleasant or restrictive.

Mwalimu J.K. Nyerere
Uhuru na Umoja

I. Introduction

This paper is not a guide to the economic or political economic literature on the public directly productive sector in Africa in the sense of a survey or annotated bibliography but in that of seeking to provide a framework for its selective interpretation, adaptation, extension and development.

The importance of the public directly productive sector in Africa needs little demonstration—like Mount Kilimanjaro or Mount Kameroon it is there for all in the vicinity to see. The importance of critical description and analysis is perhaps parallel—the mountains look very different from different perspectives and are often cloud and fog shrouded or haze and smoke distorted.

There is little likelihood of the sector becoming absolutely smaller nor—except in rare cases—even relatively so. Too many (even if hardly congruent) interests wish the reverse. Economic nationalism, filling structural gaps, transition to socialism, plums for the elite, crumbs for the clients, “modernization” of “development administration” (whether Ilchmanite or Marxian), security and capital cost minimization for MNCs, institutional instincts for self preservation are a very mixed bag of motives and strategies—in the Africa of the 1970s *all* tend on balance to result in pushing the public directly productive sector onward and outward. That multiplicity of driving forces is one of the problems of analysis—for sectors and units informed by very different goals rather different performance tests are needed and even the levels at which methodology can be common are open to question.

Not surprisingly African directly productive sectors are very different in relative and absolute size, makeup and history. Tanzania’s includes over 75 % of large and medium scale directly productive activity; is overtly aimed at reaching 100 %; operates in an articulated (if not always fully consistent) set of national and sub-national planning frames; is moving toward decentrali-

zation of control within these frames. The Sudan's includes holdovers from an earlier wave of nationalizations, traditional (in the UK) public service and utility bodies and the new joint ventures financed largely by Arab export surpluses welded with European technology and management. Nigeria's—apart from the traditional lines—includes the commanding heights industry (oil), and very large ventures; has a two tier national and state pattern; shares the coordination problems of national and state planning in general; is somewhat tailored to and constrained by the effectively pressed interests of the Nigerian entrepreneurial class. Kenya's seems an odd mixture of inherited bits and pieces, gap filling, support for large MNC ventures and a somewhat truncated experiment in cooperative state/foreign capitalism in all domestically oriented large ventures. Algeria's is—in some respects—similar to Tanzania's but more centralized and harnessed toward a more production growth and less economic balance oriented transition to socialism. Ghana's rather resembles Kenya's with a rather special heritage of gap filling and large scale unit creating ventures from 1957–1965 and a lower share of new ventures. Zambia's bears a superficial resemblance to Tanzania's but is more constrained by the somewhat ambivalent policy on private entrepreneurs, has more baronial autonomy from national frames and is less decentralized in regional and worker participation terms.

The term public productive sector itself poses problems. Clearly it includes:

- a. nationally owned (including 50 % or above joint ventures) productive units with an independent legal status;

- b. similar sub-national (State in Nigeria, regional and district in Tanzania) units;

- c. multinational production oriented institutions with majority African state ownership (e.g., East African Corporations, Tanzania-Zambia corporations, Algeria-Tunisia industrial ventures, African Development Bank). However, two problem border areas exist:

- a. co-operatives and co-operative owned ventures (e.g. banks, factories, transport companies);

- b. ventures in which state control (either in legal or administrative form) is provided even though ownership is not 50 % or more state sector.

At one level the answer to the problem depends on what it is intended to study. Parastatals and *Ujamaa* villages (producer co-operatives) should be classed together in Tanzania for some purposes and not for others. The odd cases (e.g. Tanzania Development Finance Limited with 50 % Tanzanian Board and a *de facto* Tanzania Investment Bank lending frame but a 75 % foreign equity) can be decided by inspection. However, more serious problems can arise. The old style Tanzanian co-operative structure headed by the Cooperative Union of Tanzania was a rural elite dominated one and potentially the leader of a counter-coalition to TANU (the single party). The parastatal managers—even assuming they could ally with MNC partners—had no possible political base to lead any such coalition and had many less degrees of freedom in operation. Therefore, co-operative banking (transferred to parastatal in 1971) and industry (more or less constrained to small, locally oriented units from 1970) could not in *political* economic terms be lumped

with parastatal. Assuming *Ujamaa* villages with more egalitarian management bases come to dominate the co-operatives there would be a change in the underlying reality (and quite possibly in attitudes toward co-operative large scale ventures).

II. Goals

Efficiency is not an abstract concept. It is relative to some goal or goals. If, for example, a public works programme is primarily designed to maximize bribes to ministers and civil servants, no analysis which does not take account of that fact will be fully satisfactory. Take account of need not, of course, mean approve of. However, criticism of such a system as not minimizing costs nor maximizing "useful" roads-bridges-ferries-buildings is simply evading the primary "problem".

To know all is not, in this field, to forgive all even within the context of the operational goals. Over 1971-74 Tanzania held urban meat prices down to benefit urban wage earners (and did alter quality premiums to the low wage earners' benefit). At an overall urban-rural egalitarian level (also a government/Party goal) this *was* inefficient. Therefore, no attempt was made to hold grower prices down—on the contrary. An articulation problem arose—with the packer required to meet urban demand at below cost prices and a sluggish supply response, exports vanished; the company headed for bankruptcy; absolute urban shortages at the new 50-75 % higher sales levels emerged. Clearly this was not efficient and nationalization of the packer (previously 50-50) was undertaken in 1974 partly to achieve a coherent price policy and *end* (not pay from the public purse) the deficit. Here joint ownership proved inefficient because it hid the need for coherency in pricing policy (as well as for several other reasons).

The following list of possible purposes of individual parastatals and/or a parastatal sector is illustrated purely by Tanzanian cases to demonstrate that diversity of purpose is likely over time and within a country at any given time not because it would be difficult to find Kenyan, Sudanese, Ghanaian, Senegalese, Nigerian or Algerian examples for most of the categories:

- a. serving a basically private directly productive sector e.g. Tanganyika Railways and East African Railways and Harbours prior to 1967;
- b. consolidating an economically weak sector which for national reasons could not be allowed to disintegrate or contract in terms of purely private enterprise decisions, e.g. the Tanzania Sisal Corporation;
- c. fill gaps in private initiative in entrepreneurship or finance within a basically private directly productive sector e.g. the Tanzania Development Finance Company to 1967; Tanganyika Packers when set up in the 1950s;
- d. provide future sources of government revenue, e.g. the acquisition of 50 % of Williamson Diamonds prior to independence;
- e. increase the domestic share of economic activity and the overall rate of its growth with no clear objectives as to the degree of economic independence or mode of production sought, e.g. the Tanganyika Bank of Commerce (a minor pre-nationalization joint venture);

f. perform certain specific services not considered appropriate to the private sector, e.g. the Bank of Tanzania (central bank) and the 1966 life insurance nationalization proposals;

g. provide a framework for achieving a dominant national *and* a dominant public sector position in the large scale directly productive subsectors e.g. the 1967 and (subsequent) nationalizations and negotiated purchases in commerce, finance and insurance, manufacturing and petroleum refining and distribution;

h. generate a significant and growing proportion of national investible surplus to allow a more rapid expansion of the economy and/or of communal consumption with lesser dependence on external finance and domestic taxation;

i. allow decentralization of public sector ownership to geographic and/or functional groups, e.g. the District Development Corporations, Nyanza Industrial Corporation (co-operative union owned) and (former) Co-operative Bank;

j. integrate production orientation into the centre of government decision-making and productive unit planning into the overall national development planning process, e.g. the 1969-1972 parastatal capital budget exercises and the 1974 onward move to coordinated financial and physical parastatal planning (budgeting);

k. promote economic cooperation and efficient joint resource utilisation with neighbouring countries, e.g. the Tanzania-Zambia pipeline, road transport and railway ventures and the East African Corporations;

l. promote a transition to state capitalism or to socialism;

m. facilitate decentralization e.g. the 1972-4 articulation of the State Trading Corporation into Regional Trading Companies and the intent to proceed to District level;

n. provide a framework for worker participation in management;

o. producing plums for decision-takers and crumbs for their clients.

It is critical to identify which goals (more than one normally) apply at the sectoral level and for each unit. There are significant problems of identifying actual decision-taker goal "tradeoffs" or desired mixes (as opposed to inconsistencies) when goals are partially substitutes. Equally there are difficulties in working backward and forward between sectoral and firm level. There is no reason to suppose an identical appropriate (or possible) goal balance for each unit at any one time or for one unit over time

III. Sectoral framework

It is probably appropriate to identify goals first at sectoral level (at least approximately) and work from there to the productive unit level. The process is necessarily iterative but the sectoral frame—whether worked out by the analyst or available to him from previous studies—is critical to avoiding error. E.g., a study of the Tanzania Sisal Corporation might well suppose shoring up sinking sectors was a dominant theme in Tanzanian (as in British) public enterprise creation. This would not simply be generally

wrong, it would make understanding why TSC pursued the employment (non-filling of most normal vacancies), replanting (selective and shifting to higher surplus per tonne estates), "expansion" (selective promising private taken over, several marginal public phased out), etc, policies it did, or why the government imposed internal cash flow and replanting targets on TSC which required unit cost reduction, much harder.

From the sectoral goals flows the critical description and analysis of state-sectoral-unit institutional patterns. The role of credit planning, for example, can hardly be the same in Tanzania and Algeria to that in Kenya and Nigeria. This should lead to institutional and inter-institutional relations differences. It is in this context that Zambia's decision not to nationalize banks and—probably consequential—lack of detailed, articulated domestic credit expansion budgeting (including the government among borrowers) seems open to a type of appropriateness and efficiency criticism less applicable to Kenya's rather similar inactions.

Beyond institutions and their formal interactions is the area of operating relationships. Management by control is workable only in a system with either limited control goals or a very large, very experienced bureaucracy with rapid access to accurate, detailed data. The first condition may characterize some African states—in which case they have far too many petty controls for efficiency in their own terms—but the latter is clearly not the actual state of affairs anywhere in Africa.

Thus decentralization—whether Smithian or Maoian—and management by consultation within a general legal and institutional frame—the "invisible hand" of the genuinely competitive market for Smith, a complex of institutions and forums channelling mass decision-taker relations for Mao—appears logical on efficiency grounds. However, its form will vary depending on goals and on constraints (e.g. neither Smith's market nor China's long history as a centralized state with decentralized decision-taking exists in Africa). Even with parallel goals and constraints specific historical and personnel factors will apply—e.g. the fact that the Tanzania Treasury has taken responsibility for overseeing sectoral investible surplus generation and firm financial target (whether high, low or negative) setting and meeting may be generalizable. Its parallel commitment to frame enforcement by coordination and discussion with minimum use of directives is probably specific to Tanzania's participation/decentralization goals. Its strong commitment (e.g. in fiscal policy, price control, wage adjustments, and—less consistently—selection of productive investment) to rapid raising of low income workers and peasants and to generalizing access to basic public services is partly related to specific Tanzanian goals and partly to its 1965–1974 senior personnel. Finally its dominance in the economic policy field may be generalizable (for historic reasons African Treasuries usually had better working institutional machines at independence than other economic ministries) but its sustained transition from a traditional to a planning/management centred view of its role is much less so (and has had costs in terms of the nuts and bolts of estimates preparation and operation because central emphasis and, especially, entrepreneurial ingenuity was largely focused elsewhere).

IV. Management/control

Three levels are apparent: external (e.g. via a national credit plan whether articulated directly or via a parastatal bank as agent or via a non-public sector foreign management group with or without an ownership stake); joint (e.g. Treasury-Planning-Central Bank-Commercial Bank preparation and operation of the Party-Cabinet approved Credit Plan; some joint ventures); internal (e.g. issues of hierarchy, delegation, participation).

At each level the forms and realities of management and/or control need to be related to the sectoral and unit goals. E.g., if a Board of Directors of a parastatal *de facto* secures the removal of a Minister and not *vice versa* an analysis of what goals each saw as appropriate to the unit and how these related to sectoral goals may prove enlightening. If some worker struggles to enforce participation lead to prompt government backing and some to prompt crushing an examination of the specific goals struggled for may prove illuminating (e.g. if managers disrespectful to workers are in general sacked after struggles but middle to upper income workers striking for additional income outside national guidelines are threatened with loss of jobs and/or legal action there is no necessary inconsistency).

Similarly the workable patterns will vary with country size (e.g. Nigeria could hardly centralize as much as Mauritius but a high degree of autonomy would be needed for sub-units on Rodrigues which is very isolated from the main island); available personnel (e.g. a new parastatal *may* need a foreign management partner to operate at all); goals (e.g. the objective of decentralization as well as diseconomies of centralization influenced the Tanzanian STC "Consultancy Group" to reverse the McKinsey drive toward centralization); nature of unit (e.g. petroleum's unit size and central role in Nigeria suggest that very difficult management and control patterns at all three levels are highly unlikely to be appropriate than for palm oil growing, extraction, processing); history (e.g. the particular problems of high losses and high "allocations" to "decision-taker personal pockets" characteristic of Anglophonic West African parastatal sectors in the past—and/or present—suggest different patterns may be needed than in Tanzania where, through 1973—i.e. pre-external price and drought crisis—sectoral surplus was large and rising and where "corruption" and less overt "special" allocation is both lower and rather better controlled).

V. National system role and implications

The nature of the national decision-taking coalition will influence parastatal goals at unit and sectoral level. So will its form—a client system organized on a neo-tribal basis will probably have distinctly different operating implications than an interest group one more overtly organized on sub-class or specific interest group lines. If the perceived duty of a decision-taker is to make tangible distributions to specific clients, the balancing right is to reward himself, and wide inequality at any given time is accepted if

opportunities are perceived for clients to become leaders (whether the perception is valid or not and whether the chance is relatively high or low) then most of the legal, political, management and economic discussion of the public directly productive sector is rather beside the point—it assumes a very different state and pattern of interest and reward structuring with the case cited above as a secondary and generally unacceptable component. In, for example, Nigeria of 1960–65 that assumption was probably false; whether the series of subsequent conflicts have made it more true is less than certain—in part they challenged the system, in part the inequality and general lack of opportunity to rise, in part the specific division of gains. To analyse as if the underlying national systemic reality was similar to that of the UK and Chief Festus to Mr. Poulson can hardly contribute much to understanding reality however entrancing the prose it may generate, just as to assume that “the conflict of interest” pattern of corruption often characteristic of municipal affairs in North America and some European countries is inherently different from the more bribe centred pattern characteristic of some African cities (and especially to see it as “better”!) is also to distort reality.

The more general problems are writing either with no examination of decision-takers’ personal and class interests or with attention to almost nothing else. The latter—especially when it lifts parastatal managers and bureaucrats out of the state decision-taking coalition in which they are rarely dominant—is too mechanical; the former runs a very high risk of analyzing in what ways the parastatal sector differs from the one the author would (or believes he would) seek to create and operate were *he* the decision-taking coalition.

However, the relationship is not unidirectional. Especially in a context of incomplete knowledge, short time horizons (either of the decision-taker or of reliable projections), and less than homogenous decisions—decision-takers—goals, the operation of the public directly productive sector will reinforce or weaken, serve or undermine, expand or constrain geographical, class, interest group and individual costs, benefits, goals and possibilities in unexpected (and sometimes, though not always, unprojectable) ways as well as in those sought. The pressure for nationalization of foreign firms led by the national capitalist, egalitarian Tanzanian conservative populists (e.g. Oscar Kambona) *did* contribute to the Arusha Declaration but because pressures for egalitarianism, blocking local capitalist development and separating public decisions and private gain were equally powerful the dawn of broad front public productive sector expansion was the sunset of their power. The same probably holds true—with a greater time lag and less present certainty—for greater emphasis on rural development and the “traditional” co-operative decision-takers. *Per contra* sales tax was hardly a worker demand but it in fact led directly to periodic government review in real purchasing power terms of minimum and low level wages in a way far more beneficial to the lower income workers than the existing bargaining—incomes policy legislation had intended or its institutions provided.

One evident interaction is on the state attitude to profits (or investible surpluses). If these are dominantly private, their generation *as such* is rarely a central state concern and they are likely to be viewed as a source of revenue

with little attention to actual growth of production consequences. If they are dominantly public sector (and, as a corollary, so are the direct responsibility for production increases and the problem of financing them) a change in balance of attitude and evaluation is likely. The cost of inadequate cash flow is more clearly visible as higher taxes on individuals, lower production growth or greater external borrowing—all of which entail real costs to most members of most decision-taking coalitions. The less important the private sector in Tanzania has become the more respectable have public enterprise surpluses grown and the greater the concern that parastatals should minimize the resources used to achieve any given set of goals.

In the 1975 Budget Speech this trend appears in a rather extreme and unselective formulation presumptively because of the 1973–75 price/drought crisis' impact on public expenditure, parastatal surpluses and prices, whereas in the 1971 Speech it was more articulated and modulated because the external constraints were less severe and the relative risk of oversimplification greater compared to that of financial leakage. This is, perhaps, a case of the need in analyzing or considering analysis to seek to determine what the alternatives to what was done were (or were perceived to be) and what immediate contradictions (overriding problems) required (or were thought to require) priority attention. Key management choices and strategic decision-taking are not normally marginal and incremental; the realities of the African public directly productive sector are by no means identical to those of the linear mathematical underlying much social science analysis and especially western microeconomic, development management and modernization theory. Nor of course do they bear much relation to the astonishingly binary (either/or), straight path, single solution (varying with author) models underlying many of the more utopian (or counterutopian) "radical" analysis. (This approach is logically populist or utopian socialist albeit it is often presented as Marxist and some of its proponents certainly are Marxists.)

VI. International relationship implications

Public directly productive sectors are often in large measure informed by economic nationalism in the sense of desiring greater perceived and real power by locally based individuals and institutions over external economic relationships and individual transactions. The Ghana Cocoa Marketing Board (which did quite significantly alter the share of export proceeds going to Ghanaians as opposed to foreigners albeit to the benefit of the state and its own employees rather than to that of cocoa farmers) is a case in point.

However, intention is not by any means always identical to result. The use of joint ventures and management contracts with MNCs—especially if combined with a shift to export oriented production and/or against domestically based private units—can be the agency of increased external penetration and a more complex and pervasive pattern of socio-politico-economic dependency. It is certainly arguable that the Kenyan pattern of MNC dominated large productive unit growth—at the expense of smaller

firms as well as absolutely—has had precisely this effect and that the selective use of the public directly productive sector has been critical to it both in terms of service and finance provision and in creating MNC-parastatal joint interests served by (and benefiting) a new parastatal-MNC-civil service subclass with significant secondary decision-taking power albeit with a doubtfully adequate class base and an inherently uneasy relation with the dominant political decision-takers with their rural elite (and clients) and petty capitalist-petty civil service base combined with much greater charismatic and historic legitimacy.

This is a field in which parallel attention to the goals of domestic and external decision-takers, the types and quantities of power available and likely to be deployed by each (an MNC like a state will not usually perceive it to be worthwhile to deploy its full power on a marginal issue unless it is seeking to create or avoid a precedent), and the pattern of change over time is particularly critical to analysis.

It is also one in which observing how often and in what depth the issue is raised is likely to be particularly misleading as to its extent. Tanzania has much more vocal domestic concern on this cluster of issues than Kenya or even Zambia partly because for most Kenyan decision-takers it is not perceived as a problem in the same sense and for many Zambians it is seen as less pervasive and subtle and more easily held at arms length. Indeed, the Tanzanian University analysis has tended to lag by 12–18 months and the press by 18–24 months the beginning of serious political and technical debate on the same problem aspects and how to tackle them and normally to postdate the initiation of concentrated action aimed at resolving them.

The foregoing point illustrates again the danger of “external” studies not informed by fairly detailed knowledge of actual goals, decisions, changes in decision and/or institutional patterns, timings and sequences. Just as an internal analysis is too likely to be bounded by the same assumptions, goals and perceived constraints as informed the events and patterns analyzed, so an “arm’s length” one is in danger of being superficial, most of all when it attempts depth analysis of internal goals and decision timings.

VII. Performance: Description, evaluation and prescription

To assess performance requires a prior identification of what an institution or a sector was and is intended to achieve and of the nature of the socio-politico-economic system within which it operates. The latter is necessary to reach any serious discussion of who in the system perceives which direct, indirect and side effects of parastatals and of the parastatal sector as benefits and costs and of what significance and to what extent these perceptions appear to converge with or diverge from “reality”. It is also critical to identifying which results—and to what extent—relate primarily to the individual parastatal, to the sector, to the state and to the society (or to particular individuals within each).

In the absence of such a working frame—and it is partly or totally lacking in most writing on African public enterprises—quite absurd confusions arise. For example a whole body of literature arose evaluating the West African Marketing Boards on the presumption their main (or sole) goal was long term grower price stabilization. Even a cursory survey of their charters, reports and actions would have showed this was, at most, a secondary goal and—more important, as several later writers argued—that they were always overtly multi-purpose institutions with goal clusters and weightings which changed over time.

The examination must go deeper than legal instruments or stated policies. For example the tendency to analyze many parastatals as profit maximizers (in the narrow sense of annual declared taxable profit) is often meretriciously formalistic. Often the stated target was either a ritual one or intended as a constraint against operating subsidies; especially in the case of public utilities and “gap filling” development corporations. Further its use in the arguments of parastatals as a weapon to justify policies is not adequate evidence they followed it, e.g., Tanzania’s NDC under Goerge Kahama had a clear revealed preference for maximizing group size and the scope of new ventures and a very low one indeed for raising internally generated group cash flow (even when the latter would have been easy as in raising prices of a 100 % subsidiary selling largely to 60 % subsidiaries at least enough to cover rising input costs).

Equally care must be taken to be sure an apparent “clear case” of a known category is not something quite different. Tanzania’s automatic bakery looks to be a standard large-scale mechanized plant to expand surplus seen internally as a Galenson-Leibenstein (or Bettelheim to take a Marxian variant) investment maximization through wage share minimization decision and externally as a way to meld Canadian manufacturer and aid interests. The reality is less simple—both the Treasury and the Milling Corporation doubted the venture not simply because they took an agnostic view as to its surplus generating power but because they wanted small scale, rural-producer-oriented, multi-product tinning plants instead. (The reasons were partly economic but on a much longer term and broader view than short term surplus generation.) The Ministry (and particularly the Minister) of Agriculture gave top priority to the bakery because they saw no other way to stop short weighting and adulteration of bread by a number of the existing small bakeries. This does not *per se* “justify” the decision (indeed it might be argued that it makes it almost more eccentric) but it is relevant to evaluating it, the NMC and the operating goal weights of Tanzanian institutions and decision-takers.

Evaluation in a framework allows distinction among several types of performance weaknesses:

a. *Micro-errors*—inefficiency in achieving goals by individual parastatals relating to action or inaction subject to a significant degree to firm influence or control;

b. *Sectoral errors*—inefficiency in meeting individual unit and sectoral goals relating to action or inaction either at the sectoral level or in the interactions between the sectoral and individual unit levels;

c. *National errors*—inefficiency in national policy action or inaction limiting the ability of the parastatal sector and its units to pursue national goals effectively;

d. *External context*—constraints and events which impinge on a-b-c but including the way in which flexibility and response (including positive reaction as well as passive adaptation) are or are not built in at unit, sectoral, national levels;

e. *Mismatch inefficiencies*—clear unresolved conflicts of goals (not including tradeoff problems in general but including failure to perceive and deal with them with reasonable degrees of speed and effectiveness) which hinder the working of parastatal units or sectors;

f. *Unresolved contradictions*—basic conflicts of interest within and between decision-taking groups (and the institutions for which they decide) and also between segments, formations and classes of (or acting in—e.g. MNCs) the polity which impair specific or general goal attainment;

g. *"Inappropriate" goals*—goals which from some stated point of view (e.g. the author's) are inappropriate and whose attainment is *from that perspective* an "inefficiency".

A particularly serious problem is confusing "g" with other categories. There is no obligation on an analyst to approve a goal framework or an agreed tradeoff (or balance) mix of goals but there is an obligation to separate criticism of performance *within* an institutional or systemic goal framework; criticism of the *absence* of a coherent framework; and criticism positing the need for a *different* goal framework and to make *explicit* in the last case what the posited framework is, on whose "behalf" the author advances it and why it is more "appropriate" than the existing one, i.e. who is to gain what from it.

Context has a temporal as well as a spatial and a social dimension. Neither goals nor institutions nor performance are static over time and the trend is often both more illuminating and more important than the snapshot at one point in time. e.g.: Until about 1972 the "high level" expatriates in Tanzania grew in absolute numbers—especially in the parastatal sector. However in 1961 they occupied 90 % of all high level manpower posts and in 1971 about 50 % (say 95 %-60 % in parastatals) and in 1971 the total numbers of "high level" Tanzanians exceeded the total 1961 posts, i.e. most 1971 expatriates were in posts created by development and often quite different from any existing in 1961. The trend requires study—what are its limits? how critical are the remaining expatriate posts? are the new posts phasing into Tanzanian hands like the old? It does alter the impression the raw 1971 high level foreign manpower figure gives and leads to a more fruitful basis for inquiry.

Similarly, some evaluation of the timing sequence and priority of individual unit, sectoral and polity goals is needed to evaluate progress. Otherwise one ends comparing utopia with reality and is utterly unable to make priority judgements or to criticize them. For example, to argue that worker self management (not unit worker *ownership* of large scale units which is not a Tanzanian goal and would, if it were, be remarkably inconsistent with either socialist productive and reproductive efficiency or egalitarianism) has not been fully articulated, much less implemented and leads to struggle in Tanzania is true, if trite. The same—if one is to believe

Chairman Mao among others—is true of China or—from the very different perspectives of President Tito and Milovan Djilas—of Yugoslavia. It is not much more informative to know it has made unequal but not insignificant progress since 1971 and that the labour dispute incidence is among the lowest in Africa (in itself a “fact” subject to radically different readings, possibly all correct in different units). More precise analysis of what TANU’s Executive is seeking, over what time span, how and why set beside more detailed unit and more coherent sectoral studies is needed for any serious evaluation.

Prescription evidently can be categorized in roughly the same way as evaluation. In Tanzania Ubengo Farm Implements’ internal productivity studies fell in “a” (micro-efficiency in reaching stated goals); NBC’s 1973–74 semi-internal working party overtly concentrated on ‘a’ but in the context of more effective coordination with altered sectoral and national goals (decentralization, rural units, encouragement of surplus generation by workers and peasants); the 1970–72 McKinsey decentralization proposals were in form ‘a’ but were informed by very peculiar views of what goals and constraints operated at b-c-d levels and a hopeless intermingling of “own value” (g) items (e.g. rigid hierarchicalism, maximum centralization, minimum flexibility and maximum rigid planning formulation); the subsequent 1972 Tanzanian government exercise more closely related ‘a’ to ‘b’ and ‘c’ in the context of ‘d’ and ‘e’ (e.g. it proposed maximum coordinated decentralization and high flexibility to deal with unforeseeable contingencies).

In this context legal and economic analysis and prescription should follow not merely parallel but interlinked paradigms. At the functional level this is evident enough e.g. a legal framework will either centralize or decentralize and if it does the opposite of the actual decision-takers’ intent will simply create a mismatch (or reflect an unresolved contradiction) with clearly negative efficiency results except—perhaps—from an extra-decision-takers’ point of view. At the systemic legitimation and dynamic stability level the same is true. A series of laws and orders which evolve and perfect and from time to time reflect and inform changes of course is very different from a tidal wave of artifactual rule sets and “systems of the year” which clearly undermine stability, direction, legitimacy and—one might suppose—the rule of law.

The Public Enterprise in African Administrative Research

The purpose of this article is to identify the types of research on public enterprise in Africa that have been carried out by students of public administration. The issues are discussed in the light of the aims and purposes of research into the legal aspects of public enterprises in Africa.

It is imperative to point out by way of introduction that administrative research has always been a multi-disciplinary but rarely an inter-disciplinary affair. Students of political science, sociology and economics have interacted with fellow-researchers from such fields as business administration and law. Thus, it is extremely difficult to establish any definite boundaries for the areas known as public administration research. Nevertheless, the core of such research in Africa has focused attention on the principal issues of state management after independence. At the risk of being accused of oversimplification, the bulk of administrative research in Africa can be divided into four categories, depending on research focus and researcher's orientation.

As regards the focus of research one can identify a major distinction between those who have stressed the importance of *organizational structures* in shaping administrative behaviour (and therefore in the end also administrative performance) and those who have emphasized *contextual factors*. The "development administration" school, for instance, has identified the need for structural reforms on the assumption that the colonial administrative structures were primarily law-and-order-oriented and thus not attuned to the development needs in the post-independence era.¹ A new style of administration characterized by innovation and adaptation was needed to take the place of the bureaucratically organized colonial administration with its emphasis on routine and repetition. Similar views have been echoed in government-appointed administrative review commissions, e.g. in Ghana, Kenya and Nigeria.² Management consultancy calls for "Management By Objectives" and "Organizational Development", etc. have been made in the same spirit.

A different focus is represented by those who, like Riggs, regard social and cultural factors as the prime independent variables in the study of administration.³ Their argument is that, however desirable the Weberian ideal-type of rational-legal bureaucracy may be, it cannot be successfully operated in developing countries, because of their prevailing value systems. Although this argument has carried more weight in the analysis of Asian bureaucracies it has also featured in the discussion of African administration. A different "ecological" approach is that of the Marxists. The evils of bureaucracy in Africa (as elsewhere) can be attributed primarily to the fact that it is controlled by the "wrong" class.⁴ The African administration cannot become

development-oriented until it has been purged of its bourgeois content. The Marxist call is for revolution.

In all this research one can identify two different types of orientation, what Ilchman has labelled the difference between the “essentialists” and the “existentialists”.⁵ The former are satisfied to classify and organize reality into different “boxes” and “folds”, thereby laying, more or less successfully, the foundation for policy prescriptions. On the whole, however, they never explicitly offer their own recommendations for action. These remain implicit in the analysis. The “existentialists”, on the other hand, build into their analysis calls for action. They start from the constraints of the actors and try to tell them what to do. The conventional administrative reformer will tell the civil servants and the managers of their bottlenecks and what needs to be done to remove them. The Marxist revolutionary will adopt a similar approach but address his recommendations to the “masses” or their spokesmen.

The issues of state management in Africa have been tackled by many types of research, using different theoretical approaches and methods, and taking advantage of existing knowledge in several disciplines. Out of all these efforts is slowly growing a core of knowledge of African administration that is relevant to the practitioner and the academic alike. Graphically, this can be illustrated as follows:

It is in this context that research on public enterprises by students of public administration must be seen. It would be wrong to assume, however, that public enterprises are old-time objects of their research. Although public enterprises existed before independence, they attracted very little attention from administrative researchers during the 1960s. The main reason was that so many other institutions and issues appeared more important. Africanization of the civil service, the relationship between political and administrative

structures and personnel, the organization of the government service, etc, were sufficiently important to leave little or no time for interest in public enterprises. In the last five years, however, matters have changed. The public enterprise as a tool of development has acquired an increasing attention also from researchers on administration.

Why attention to public enterprises?

There are several reasons why the public enterprise has acquired more attention by researchers. One obvious reason is the quantitative expansion of such institutions in the last ten years. The growth of infrastructural investments and public services has been one important contributory factor to this expansion. Another factor has been the needs of the emergent African bourgeoisie. Whether capitalist or socialist in their official political orientation, they have turned the public enterprise into an instrument of enhancing their own socio-economic position in society and controlling the economy. Thus, Chief Udoji estimated that by 1973 Nigeria had a total of 250 public enterprises of different kinds, the Ministry of Agriculture in Kenya alone controlled approximately 100 such enterprises; Uganda had 14 major corporations and one Development Corporation with 43 subsidiaries.⁶ In Tanzania, the number of public enterprises has trebled since the Arusha Declaration and in 1975 exceeds 200. Unlike western Europe, where any attempt to increase state control over the economy leads to major political confrontations, public sector expansion in Africa, through the establishment of public enterprises, has proceeded without political controversies.

Despite these common features, it must be noted that the concept of public enterprise refers to a whole host of institutions which differ from each other along several dimensions. The public enterprises in Tanzania tend to adopt certain features which are not present in such enterprises in Kenya because of the different structures of the two economies. Public enterprises also vary on such issues as ownership and management structures and the public goals pursued. Rweyemamu had identified seven major goals that different public enterprises have been called upon to realize:⁷ (1) promotion of indigenous participation in commerce and industry; (2) price stabilization, particularly with reference to primary products in the agricultural sector; (3) provision of essential public services; (4) integration of the national economy (investments in projects which do not attract private sources of finance); (5) participation in projects involving international finance; (6) intervention to avoid private monopolies; and (7) participation in profitable enterprises to increase government extraction of profits made in the economy. In all, public enterprises now constitute a large, and growing aspect of the public sector, with impressive financial investments.

It is not only these quantitative aspects of public enterprises, however, that have attracted the researchers. Equally important has been the nature of their performance. Many social scientists, notably economists, have been attracted by the public enterprise because it offers a viable operational alternative to

conventional government administration. Relieved from the constraints of bureaucratic regulations, they are presumably able to attain a higher level of efficiency in their operations and thus save public funds. There are also many social scientists who have focused on public enterprises for the very reason that these institutions have failed to realize such goals as higher efficiency and improved service to the public.

What kinds of research have been done?

It would be wrong to pretend that in spite of growing interest in public enterprises much research has been completed. Although it was a political scientist, Professor Harry Hanson, who up to his sudden death a few years ago could claim the title of "dean" of research on public enterprises in the Third World,⁸ colleagues in the same discipline have been slow to follow in his footsteps. One exception is Garth Glentworth who some years back carried out a major study of two public enterprises in Uganda, Uganda Electricity Board and Uganda Development Corporation.⁹ He was particularly interested in identifying what kinds of contribution to the development of Uganda public enterprises with different organizational imperatives could make. Geoffrey Steves, a Canadian political scientist, carried out a study of the role of Kenya Tea Development Authority in the field of rural development in Kenya,¹⁰ focusing specifically on the questions of control and participation by the farmers. In Tanzania much attention has been paid to the issue of workers' control. Studies by Msekwa,¹¹ Mapolu¹² and Mihyo¹³ highlight Tanzania's efforts to inject measures of workers' participation and control in the public enterprises. A survey by Packard¹⁴ discusses the role of public enterprises in the overall planning system of Tanzania. Yash Tandon has recently turned his attention to the role of multi-national corporations in the light of current underdevelopment theories and in this context touches on their linkages with public enterprises in Africa. Finally, on Tanzanian grounds there exist case studies by undergraduate and post-graduate students on various aspects of the management of public enterprises in the country. Notable among these is the work by Ngila Mwase on the public transport company—*Usafiri Dar es Salaam*.¹⁵ The Zambian scene can offer an interesting case study by Burawoy of the process of Africanization in the copper mines.¹⁶ He analyses several key management issues, e.g. the control of the mines, the problems of succession created by Africanization and the issue of supervision in the context of racially defined groups.

The West African material is less familiar to the author of this paper and this is partly a consequence of the relatively limited communications across the continent on matters of research. The Nigerian political scientist, Michael Olisa, has produced a useful overview of factors affecting public enterprise performance in his home country.¹⁷ A similar study on Ghana has been produced by Greenstreet.¹⁸ Work done by the Institute of Administration at the University of Ife (until recently headed by Professor Adebayo Adedeji, now Executive Secretary of the (E.C.A.), the School of Administra-

tion at the University of Ghana, Legon (headed by Professor Kwame Adjei) and the Ghana Institute of Management and Public Administration (headed by James Nti) must also be mentioned here. Much of it, like that of the Institute of it, like that of the Institute of Development Management in Tanzania, has been devoted to the development of teaching material, notably case studies, and to consultancy services to public institutions. The GIMPA Case Study material, some of it on public enterprises, have been used in the teaching of public administration and management in many African countries.

Some contributions by political scientists and students of public administration have been conducted under the auspices of management consultancy and public review commissions. Professor Robert Abramson has worked on organizational development problems in some of the East African Community corporations.¹⁹ The present author has participated in a government appointed review commission of management training in Tanzania.²⁰

The list of research project does not pretend to be exhaustive, but the different studies mentioned above indicate the range of interest and actual research in which social scientists other than economists have been engaged.

What are the emerging issues?

It may be too early to categorically identify the emerging issues in research on public enterprises as seen from the angle of administrative research. Nevertheless, two major sets of issues can be suggested as acquiring particular attention. The first refers to the internal operations of these enterprises and focus on the conflict between democratization and professionalization. The second concerns the relationship between the public enterprises and the political and administrative structures and can be summarized in the question of autonomy versus control.

a. Democratization or professionalization

The purpose of juxtaposing democratization and professionalization is not to imply that there exists an irresolvable conflict. There does, however, exist a choice of which to give priority. Many researchers believe that the principal issue in public enterprises is to make their management structures more democratic. Others believe that the main challenge lies in the task of making the African managers more professional and thus better equipped to run these enterprises.

It may not be a coincidence that the issues of democratization has attracted particular attention among researchers in Tanzania. Not only has the Tanzanian leadership gone further than others in terms of introducing measures aimed at workers' participation and workers' control of public enterprises. There have also been more frequent clashes between workers and management suggesting that the new measures have not remained purely

paper products. The assumption made by researchers like Mapolu and Mihyo is that the public enterprise must be controlled by the workers. Otherwise it does not differ very significantly from private corporations. The notion that the enterprise belongs to its employees can only be instilled if they can exercise some real control over it. In the light of this assumption they proceed to investigate the constraints on realizing these revolutionary objectives. While admitting that the Presidential directive on worker's participation (No 1, 1970) does not go very far towards facilitating control, both researchers suggest that the position of management has been shaken after the introduction to the new Party Guidelines (*Mwongozo*) in 1971. Thus, it is not surprising that many public enterprises in Tanzania have been turned into arenas of class struggle. While they see the resolution of this conflict in favour of the workers as a precondition for a more constructive contribution by public enterprises to Tanzania's development, government authorities have more recently hardened their approach to workers questing for increased control through such measures as "laying down the tools".

The question of democratization is tackled slightly differently in Burawoy's study. His main concern is to identify how the expatriate management in the copper mines tries to resist measures aimed at placing Zambians in senior positions in the companies. Zambian successors to expatriates are not only opposed by remaining whites but also find it difficult to gain legitimacy from their black subordinates. The latter, who expect their Zambian senior to act like one of them, find that their promoted colleague, due to expatriate control of the management, is compelled to behave differently. Rather than being one of "us", he becomes one of "them". The issues raised in Burawoy's study are likely to have a wider application to public enterprises elsewhere in Africa where the expatriate component remains prominent.²¹

The other approach stresses that the African manager can never become effective until he has undergone professional training. His failure to impress African subordinates and expatriate colleagues alike stems from his lack of self-confidence which in turn is a product of lack of professional outlook. Much of the consultancy efforts by Abramson and his colleagues in the East African Community corporations have been aimed at making the senior management more versatile with modern management techniques, thereby expecting it to offer more effective leadership of the enterprises.

This need for professionalization has, in the view of some observers, also been encouraged by the promotion to senior positions in public enterprises of people with an unsuccessful political career. Politicians with no or little experience of management have been given "retreatment" post in public enterprises. This tendency, which seems prevalent in all African countries, has made the call for professionalization even stronger.

At least in West Africa, notably Nigeria, professionalization has been seen as remedy to nepotism and tribalism. Olisa draws attention to this problem and so does Udoji. The latter also makes the point that not even ex-civil servants are very suitable for management jobs in public enterprises because of their bureaucratic outlook. Professionalism among managers is seen as a safeguard against appointments, on a patronage basis, of either politicians or

civil servants to management posts in public enterprises. The Egyptian scholar, Fouad Sherif, acknowledges, however, the contradictions between democratization and professionalization in enterprise operation that may ensue from strong pressures towards the latter.²² Finally, it should also be mentioned that the many public review commissions that have looked into management problems in the public sector in African countries have made recommendations along the lines of professionalization. More training for the managers and fewer appointments on a patronage basis have been among the more common prescriptions offered.

b. Autonomy versus control

This is a classical issue in the literature on public enterprises and by no means specific to Africa. The reason why it has attained particular importance in Africa stems from the fact that these enterprises were set up free from bureaucratic control on the assumption that they would be more efficient and more effective than regular government departments, yet their performance has often pointed to the contrary.

A few years back public enterprises were looked upon as a panacea to the problems of economic underdevelopment. With the help of these institutions, not only would the profit drain overseas come to an end, but so would exploitation. The new enterprises would safeguard not only accumulation of surplus in public interest but also the welfare of the employees and the customers. Yet, only in exceptional cases have these goals been successfully attained. By and large, public enterprises have incurred heavy losses and services to customers or clients have been poor. The welfare of the employees has been improved in many cases and many new employees have been accepted. These measures, however, have not led to increased output and it seems much of the potential surplus has been consumed within the enterprises on matters from which only a few individuals benefit, e.g. official cars and staff buses, houses to the managers and a variety of fringe benefits, in most cases accessible only to the senior employees.

In socialist Tanzania, tendencies like these were anticipated and through the leadership code (contained in the Arusha Declaration) and the establishment of a separate Standing Committee on Para-Statal Organizations (SCOPO) this parasitic behaviour has been somewhat contained. Yet, the performance of public enterprises over the years has not improved. To some extent this can be attributed to the general problems of underdevelopment, such as Tanzania's disadvantageous position in the world economic system, but in part it is also due to slackness in the management of these enterprises. Realizing that there must be room for improvement, the Government has decided this year to set up a special Inspectorate of Para-Statals in the Ministry of Finance and by law require these enterprises to make profit. As Finance Minister, Cleopha Msuya said in his budget speech: "Those para-statals which will fail to generate surpluses will have to close down".²³

The trend of events in other countries is not very different. Recent crises in

the Kenya Meat Commission and the Kenya Cooperative Creameries (registered both as a cooperative and a public company) reveal similar shortcomings in two of Kenya's largest public enterprises. Commissions of enquiry into the performance of public enterprises in Nigeria tell the same story. Many of the public enterprises which were almost indiscriminately started during the reign of Nkrumah in Ghana have survived but have been more of a burden than an asset to the state. Corruption and squandering of money on benefits to senior employees have been rampant. It is in this light that the present military regime has decided to set up a special Board of Government Business to enable it to scrutinize more closely the financial performance of the various state business ventures. The new Board combines the functions of SCOPO and the Treasury Inspectorate Unit set up in Tanzania.

The pattern virtually everywhere has been to allow the establishment of public enterprises with a relatively high degree of autonomy but then gradually—in some cases under dramatized circumstances—tighten the screws through new measures of control. In this respect the history of public enterprises in the independent states of Africa resembles that of the cooperatives.²⁴ At the time of independence cooperatives were the panacea of development, but disillusioned with their performance under a system of little state intervention, governments introduced new pieces of legislation that have turned cooperatives into their official hand-maidens, forced to operate under very unfavourable conditions.

Regarding the measures of control introduced to improve public enterprise performance and to ensure that it is in line with official political goals, it is significant to note that governments have often relied on political or administrative decisions rather than legal instruments. In Tanzania, for instance, the leadership code was announced as part of TANU's political program and ratified by party organs. SCOPO was set up by cabinet decision and many other measures by parent ministries have been introduced by administrative fiat. In the case of the leadership code and SCOPO it is clear that these instruments, though lacking legal status, are more powerful than the legal acts that presumably regulate their performance. Thus, a SCOPO directive overrules any rights of the public enterprise contained in the legal document guiding its establishment and operations.

Evidence from other countries²⁵ suggests a similar preference for political and administrative interventions. The reasons for this inclination may vary from country to country, even from case to case within one and the same country. It may in part be attributed to the absence of well-established and formalized measures of control; the system has not settled yet and this encourages reliance on political and administrative regulations. It is to some extent the result of mutual suspicion among politicians/administrators, on the one hand, and managers, on the other. These political control measures have also been introduced in some countries to curb excessive inclinations to grab wealth and acquire social prestige and status. To be sure, the prevalence of such measures give support to the view advanced by some researchers, that the management problems in public enterprises cannot be viewed primarily as an internal organizational issue but as one rooted in the trends of socio-economic development in society at large.

Conclusion

In conclusion it may be argued that the strongly perceived needs to increase government control over public enterprises in recent years have raised political and administrative directives to prominence, often at the cost of existing legislation in this field. The original legal instruments of most public enterprises are very general in nature and safeguard a high degree of autonomy of operation. What we have witnessed in recent years is the constantly growing circumvention of this sphere of autonomy. The large number of interventions by political and administrative institutions (usually perceived as "interferences" by the managers) have drastically curtailed public enterprise autonomy, so much so that the legal instruments have lost much of their validity.

This complex interaction between politics, administration, management and law proves the desirability of an inter-disciplinary approach to the study of public enterprises. The fact that so relatively little has been done on public enterprises in Africa and that most of what has been done is disjointed and dispersed makes the potential impact of a comprehensive, *inter-disciplinary* study so much the greater.

Notes

1. For a comprehensive survey of the issues subsumed under "development administration", see Bernard B. Schaffer: "The Deadlock of Development Administration" in Colin Leys (ed.): *Politics and Change in Developing Countries* (London 1969).

2. The Mills-Odoi Commission in Ghana 1967, the Ndegwa Commission in Kenya 1971 and the Udoji Commission in Nigeria 1974.

3. Fred Riggs: *Administration in Developing Countries* (Boston 1964).

4. One advocate of this view is the Tanzanian lawyer, Issa Shivji: *The Silent Class Struggle in Tanzania* (1970).

5. Warren F. Ilchman: "Decision Rules and Decision Roles: Some Thoughts on Explanation of Productivity and the Productivity of Explanation", "Conference on Comparative Administration" Arusha, September 1971.

6. Chief J. O. Udoji: "Some Measures for Improving Performance and Management of the Public Enterprises" in G. Hydén and A. H. Rweyemamu (eds.): *A Decade of Public Administration in Africa* (Nairobi 1975), p. 237.

7. Ibid, p. 234.

8. A.H. Hanson: *Public Enterprise and Economic Development* (London 1959).

9. Some findings of his study are published in an article written in collaboration with Muloni Woezi: "The Role of Public Corporations in National Development: Case Studies of the Uganda Development Corporation and the Uganda Electricity Board", *African Review*, Vol. I, No. 3.

10. Steves presented a paper on KTDA at the "Conference on Comparative Administration", Arusha, 1971. I am unaware of any other publication on the subject by the same author.

11. Pius Msekwa: "Background to Workers' Participation in Management in Tanzania", *African Review*, Vol. V, No. 2.

12. Henry Mapolu: "The Organization and Participation of Workers in Tanzania", *African Review* Vol II, No 2.

13. P. Mihyo: "Labour Unrest and the Quest for Workers' Control", *Maji Maji*, July 1974.
14. P.C. Packard: "Management and Control of Parastatal Organizations" in Uchumi Editorial Board: *Towards Socialist Planning* (Dar es Salaam 1972).
15. Ngila Mwase: "The UDA Bus Fares and the Plight of Worker Passengers" (to be published in *Taamuli*, Department of Political Science, University of Dar es Salaam).
16. Michael Burawoy: *The Colour of Class in the Copper Mines* (Manchester/Lusaka 1973).
17. Michael S. Olisa: "Factors Affecting the Performance of Public Corporations in Nigeria" in Hyden-Rweyemamu, op.cit.
18. D.K. Greenstreet: "Public Corporations in Ghana (Gold Coast) During the Nkrumah Period (1951-66)", *African Review*, Vol III, no. 1.
19. Robert Abramson: "A Revised Concept of Organization Development" (UNDP/EAC Administrative Improvement and Training Project, Arusha, April 1973).
20. Management Training Study: *Management Development in Tanzania* (Dar es Salaam April 1975). At the time of writing this paper the report has not been released by the Government of Tanzania.
21. His views were, for instance, corroborated in a study by the present author of management problems in the Ministry of Water Development and Power in Tanzania, "Expatriate Effectiveness in Development and Power in Tanzania: A Case Study of the Ministry of Water Development and Power" (Dar es Salaam, October 1973).
22. A. Fouad Sherif: "Developing New Managers for the Socialist Enterprise Sector in the UAR" in Hyden-Rweyemamu, op. cit.
23. *Daily News*, 13 June, 1975.
24. See, for instance, the two volumes edited by C. G. Widstrand *Cooperatives and Rural Development in East Africa* (Uppsala 1970) and *African Cooperatives and Efficiency* (Uppsala 1973).
25. See, for instance, articles in Hyden-Rweyemamu, op.cit. and a special volume of *African Review* (V:2) on public enterprises.

Part III

Case Studies

Public Enterprise in Kenya

I. Introduction

It is to be hoped that the recent increase in interest and research in the field of public enterprise will push beyond the theoretical debates and formulations set around the post-war public corporations in Britain. There has since been a substantial increase in their use in the common law jurisdictions, and in Anglophonic Africa, in particular, there is a marked governmental dependency on this legal form.

But this wide usage in Africa has not been matched by significant inquiry into its origins or assumptions. To the politician the malleability of the form has tended to make scrutiny of its original underpinnings unnecessary. To the academic inquirer, too often, its novelty has tended to make factual reviews of its workings sufficient. But these very characteristics require theoretical questioning. Why it may be asked, is the form so malleable? Why has the public corporation developed so recently?

This paper raises some of the issues that emerge from such inquiries within the context of the operations of public corporations in Kenya over the last five decades. Firstly, it examines some of the theories that have influenced, or been of relevance to, the introduction, the form and the continued use, of the public corporation in Kenya. Next it examines the theoretical assumptions underlying the legislation governing public corporations in Kenya both prior to, and after, independence. Thirdly, through an examination of the operations of the major public enterprises an attempt is made to state the objective functions of public enterprise in Kenya. Finally, the paper considers the future uses and functions of public enterprise in Kenya.

II. Some theoretical observations

The basic premises of public corporation legislation in Kenya, (as in anglophone Africa), are those of the British public corporation legislation of the 1945 period. They may be conveniently gathered from some of the better known pronouncements about the public corporation form:

We are seeking a combination of public ownership, public accountability and business management for public ends. Herbert Morrison, *Socialization and Transport* (1933), p. 149. What we were seeking was public ownership, public appointments, a sense of accountability to the nation-John Bull-together with efficiency of day-to-day business management on commercial lines. . . We were seeking, in its day-to-day operations, whole detachment or partial detachment from one department or another of a public corporation free from political

interference, because we did not wish to upset the commercial success of the undertaking. . . we were giving this greater degree of managerial autonomy in order that we could get a higher degree of business efficiency and less red tape and bureaucracy. (Herbert Morrison, in the House of Commons, 1954, *Hansard*, Vol. 423, Cols. 849-850.)

As applicable to British corporations was President Franklin D. Roosevelt's conception of the Tennessee Valley Authority (TVA) as

A corporation clothed with the power of Government, but possessed of the flexibility and initiative of a private enterprise. *Message to Congress*, 10 April 1933. The public corporation is based on the theory that a full measure of accountability can be imposed on a public authority without requiring it to be subject to ministerial control in respect of its managerial decisions and multitudinous routine activities, or liable to comprehensive parliamentary scrutiny of its day-to-day working. The theory assumes that policy, in major matters at least, can be distinguished from management or administration; and that a successful combination of political control and managerial freedom can be achieved by reserving certain powers of decision in matters of major importance to Ministers answerable to Parliament and leaving everything else to the discretion of the public corporation acting within its legal competence. (W. A. Robson, *Nationalized Industry and Public Ownership*, London, 1962, 2nd. Edn., pp. 75-76.)

The principal concepts that the public corporation embodied according to these formulations were those of managerial and financial autonomy from the Government, and public accountability notwithstanding that autonomy. But despite the presence, and persistence, of these characteristics in public corporations generally, a re-examination of this theoretical framework has become increasingly necessary.

This is because in relation to the form certain basic questions have not always been addressed: Is this theoretical division between policy and management and administration of universal applicability? Or is it explanative only of the British public corporation? Is the division of power set out in the legal rules pertaining to the public corporations in Britain, proper to all societies? How does the form mediate in the conflict between social formations within, for example, Kenyan society? What are the demands being made in each society that this conception of the public corporation can satisfy, and why are pre-existing or other corporate forms, e.g., the company, the guild or the co-operative, or non-corporate forms, e.g., the Government department or the partnership, unable to do so, or do so fully? Why has this form developed at this time? Why is it "destined", in Prof. Robson's words, "to play as important a part in the field of nationalised industry in the twentieth century as the privately owned corporation played in the realm of capitalist organization in the nineteenth century"?¹

A major effort in inquiry into the public corporation form has moved away from these questions.² There has been instead a satisfaction with *ad hoc* classifications and with lists and categories detailing seriatim the reasons for the choice of the public corporation form, the characteristics of the form and the purposes to which public corporations are put.

In respect of the choice of the form it is first necessary to inquire into the precise economic, political and social functions the public corporation serves, and how these efficaciously advance the chosen mode of production. By itself, it is of little value to list the immediate causes of the introduction of public corporations: these would suggest that explanations for the existence

of the public corporation may lie as well in natural disasters as in planning, in ideology as in 'pragmatism', and in other similar sets of stated purposes.³ But such lists cannot tell us who has made the choice of the public corporation, or chosen the timing of its introduction, or who benefits from its operation, and how. Similarly, it is useful to enumerate the characteristics of the legal form. But it is not a substitute for theory.⁴ We must be able not only to list autonomy, or the absence of shares, as characteristics and set out the resultant legal position, but also to explain why autonomy is a characteristic, and why there is an absence of shares, and so on. In other words, it is necessary to identify the pressures in society that autonomy and the lack of shares satisfy, and to show how these characteristics assist the further development of the mode of production they serve.

These enumerations would be valid exercises if undertaken with the preceding questions in mind, for the purposes to which public corporations are put are part of the process by which conflicts are conducted or resolved in particular societies. Since different societies reflect variations of the process it is not surprising that the purposes of public corporations have varied from country to country. The phenomena has been dealt with by the approach referred to by listing a wide range of divergent purposes.⁵ But divorced from the preceding question a list does not explain why such varied purposes are capable of achievement through the same legal form. In other words, it lists the colours changed, but does not explain why the public corporation is the legal chameleon it is.

Another issue that illustrates the need for clearer theoretical understanding arises in the evaluation of the performance of public corporations. There is again a long list of micro-criteria available—e.g., service, surplus, production targets, conservation of foreign exchange. These are valuable tests to apply, but again not in isolation. Firstly, lists like these do not explain who has established the criteria, or who has benefited, or is to benefit, or has failed to benefit from the operation of the enterprise. Secondly, such lists do not tell us why opposing criteria are valid, and often simultaneously valid. Nor why the same performance is satisfactory in one set of circumstances and not in another, or at one point in time and not in another. The Kenya Government in reviewing the performance of its parastatals has noted the conflict. In relation to the Eastern Africa National Shipping Line (EANS�) the Development Plan, 1974-78 has stated: "The Line when established was directed to serve the interests of the participating nations and, at the same time operate as a commercial enterprise. Serving the interests of the participating nations (Kenya, Uganda, Tanzania and Zambia) implies charging low freight rates, while operating as a commercial enterprise implies making a profit. The pursuit of these two goals has given rise to situations in which the Line frequently finds itself making conflicting decisions. This is a matter that is to be rectified during this Plan."⁶ Such rectification presupposes a theory of the public corporation.

Accordingly a wider ranging inquiry, going beyond the mere recording of phenomena, is necessary into the origins of the British public corporation to establish the theoretical sources of the form and its characteristics. This in turn would enable us to better understand the transplanted legal form in

Kenya.

In addition to the legislation of the British public corporation, and its assumptions, there are other areas in which it is possible to search for the theoretical roots of the Kenyan public corporation. One such is the existing structure of rules and pre-existing legal forms in both Kenya and Britain. Firstly, the pre-existing legal principles and decisions influenced the newly introduced public corporation form. Secondly, the legislation and operation of the new and later corporations required to be reconciled with existing corporation law and practise, as well as with other provisions of the law.

These influences are important because they can, and do, autonomously add to or distort the concept or form demanded (or even planned). These pre-existing provisions are not often, indeed seldom, in the interests of the class establishing the public corporation at any given time, and until there is an abolition of such provisions, or their assimilation into different purposes they remain an influencing factor. Also, and specifically in Kenya, the effect of public corporation legislation in the wider context of other legal processes has an important effect, (though it is not to be exaggerated), on the parties contending in, or administering public corporation activity. In the welter of swiftly changing or expanding policies the legal rules and their professional interpretation often provide the only continuous guidelines to the civil or parastatal servant. In the process of bargaining going on in respect of any one project involving individuals, departments and investors, the rules also provide his only protection. The practise of public corporation activity is also affected by the fact that the normative determination of property rights is in accordance with these rules. While manipulation of the process is possible, such rules and the publicity attendant on deviation from them cannot always be disregarded.

But although these are factors that may affect the performance of the public corporation, only the first of these affects the concept. Accordingly such influences, that add to or amend the form, must be identified. But the legal process itself does not initiate the demand for the form and a sense of unreality would attach to the extraction of public corporation theory purely from the legislation and case law of either Kenya or Britain.

One formulation⁷ has sought to explain a major part of parastatal activity in East Africa in the following manner: this concept, applying to the pre-independence and neo-colonial operations of East African national development and financial corporations, has cast such corporations as operating in either a catalytic role or an injector role. In the catalyst role the government corporation seeks to establish a permanent non-governmental enterprise by an initial government investment. This government investment acts as a catalyst by either filling a temporary gap in private enterprise resources or by attracting initial or later private investment. The public investment is then withdrawn and the process repeated elsewhere. In its injector role governmental capital is directly and more permanently invested. The assumptions here are that the economic system is a private enterprise system and that there are areas where government ought not to operate on a permanent basis. Again, advanced as a proposition of universal applicability to explain the functions of these financial institutions such a theory has

obvious limitations in dealing with corporations operating in a socialist economy. But within the context of the colonial and neo-colonial economy, where the assumptions are shared, this has been an influential concept and we shall return to it later in reference to Kenya.

It is an assumption of this paper that the theoretical foundations of the public corporation form are to be found in the nature of the political economy within which the public enterprise emerges or operates.

The form has originated in Britain from the realization by an emerging and contending working class that it cannot institutionalize accumulation of capital for its benefit through the existing forms of commercial organization. The characteristics of the public corporation form reflect the new rules and principles necessary to perform that task. But these characteristics do not represent the ideal structure, or an immutable one. The initial, or present, structures simply reflect the extent to which the class seeking them could wield the necessary political power to impose its will at a particular time. And so the form may as yet be imperfect and may or may not later 'develop', that is, perfect the desired processes of appropriation at the expense of other contending groups in society. The imposed structures in Kenya are therefore in turn not universal patterns or forms of organizing this demand but manifestations of the stage reached at a particular historical point in this particular mode of production.

Similarly, in relation to the Janus-like purposes of public corporations it is suggested that the explanations lie less in devising open-ended categories in which new uses are squeezed in or added on, than in the nature of the state within which the public enterprise functions. Specifically, the interests of the ruling class or coalition determined by the political economy establish the uses and purposes to which public enterprises are put. There are therefore no universal categories that explain the opposing purposes. Rather that class interests are varied and opposing and contradictory and subject to a vast number of forces, and that all these are reflected in the use made of the public corporation. Likewise, the criteria for evaluation must be by reference to an inquiry into class interests served, for announced criteria are usually subjective and often consciously misleading. Like the form then, neither the purposes nor these criteria are universal criteria with some justification independent of, and isolated from, their class functions.

In relation to performance, present inquiries reveal an apparently unsatisfactory level in many countries: discrepancies between the stated aims of legislators and the real destinations of surpluses, between the intended beneficiaries and the actual ones, between statute and practise. These are not chance phenomena, generated casually through inefficiency, or dishonesty, or lack of training. While efficiency becomes sooner or later a prime concern to a government and to a proper assessment of a corporation's effectiveness, any inquiry must first identify the beneficiaries of efficiency before extolling the benefits of efficiency. Prof. Robson remarks that "In any discussion about efficiency it is essential to remember that 'efficiency' does not determine the ends which an industry or service seeks to attain, but only the effectiveness and economy with which given ends are pursued."⁸ Such factors certainly contribute to shortfalls or total failure in the achievement of goals, but not in

the conscious *substitution* of a class of substantive beneficiaries not originally intended.

Rather these unsatisfactory levels of performance and discrepancies reflect the fact that despite ownership by the 'public' and the 'nation', the conflicts between the classes in that society, public and nation continue, and continue in the operations of the new corporation. And the performance reflects the varying strengths at varying times of the parties contending to obtain a result favourable to them through the operation of the corporation. An identification of the political and economic strengths and weaknesses of the contending classes in any given society goes far to explain the performance (and uses) of the public corporations operating therein. This explains why there are few static criteria available to assess these institutions and why the recording of performance not spread over a significant period is misleading.⁹ These strengths and weaknesses will determine the content of the form, its actual beneficiaries, and its 'successes' and 'failures'. Assessments of success and failure will differ with the standpoints of the contending forces which may often seek opposite results from the working of the corporation. It is well to remember in our context that what the government may regard as a failure may well be viewed by the joint investor or manager, for example, as a very successful enterprise and investment indeed.

Put simply, an inquiry into the class struggles in the given society is a prerequisite to any explanation of the public enterprise activity within it.

The standpoint that public enterprises, like other legal institutions, are manifestations of and serve class interests gives rise to some important, though preliminary, considerations. Firstly, of course, it explains why the same legal form can be utilised for contradictory purposes, because the purposes are determined not by the legal form but by the class utilising it, and the different classes have different interests.

Secondly, this standpoint enables us to see that public enterprises are not autonomous legal forms or management exercises, but implementing agencies for policy decisions made elsewhere.

Thirdly, it assists in avoiding the universalization of theories that do not take into account the differing socio-economic contexts in which they are supposed to apply. The performance of public enterprises is tied to the specific political economy. Accordingly any search for a general theory needs to be reconsidered. It is suggested that there can be no useful general theory divorced from the specific mode of production in which the public enterprise originates or operates.

Though it is necessary to record the above, a fourth consideration must be noted. The basic premise that the public enterprise is an instrument of class interests, though valid and requiring acknowledgment, may constitute however a theoretical statement of such generality as to offer only limited practical usefulness.

What is required, therefore, is to set out thereafter a theoretical framework that given this basic proposition, takes into account the specifics of the given political economy. What are to be sought are propositions that take into particular account the mode of production in which the enterprise operates, the property ownership system, the classes and groups that contend within

that society and their sources of power and wealth. Thus the functioning of the public corporation within a socialist society must reveal a theoretical framework that is not the same as that of a public corporation within the capitalist system.

Within the neo-colonial political economy that is part of the global capitalist structure, within which Kenyan public corporations operate, the theoretical framework would likewise show variations from those pertaining to the use of public corporations in the metropole.

An analysis of the nature of the neo-colonial state would precede the attempt to extract such a theoretical framework, within which emphasis would vary from country to country. What follows is an account of the various theories under which the public corporation in Kenya has been operated, and upon which its legislation has been based, over the period since the substantial enactment of public corporation legislation in Kenya in the 1930s.

III. The theoretical assumptions of Kenyan public corporation legislation

A large number of parastatals existed in Kenya at the time of independence. There were earlier corporate bodies—sole or aggregate—but the specialised corporations grew in two periods prior to independence. Firstly during the 1930s and the Depression, when public corporations were established to ensure the survival of settler farming. An example of these is the Land and Agricultural Bank (1931).¹⁰ The second period covers the years after the second world war when more statutory marketing boards were established, and following them the development corporations.

At the time of Self-Government and Independence in 1963 the incoming government inherited these institutions and legal forms. More importantly, the Government inherited the assumptions of the legislative and economic framework of these public corporations, and retaining them has operated on their basis. What are these assumptions? From the beginning the primary assumption was that the economy was, and would remain, a private enterprise economy, and that the role of the public corporations in it was important but limited in both extent and the area of operations. The creation of a social basis for such an economic structure was manifestly in mind, and the public corporation also had a part to play there. The next assumption was of the concept of the autonomy of the public corporation. A third assumption was that of the public accountability of such bodies, policed through ministerial and parliamentary controls.

Up to 1963

The private enterprise assumption

While the major debates about the British public corporation had been set against the question of the nationalisation of important sectors of the

economy, the public corporations had not before 1963 been seen in Kenya as instruments of nationalization. Nationalization itself was not a political issue until the advent of majority government. But outside the colony the question *had* been debated, so that the take over of key sectors in the colony through the establishment of public corporations did not come up for the first time only at independence. The option did present itself to the KANU Coalition administration and later government of 1963. But the issue had arisen earlier in Britain in a post-war consideration of productive enterprises in the colonies.

In the establishment in Kenya of the public corporations of the inter-war years the consideration had specifically been the resuscitation of an ailing settler agriculture, solely privately owned (though heavily subsidized). But on the assumption of power by the Labour administration in Britain in 1945 the question of nationalization in Britain also brought to the fore the issue of the colonial assets of British companies. Accordingly the nationalization of colonial private interests, especially in mining and agriculture was considered by the Colonial Office. Several obstacles presented themselves. "It was difficult to nationalize the large private companies of the imperial system without the co-operation of each territorial administration. Colonial governments had sufficient autonomy to support a locally-based company against the nationalization of its assets, if the parent metropolitan company was threatened. Tate and Lyle, when faced with the prospect of nationalization in the sugar industry, made arrangements to 'hive off' their colonial sector into separate organizations."¹¹ Secondly, it was realized that colonial production for export to Britain was dependent almost wholly on private capital. Thirdly, it was felt that neither a British nor a colonial territorial public corporation was an appropriate socialist answer to the exploitation of the colonies by monopoly capitalism. In the result, Creech Jones, then Colonial Secretary, refused to agree to the nationalization of the private trading companies, such as the United Africa Company.¹²

Alternative suggestion was that British public corporations should purchase shares of colonial trading companies without interfering with the management but so that their affairs would be made more accountable. This too was not carried out,¹³ (though enabling statutory powers to that effect were enacted).¹⁴ Similarly, suggestions that the assets of the large multi-territorial trading companies be divided between individual territorial public corporations operating as co-operative wholesale societies were rejected.¹⁵

But overriding all these alternatives (incapable as they were of determining colonial relationships), was the imperative of establishing sources and methods for an ensured supply of food and raw materials to the Britain of the post-war period. The abandonment of any socialist programme in relation to the colonies inevitably followed. It led consequently to the establishment of the colonial public corporations that did precisely that. These retained the private ownership base of the colonies and led to the final integration of Kenya's productive system into the global capitalist order.

What in fact were established were territorial marketing boards. These were either totally new boards, or, as in the case of the successors of the West African Produce Control Board, which was established and operated in

Britain as a British organization, decentralised bodies.

Finally, in addition, two British public corporations concerned with the colonies were established: The Colonial Development Corporation (C.D.C.) (now the Commonwealth Development Corporation), and the Overseas Food Corporation (O.F.C.). Both these were set up by the Overseas Resources Development Act, 1948.¹⁶ The first project of the O.F.C. was statutorily stated to be the ill-fated Groundnuts Scheme in the East African territories.¹⁷ The C.D.C.'s statutory duties were likewise set out. These were to have a major influence on the Kenyan development corporation's operations. A primary duty of the C.D.C. was to secure "the investigation, formulation and carrying out of projects for developing resources of colonial territories with a view to the expansion of production therein of foodstuffs and raw materials, or for other agricultural, industrial or trade development therein."¹⁸ Since the state of industry in the colonies, consciously brought about, could only lead to the export of the intended expanded production to the industrialised metropole centres, this section gave statutory recognition to the historical function of the colonies.

In relation to the place of private enterprise in the colonies the Corporation was empowered "to promote the carrying on of such activities by other bodies or persons, and for that purpose to establish or expand, or promote the establishment or expansion of, other bodies to carry on such activities either under the control or partial control of the corporation or independently, and to give assistance to such bodies or to other bodies or persons appearing to the Corporation to have facilities for the carrying on of any such activities, including financial assistance by the taking up of share or loan capital or by grant, loan or otherwise".¹⁹

Of these two functions it was the latter that was to prevail, namely that the C.D.C. was to assist and complement, rather than replace or compete with, private capital in the colonies. So that by 1954 the Corporation reported that "the Corporation endeavour²⁰ to work in association with experienced private enterprise in the colonial territories in which they are operating."²¹ And "the Public Accounts Committee in 1954 criticized the C.D.C. for making too many 'finance-house type' of investments instead of concentrating on its role of financing worthwhile projects on which others would not risk their capital".²² Finally, "in 1959 it was expressly forbidden to consider the provision of welfare and social services, and encouraged to concentrate on hotels, water supplies, and housing which were commercially viable."²³

These metropole requirements and resultant trends came inevitably to determine the form and use of the territorial corporations; for it was at this time that the Industrial Development Corporation (the precursor of the present Industrial and Commercial Development Corporation (the I.C.D.C.)), was established in Kenya under the Industrial Development Ordinance, No. 63 of 1954.²⁴

The new Corporation's ties with private enterprise was a major concern of the Ordinance. The Corporation was not being established to begin operations. It was taking over the business of the East African Industrial Management Board, itself a body incorporated in 1952 but established first in 1944.²⁵ The Board was referred to in the Ordinance as 'the Former Company',

and the provisions of the Ordinance carry as much public corporation language as that of the Companies Ordinance. The 'acquiring and taking over as a going concern' of 'the undertaking and business of the Former Company' (S.3 [1])²⁶ are phrases whose more usual habitat is a Memorandum of Association. The Objects Clauses of such memoranda are again recalled in an examination of S.9 of the Ordinance which set out the 'Powers of [the] Corporation' at unusual length and in the paragraph form of such clauses. Similarly, there was statutory provision for the appointment of alternate directors (S.5), not usually found in public corporation legislation. Again unusually, provision was made for the application of provisions of the Companies Ordinance to the Corporation. (S.17).²⁷

Finally, the C.D.C.'s changed emphasis of complementing private enterprise was enacted for the I.D.C. Section 3 (2) of the Ordinance provided that "in the exercise of its functions under this Ordinance the Corporation shall have regard to the desirability of-

(a) *Acting principally as an auxiliary finance organization* and not as the sole source of the provision of finance in respect of any particular undertaking or enterprise as aforesaid;

(b) Exercising its powers of affording financial assistance. . . by way of guarantee, loan or investment and not by way of grant or subsidy;

(c) Requiring early liquidation or repayment of any guarantee, loan or investment made by the Corporation, in order to ensure so far as possible that the liquid resources of the Corporation may be available for other purposes. . ."

These legislative boundaries enact an important conceptualization of the development corporation's role. J.D. Nyhart, against the background of agricultural undertakings by the Uganda Development Corporation, (which had been established in 1952), and the C.D.C. in Uganda and Kenya during this period, has suggested²⁸ that their activities tend to place such corporations in one of the two roles mentioned earlier. In one the Corporation "merely acts as an agent bringing together factors of production from other sources and helps to fuse them into a viable concern without using up its own resources permanently. The purpose in this case is for the government to do as little as possible consistent with getting the enterprise established on a sound basis. Once this has been achieved the corporation can re-employ its capital and management resources elsewhere, so that these scarce resources can be made to go as far as possible."²⁹ This is the catalyst role. In the injector role the corporation itself invests capital, personnel or management on a much longer, or permanent, basis. Here a private enterprise partner is absent or unable to assume any significant or major role, either immediately or for some time. This may be because there are no, or insufficient, returns on the investment. The roles are usually mixed in the various parts of any one project, though it is possible for a corporation to pursue a fully injector role. Rather, Nyhart points out, "the distinction is in the attitude of the corporation and the emphasis it places on making use of others' resources".³⁰

The Industrial Development Ordinance of 1954 manifestly emphasised the catalyst role of the I.C.D. There was provision for the injector function, for

the corporation *was* authorized also to invest in undertakings which were not "likely to prove self-supporting or to furnish direct profits either immediately or in the future". (S.3 (2)). But the primacy of the catalytic purpose was clear. And the catalytic purpose presupposed a preference. In Nyhart's words: "There is no reason why a development corporation in agriculture should not seek both roles, so long as it distinguishes in its own mind which it is doing and why. It seems to me though that in agricultural activity as in other activity the development corporation should ideally pursue the role of the catalyst first. This generalization I recognize as stemming in part from some personal bias on the political question of the proper role of a government agency."³¹

The concepts of autonomy and public accountability

The Industrial Development Ordinance, 1954 also legislated for the concerns of autonomy and public accountability. The corporation possessed a separate legal personality. (S.3 (3)). *All* its directors (though appointable by the Minister), were to be persons who had had experience in industry, trade or administration. (S.4 (1)). These appointments were to be made after consultation with the Corporation. (S.4 (3)). The Corporation was empowered without further approval of the Minister to appoint a general manager, managing agents, and others on terms and conditions the Corporation was to determine.

The provisions regarding public accountability were substantial and Ministerial control was prominent. Certain powers of the Corporation were only to be exercised subject to the approval of the Minister (S.8). This was especially the case in respect of borrowing. (S.9). The surplus funds were subject to directions of the Minister and liable to be recalled to the general revenue fund. The Annual Accounts and Report of the Corporation were to be presented to the Minister, who in turn would lay them before the Legislative Council. (S.14). The ensurance of public accountability through inquiry by a non-representative 'parliament' underlines the restricted class use that can be made of 'public' corporations. Finally the Minister was empowered to make further governing regulations. (S.18).

Similar provisions, with like emphasis, may be found in the legislation of the other major public corporation of the period, the Kenya Meat Commission.³² These principal features may also be found in the marketing board legislation of that time, though with less uniformity and some confusion.³³ The marketing boards as public corporations, though operating in important economic areas and regulating and dealing with vital produce, were never intended to nationalize the various industries they served. Quite the converse was the intention, private producers being assisted by the Boards and being represented on them. The autonomy of the Boards was reflected in their separate legal personality. The members of these boards were sometimes appointed by the government, sometimes chosen or elected from among producers or persons with special knowledge of the industry or other conditions. The tenure of the members, apart from the Chairman, was

usually determined by the statute. Public accountability was established through the Minister's powers over borrowing, auditing, and the making of further regulations. But there was not always provisions for appointments, or for reports and accounts to be placed before the Legislative Council, nor was there provision for directions to be given by the Minister. Thus the control provisions of the Industrial Development Ordinance in this respect were noticeably in excess of the comparable, and contemporaneous marketing board legislation. The difference is attributable to the clear identification of interest between the producers and the government in the then settler dominated agriculture industry. In the areas the I.D.C. was to fund, the entrepreneurs to be supported were not always the known political or social quantity that farmers were. This gap in respect of Ministerial control was to be felt immediately there was a change in 1963 in the parties manning government. Then, until there was a change in the producers, the presence of explicit legal controls became necessary. Thereafter, since the early seventies, again as interests began to converge informal controls have been the preferred manner of directing parastatal activity.

These then were the conceptual underpinnings of the colonial public corporation. It is obvious that the colonial public corporation was not an instrument of nationalization. Specifically its role was to bolster private enterprise. The catalyst role of the I.D.C. and the C.D.C., as well as the provision of infrastructural services by the colony's public corporations assumed, and assured, the dominance and continuance of private enterprise. The structure and functions of the marketing boards made a similar assumption.

Secondly, such roles assumed the division in the colony of economic activity into governmental and private areas of responsibility. Such divisions had largely disappeared in economic decision-making in the post-war metropolises. But its continuance in the settled colonies (and dominions) was not unexpected given the class origins of settler opinion-makers in such places. A similar view would also survive, for example in Britain, in a group of like origin operating in insulated areas, such as the courts. And this has been visible particularly in cases affecting public corporations. One of the issues before the common law courts over the past hundred years has been the question of the attributes of a corporation that derives its existence from statute or other Crown or Governmental action. Is it clothed with the privileges of that government? Does it, for instance, have priority in a creditor's winding up, or have favourable limitation periods? One test used to answer these questions has been whether the public corporation was exercising functions which were those usually carried out by private enterprise.³⁴ If so, despite its governmental origin, the corporation was denied governmental attributes or privileges. More recently this test has been superseded by an inquiry into the extent of governmental control over the corporation and the nature of the particular transaction in which the claim for privilege is made.³⁵ But the economic philosophy that divides the private and governmental sector does survive on, and surfaces from time to time. A well-known statement of it is in *Tamlin v. Hannaford* (1950) 1 K.B.18. Denning L.J. (as he then was), in holding that the British Transport

Commission was not entitled, as the Crown was, to exemption from the provisions of the Rent Restriction Acts, said, "It is, of course, a public authority, and its purposes no doubt are public purposes. But it is not a Government department, nor do its powers fall within the province of Government." (at 24). Other sightings of this vanishing species are *B.B.C. v. Johns* (1964) 1 All E.R. 923 in which the court held that broadcasting was not within the province of Government, and, most recently, *Trendtex Trading Corporation v. Central Bank of Nigeria* (The Times, 27 March 1976), where the court held that the functions of the Central Bank of Nigeria regarding the issue and control of currency, the supervision and regulation of the banking industry were "essential functions of the state and could not be performed by any other body". The bank accordingly had sovereign immunity from civil process.

The influence of such judgments over likeminded courts and administrators in the colonies reinforced the auxiliary nature of public corporation activity there.

The principal beneficiaries of these views and the resultant legislation and operations were, locally, the settler community, and in the metropolitan area, the bourgeoisie with colonial interests. The range of beneficiaries clearly excluded the African majority in any significant sense for they did not form part of the social or economic base of this private enterprise system. Although local participation had always been intended in the projects of the I.D.C. and the C.D.C., it was obvious that in the 1950s local participation meant only inputs by private *non-African* capital. However as the political balance shifted with the end of the decade local participation increasingly was intended to mean African participation. But by then the search for such participants under those programmes was too late. Nyhart, in 1959 wrote, "Thus far, the possibility of African participation as a source of capital has not seemed to receive much attention. Both development corporations support this principle in theory, with varying success in practise. A C.D.C. representative has stated that C.D.C. considers as an ideal venture one in which the Corporation, outside commercial interests and local participation, each hold roughly a third. The view, however, is apparently of recent origin."³⁶ Giving Uganda figures Nyhart shows that out of the five projects of the Agricultural Enterprises Ltd., (A.E.L., the Uganda Development Corporation subsidiary), African interests held equity in only two, and that to the extent of 4 % and 3 1/2 %, though there was substantial African participation on A.E.L.'s Board, and there was provision in the enabling statute to sell equity to African local governments. The picture was little different in Kenya.

Thus in Kenya at this period the lack both of African participation and capital was a primary characteristic of public corporation activity. Accordingly the imminent African government saw the uses and beneficiaries of parastatals differently, and it was with this approach, though with the same legal assumptions and structures, that the self-governement period began.

After 1963

The principal use of the parastatals and public enterprises in the period immediately commencing self-government in 1963 was to provide the incoming majority with capital that was not otherwise available to it. A primary concern of this period therefore was to ensure for this purpose the political takeover of the existing parastatal organizations, and an eagerness to assume control is visible. At first the concerned bodies were the marketing boards and the Agricultural Finance Corporation. The extent of commercial public enterprise activity was still small. Somewhat to their surprise one should think, though accurately reflecting the class nature of legal institutions, the incoming government found that, as mentioned earlier, there were few formal governmental supervisory powers over these boards. No social patterns had as yet been established that gave informal controls to the newly constituted government. Accordingly, though state capital was available or the potential capital for successful public enterprise had become available, the legal structures were still defective to assist the new local would-be beneficiaries. On the local level these institutions were geared specifically to assist the settler community; on the international level to assist the metropolitan bourgeoisie. The legal structures needed therefore to be altered. Where control was absent, control had to be imposed; where discretion was exercised, the decision-makers had to be replaced; where institutions were lacking, these had to be established.

Thus in the self-government period the Statutory Commodity Boards (Amendment of Laws) Ordinance, 1963, No. 45 of 1963, was passed adding the following standard control provision:

In the exercises of its powers and in the performance of its functions under this Ordinance, the Board shall act in accordance with any general or specific directions that may be given to it by the Minister.

The amendment affected *eleven* statutes, and applied to the Canning Crops Board, the Cereal Produce Board, the Coffee Board, the Cotton Lint & Seed Marketing Board, the Dairy Board, the Pyrethrum Board, the Sisal Board, the Tea Board, the Wheat Board, the Pig Industry Board, and the Kenya Meat Commission. There was additional Regional legislation regarding representation on these and other boards. Likewise, the personnel of the Transport Licensing Board were soon replaced. Similarly, when the focus shifted to retail trade in 1967, the Industrial Development Ordinance, then referred to as an Act, Cap. 517, was amended to include this power to give directions.

Another area of rectification related to the appointment of the chairman of the various bodies. The desire to vest in the government the right to such appointment through formal controls was prompted, as the Minister for Agriculture and Animal Husbandry reported to Parliament in 1964, "because when we became government there were certain charimen of organizations with whom we had trouble."³⁷ The Government therefore sought in new agricultural board laws, as a matter of policy, to include the power to appoint the charimen of newly created bodies.

Increasingly, therefore, the concept of autonomy, or its extent, was being redefined for local purposes. This was exactly what had been done in Britain

in the first place, though later a universal measure was sought from it. We may observe that autonomy in public enterprise prevails to the extent of reliable control mechanisms. Where informal or unspoken controls are not present or not workable then direct assumption of control by the government becomes necessary, and visible and actual autonomy is sacrificed. Where reliable informal controls are working, that is where the state and the parastatal are both operated by, or to the benefit of, the same class or groups, then 'autonomy' returns or takes over. In Kenya there was at this time a substantial changeover in the personnel of the parastatals and, in addition to the statutory powers regarding directions, other formal and informal controls were being established and tested. The maize shortage of that period (1964) is a convenient starting point to evaluate one such major control in relation to the issue of autonomy.

During this period the substitution of existing settler board officials was an obvious necessity. The establishment of informal controls and social pressures, as against legal relationships, was an increasing requirement for good government. The demands of the nationalist movement pressed for the Africanization of the boards. The sometimes hostile and irreconcilable attitudes of such board officials acerbated the situation. All these made it logical that the changes in legal forms and provisions would be matched by the appointment of persons there who could be politically trusted. Thus a number of Members of Parliament were appointed to the marketing boards and other parastatal governing bodies. One of the appointments was that of the Hon. Paul Ngei, M.P. to the Maize Marketing Board in 1963. His term of office ended in 1964 when he became Minister of Marketing and Co-operatives. Following upon a national food shortage and upon allegations in the press and in parliament of corruption and other problems in the distribution of maize a Commission of Inquiry was established in 1965. The Commission under the Chairmanship of Mr. Justice Chanan Singh of the High Court of Kenya carried out an extensive inquiry and submitted its Report in 1966.³⁸ In respect of the above context the Report recommended that "if at all possible, a politician should not be appointed as the Chairman of the Marketing Board. *We also recommend* that politicians should not be appointed members of the Board".³⁹ "We realize", the Report noted though, "that the Government of Kenya having already taken certain decisions may not be in a position to implement this recommendation immediately. We are firmly of the opinion, however, that implementation should be made as soon as opportunity offers".⁴⁰ Yet the following year a parliamentary question established that there were twenty M.Ps. on the various statutory boards.⁴¹ Of these one was the chairman of the Maize and Produce Board, two were vice-chairman of other boards and the rest were ordinary members. On the Maize and Produce Board (the successor to the Maize Marketing Board), there were four M.Ps. (including the Chairman).⁴² The Government stated that "the main reasons why these Hon. Members are on boards is because they not only help in forming the policy of their respective boards but also keep members of this House and the public informed."⁴³

Professor McAuslan has pointed out that all the East African governments, but particularly Kenya's, "regard membership of corporations as an

opportunity to exercise political patronage. Ex-Ministers, M.Ps., and long standing party members are put on corporations often as chairmen, and if they fall out of favour they tend to be replaced by other persons who need to be rewarded or placated by office."⁴⁴ He considers it a factor sufficiently pervasive to affect the performance of corporations, and more specifically that its effect is to "deny the corporations that feeling of independence usually regarded as necessary for the successful performance of their functions."⁴⁵ Professor McAuslan points out that "Kenya legislation is based on this "theory" of the division of responsibilities between Minister and corporation, but, as in other countries, practise does not always accord with legislation and theory. Two interrelated factors account for this; to some extent appointments as members of corporations (and this applies to statutory commodity boards as well) are used as political rewards, and members are thus more beholden to appointing Ministers than might otherwise be the case; this in turn makes the corporations less willing to resent formal ministerial directions and more susceptible to informal ministerial pressure."⁴⁶

While this is certainly true, there was and is a concurrent and more cynical use of the parastatal offices that is even more clearly indicative of how government views the concept of public corporation 'autonomy'. From early on, but more noticeably after 1969, appointments to parastatals have been used as a rehabilitation process for former political *opponents*. Thus since 1970, Mr. Bildad Kaggia has been appointed Chairman of the Maize & Produce Board. Mr. Kaggia had been the K.P.U. opposition party Deputy President from its inception in 1966 till he resigned in 1969. Mr. J.D. Kali has been appointed Chairman of the Cotton Lint and Seed Marketing Board. Mr. Kali had been the K.P.U. Deputy Secretary from 1966-1969, and had also been detained in 1969. Mr. Tom Okello-Odongo has been appointed Vice-Chairman of the Adult Education Board. Mr. Okello-Odongo had also been K.P.U. Member of Parliament for Kisumu Rural from 1966-1969 and he too had been detained thereafter. Mr. Luke Obok has been appointed Vice-Chairman of the Kenya Film Corporation. He had been K.P.U. Member of Parliament for Alego since 1966 and had also been detained in 1969.

It would also be instructive to reexamine the 1963-1964 appointments of former non-K.A.N.U., especially K.A.D.U., leaders to statutory boards. Between 1963 and 1964 Mr. Paul Ngei, former A.P.P. Member of Parliament, was Chairman, Maize Marketing Board. Between 1964 and 1966 the following prominent former K.A.D.U. leaders held office in the Maize & Produce Board: The Hon. Masinde Muliro, M.P. (Chairman, 1966-1969), the Hon. Ronald G. Ngala, M.P. Chairman, (1964-1966), the Hon. Eric Khasakhala, M.P. (Vice-Chairman, 1964-1966). Khasakhala had also been Chairman of the Kenya Agricultural Produce Marketing Board from 1964-1966, and Muliro the Chairman of the Cotton Board from 1964-1966. Whether these appointments constituted part of the merger arrangements of the two parties into K.A.N.U., or constituted a probationary period, it is significant that each of these left the board for cabinet or other ministerial office.

The rehabilitative or probationary function of such appointments can be found elsewhere too. In Uganda recently the Commissioner of Police and the

Deputy Commissioner of Police were dismissed. It was reported that the President had said that "both dismissed police chiefs would be given jobs in Government parastatal bodies if they behaved themselves".⁴⁷ In Tanzania the appointment of army officers to parastatal managerial positions could also be examined.

It is obvious that such appointments cannot be conducive to any policy autonomy. Relations with the Minister are dependency relationships. Not because of the bureaucratic hierarchy or legislation, but because the Minister is in political favour while the appointees have yet to reaffirm their loyalty. Their participation in what is popularly, and in decision-making circles, seen to be manifest governmental activity asserts support for government policies and denies their previous policy positions. It is an admission of error and a display of conformity. Within such limits it is unrealistic to talk of 'autonomy'. There may be administrative autonomy and this too may be curtailed, but clearly none to initiate policy. Such persons are appointed expressly *not* to initiate policy but to show their willingness to *implement* policy which is made elsewhere and with which, not too long ago, they were in public disagreement.

Whether such appointments can be justified on the basis of not letting experienced administrators remain unutilised in periods of scarcity, or that such appointments constitute the only areas of reasonably remunerative employment available to such persons, it is clear that they are not conducive to the concept of autonomy. In fact *their* appointments, rather than those of supporters, show that such governments do *not* consider that any policy decisions are to be taken at parastatal level.

To what extent then had the inherited concept of autonomy in the public corporation altered by the 1970s? By 1974 the Government in reviewing the place of the parastatals stated, "The real significance of these new institutions is as policy instruments".⁴⁸ In neighbouring Tanzania the conclusion had been drawn earlier, and as explicitly. The Presidential Circular on the Rationalization of the Parastatal Organizations considered that "Broad policy is a matter for the elected TANU Government of Tanzania, and the parastatal organizations are instruments of execution—tools which must be used by the policymakers, and which must be at the command of the responsible authorities (the sectoral and parent Ministries)".⁴⁹ The TANU Guidelines (1971) emphasizing the Party's position state that "The Government, parastatals, national organizations, etcetera are instruments for implementing the Party's policies."⁵⁰

These trends were clearly emerging in the time of self-government but the division of responsibility envisaged by the legislation then still suggested a wider gap than subsequent practise came to show. So that, for example, in 1964 the Minister for Agriculture and Animal Husbandry could still say "I can give Members an assurance that I have no intention of telling my nominated members on the Board what they are to do or not to do. This is not my policy. If I disagree with the Board, then it is my policy to go to the Board and tell them I disagree with it, and if they cannot convince me then, under the powers I have, I will tell them it is Government's wish that they do so and so, but it is not my intention to hamstring any member I put on, be he a Back

Benchers or somebody else.”⁵¹ “My nominated Members from Government are four in number against 14 which come up through the other [co-operative or Regional] way and I do not think that they have any over-riding influence other than to advise and to help, and this is what I intend to do.”⁵²

Another major control mechanism used in the public enterprise field and affecting autonomy was the decreasing reliance on the public corporation form itself and the increased use of the private company form. After 1965, and particularly in the period till 1968, the following important public enterprises were established: The Kenya National Trading Corporation (K.N.T.C.), the Development Finance Company of Kenya Ltd. (D.F.C.K.), Kenatco Transport Company Ltd., The Kenya Wine Agencies Ltd. (K.W.A.L.) The National Bank of Kenya, The National Construction Company (later to be re-incorporated as a statutory corporation), The Kenya Industrial Estates (K.I.E.), The Kenya Film Corporation (K.F.C.), The I.C.D.C. Investment Company Limited, and the Industrial Development Bank Ltd. All of these were companies incorporated under the Companies Act, Cap. 486.

The ease, speed and lack of publicity with which they could be formed contrasted with the manner in which statutory corporations had to be established. These considerations emphasised the intended deprivation of autonomous activity. The secrecy inherent in the private company form and the absence of any prescribed accountability to Parliament, in the form of annual reports or otherwise, gave additional flexibility, though brief reports on some of these companies did, and do, appear in the Annual Reports and Accounts of the I.C.D.C., when the I.C.D.C. has been the holding company for the government share in such companies. Finally, the principal benefit lay in the freedom to appoint directors and managers at discretion, and without any legislative fetters or qualification or accountability. There would be no statutory restrictions on the type of directions to be given, and responsibility would be owned by the directors not to a general meeting of shareholders, or Parliament, but to the Permanent Secretary or the Minister. Policy implementation and not policy making was their function. Thus, for example, in at least the case of the K.F.C., decision-making in respect of its affairs had on occasion reached Cabinet level.

Thus, like the concept of autonomy, public accountability was being redefined. Accountability was moving away from Parliament and in the direction of very small, and less representative, groups. In 1966 when the Maize Report was published, there was no debate on it in Parliament. Attempts were made to have a full debate, but these were unsuccessful, and finally none was held. There was a minimal governmental response, and the Minister concerned was reinstated.

These assumptions of the organizational concepts of the public corporation form in Kenya have continued in these directions to the present.

The principle of autonomy has continued to be defined in terms of separate corporate identity without any effective power being vested in the institution. The separation from governmental control remains minimal. The Tana River Development Authority Act, No. 7 of 1974 is a recent example. By S.3 of the Act the authority is established with such separate legal personality. But

the control mechanisms are substantial. The Chairman is appointed by the Minister. (S.4.). There are five non-officials out of an Authority of fifteen, but the Minister has power to remove the non-officials. (S.4 (3)). The other Board Members are the Permanent Secretaries of five ministries, and other officials *ex officio*, including the Chariman of the E.A. Power & Lighting Co. Ltd., now a Government owned subsidiary company. The Minister approves the remuneration of the members of the Board (S.4 (5)), and the moneys of the authority are drawn from the Government and from approved loans. (S. 10). The auditor is appointed by the Minister. (S.11).

It may be observed that the concept of public accountability is legislated into these wide Ministerial powers. The trend towards the atrophy of parliamentary enquiry is confirmed. Noticeably absent are the lack of provisions giving the Minister power to give directions to the Authority, which in the British model would give rise to opportunities for Parliamentary inquiry and for the justification of policies. (S.9 does however provide for the executive Chairman to be subject to the general or special directions and decisions of the Authority). Similarly absent is any provision requiring an Annual Report and any provision requiring the tabling of any such report in the National Assembly. In fact there is a total by-passing of Parliament as an accounting party, though there is heavy Ministerial control at all levels of the operation of the corporation.

The assumption of a private enterprise economy also remains. The division of labour between the private and public sectors continues to be assumed. Thus the 1963 inheritance, articulated in the following fashion in Parliament in 1964, can be clearly traced:

I feel that whichever company is approached to do the actual processing of the pyrethrum, the Pyrethrum Board should buy more of the shares of the company in order that this company may be the property of the Board, because we have a declared policy in this country that whatever the individuals cannot do, then the public should own that property.⁵³

This emphasis on the catalyst role of the public corporations has persisted. The I.C.D.C.'s entire growth over the period since 1966, its lowest point in terms of financial liquidity, has been based on the primacy of its catalyst function. In speaking of the activities of the Industrial Development Bank Limited, a 1973 associate Company, the I.C.D.C. Annual Report for 1974/75 states:

The Corporation [I.C.D.C.] on its part has provided 10 to 15 percent of the investment, all in the form of equity. This indicates the important catalytic role played by the Corporation in channelling and directing investment resources other than its own into new industrial enterprises in Kenya.⁵⁴

The Tana River Development Authority Act confirms these approaches, providing that one of the functions of the Authority shall be:

to maintain a liaison between the Government, the private sector and foreign agencies in the matter of the development of the area with a view h a view to limiting the duplication of effect and to assuring the best use of technical resources. (S.8 (h)).

It is also charged with the duty of "render[ing] assistance to operating agencies in their applications for loan funds if required". (S.8(i)).

IV. Principal themes in public enterprise activity in Kenya since 1963

We have concerned ourselves so far with the theoretical assumptions of public corporation legislation and operation in Kenya for the periods prior and subsequent to 1963. We turn now to a consideration of the functions that the public corporation has served through its legislation and operations in Kenya in the period since independence.

Firstly, though not alone, the public enterprises constituted the necessary legal form and conduit for the use of state capital to generate class capital. Secondly, public enterprise has been utilised to bring about, not the expansion of public ownership of productive enterprises, but the enlargement of the *private* sector, and a broader base of local private control and ownership of the economy. Consequently, public enterprise in Kenya has consciously sought, and developed, a special relationship with foreign capital. Thirdly, the public enterprises and other parastatals have become the instruments for the growth and reinforcement of changing social formations in Kenya, specifically of an enlarged petty bourgeois stratum.

The parastatals as sources of capital

The principal use for the parastatals in the period immediately commencing self government in 1963 was to provide the incoming majority with capital that had not otherwise been available to it. State power is also economic power and the availability of a substantial bloc of capital, or control over capital, was made possible by the assumption of political power. Accordingly, as we have seen a primary concern of the self-government period was to ensure the political takeover of the existing parastatal organizations.

In the years following the Lancaster House Conference of 1960 the immediate area of confrontation between prior governing groups and new governing groups, related to the long disputed issue of land, and accordingly the important parastatal activity in this period is concentrated there. The changes in the ownership of land, and the assumption of control over the marketing and pricing arrangements relating to agricultural produce were partly channelled through the existing and re-organized parastatals such as the Land Agricultural Bank, the Agricultural Finance Corporation, the Agricultural Development Corporation, and the marketing boards, though the major role was played by the Department of Settlement.

During this period the available parastatal funds provided a pool from which members of the governing group sought funds for the acquisition of land, farm assets and services. There was also a limited use by this group, at this time, of parastatal funds for the acquisition of businesses. But with the years the range of activities of this governing group outgrew the financial resources of the individual parastatals. The scale of their activities, whether in agriculture or in trade, had vastly increased and alternative, and adequate, sources of capital were found.

Accordingly the principal *users* of parastatal capital from 1967 onwards, but specially after 1970 have been not the local governing group but a slowly growing supportive strata of actual and aspirant petty-bourgeois.

During the early sixties (while bigger individual farms and operating or development loans were being acquired by members of this governing group) programmes for the allocation of land and financial assistance to small-holders did experience a shortage of capital.⁵⁵ Likewise in relation to commerce, there was pressure on the government to make capital available to existing small businesses and those seeking to enter the retail trade. To this end the government continued to operate the small business loans scheme of the I.D.C., which had been set up in 1961 with a revolving fund of Shs. 1 million.

This scheme recognized the difficulties facing African retailers in obtaining access to capital with which to compete in a viable fashion with existing traders. A few years later, in 1966 Marris and Somerset still found the lack of capital the single greatest difficulty facing African businessmen. They record the historical reasons for this. The colonial segregation of the economy isolated African businessmen from the system of banking and commercial credit. "Socially, they had no contact with European bank managers or their Asian staff, and economically, they had no assets a bank would accept against which to secure a loan. Their most valuable possession was the land they farmed, but until land consolidation began in the Kikuyu country in the 1950s, these customary rights could not be negotiated. The banks had always regarded help to the African economy as a government concern, seeing their own function rather as facilitating international movements of capital; while the colonial administrations treated Africans as wards, to be protected against financial risks they could not sustain."⁵⁶ An example of this was the Credit to Africans (Control) Ordinance, No. 67 of 1948,⁵⁷ which prevented recovery by suit of loans from non-African lenders to African borrowers in excess of Shs. 2.00, unless the transaction had first been approved by the District Commissioner. Its effect was to deny credit to African entrepreneurs. Thus "two years before the independence of Kenya, the only sources of credit open to African businessmen were small government loans administered through local boards and, more importantly, the personal savings of their acquaintances".⁵⁸

Against this background, and in the light of the I.D.C.'s statutory duties set out earlier, (S.3 (2) (a) (b) and (c) of the Ordinance), the Small Industries Revolving Loan Fund had been administered. From 1961 and well into the post-independence period the programme faced problems. Marris and Somerset identify some of these: Considerations of making funds available easily conflicted with the corporation's concern for realizable security; delays in grants often stretched to twelve month periods; the cost to the applicant in obtaining the loan often amounted to ten per cent of its value, sometimes twenty per cent; the grant of sums significantly lower than those asked for or useful; and the Corporation's refusal to give loans for both equipment *and* working capital. Unsatisfactory repayment performances constantly diminished the size of the capital available in the revolving scheme and consequently the political effectiveness of the scheme.⁵⁹ Finally, in 1966 the

I.C.D.C. reported that its activities had come to a 'virtual standstill' from a lack of funds (though the amounts approved and issued that year had almost equalled the total approved and issued in the previous five years during which the small loans schemes had been in existence).⁶⁰

It could not contribute the size of capital needed for the increasingly ambitious commercial and industrial activities of the local governing aspirant bourgeoisie. It had no funds to satisfy the smaller demands of the petty traders. The aspirant bourgeoisie were finding alternative sources of capital through partnership or association with corporate institutions, governments and individuals from abroad. But such avenues were not open to the large numbers of petty traders and businessmen. Consequentially, political pressures mounted for greater participation in the control of and the sharing of the benefits of private enterprise. New institutions or new programmes had to be found to contain them. The I.D.C.'s role had to be redefined.

Parastatals and private enterprise

The demands of the independence movement relating to land and agriculture had constituted a challenge to the international capitalist order. This had led to the early focus of governmental and parastatal activity on these areas. But while the allocation of farms and money through settlement schemes and parastatals displaced the old settler dominance of the agricultural economic base they did not affect Kenya's relationships with metropole capital. What had happened was that a local, and expendable, component of the international capitalist order—the settlers—was permitted to be extinguished. In its place, to perform the same functions, was substituted a currently more desirable participant, an exercise sought to be repeated a decade and a half later in Zimbabwe.

This focus on land and agriculture had prevented any major correction of the difficulties facing African businessmen, or any facing up to the presence of foreign capitalist non-agricultural enterprises in Kenya or to the local dominance of the retail and wholesale outlets by a section of the Asian community, which was part of the international capitalist order.

Governmental and parastatal activity intending to deal with these factors posed contradictions at two levels: firstly, that between the local governing group with political power and the international bourgeoisie; secondly, between the local governing group with political power and a local commercial bourgeoisie, that while a part of the international capitalist system was drawn from different social and political bases.

The resolution of these contradictions had to be preceded by the political choice of the rejection or acceptance of a private enterprise economy. This choice was made in the period 1963–1965. While the acceptance of private enterprise was increasingly reiterated, the contradictions remained. They gave rise to immediate and conflicting political pressures: On the one hand, to safeguard existing private investments and their non-Kenyan ownership, and to engender a favourable climate for further private investments, foreign

and local; that is, to ensure the existing further utilization of such private capital; on the other, to obtain a significant share of these for Kenyan, specifically African, ownership, that is, to bring about African-owned capital. The latter demand was to be characterised in the political arena as the Africanization of the economy.

The Government saw these priorities in precisely that order. Thus official statements regarding Africanization in 1967 and 1968 emphasised that "This employment policy will not be allowed to impair the overriding objective of reaching the development targets set out in the development plan",⁶¹ and that "It is intended that we shall move forward without disruption of the business and the economy of the country".⁶²

Accordingly, governmental and parastatal priorities in relation to the commercial and industrial, but particularly the commercial, sectors came to be firstly to consolidate and to entrench private enterprise in Kenya; next, to rapidly enlarge domestic private enterprise, and, finally to accelerate the establishment of African domestic private enterprises and the Africanization of existing non-African enterprises.

Parastatals and Africanization

For while private enterprise had continued since 1963 to be the desired economic mode, domestic African participation and control in it had grown minimally, and not commensurately with the participation and control acquired in the political institutions. Between 1963 and 1965, apart from the agricultural sector activities noted above, the principal areas of africanization had been only in the public sector, particularly the Civil Service and the provincial administration. By 1966 the pace of voluntary africanization within the private sector, especially in private commercial activity, had been so slow⁶³ that serious political pressures had built up. In response the government identified, correctly, the retail trade outlets as the area where change was both desirable and where unfavourable economic and political consequences could be contained. The casual programmes and strategy of assistance, such as the I.D.C.'s Small Industries Revolving Loan Scheme, had proved inadequate. Planning for an effective change and participation was undertaken.⁶⁴

By 1967 the legal, financial and administrative machinery for these measures was ready. The Trade Licensing Act, No. 33 of 1967 empowered the Ministry of Commerce and Industry through licensing to control non-citizen trading in geographical areas as well as in specified commodities. The Immigration Act, No. 25 of 1967, gave government control, hitherto lacking, over the long-term residence of non-citizens in the country. The Kenyanization of Personnel Bureau, set up in 1967, monitored employment opportunities in the private sector with special reference to the emplacement of Africans.⁶⁵ Provincial administration committees fed information to the ministries. The Industrial Development Act, Cap. 517 was amended to establish the ICDC in its current form. The application of the Registered

Land Act, Cap. 300, a 1963 Act, was extended to make individual titles to land available as security for loans. The Landlord & Tenant (Shops, Hotels & Catering Establishments) Act, No. 13 of 1965 contributed as is seen below, to the control of business premises taken over. New regulations were made under the Statistics Act, Cap. 112,⁶⁶ to facilitate the acquisition of necessary information for planning purposes. Political challenges to this and all other programmes contributing to the extension of a capitalist mode of production (as to individual office), were, if necessary, to be contained through the amendments of 1966 to the Preservation of Public Security Act, Cap. 57 and the Constitution. Increased financial provision was made for the ICDC, whose activities, as mentioned earlier, had come to a standstill in 1966 for lack of funds.

The function of the parastatals accordingly was not to nationalize the retail trade but to establish an altered private ownership of that sector. What was aimed at here was a confrontation with the existing local commercial bourgeoisie; what was sought was the substitution of Asian businessmen of this class with African businessmen, but not the demise of the class or the displacement of international capital in Kenya. Like the settlers, who had been a part of the international capitalist order, this class of shopkeepers and merchants were a part of that order. Again like the settlers they were a local, and an expendable, component of that order. Once again another local replacement was being preferred. In each case, global imperialist relationships in respect of Kenya remained unaltered.

These activities were couched in the political terms of a programme to progressively Africanize the economy. Thus the language of the government, the parastatals, the press and the individuals affected by the moves was in these terms. The measure of the success or failure of these programmes also therefore came to be the visual test of a substituted colour, rather than the more difficult one of ascertaining the actual transfer of capital accompanying these steps. Examined here briefly are a few of the more important of the parastatal bodies involved in the Africanization of the commercial and industrial sector through the establishment of African-owned private enterprise. Also looked at is the scale of the transfer of capital as a result of their operations.

Industrial and Commercial Development Corporation (ICDC)

The ICDC represents the single most important statutory body in the government's efforts to africanize retail trade and the commercial sector. It has functioned as the main public lending and investment institution in that sector.

The Corporation was, as examined earlier, set up in 1954-55 but its present statutory form was provided in 1967 by the Industrial Development (Amendment) Act, No. 7 of 1967, which changed the Corporation's name from the Industrial Development Corporation (I.D.C.) to the current appellation and confirmed commerce as a major area of governmental interest. The Corporation, which falls under the Ministry of Commerce and

Industry, funds itself from direct governmental grants, injection loans from the Kenya government and governments and institutions abroad, (these latter loans sometimes secured by the Kenya government), loans from local banks, and income from investments, either directly or through its subsidiaries, mainly the I.C.D.C. Investment Company Limited. The Corporation gives out loans to private applicants, invests in the shares of other companies, and in property.

These loans, investments and other participatory forms are principally directed towards the end of African ownership of these businesses, whether as sole proprietors, partners or shareholders. The ICDC's statements of aims over its effective period affirms this use of the public enterprise and parastatal. Speaking of its activities the 1965/66 Annual Report states.

These activities include help to African industrialists and traders to expand their operations, the construction of shopping centres and industrial estates and the promotion of overall africanization of industry and commerce.

Five years later the Corporation was reiterating this function, and the 1970/71 Annual Report says:

Besides this tremendous success in the Corporation's development role, the I.C.D.C. relentlessly pursued its promotional role as an effective mechanism for the implementation of the policy of africanization in trade and industry in furtherance of the Government's policy.

The most visible function was the giving of loans to existing or incoming retail traders and other commercial applicants. But in addition to this, and in furtherance of the broad aims, the ICDC has bought into various companies. One aspect of this is examined later. These investments were originally not viewed solely from the point of adequate returns. An additional purpose was had in mind. Commenting on the purchase by ICDC of the local shares of an international insurance company, J.H. Minet & Co. (E.A.) Ltd., the Executive Director of ICDC stated that "in a year's time the ICDC would be in a position to sell up to 15 % of its shares to Africans individually or to African Co-operatives to stimulate greater African participation in the insurance business."⁶⁷ The resale of such shares to individuals has however not been done. Such resale has been effectively replaced by the formation of the ICDC Investment Company Limited, a public company. Individuals may purchase shares in this company and obtain their return through the investment in turn by the company into ICDC projects and other companies. The goal of greater African participation in various fields is then presumably met by a vicarious shareholding through ICDC Investment Co. Ltd. Like the ICDC itself the company has thrived and its shares quote above par on the Nairobi Stock Exchange.⁶⁸ In 1974 it paid a 20 % dividend to shareholders.

The direct Africanization programmes involving takeovers of existing businesses and buildings and the establishment of new businesses are operated by ICDC through its Small Loans Schemes. These are made up of revolving funds from which loans are advanced covering commercial and industrial enterprises, property and machinery. In 1975 the Small Commercial Revolving Loans Fund constituted about 30 per cent of the Small Loans

Schemes funds and the Small Property Revolving Loans Fund about 35 per cent.

Some impressions on the transfer of capital may be gained from Table I which shows the average amounts obtained by applicants under the various loan schemes over the past five years. Since the inception of the schemes, in 1964, up to 1974 a total of 6 416 businessmen had been assisted under these schemes.⁶⁹ In 1975 a further 810 applications had been approved.⁷⁰ In 1966 ICDC's financial commitments for the commercial sector had been Shs. 2,500,000 benefitting 170 applicants in that year. By 1974 the number of applicants benefitting that year was 1321, and the amount disbursed was over Shs. 66,000,000.

Noticeable from these figures is that the average loan amount in any of the categories is not very large. In their 1966-67 study of ICDC aided businesses Marris and Somerset found that "the ICDC contributed 76 per cent of the capital in industrial concerns established with less than 50,000 shillings, only 50 per cent in concerns with over 100,000 shillings, and 53 per cent in the

Table I. *I.C.D.C.'s financial assistance to businessmen: 1970-1975 (K.SHS.)*

Scheme	As at 30 June of	Net amount outstanding under scheme	Net No. assisted by scheme	Amount advanced that year	No. assisted that year	Average amount of loans that year	Average amount of loans over past 5 years
1. Small Commercial Loans Revolving Fund	1971 1972 1973 1974 1975	32,184,180 43,969,660 53,999,720 67,137,720 77,367,500	1,444 2,269 3,018 3,753 4,262	19,506,000 20,029,960 19,280,760 24,812,140 21,663,420	668 903 872 955 762	29,200 22,181 22,110 25,981 28,430	K.SHS. 25,580/=
2. Small Industrial Loans Revolving Fund	1971 1972 1973 1974 1975	11,237,360 14,341,040 21,365,660 30,058,320 35,685,340	258 362 474 560 608	6,350,000 3,533,440 7,452,460 10,937,420 7,300,320	153 143 124 115 89	41,503 24,709 60,100 95,108 82,026	K.SHS. 60,690/=
3. Small Property Loans Revolving Fund	1971 1972 1973 1974 1975	25,683,520 38,448,100 55,406,920 78,017,800 87,445,740	n.a. 448 621 851 1 036	14,400,000 15,080,000 18,202,940 24,300,760 12,694,620	193 297 174 240 224	74,611 50,774 104,614 101,253 56,672	K.SHS. 77,585/=
4. Small Loans Scheme As a Whole	1971 1972 1973 1974 1975	72,000,000 100,233,800 136,538,960 186,914,120 224,661,340	2 002 3 103 4 155 5 217 5 971	40,000,000 38,645,840 47,544,060 66,609,290 53,924,286	1014 1343 1188 1321 1087	39,447 28,775 40,020 50,423 49,608	K.SHS. 41,655/=

Source: *ICDC Annual Reports and Accounts*, 1970-1975.

Not shown separately, though included in computation of Category 4 is the Machinery Loans Fund (the average loan amount of which has been sharply rising), for which figures are not available for the whole period. The average amount of the loan for the past three years in this category is Shs. 572,123/=.

middle range: in commerce the corresponding figures were 58, 19 and 25 per cent. Thus the ICDC was making a relatively small contribution to the most ambitious commercial undertakings, although these were probably the only enterprises in the commercial sector which were really innovative".⁷¹ While the size of the average loan has increased in recent years the amounts would still seem to suggest that, with exceptions, Marris and Somerset's percentages would not be too far off present percentages. With the increase in the availability of bank loans and overdrafts the figures in respect of the bigger enterprises might even be lower.

What the average amounts suggest, notwithstanding that the businessman also draws on other sources of capital, is that these loans do not enable the applicant to acquire ownership or control of those businesses that generate large returns. That is, they do not enable him to be a serious contender for participation in any commercial activity that alone can generate for him a significant political or social base.

The National Construction Corporation (NCC)

The corporation was originally set up in 1967 as a company. Its functions were the promotion of the construction industry by encouraging and facilitating the participation of African contractors in both the building and engineering industries. By the National Construction Corporation Act, No. 9 of 1972 it was re-established as a public corporation under the Ministry of Works.⁷² It is intended as stated by the Assistant Minister in the National Assembly to:

help African contractors to take up more challenging contracts being undertaken currently by foreign companies. African contractors had been under pressure because of insufficient funds to keep them at par with competitive contractors from overseas. The government was anxious to see that Africans fully participated in the construction and contracting industry.⁷³

The construction industry's importance in the transfer of capital will be clear from the fact that "in terms of capital formation by type of asset in the modern sector, investment in building and construction amounted to £45 million, or 43 per cent of total capital formation."⁷⁴ "The structure of this industry shows the familiar three-tier pattern of the Kenyan economy, with a few large European contractors dominating the large civil engineering projects, and large non-residential building contracts to a lesser extent; the Asian firms mainly with an annual turnover between £10,000 and £400,000, mostly in building; and the African contractors spanning the whole range from the two largest, employing 700-800 workers at the moment, down to the one-man self-employed artisan. In spite of the commendable efforts of the National Construction Corporation, the participation of Africans in housing and construction activity remains very limited."⁷⁵ There are presently over 1 000 African contractors registered with the NCC. They are classified into six categories depending on ability to undertake different sizes of contracts from Category A, covering those able to undertake jobs costing over £150,000 to Category F, covering those undertaking jobs costing up to £15,000. However,

out of the 700 contractors registered in 1971 Leys points out that not more than fifty were effective. After several setbacks, a system was introduced whereby the government gave NCC first option on all government building work estimated to cost no more than £20,000 per project.⁷⁶ Of total construction investment public sources initiate in the region of 60 per cent.⁷⁷ Yet this too has not worked to build up a wider base. Thus recently the Nairobi branch of the Association of African Constructors "expressed concern at the awarding of tenders involving minor construction work to foreign-owned firms, while there were hundreds of African contractors and builders capable of doing the same work."⁷⁸

It can again be seen that the assistance given by this parastatal body is to not more than ten per cent of those who see themselves as qualified to receive help. In addition, financial assistance has not normally been extended to those contractors in Category A who may expect technical assistance. Those in Categories B to D do receive financial assistance, while those in Categories E and F may receive financing which is dependent both on the provision of collateral security and on an agreement with the clients about the competence of the contractors.⁷⁹ It is again difficult to find in these assistance patterns a major source upon which members of the local governing group draw for their own enrichment, or upon which persons outside such group draw on to challenge the political and financial power of the group.

The Transport Licensing Board (TLB)

The Transport Licensing Board was set up in 1938 under the provisions of the Transport Licensing Act, now Cap. 404, and operates under the Ministry of Power and Communications.

In the years since independence the Board has increasingly seen its main role as an instrument for the africanization of the transport industry. In the exercise of its powers towards this end the Board found the old law inadequate and sought additional powers. The Transport Licensing Regulations were thereupon added to. The additional regulation provided that the Board in the exercise of its discretion could "have regard to whether the applicant is a citizen of Kenya or, if the applicant is a company, to whether the members and employees of that company are citizens of Kenya".⁸⁰ The qualification and discretion were stated in terms of citizenship of the country. But in confirmation of its above-mentioned role the Board saw the new regulation as the legal machinery by which it was to further its africanization programme. Relying upon the regulation it soon made a distinction between Kenya citizens of different origins and refused an application made by citizens of non-African origin, which, in its view, did not fall within its africanization aims. In *Shah Vershi Devshi & Co.v. Transport Licensing Board*⁸¹ *certiorari* went from the High Court to quash the refusal and restore the licences concerned. The court held that such refusal had been unconstitutional as being discriminatory and had been outside the powers conferred by Regulation 15(3).

The Transport Licensing Board will not grant new TLB Licences to non-citizen transport operators in 1971—be they big or small companies—unless they are prepared to give a definite promise that they will sell 51 per cent of their shares to Africans before the end of the year.

This is in accordance with the Government's declared policy of helping the indigenous people to participate fully in the attempt to achieve economic independence.

We are working with the Ministry of Power and Communications to see that we implement a crash programme in the road transport business during this year with a view to transferring a large share to Africans.⁸²

The applications to be determined by the TLB at each of its itinerant meetings over the country are gazetted, as are the results of its deliberations. A study of these over the period 1965 to 1971 again suggests a wide dispersal of the ownership of licences with few concentrations of ownership that have directly been used by individual members of the local governing groups as a financial or political base. Such persons, or their wives, *do* hold many licences, and there *are* concentrations. But the two do not coincide on a widespread basis. The concentrations fall into two groups. One where operators dominant in the pre-independence period have been allowed to continue and to expand. Examples of these are the private Nairobi taxi fleets, and the goods and petrol carriers. The major operator in this category is the United Transport Overseas Ltd. (UTOS) group. UTOS itself is one of 43 subsidiaries of the United Transport Company Ltd. (UTC), a U.K. company, which in 1967 held 60 % of UTOS with the remainder being held by the British Electric Traction Omnibus Co. Ltd. (BET), (87th in the Times 300 [1967]). UTOS's own major subsidiaries in Kenya are Kenya Bus Services Ltd. of Nairobi, Kenya Bus Services (Mombasa) Ltd., and East African Road Services Ltd. (Until nationalization it also controlled Dar es Salaam Motor Transport Ltd. [DMT]). It has also over 50 other subsidiaries, including 13 in Rhodesia and 18 in South Africa.⁸³

Kenya Bus Services Ltd. at independence had a monopoly franchise to operate passenger bus services within Nairobi and Mombasa. Despite the very large numbers of licences granted in the past thirteen years to African operators, the monopolies have not been withdrawn, though Nairobi City Council has acquired a shareholding in the Company.

With the important growth of tourism in Kenya operators in this category have extended into the tourist transport business, UTOS's associated company, United Touring Company of Africa Ltd., is now the largest single tour company in the whole of Africa. Although a post-independence avatar of a pre-existing but failing co-operative, the Kenya National Transport Ltd. (KENATCO) falls within this type of concentration.

The second type of concentration is of little magnitude in comparison. It has arisen around the provincial passenger bus services and the host of smaller tour operators.

These concentrations confirm the pattern that the functioning of this parastatal has *not* led to the emergence of any major indigenous individual or private company transport operator(s) who can challenge the distribution of local political power. The transnationals and other local major, but non-African, transporters are partners in the present order. The second category of concentration, more African, could give rise to such a challenge. But the

apparent base such concentration provides has been undercut by the dependency of these operators on the finance houses for their funds and on the TLB for their licences.

Thus local political challenges from a power base within this industry have been controlled while there has still been a broad programme of granting licences to African applicants. While this has eased the political demand for africanization, it has in respect of individual applicants been small, and strictly controlled, assistance into the business world. A similar trend may be observed in respect of liquor licensing.

The Business Premises Rent Tribunal

The dealing in and disposition of agricultural land in Kenya is governed by the Land Control Act (No. 34 of 1967), Cap. 302, and the local Land Control Boards. The Rent Restriction Act, Cap. 296, controls the rents, and the termination of tenancies, of residential premises. Control over the rents and tenancies of business premises has been established by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act No. 13 of 1965 (as amended), Cap. 301.

Two features of the original 1965 legislation deserve comment. Firstly, while the Rent Restriction Act has provision for a standard rent in respect of affected dwelling houses, the Landlord and Tenant Act made no such provision for business premises. Unlike for example Tanzania, therefore, no standard rents apply to business premises in Kenya. It is thus possible to exploit a situation of scarcity or of over-eager tenants or buyers. Subletting is profitable. Weak tenants cannot resist unfavourable contractual rents. Secondly, at the time of its enactment the Act did not apply to all business tenancies, even in relation to the specified businesses affected by the Act. Tenancies of over five years' duration were not protected.

The provisions of the Act were administered through the Business Premises Rent Tribunal, which the Act set up, and which operates under the aegis of the Ministry of Commerce and Industry. But the effect of these two omissions was to leave the Tribunal helpless in the face of exorbitant or high rents which were agreed by the tenants as the price of entry into commercially desirable locations, for though the Tribunal had power to assess rents which had not been fixed, or which were to be revised, it had no power to change an *agreed* rent. Accordingly African traders without adequate capital faced increasing difficulties. Thus soon after the Trade Licensing Act of 1967 had been in effective operation the newspapers were reporting that:

Kenya's Business Premises Rent Tribunal is seeking changes in the law to facilitate the smooth takeover of commerce by Africans.

In the meantime, however, he [the Chariman of the Tribunal] urged new African traders not to accept leases of more than five years, since under the law at present, disputes in such cases cannot be referred to the Tribunal.⁸⁴

Finally the Act was amended in April 1970 by the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Amendment) Act, No. 2 of

1970. It enabled the Tribunal to acquire jurisdiction over tenancies of a period exceeding five years where the Minister specified any class of tenancy to be a "controlled tenancy" under the Act. It permitted a tenant to apply to the Tribunal for reassessment of the rent (whether agreed or not), and for the alteration of any term or condition in the tenancy. These were the powers the Tribunal considered it needed to best assist incoming African traders.

It may be observed that these deficiencies in the working of the Act were seen as obstacles to the programme of Africanization, rather than as gaps in the control that government would otherwise exercise over a commodity in which profiteering was easy. Therefore these *specific* obstacles were removed rather than a system of standard rents imposed on a prevailing market. Again the restricted base of help extended can be noticed. The parties assisted were, and remain, those whose bargaining power in a market situation is weak and who therefore acknowledge a dependency on those currently in control of the state. The help extended either through the Business Premises Rent Tribunal or through the ICDC Property Loans (for the figures of which see Table I), does not alter the balance of local political power.

The Kenya National Trading Corporation (KNTC)

The KNTC, a wholly owned subsidiary of the ICDC, was set up under the Companies Act, Cap. 486, and commenced operating in 1965. It also falls under the supervision of the Ministry of Commerce and Industry. Its functions have been described as assistance in the transfer of commerce to citizens, the establishment of a viable rural distribution network and state trading activities.

In practice the KNTC has been the instrument of the africanization of the private distribution trade in a large number of consumer commodities. In the wholesale business the government has sought to break non-citizen, non-African control by granting exclusive import licences to the KNTC. Thus while it does not see sufficiently large numbers of African importers and wholesalers on the scene the government lets the KNTC take their place, requiring all orders from all traders in certain commodities to be placed through the KNTC, making the KNTC a monopoly. At first the only such commodity was sugar. But this was increased after 1967 to over fifty items, including salt, edible oils, rice, textiles and cement, although sugar continues to be the most important single commodity handled by the KNTC.

The KNTC has not performed marketing functions by way of resale or departmental outlets, although the KNTC does have about twenty depots. Instead it has appointed agents, who are private traders, either Africans, or African partnerships with non-African traders already dealing in the particular commodity taken over by the KNTC. By 1972 KNTC had appointed about 1 200 such private agents. In its capacity as a monopoly importer in specified commodities the KNTC has acted as the agent of private traders importing such commodities through it, and has charged agency fees. Basically therefore the KNTC has not been a national trading concern at all, but yet another channel for the advancement of private individuals, trading

firms and companies. In its role of national trader it has been so passive that the government has found one of its own commissions recommending:

a detailed economic and financial examination of the corporation aimed at changing the corporation from a 'commission agent' into a business organization in the true sense of the phrase.⁸⁵

Rather the KNTC has acted as the means whereby the government has controlled the africanization of distribution outlets. This it has done, and continues to do, by in turn giving monopoly distribution rights in both rural and urban areas to African traders and by giving, where necessary, extended credit, thus permitting competition with established non-African traders and the transfer of the commerce in the specified commodities to African hands.

But as with the passage of time its activities stabilize African retail traders, the KNTC and all the other measures taken by the government, generate the very African importers and wholesalers it subrogates for. For the KNTC does not exist to *eliminate* the small and large African importer, wholesaler and retailer, but to *create* him. As it does so it fulfills its purpose and it either declines or is to be given a new role. The government has therefore recently observed that "now that national capabilities exist in this field, KNTC need no longer be a monopoly. Rather, its role will be to provide the competition that prevents monopolization of this trade by any private company. It will also continue to act as wholesaler to small retailers where the need for such service exists. Finally, KNTC will begin to operate in the export and import trade."⁸⁶

The persons benefitting by these roles have been of mixed financial ability. Though the turnover of the KNTC has been increasing from nearly £4 million in 1966-67 to about £29 million in 1972-73—this is the volume of business handled directly by the corporation. By 1972-73 the indirect business amounted to an additional £31 million⁸⁷—the bulk of the assistance has been to traders of lesser financial means. This may be gathered from the type of assistance given, namely, the extension of longer term credit and the grant of commodity monopolies, the emphasis on rural areas and the fringes of established urban business areas, commodities initially dealt in, namely, household commodities, and the large number of agencies.

Parastatals and the petty bourgeoisie

It is discernible from the foregoing that the parastatals in Kenya have become the instrument for the growth and reinforcement of "classes or strata within a colony, which are closely allied to and dependent on foreign capital, and which form the real basis of support for the regime which succeeds the colonial administration."⁸⁸

The parastatals have firstly been used to consolidate and entrench the incoming governing group. This group has displayed aspirations to developing into a domestic bourgeoisie, and hopes of becoming a part of the international bourgeoisie, the ruling class that holds the dominant economic power within the country. It has been suggested earlier that the parastatals

have been of only limited financial assistance to this group, whose activities have outgrown the financial range and ability of the individual parastatals. But the parastatals have continued to serve this group through its continued control over them. Thus while it does not significantly *use* parastatal capital and licences it continues to *control* the disbursement of this capital and these licences.

Secondly, and more importantly, the parastatals have been used to substantially enlarge the petty bourgeois stratum within the country that is not part of the local governing group. It serves the aspiring bourgeoisie as a stratum to both recruit from, and to use as a buffer group. Such a stratum has both common and antagonistic interests in relation to the governing group. Therefore the parastatals play in relation to this stratum, a likewise contradictory role. On the one hand they extend it financial and other assistance, encouraging its supportive role. On the other, they control the grant and quantum of that assistance and the licences that enable the stratum to operate, thereby containing conflicting political or economic activity on its part.

Through the parastatals an increasing part of the population has begun to participate directly and to have a growing stake, in the capitalist mode of production. The scale of the participation in relation to international capital is infinitesimal. But it constitutes the affirmation of the invitation to the latter to operate in the country. Locally, it constitutes an affirmation of the role of the domestic governing group. Thus this enlarging participation, and engendering of capitalism, constitutes one base of local political power and hence of the sustenance of the international operations. Hence moneys are made available to this enlarging petty-bourgeoisie.

But simultaneously, the parastatals are also controlling devices which not only create and enlarge this stratum, but which also determine its size and content; and ultimately through the control of its economic sources control its political strength and thereby its ability to constitute a real challenge to the local governing group. The parastatals, through the increasing sums of money funnelled through them, could conceivably have benefitted individuals or groupings into credible alternatives to the present holders of local political power. It is a clear measure of the regulatory function of the parastatals that no groupings based in this fashion have emerged.

The relationship with finance capital

Domestically, then, the effect of this co-ordinated parastatal and governmental activity was the increasing Africanization of local private enterprise, and the emergence of the social formations referred to above. This was how the local contradictions were being dealt with. How did the contradiction with international capital fare in the face of all this enlarged parastatal activity?

There was over this period a continuous and insistent political demand for increasing African participation in the non-agricultural economic area, giving rise to the africanization issue. But there was a simultaneous endorsement of private enterprise. On the part of the foreign investors these

gave rise to hesitation between disbelief and opportunity. But it is over this same period that this statement of conflicting interests dissolved into the negotiations of neo-colonialism. International capital taught itself to acknowledge that an incipient local bourgeoisie should share in the profits, and more importantly that there were positive advantages in state participation and partnership. But simultaneously it evolved new methods of asset transfers, responding to the legislative (e.g. exchange control laws), and political (e.g. altered board memberships), controls imposed, which methods assisted in a sometimes enhanced extraction. These have been well documented.⁸⁹ What was becoming clear was that, though much parastatal activity was nominally a challenge to the inherited system, in reality it has become an exercise in readjusting and refining the division of the spoils. It did not question the system, it attempted to lay down ground rules for a partition of profits more acceptable to *both* parties.

Secondly, direct public enterprise activity in Kenya over this period has been more in the distributive sector and less in production. There has been thus a minimal basic conflict. In fact public enterprises are often major conveyors of imported goods. The ICDC lending in turn has promoted other commercial outlets that have the same function.

Thirdly, a significant part of Kenyan parastatal funds have been invested in international capital enterprises within the country. The ICDC funds are such an example, though not an isolated one. The Development Finance Co. of Kenya Ltd. (DFCK), the Industrial Development Bank Ltd. (IDB), the Kenya Tourist Development Corporation and the ICDC Investment Co. Ltd. are some of the others. In 1967 the equity holdings of ICDC, that is ICDC's investments in productive enterprises were Shs. 13,680,000. By 1971 they had risen to Shs. 34,100,000. These equity holdings then represented ICDC's single largest portfolio of investments, more than the portfolios of commercial loans and property loans, and more than the entire range of industrial investments put together. By 1975 these equity holdings amounted to Shs. 133,209,920. The equity portfolio was still the single largest portfolio, and the associated companies holdings were in fact second only to the property loans as a single investment. Out of the 1975 figures, Shs. 85,893,740 (64 %), were invested in associated companies, that is in companies in which the ICDC has a minority share-holding. A large part, though not all, was invested in the local operations of the multinationals. As at June 1975 some of such ICDC investments were:⁹⁰

— A 14% shareholding in East Africa Industries Ltd., one of the largest producers of consumer goods in East Africa, making soap, detergents, toothpaste, margarine and other household products. This company is part of the Unilever Group, which holds a 55% interest. On a world rating this is the biggest of the companies with interests in Kenya, with about 400 different associated companies throughout the world. Another shareholder is the Commonwealth Development Corporation (CDC) holding 28% of the issued share capital of Shs. 40.5 million. (The CDC received by way of dividends in 1973 the sum of Shs. 7.5 million and in 1974 it expected to receive Sh. 6.8 million on an investment of Shs. 11,394,000). The ICDC has an investment of Shs. 3,034,600. It received thereon in 1974 a dividend of Shs. 2,844,000

and in 1975 (on the same investment) a dividend of Shs. 3,412,800, giving a return rate for the latter year of 112%. The value of the ICDC investment is considerably increased when account is also taken of the holdings in this associate company of the ICDC Investment Co. Ltd., in which latter the ICDC holds a 32% interest.

— A 26 % shareholding in Union Carbide Kenya Ltd., a subsidiary of Union Carbide interests spread over the world. The value of the ICDC investment was Shs. 4,887,060.

— A 20 % shareholding in Firestone East Africa (1969) Ltd., a subsidiary of the U.S. Firestone interests. The value of the ICDC investment was Shs. 8,435,860.

— A 16.2 % shareholding in Metal Box Company of Kenya Ltd. This is a subsidiary of The Metal Box Company Ltd., with global interests including holdings in South Africa and Rhodesia. The value of the ICDC investment was Shs. 4,635,000.

— A 30 % shareholding in Polysynthetics E.A. Ltd., with Farbwerke Hoechst A.G. of the Federal Republic of Germany, holding the remainder through Hoechst (E.A.) Ltd. The value of the ICDC investment was Shs. 643,000.

— A 3.1 % in Panafrican Paper Mills (E.A.) Ltd., the largest single foreign investment project in Kenya (worth approximately Shs. 340 million). The principal co-shareholder is Oriental Paper Mills Ltd. of India, representing the Birla interests. The value of the ICDC investment was Shs. 3,582,380.

— A 34 % in African Radio Manufacturing Co. Ltd., a subsidiary of the Tancot Ltd. group, itself a Lonrho subsidiary, manufacturing under licence from the Sanyo electronic interests. The value of the ICDC investment was Shs. 818,680.

— A 39.5 % shareholding in Pan African Vegetable Products Ltd. with Barclays Overseas Development Corporation Ltd. and Brukner Werke A.G. as co-shareholders. The value of the ICDC investment was Shs. 4,100,000.

— A 51 % shareholding in Fluorspar Company of Kenya Ltd., (a subsidiary, not associated, company), where other shareholders include Continental Ore Corporation of New York and Bamburi Portland Cement Co. Ltd., the latter representing the interests of Associated Portland Cement Manufacturers Ltd. The value of the ICDC investment was Shs. 8,160,000. This Company will be borrowing, through the ICDC, Shs. 7,000,000 each from Barclays Bank International Ltd. and the Export-Import Bank of the United States.

— A 59 % shareholding in General Motors (Kenya) Ltd., a subsidiary of General Motors of the United States.

It is significant that it is the government's principal instrument of africanization, the ICDC, which has a major involvement with the international corporations and finance capital. It must also be kept in mind that these percentages do not exhaust public shareholding in these companies, for government may simultaneously invest in the same undertaking through two or more channels, using from among, for example, the ICDC, the ICDC Investment Co. Ltd., the DFCK, the Treasury,⁹¹ or the Industrial Development Bank Ltd. (IDB).

Fourthly, the funds used to resolve the local contradictions posed by the

presence of white settlers and Asian businessmen were obtained from finance capital itself.

In respect of the settlement schemes that bought out the white settlers at, and after, independence the moneys came in the form of loans from the World Bank (IBRD) and the Commonwealth Development Corporation (CDC) for the low-density schemes. In 1961 the IBRD agreed to lend Shs. 60 million and the CDC Shs. 30 million. The loans were the subject of a protracted adjustment and reordering of terms over the following three years—when the endorsement of private enterprise was being fashioned—culminating in the signing of a revised agreement in 1964.⁹² The high-density Million Acre Settlement Scheme was operated with funds obtained from the British government, one third in the form of a loan.⁹³

When, later, capital was sought for the similar transformation of the commercial sector, like sources were looked to. The majority of the ICDC's sources of funds have been local, but at various times important support has come from foreign sources through grants as well as loans. Among such sources have been the Governments of the Federal Republic of Germany, Sweden, Denmark, the West German Development Bank, the United States A.I.D., the East African Development Bank, the U.S. Eximbank and the local commercial banks. Over the past five years the percentages of the funding of the ICDC, by sources, have been as follows:

Table II

Source	1970-71	1971-72	1972-73	1973-74	1974-75
1. Kenya Government	53%	56%	56%	57%	55%
2. Bank Loans	28	25	22	18	22
3. West German Govt. Loans	9	8	8	7	9
4. Capital & Revenue Reserves	8	8	11	14	12
5. Others	2	3	3	4	2

Source: ICDC *Annual Reports and Accounts*, 1970-1975.

In addition the ICDC associated institutions also of course obtain other foreign funding. An example is the Industrial Development Bank Limited, also a financing corporation, which during 1974-75 raised Shs. 99,200,000 from "outside sources" to finance its investment programme, this sum being additonal to the approved investment outlay of Shs. 119 million. During that period World Bank credit facilities to the extent of \$5 million had been made available to it.

It is not difficult to see that these institutions and governments would support programmes of parastatal spending that would further private enterprise in the country. The ICDC Chairman's Report for one year stated: "My appreciation also goes to all those institutions, organizations and foreign governments which in one way or another, have contributed to our success. By assisting us, they have clearly demonstrated that they also share the same ideals and aspirations."⁹⁴ The transactions are demonstrations

rather of the fact that it is the government and parastatals in Kenya that share the aspirations and ideals of the donors.

Fifthly, it was, as noted earlier, over this period that other sources of capital were made available to the local governing group, and once again the private sources to private donors were inevitably foreign. The dependency of members of this group on the parastatals being reduced, and on these private sources increased, it was not likely that these controllers of parastatal activity, so long as their interests were otherwise served, would through the parastatals hamper the local activities of their overseas patrons.

What emerges from all the above is that though much parastatal activity was potentially and even sometimes nominally, in conflict with the inherited economic arrangements and order, the years following independence showed to both parties that there could be, and was, an identity of basic interests, that managed with discretion and adroitness could only lead to mutual advantage.

V. Looking ahead

We may conclude with a brief anticipation of the use of public enterprise in the period ahead. The availability of capital from sources other than themselves will continue to progressively reduce the reliance on and the use of public enterprises. Any withdrawal or absence of capital from such other sources will restore a dependency on public enterprises.

Likewise, given such continued availability, the public enterprises will continue to perform their specific role in relation to the enlargement and control of the petty bourgeois stratum referred to above to the end of blunting the domestic contradictions.⁹⁵ It is necessary to keep in mind that while the parastatals perform this role they are not the only institutions used for this purpose. They are only a part of the same strategy executed through many different agencies and means, including government loans, private banks, private companies, legislation, patronage and corruption. But the parastatals have greater visibility and are part of the dialogue between the locally dominant emerging class and the urban and rural majority they nominally represent. Though there are large areas of congruence their interests are not the same. (Recent events have demonstrated the gap and the removal of the spokesmen of the latter has underlined it). But the parastatals remain with a major part in the accounting process between the two, for the benefits of the system are parcelled out among the petty bourgeois not sharing political power, and others, through the parastatal mechanisms of loans and licences.

The continuing role of the deceptively large public sector⁹⁶ has been emphasised in the government projections of the 1974-1978 Development Plan. "It is frankly recognised by the Government that the economic philosophy most suitable for the country is an eclectic one. The forms of prevailing productive organization must include an increasing role for the Government, expansion of the co-operative form of organization, encouragement and active promotion of self-help schemes and respect for private

ownership, coupled with a growing domestic share in that ownership. Essentially, this is a prescription for a "mixed" economy. Private enterprise has received active encouragement, at the same time, the Government has involved itself in all sectors of the economy to promote development as well as Kenyanization".⁹⁷ But the public sector's complementary function in relation to private enterprise has also been confirmed. Thus the Plan "recogniz[es] that Government monopolies can commit the same abuses as private ones, since any enterprise not subject to the rigours of competition or effective management is apt to become inefficient. Therefore rather than outright nationalization, Government enterprises may be established to compete with existing private firms".⁹⁸

The role of the KNTC, e.g., is thus projected as changing "to provide the competition that prevents monopolization of this trade by any private company".⁹⁹ The Government participates not to discourage private enterprise—for in commerce "the Government recognizes that the provision of efficient marketing facilities must largely depend on the initiative and skills possessed by private entrepreneurs"¹⁰⁰—but from considerations of efficiency.¹⁰¹

Likewise, the use of public enterprises to transfer private ownership rather than to nationalize it, has also been acknowledged. Thus the exhaustion of one particular Kenyan use of public enterprises is envisaged. In respect of corporations handling agricultural products the Plan notes: "With increasing private capabilities in internal commerce, it is no longer necessary or desirable for these corporations to maintain all their monopoly privileges. Those that deal with primary products (such as maize) will continue as price stabilizers through buying, selling, and storing. But farmers will also have the option of selling, and consumers of buying, direct or through other retailers."¹⁰² Likewise, in relation to trading corporations, the monopoly status of the Kenya National Trading Corporation (KNTC) will, as noted earlier, be altered.

Parastatals in other fields where private capabilities are established, e.g., the Kenya Film Corporation, can be expected to be similarly treated.

There is an increasing gap emerging between the activities of the institutions assisting small-scale businesses, such as the ICDC and the KNTC, and those operating in support of medium and large scale enterprises. At first the ICDC had been a source of funds for "industrial" development and enterprises. By 1964 it was felt that a more specialised parastatal should handle the demands of the larger industrial undertakings. Accordingly the Development Finance Company of Kenya Ltd. (DFCK) was formed in that year. This corporation took over the larger industrial loans from the ICDC. But its operations fell into patterns similar to the ICDC, and one study found that as a commercial investment company it had been successful but as a development company pioneering risky ventures needed to change the investment patterns inherited at independence, it is "clearly a failure".¹⁰³ Finally, in 1973, a third corporation was set up to administer government assistance to larger scale industries. This was the Industrial Development Bank Limited (IDB).

The ICDC appears to be set to concentrate in the future on small scale

enterprises, providing either credit or management or other services.¹⁰⁴ The DFCK, despite a doubled subscribed capital, has been involved mainly in large commercial joint ventures, and this seems to be its future area of concern as well. The IDB has yet to establish a pattern of lending and investment, though when set up it was envisaged that the bank would normally assist projects requiring an investment of Shs. 1,000,000 and above. Its present authorized capital is Shs. 80 million and the issued capital amounts to Shs. 46,700,000. (The Kenya Government holds 49 % of the shareholding, with ICDC holding 26 % and the Kenya National Assurance Company Limited and the National Bank of Kenya Limited holding 12 1/2 % each.) But its borrowing patterns confirm the observations made earlier and indicate that these are continuing relationships: the bank drew its initial funds from its paid up capital and from the World Bank (Shs. 35 million). Thereafter a second World Bank credit of Shs. 71.4 million has been negotiated. Other loans secured have been those of Shs. 16.8 million from the Export Credit Guarantee Department of Morgan Grenfell in the United Kingdom and Shs. 11 million from the F.R.G. Development Corporation.

None of these projections therefore envisage a challenge to the operations of finance capital in Kenya. But policy-makers are aware of the need to monitor its activities and prevent unchecked operations. This is done in two ways.

Firstly, the Kenya government constantly scrutinizes all investment projects.¹⁰⁵ While the bargaining process¹⁰⁶ often reflects an undesirable disparity between the parties this is not always the case, nor are matters thereby allowed to go by default.¹⁰⁷ The Treasury and the Central Bank of Kenya also seek to control unauthorized transfers¹⁰⁸ as well as the use of local funds, such as local bank overdrafts which are not matched by foreign exchange actually brought into the country in respect of the particular project or business. Other controls of an informal nature are also exercised.¹⁰⁹

Secondly, there is a longer-term strategy which seeks to compete with those operations. Such a strategy considers the present commercial and light industrial sector the base of a future national industrial capital in an emerging nation-wide capitalist economy. This is how the Ministry of Commerce and Industry's planners see the role of the commercial sector for the future:

While it is not possible at the moment to specifically identify quantitatively the contribution that this sector has made to development, there is no doubts as to its inherent catalytic effectiveness. The more efficiently it grows, the more the people get used to a cash economy and the more goods are available to the general public. This exposure to goods and need for cash to buy them encourages production. In turn this leads to the identification of possible manufactures. From the developed businessmen come entrepreneurs in industry to take advantage of the demand they have helped to create. The development of the commercial sector can therefore be used as a forerunner to general and particularly industrial development. It might be considered as a basic strategy to be emphasized by planners.¹¹⁰

Both these, the immediate and the longer-term strategies, however, are responses which are inadequate assessments of the relationships between the protection of local funds and nationalist interests on the one hand, and

imperialism on the other. The generation of moneys locally, (in the form either of government revenue or through privately held projects), from the operations of finance capital within the country cannot qualify either to be called domestically generated capital, or to contribute to the establishment and development of an autonomous industrial base in Kenya. Again, the political necessity of africanization cannot be a valid basis for assuming that the enlargement of the capitalist mode in Kenya manned by local managers, or even entrepreneurs marks the demise of imperialist domination.

Accordingly, if public enterprises in Kenya are to bring about broader patterns of benefit within the country, and to cease to be the locking mechanisms into exploitative relationships with incoming capital, then the emphases in the future will have to lie elsewhere. "The imperialist era does not destroy either the striving for national political independence or its "achievability" *within the bounds of world imperialist relationships. Outside these bounds, however. . . any major democratic transformations anywhere. . . are "unachievable" without a series of revolutions and are unstable without socialism.*¹¹

Notes

1. W.A. Robson, *Nationalized Industry and Public Ownership* (London, Allen & Unwin, 1962) 2nd Edn., p. 77.

2. See, for example (Ed.), W. Friedmann, *The Public Corporation: A Comparative Symposium* (Toronto, University of Toronto, 1954); J.F. Garner, "Public Corporations in the United Kingdom" (Chapter 1), A.W. Bradley & J.P.W.B. McAuslan, "Public Corporations in East Africa" (Chapter 15), and W. Friedmann, "Government Enterprise: A Comparative Analysis" (Chapter 16), all in (Eds.) Friedmann & Garner, *Government Enterprise* (London 1970); W. Friedmann, Government (Public) Enterprise (Vol. XIII, Chap. 13, *International Encyclopedia of Comparative Law*), (New York, Oceana, 1972); N.S. Carey Jones, S.M. Patankar & M.J. Roodhoo, *Politics, Public Enterprise & the Industrial Development Agency* (London, Croom Helm, 1974).

3. W. Friedmann, "Government Enterprise: A Comparative Analysis" (Chapter 16), (Eds.) Friedmann & Garner, *Government Enterprise* (London 1970), pp. 303-7, 333-6.

4. Contra Om Prakash, *The Theory and Working of State Corporations* (New Delhi, 1971).

5. To replace private enterprise, to assist private enterprise; to nationalize capital and management, to denationalize it; to make profits, to provide services; to operate commercial enterprises, to undertake militarily strategic activities; to take over successful capitalist enterprise, to take over failing capitalist enterprises. For examples, see W. Friedmann, "Government Enterprise: A Comparative Analysis" (Chapter 16), pp. 266-271, both in Friedmann & Garner, *supra*.

6. *Development Plan 1974-1978*, Part I, Para. 16.59, p. 359.

7. J.D. Nyhart, "The Uganda Development Corporation and Agriculture" (December 1959) Vol. 6 No. 2, *East African Economic Review*, p. 104. I. Livingstone and H.W. Ord, "National Development Corporations and Private Enterprise", (Ed.) P.A. Thomas *Private Enterprise and the East African Company* (Dar es Salaam, Tanzania Publishing House, 1969), p. 262.

8. W.A. Robson, *supra*, p. 421.

9. See Reginald H. Green, "Historical, Decision-making, Firm and Sectoral Dimensions of Public Sector Enterprise" in this volume.

10. Land & Agricultural Bank Ordinance, No. 3 of 1931; R. van Zwanenberg, "Kenya's Primitive Colonial Capitalism: The Economic Weakness of Kenya's Settlers Up to 1940". (1975) IX *Canadian Journal of African Studies*, p. 277. pp. 283-287; R. van Zwanenberg, *The Agricultural History of Kenya* (Nairobi, East African Publishing House, 1972).

11. J.M. Lee, *Colonial Development and Good Government* (Oxford, The Clarendon Press, 1967) pp. 116-117.

12. *Ibid.* p. 117.

13. *Ibid.* p. 117.

14. Overseas Resources Development Act, 1948, S.1 (2) (b).

15. J.M. Lee, *supra*, p. 117.

16. 11 & 12 Geo. 6, Ch. 15; *Statutes*, 1948, 11, 12 & 13 Geo. 6, Vol. 1, p. 3. The Act came into force on 11 February 1948. This was followed by the Overseas Resources Development Acts of 1949, 1951, 1954, 1956, 1958 and the Overseas Resources Development Act, 1959 (7 & 8 Eliz. 2, Ch. 23; *Statutes*, 1959, p. 154), which repealed the 1948 Act and continued the Colonial Development Corporation. Finally by the Commonwealth Development Act, 1963, (11 & 12 Eliz. 2, c. 23; *Statutes*, 1963, p. 1 177), the CDC's name was changed to the Commonwealth Development Corporation (also the CDC). The two last mentioned acts may be cited together as the Overseas Resources Development Acts, 1959 and 1963. They were followed by the Overseas Resources Development Act, 1969, which permitted the Corporation to operate outside the Commonwealth.

17. S.3 (1), ORDA 1948. See also Alan Wood, *The Groundnut Affair* (London, 1950) which sets out the story until 1950. The O.F.C. was later dissolved and its operations in Tanganyika were handed over to the Tanganyika Agricultural Corporation.

18. S.1 (1), ORDA 1948.

19. S.1 (2) (b), ORDA 1948.

20. Like the Report, *infra*, the earlier Overseas Resources Development Acts prefer a reference to each corporation in the plural form, using the pronoun 'them' to refer to each of the two corporations set up. By 1959, however, the singular is used! But the contemporaneous colonial laws, e.g. the Industrial Development Ordinance, No. 63 of 1954, of Kenya, or the Uganda Development Corporation Ordinance, No. 1 of 1952, of Uganda, have always used the singular form. Though the 1959 choice of the singular pronoun and verb to follow references to a corporation indicates that literary fashions are changing, Gowers gives useful guidelines in respect of the appropriate verb to be used with collective nouns or nouns of multitude: "There is no rule; either a singular or plural verb may be used. The plural is more suitable when the emphasis is on the individual members, and the singular when it is on the body as a whole. 'A committee *was* appointed to consider this subject'; 'the committee *were* unable to agree'. . . Conversely a subject plural in form may be given a singular verb if it signifies a single entity." Sir Ernest Gowers, *The Complete Plain Words* (Harmondsworth, Penguin, 1962), p. 183. See also *The Oxford English Dictionary* (Oxford University Press, 1971), p. 1010.

21. *Colonial Development Corporation Report*, London 1954, p. 7.

22. J.M. Lee, *supra*, p. 123.

23. *Ibid.* p. 123.

24. The Ordinance came into force on 15 February 1955 (G.N.201/1955).

25. The Board was first set up under the Defence (East African Industrial Management Board) Regulations, 1944 (G.N.434/1944), made under the Emergency Powers (Defence) Acts, 1939. It was incorporated under the Defence (Industrial Management Corporation [Incorporated]) Regulations, 1952 (G.N.678/1952), made under the Supplies & Services (Transitional Powers) Act, 1945 and the Order-in-Council of 1946. Regulations made in 1953 (G.N. 1316/1953) gave added power to the Board to purchase shares and to give guarantees. By the Defence (Industrial Management Corporation) (Incorporated) (Revocation) Regulations, 1955 (G.N.200/1955) the Board and Corporation were abolished with effect from 15 February 1955, the date on which the Industrial Development Corporation Ordinance commenced. (See footnote 24, *supra*.) The Board reflected a change in imperial policy which till 1940 had been against the development of industries in the colonies. With the outbreak of the 1939 war goods hitherto imported into Kenya and East Africa were not always obtainable. "In response to this state of affairs the Kenya Industrial Management Board was set up in Nairobi in 1940/41. The Board was intended to encourage the local manufacture of some goods formerly imported from Europe, in order to save having them shipped. The plant and equipment of this Board was bought up after 1945 by East African Industries Limited. This company was financed by the British Government and by Unilever." R. van Zwanenberg & Anne King, *An Economic History of Kenya & Uganda, 1800-1970* (Nairobi, East African Literature Bureau, 1975), p. 126. Both the stated and the objective functions of the old Board and the new Industrial Development Corporation can be

gathered from the debates on the Industrial Development Bill: "It seems to me that this Bill, putting on a more permanent footing the Industrial Management Corporation, will achieve that object and go some way towards the provision of avenues of employment for the people that we are aiming, under our agricultural development by consolidation of units, to bring off the land who will be forced to find their employment in industrial enterprises." Mr. Tyson, Legislative Council, *Debates*, Kenya, Vol. 63 (1954), Col. 1057.

26. The numbering of the sections cited here is that of the 1954 Ordinance as enacted. It differs slightly from the numbering in the present form of the statute, the Industrial & Commercial Development Corporation Act, Cap. 517, *Laws of Kenya* (1962).

27. A similar provision is to be found in the Uganda Development Corporation Ordinance, No. 1 of 1952. Under its equivalent section (S. 20), over one hundred sections of the Companies Ordinance were applied to the U.D.C., the Corporation also having been registered as a company. (S. 3 (2)).

28. J.D. Nyhart, "The Uganda Development Corporation and Agriculture" (December 1959) Vol. 6 No. 2, *E.A. Economic Review*, p. 104.

29. Livingstone & Ord, *supra* footnote 7, p. 263.

30. J.D. Nyhart, *supra*, p. 106.

31. *Ibid.* p. 113.

32. Kenya Meat Commission Ordinance, No. 13 of 1950. For the Kenya Meat Commission see A.F. Dingwall, "The Kenya Meat Commission" (July 1958) Vol. 5 No. 1, *E.A. Economic Review*, 14; D. Dresang & I. Sharkansky, "Sequences of Change & The Political Economy of Public Corporations: Kenya" (1975) 37 *Journal of Politics*, p. 163; *The Kenya Meat Industry* (Sessional Paper No. 99/1956-57) (Nairobi, Government Printer, 1957); *Report of a Board of Inquiry Appointed to Inquire into a Trade Dispute at the Athi River Premises of the Kenya Meat Commission* (Nairobi, Government Printer, 1960); *Report of the Commission of Inquiry into the Administrative & Staff Relations of the Kenya Meat Commission* (Nairobi, Government Printer, 1961); T.J. Aldington & F.A. Wilson, *The Marketing of Beef in Kenya* (Nairobi, I.D.S. Occasional Paper No. 3, September 1968).

33. See J.P.W.B. McAuslan, "Administrative Law in Kenya—A General Survey", *East African Law Today* (London, Commonwealth Law Series No. 5, 1966), p. 23.

34. *The Mersey Docks & Harbour Board Trustees v. Gibbs* (1866) L.R. 1 (H.L.) p. 93; *Coe v. Wise* 5 B. & S., p. 440; *Mersey Docks Trustees v. Cameron* and *Mersey Docks Trustees v. Jones* 11 H.L.C., p. 443.

35. See Peter W. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Sydney, Law Book Co. Ltd., 1971), p. 204-214; Richard Turkson, "The Legal Status of Public Corporations" (1970) 2 *Review of Ghana Law*, p. 64; and Peter Bayne, "The Definition of the Republic in Public Law and Criminal Law Contexts" (1970) 3 *Journal of the Denning Law Society*, Dar es Salaam, p. 25.

36. J.D. Nyhart, *supra*, p. 109.

37. *Official Report*, National Assembly, House of Representatives, Vol. 2, 4 March 1964, Col. 462.

38. *Report of the Maize Commission of Inquiry* (Nairobi, Government Printer, 1966).

39. *Ibid.* Summary of Conclusions, Recommendations and Findings, Para. 38, p. 162.

40. *Ibid.* Para. 282, p. 86.

41. *Official Report*, National Assembly, Vol. 12 (Part I), 31 May 1967, Cols. 485-6, Question No. 479, "Parliament Membership of Statutory Boards". For detailed data on the presence of members of parliament on statutory boards, agricultural and non-agricultural, see Jay E. Hakes, *Patronage & Politics in Kenya: A Study of Backbencher Membership on Statutory Boards* (Occasional Paper, Department of Government, University of Nairobi, 1971) and Jay E. Hakes, *The Parliamentary Party of the Kenya African National Union: Cleavage and Cohesion in the Ruling Party of a New Nation*, (Ph. D. Thesis, Duke University, 1970). Hakes considers that in addition to constituting patronage outlets, such appointments of critics from the produce growing areas concerned have stifled adverse political criticism of the politically vulnerable boards. This strategy has contributed, together with ministerial appointments and career expectations, to an otherwise endangered party cohesion.

42. *Official Report*, National Assembly, Vol. 12 (Part I), 31 May 1967, Col. 486.

43. *Ibid.* Col. 486, the Minister for Agriculture & Animal Husbandry.

44. Bradley & McAuslan in (Eds.) Friedmann & Garner, *supra*, at p. 273.

45. Ibid. p. 273.
46. J.P.W.B. McAuslan, "Administrative Law in Kenya", *supra*, at pp. 37-38.
47. *Daily News*, Dar es Salaam, 3 May 1976.
48. *Development Plan 1974-1978*, Part I (Nairobi, Government Printer, 1974), p. 37.
49. Presidential Circular No. 2 of 1969, *Rationalization of Parastatal Organizations* (Dar es Salaam, State House, 1969).
50. *Mwongozo* (The T.A.N.U. Guidelines) (Dar es Salaam, T.A.N.U., 1971), Clause 11.
51. *Official Report*, National Assembly, House of Representatives, Vol. 2, 4 March 1964, Col. 461-2.
52. Ibid. 3 March 1964, Col. 394.
53. The Hon. E. Bommett, M.P., *Official Report*, National Assembly, House of Representatives, Vol. 2, 4 March 1964, Col. 455.
54. "The Role and Scope of I.C.D.C. in Promoting Industrial Development of Kenya", I.C.D.C. *Annual Report and Accounts 1974/75*, p. 48.
55. See Leslie H. Brown, "The Settlement Schemes", a series of articles in the *Kenya Weekly News* from July to October 1965.
56. Peter Marris & Anthony Somerset, *African Businessmen* (Nairobi, E.A. Publishing House, 1971), p. 181.
57. Cap. 104, *Laws of Kenya* (1948). This was a successor to the Credit Trade with Natives Ordinance, No. 1 of 1903 (Cap. 130, *Laws of Kenya* [1926]). It was finally repealed by the Credit to African (Control) (Repeal) Ordinance, No. 11 of 1960. See also M.L. Marasinghe, "Natives and Businessmen in British Colonial Africa: Some Problems in the Law of Contract" (1974) 10 *East African Law Journal*, p. 213.
58. Marris & Somerset, *supra*, p. 181.
59. Peter Marris, *Lending Money* (Nairobi, I.D.S. Discussion Paper No. 37, December 1966).
60. I.C.D.C. *Annual Report and Accounts 1965/66*. *Daily Nation*, Nairobi, 10 December 1966.
61. *Kenyanization of Personnel in the Private Sector*. A Statement on Government Policy relating to the employment of non-citizens in Kenya (Nairobi, Ministry of Labour, 1967), p. 1.
62. *Statement on Application of the New Immigration Act in relation to "Work Permits" and Kenyanization* (Nairobi, Ministry of Home Affairs, 1968), p. 3.
63. "In 1967, for instance, there were 62 companies quoted on the Nairobi Stock Exchange, with net assets of just under £67,000,000. Only three had a majority of African directors, and over half had entirely European boards. In all, 14 % of the 376 directorships in these companies were held by Africans, and 5 % by Indians. In the same year there were three African firms to be found in the whole of Nairobi's Industrial Area." Marris & Somerset, *supra*, p. 12. See also generally, *Who Controls Industry in Kenya?*, Report of the Working Party of the National Christian Council of Kenya (Nairobi, E.A. Publishing House, 1968).
64. Colin Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism* (London, Heinemann, 1975) in a consideration of African Capitalism (Chapter 5), details the shift from special assistance to protection in the programmes to foster African capitalism.
65. For more details of its operations see The ILO Report, footnote 74, at its pp. 564-565.
66. The Statistics (Employment) Regulations, 1967 (L.N.126/1967).
67. *Daily Nation*, Nairobi, 10 June 1969.
68. Share prices are reported daily in the local English language press. *The Standard* gives an additional and touching service: "For the benefit of small investors, whose interest in shares is increasing, the names and addresses of members of the Kenya Stock Exchange are given below." See also "Kenya's Portable Exchange" in *Newsweek*, 22 May 1972, which reported: "What most pleases chairman Thuo and the Kenya Government about the Exchange is the new business that continues to come from Kenyans, giving them stronger control over their own economy and lessening the chances of risky and chilling state take-over." Described as the first and most vigorous institution of its kind in Black Africa, the Exchange traded about £40 million worth of shares in 1971, well ahead of the only other Black Africa stock exchange in Lagos. The article also reports the chairman as considering the capitalist principle at home in Kenya and remarking that "the African in Kenya was a capitalist before the Europeans arrived".
69. I.C.D.C. *Annual Report and Accounts 1973/74*.
70. I.C.D.C. *Annual Report and Accounts 1974/75*.
71. Marris & Somerset, *supra*, p. 188.
72. A subsidiary company, again to be called the National Construction Company is projected.

73. *Daily Nation*, Nairobi, National Assembly Report, 15 June 1972.
74. *Employment, Incomes and Equality* (The ILO Report) (Geneva, ILO, 1972), p. 473.
75. *Ibid.* p. 197.
76. Leys, *supra*, p. 163.
77. The ILO Report, *supra*, p. 473.
78. "African Contractors Hit at Minisuries", *Daily Nation*, Nairobi, 28 August 1976.
79. *Development Plan 1974-1978*, Part I, *supra*, p. 308.
80. Regulation 15 (3), L.N. 264/1968.
81. (1971) E.A., p. 289.
82. *Daily Nation*, Nairobi, 7 January 1971.
83. *Who Controls Industry in Kenya?* (Nairobi, E.A. Publishing House, 1968).
84. *Daily Nation*, Nairobi, 26 January 1970.
85. *Report of the Commission of Inquiry into Public Service Structure and Renumeration* (The Ndegwa Commission Report) (Nairobi, Government Printer, 1971), p. 201.
86. *Development Plan 1974-1978*, Part I, *supra*, Para. 1.33, p. 9.
87. *Ibid.* Para. 17.35, p. 377.
88. Leys, *supra*, p. 26.
89. B. Herman, *Some basic data for analysing the political economy of foreign investment in Kenya* (Nairobi, I.D.S. Discussion Paper No. 112, 1971); "Foreign Investment in Industry" (Technical Paper No. 16, The ILO Report, *supra*, p. 437); "The Control of Profits" (Technical Paper No. 17, The ILO Report, *supra*, p. 459); Andrew Coulson, "Bloodsucking Contracts" and Issa Shivji, "Capitalism Unlimited" both in (Ed.) Henry Mapolu, *Workers and Management* (Dar es Salaam, Tanzania Publishing House, 1976); R. Hutchinson "Neo-Colonial Tactics" (July 1973) *Africa*, No 23, at p. 74 and *Daily News*, Dar es Salaam, 26 & 27 July 1973; Andrew Coulson, "The Fertiliser Factory", (1972) *Maji Maji*, No. 8, p. 26; Pierre Jalée *The Pillage of the Third World* (New York, Monthly Review, 1968); Andrew Coulson, "The Automated Bread Factory" (1975) *Eastern Africa Law Review* (Forthcoming); Paul Semonin, "Nationalizations and Management in Zambia" (1974) *Maji Maji*, No. 1; see also B. Van Arkadie, "Private Foreign Investment: Some Limitations", in (Ed.) P.A. Thomas, *Private Enterprise and the East African Company*, *supra*, p. 156.
90. Sources: (a) I.C.D.C. *Annual Reports and Accounts*; (b) *Who Controls Industry in Kenya?*, *supra*; (c) *United States and Kenya: Areas of Co-operation* (Nairobi, U.S.I.S., 1974).
91. Through the Permanent Secretary of the Treasury as a corporation sole under the Permanent Secretary to the Treasury (Incorporation) Act, Cap. 101.
92. John W. Harbeson *Nation Building in Kenya, The Role of Land Reform* (Evanston, Northwestern U.P., 1973), pp. 207-209.
93. By 1966 the Department of Settlement had spent £21,800,000. Of this £9,014,000 was in the form of a British grant, £9,530,000 a British loan, £1,218,000 a loan from the Government of the Federal Republic of Germany, £406,000 from the IBRD, £203,000 from the C.D.C., £1,251,000 from the Kenyan Land Bank and Agricultural Finance Corporation, and £178,000 from the Kenya Government. *Who Controls Industry in Kenya?*, *supra*, p. 192.
94. I.C.D.C. *Annual Report and Accounts 1973/74*, p. 7.
95. In surveying Commonwealth Development Corporation (CDC) projects in Kenya, its Chairman, Sir Eric Griffith-Jones "described the Buru Buru Housing Estate (in Nairobi) as an extremely imaginative undertaking. Sir Eric said that one of the unique aspects of such a project is that it acts as a stabilising factor between the middle and upper classes." *The Standard*, Nairobi, 28 February 1976.
96. In 1968 the Government stated that there were 403 "statutory boards and other bodies in the country, ranging from big State corporations such as the I.C.D.C. to small committees such as the Factories Committee under the Ministry of Labour." *Official Report*, Vol. 14, National Assembly, 4 March 1968, Col. 298 (Question No. 12). Lower figures have also been given on other occasions, and of course only a small proportion of these institutions are productive enterprises. Hakes, *supra*, 263 (Thesis), points out that the discrepancy in totals given from time to time reflect the ambiguity as to the definition of a statutory board.
97. *Development Plan 1974-1978*, Part I, Para. 2.8, p. 36.
98. *Ibid.* Para. 1.26 (iii), p. 7.
99. *Ibid.* Para. 1.33, p. 9.
100. *Ibid.* Para. 17.3, p. 367.

101. Ibid. Para. 17.3 (d), p. 367.
102. Ibid. Para. 1.33, p. 9.
103. Volker Vinnai, *The Role of the Development Finance Company of Kenya in the Industrialisation Process* (Nairobi, I.D.S. Working Paper No. 98. April 1973), p. 18.
104. See The ILO Report, *supra*. Chapter 11, p. 194; and "The Management of Credit and Other Services to Small-scale African Businessmen" (Technical Report No. 18, The ILO Report, *supra*).
105. See The ILO Report, *supra*, p. 439 for part of the process. The Ministry of Commerce & Industry in its Industrial Development Division includes an Industrial Survey & Promotion Centre, which undertakes feasibility studies. For suggestions of improvement also see The ILO Report, pp. 189-190.
106. See Robert L. Curry & Donald Rothchild, "On Economic Bargaining Between African Governments and Multi-national Companies" (1974) 12 *Journal of Modern African Studies*, p. 173.
107. See The ILO Report, *supra*, p. 440.
108. See Volker Vinnai, *The System of Exchange Control in Kenya* (Nairobi, I.D.S. Discussion Paper No. 148, September 1972).
109. Jon G. Ndegwa, "Government and Multi-national Transactions: A Study of Bargaining with emphasis on the Kenyan Experience", (1976) *Eastern Africa Law Review* (Forthcoming).
110. "The Role and Scope of the Commercial Sector in Kenya" (31 January 1975), I.C.D.C. *Annual Report and Accounts* 1973/74, p. 51.
111. V.I. Lenin, *A Caricature of Marxism and Imperialist Economism* (Moscow, Complete Works, Vol. 23, p. 53).

Law and Public Enterprise in Tanzania

One of the most significant developments as a result of Tanzania's commitment to a socialist form of development is the emergence of institutions of public enterprise. The basic institution is the public corporation, a statutory corporate body set up through or under an act of Parliament. But public enterprise has taken other forms too, the departmental form at the national level, and the company form at district levels. More importantly, the various forms are often harnessed together, so that while the law charges a department or corporation with public responsibility for certain activities, the corporation or the department often discharges that responsibility through the establishment and management of companies under the companies code. The total picture is thus complex, and it is unclear whether various institutional distinctions are of any significance. It has indeed become common to refer to the various institutions in the public economic sector as parastatal institutions¹ and a common body of rules equally applicable to all of them is emerging. Nevertheless, as the public corporations have a primary responsibility for the development and co-ordination of various sectors of the economy, and are directly accountable to the government and Parliament, much of the debate on public enterprise has centered around them.

The avowed purposes and functions of Tanzanian political and economic policies are the establishment of a socialist state. The Tanzanian policies have been elaborated in a series of position papers, and a number of principles underlying the ideology of *Ujamaa*, or socialism, has emerged. Whether Tanzania is striving towards socialism or some form of state capitalism has become an acutely controversial issue in recent years.² What is undeniable, however, is that the government has steadily increased both its control over and direct participation in the economy. The pattern of the ownership of productive resources and enterprises has changed drastically over the last ten years; there have been serious, if not always successful, attempts at economic planning; forms and the modalities of the interaction of the domestic economy with international capital have been altered. Tanzania has thus been engaged in, if not the transformation of the economy at least in major re-adjustments of it. The transfer of the ownership of the major productive and financial enterprises to the public sector and the efforts to manage closely the economy means that in important ways the economy is differently organised than in the pre-independence period.

The purpose of this chapter is to examine the impact, on the one hand of the law and legal system on public enterprise institutions, and on the other of public enterprise on the law and the legal system. The legal system for the purposes of this paper consists of rules and institutions like courts; it is a sub-

system within the larger political and administrative order of a society. The law represents a device and technique for ordering and regulating behaviour and determining relationships. In general the purposes pursued through the legal system—as a rule the interests of the dominant classes or groups in a society—are not different from interests pursued through other methods and mechanisms of the state. Nevertheless the legal system can have a certain degree of autonomy of the other apparatuses of the state, especially if the legal system operates through generalised rules with limited and well defined administrative discretion, enforced through or supervised by tribunals with some institutional independence.³ It is clear that the autonomy of the legal system cannot survive if its operation is significantly at variance with the political and economic aims of those who control the rest of the state apparatus. Nor is autonomy possible, it may be argued, if the state attempts a close regulation of the economy. The probability of a lack of autonomy of the legal system is greater if the state attempts a change in the underlying principles and structures of the economy. In such situations the role of the legal system becomes problematic. If it is well established and firmly rooted in an old political economy, it may pose important resistance to new economic changes; if it is not well established or is grounded on weak political support, its autonomy will atrophy, and the legal system may dissolve in the administrative or political system.

In the case of Tanzania, it is useful to start with a brief examination of the legal system that constituted the starting point for the establishment and the regulation of public enterprises. The base line of the law is the British based common law system, which has a heavy private enterprise bias. Unlike socialist legal systems, the common law does not start with a clear theory of the public ownership and management of the means of production. Some features of the common law pertinent to public enterprise have been discussed in the first chapter; these may be briefly restated. The major institution for commercial and industrial activities is the company, the rules for which have been developed on the premise that the essential responsibility of the management is to maximise profits, and while various rules have evolved to protect the public interest, there is a basic reluctance to interfere with the internal affairs of the company. The management thus has very considerable autonomy.

Another aspect of the common law that is relevant here is its attitude towards administrative discretion. The common law is biased against administrative discretion. In the late nineteenth and the early twentieth century, the courts were hostile to administrative discretion vested in licensing, housing, town planning authorities, etc., and tried to frustrate schemes for social and economic reform which depended on the exercise of discretion, but later courts either intervened on a narrow set of grounds, the rules of natural justice, or stayed well clear of administrative discretion. Unlike the US, where constitutional provisions have enabled the courts to formulate broad and specific rules to regulate administrative behaviour, Tanzania inherited the narrow and limited rules to regulate administrative behaviour. It might therefore be expected that the courts would not take an active stance *vis-a-vis* public corporations, making the gradual development

of judge made rules in this area unlikely. Thirdly, in so far as the common law recognised alternative forms of commercial and business organisation, it was the public corporation. The common law developed relatively few rules to deal with them. The public corporation in its present form is a device of recent times, and derived largely from legislative activity. While in its structural characteristics it owes much to the company analogy, autonomy achieved through a board of directors, courts have played a relatively minor role in their regulation. Legislative and administrative controls have been considered more important, although the two do not necessarily work towards the same ends. In so far as public enterprise occupied a small place in a largely private enterprise economy, it was not surprising that the courts applied rules by analogy from that sector, in instances when their jurisdiction was exercised. What is the effect of such a system on the organisation and functioning of public enterprise? What is the impact of public enterprise on such a system? It needs to be borne in mind that the kind of public enterprise in Tanzania is quantitatively and qualitatively different from that in Britain. It pervades the economy, and is a key instrument in its transformation towards a socialist system. How does a *laissez faire* legal system respond to the pressures of a socialist pattern of development?

Sketch of the growth of public enterprise in Tanzania

To understand the legal situation of public enterprise in Tanzania, it is necessary to sketch briefly the history of public enterprise. Public enterprise played a relatively small role before independence. There were hardly any state investments in or management of industrial enterprises. An agricultural corporation had been set up in 1954 to take over and manage the remnants, mainly some ranches and irrigation schemes, of the unsuccessful scheme for the production of groundnuts. Another and considerably more important form of state intervention in the economy was through agricultural marketing boards, which had the monopoly of marketing produce and of selling it in the local or international markets. These boards were not as important as in some other parts of Africa, only one (cotton) having a price stabilisation policy. Nevertheless, there was a general legislation which authorised the government to exercise the most far reaching powers over agriculture. Production of particular crops could be licensed, the movement of produce regulated or prohibited, and the prices at which the crops could be sold fixed.⁴ The government's intervention or participation in commerce was less extensive. It had acquired shares in a few companies (the most significant of these, the Williamson Diamond Mines, was acquired partly as payment of death duties on the death of its largest shareholder) and made and guaranteed loans to others, including Tanganyika Packers, often as incentives to private enterprise.⁵

Since independence much greater use has been made of public enterprise, as well as other instruments of state control and regulation of the economy.

But the purposes of such enterprise and regulation have been changing, and an illustration of the change can be given through a brief history of the major industrial public corporation, the National Development Corporation (NDC).

In 1962 an industrial development corporation was set up,⁶ largely as a result of advice from western economists. In 1960 a team from the World Bank had visited Tanzania to make a survey of the economy and to make recommendations for future developments. The team endorsed the idea of a state company, to be set up in conjunction with the British Commonwealth Development Corporation, not so much for investment purposes, as for investigation of investment possibilities. Its basic function was to be promotional and advisory; it would identify promising fields for investment, and provide loans to private entrepreneurs to make the investment; it would also go into partnership with foreign private investors, as a means of encouraging them.⁷ In 1961 the team's visit was followed by that from a firm of American consultants on a mission from the USAID to advise more specifically on industrial development. Its basic premise was that "most industrial opportunities in Tanganyika are neither so readily identifiable, nor so clearly feasible and attractive, as to ensure that they will be accomplished without encouragement."⁸ A key role for the government was therefore essential. The advisers made their recommendations on the basis of assumptions about government policies, which they arrived at after discussions with government leaders, including Nyerere. The first assumption was that the political and economic philosophy of the government favoured the use of private enterprise for industrial and commercial development, while the government's investment would be in the supporting infrastructure and in projects that were not sufficiently attractive to the private sector. The government recognised the need to ensure, through various devices, high profits for private industry to encourage it to invest. It would be willing to go into partnership with private investors in privately managed enterprises on either a loan or equity (majority or minority) basis, "as may be most appropriate to the needs of the enterprise and the wishes of private entrepreneurs". Another assumption of the government policy was to increase the participation of Africans in the economy, and the speed with which this took place would be one important factor in assessing the contribution of private enterprise.

On the basis of these assumptions, the advisers recommended the establishment of an industrial development corporation, with three basic functions: to give loans to Africans for small scale business enterprises; to give large loans to "high risk" private enterprise on soft terms for investment in areas important to the country's development; and to enter into joint ventures with foreign private partners in projects geared towards profits. The last mentioned activity, it was recommended, should be conducted through the establishment of a development company in conjunction with the agencies of the British and West German governments. The recommendation therefore was for both a development state corporation and a development company. Its concept of the latter differed from that of the World Bank in that while the Bank had wanted the company to be investigatory and only rarely to go into

investment, under the new proposals, the company would actually invest in profitable ventures.

In the event, the government set up both the Industrial Development Corporation and the Tanganyika Development Finance Company. The former was set up by a specific statute and was to be owned by the government, while the company was to be owned jointly with the British and the Germans, Governments each with one third equity, and was to operate under the Companies Ordinance. The justification given for this separation was that the Corporation, being under the sole authority of the Government and the direction of the Minister of Commerce and Industries, would be a real instrument of policy, and able to sponsor projects which promised no obvious profit, while the company would be run on more commercial principles.⁹ Both these institutions were to operate in the context of a policy where most of the direct investment in productive enterprises would be made by the private sector. Indeed, the total initial grant for the Development Corporation was no more than £500,000. Nor was it obvious at this time that the Corporation would be the principal means of government investment. While the Corporation was being established, the Government was also planning a direct investment of £300,000 on its own in the construction of a hotel; and the task of promoting small African enterprise was not entrusted to the Corporation.

In 1964, when the First Five-Year Plan was published, the Corporation was modified to become the major instrument of government industrial policy.¹⁰ The reorganisation took place in context of the new plan. The Corporation absorbed the Agricultural Corporation, on the basis that most of the industrial development was in connection with the processing of agricultural raw materials. The new corporation, now called the National Development Corporation (N.D.C.), was also free to enter the commercial field. It was expected that the wider area of operation would enable the Corporation to plan a more rational allocation of resources. There was an emphasis on profitability, commercial principles and competitiveness, as well as on the need to secure a financially independent base for the Corporation.¹¹ The financial base was strengthened by the transfer to the Corporation of the investments held by the Government through the Treasury Registrar; and was intended to be consolidated through emphasis on profit. Its increased importance was reflected in the new composition of its Board of Directors, which now included six of the key members of the Cabinet, and by vesting the powers of issuing directives in the President, instead of the Minister for Commerce and Industry as previously. If the Corporation was to be the Government's chief instrument in economic development, it was necessary both to speed up the process of decision-making and to ensure clear government policies and their co-ordination. The new institutional arrangements were intended to provide for these needs.

In spite of the restructuring of the Corporation, the stress on direct investment and management as opposed merely to loans, and the extension of the area of its operations, there was no basic change in the development strategy of the Government. In the Plan, the primary role in industrial and commercial investment was still assigned to the private sector, to the extent of

three quarters of the projected investment. The private sector was envisaged as providing 47.2 per cent of the total public and private investment. Public investment was to be largely in the development of the infrastructure, so that of the directly productive industrial and commercial investment, the private sector was supposed to provide 80 per cent. The plan outlined various incentives for the private sector: the repatriation of capital and profits; the provisions of industrial estates; tariff protection for infant industries; accelerated depreciation and investment allowances; government financed economic surveys and feasibility studies; and limited financial assistance through the Development Corporation. The operating principles of the Corporation as laid down in the new legislation committed it to competitiveness and profitability, and thus to conform to the rules, supposedly, of private enterprise. The acquisition of government investments as well as an increased budget, however, meant an expansion in the activities of the Corporation. Nevertheless it was not until 1967 that the NDC was set up in the role of a key instrument of economic policy and development.

1967 marked a major shift in the functions of public enterprise. That year the ruling party, Tanganyika African National Union (TANU) in the one party state of Tanzania, adopted a policy paper, known as the Arusha Declaration. The Declaration committed the party and the government to policies of socialism and self-reliance.¹² The relevant guiding principle was laid down as follows in the Declaration: "The way to build socialism is to ensure that the major means of production are under the control and ownership of the Peasants and the Workers themselves through their Government and their Co-operatives." The Declaration then identified the "major means of production", and urged the government to nationalise them. The government nationalised all banks with the exception of a co-operative bank, and established a state corporation, the National Bank of Commerce, in which it vested their assets.¹³ It nationalised the National Insurance Corporation, established under the Companies Ordinance and in which it had majority shareholding, and prohibited other insurance companies from transacting business in the country.¹⁴ It nationalised major food processing firms and vested their assets in an existing statutory corporation, the National Agricultural Products Board.¹⁵ It nationalised the largest firms engaged in export, import and distributive trade, and vested their assets in a new state corporation, the State Trading Corporation (STC).¹⁶ It took over majority shares (up to 60 per cent) in eight manufacturing concerns ranging from beer brewing to cement manufacture, and vested the shares in the NDC.¹⁷ Finally, it announced the intention to take over some sisal estates, which were eventually vested in another corporation, the Tanzania Sisal Corporation.¹⁸

The effect of these measures was that the government obtained ownership and control of the major financial institutions, and acquired partial ownership and some direct control over the more important industrial and commercial enterprises. State economic enterprises became the most important economic actors. These new measures made clear that state corporations were no longer to be viewed as filling the gaps left by the private

enterprise or making good the deficiencies of the market mechanism (although the Sisal Corporation was established to take over a declining industry). Henceforth they were to be instruments for the implementation of state policies and the state control and management of the economy. They now dominated the economy and need no longer operate in an environment where the operating rules were laid down by the private sector. The policy assumptions of the First Five-Year Plan which had two years to run were rejected, and the Plan ceased to be a guide to policy or action.

The Second Five-Year Plan, issued in 1969, was based on the new strategy of development. It stated that "the private sector cannot be relied upon to provide the main thrust in directly productive investment. The Arusha Declaration specifically places an increased responsibility on the public sector to engage in directly productive investment, both in industry and large scale agriculture. During the Second Plan the institutional foundations for socialist development must be consolidated."¹⁹ The plan provided for the bulk of the investment to be made through the public sector. 84 per cent of the investment was to be made by the parastatals, while the private sector was to contribute only 12 per cent. The public sector was to contribute 79 per cent towards output, the private sector 16, while the public sector was to generate 77 per cent of new employment compared with 16 per cent by the private sector.²⁰ Developments since the enunciation of the plan have followed the direction outlined in it, and the public sector has come to play a crucial role in the economy—as investment agencies, as productive units, as instruments to generate and mobilise surplus and savings, as employers of labour, and as mediating between foreign and state domestic capital. At the end of 1973, there were 112 public enterprises operating at the national level, across most sectors of the economy. Among them they employed just over 72,000 workers out of the total national employment of under 500,000. But their crucial importance lies in the investments made by them. In 1971 they accounted for 43 per cent of the total gross domestic capital formation, and today that figure is over 50 per cent. Hardly any major investments would be made without the participation of a public enterprise. Another striking feature is that these developments are of recent origin. In 1973 the public enterprises had

Table 1. *Number of parastatal enterprises by industry.*

	1966	1967	1968	1969	1970	1971	1972	1973
Agriculture	4	5	6	6	6	8	9	9
Mining	2	2	2	2	2	4	4	4
Manufacturing	13	26	29	31	36	43	43	44
Electricity	1	1	1	1	1	1	1	1
Construction	2	2	2	2	2	3	3	3
Commerce	12	14	14	15	18	19	19	25
Transport	—	2	3	4	16	5	7	7
Finance	6	9	10	10	8	8	10	10
Estate & Business Services	—	—	3	3	3	4	4	4
Services	3	3	3	4	3	5	5	5
Total	43	64	73	78	85	100	105	112

investment of over 1,000 million shillings, while in 1966, it was barely 120 million, while employment in 1966 was only 18,600. Tables I, II and III give some idea of the growth of public enterprises, by showing the number, employment and investment over a nine-year period, from 1966 to 1973.

Table II. *Numbers of persons engaged in parastatal enterprises and their wages and salaries.*

	1966		1967		1968		1969	
	Em- ploy- ment	Wages & Sala- ries (Shs' 000)	Em- ploy- ment	Wages & Sala- ries (Shs' 000)	Em- ploy- ment	Wages & Sala- ries (Shs' 000)	Em- ploy- ment	Wages & Sala- ries (Shs' 000)
Agriculture	4736	12130	4847	16344	11665	38649	20642	56225
Mining	2795	26208	2638	28704	2593	26574	2373	28387
Manufact.	2330*	11827	5302	36723	8792	50940	12350	71183
Electricity	1810	12503	2010	13775	2151	14405	2225	14940
Construct.	5076	12958	4674	13205	3293	20259	3189	17126
Commerce	971	6745	3289	15328	3104	27598	3791	29905
Transport	—	—	965	5811	—	17090	1304	22145
Finance	422	4354	2049	30439	2555	39604	2988	38786
Real Estate and Business Service	—	—	—	—	3	228	20	505
Other Services	461	2118	518	2171	534	2246	1043	3462
Total	18601*	88843	26292	162500	34690	237593	49925	282664

* Recalculated figures. Original figures believed incorrect.

	1970		1971		1972		1973	
	Em- ploy- ment	Wages & Sala- ries (Shs' 000)	Em- ploy- ment	Wages & Sala- ries (Shs' 000)	Em- ploy- ment	Wages & Sala- ries (Shs' 000)	Em- ploy- ment	Wages & Sala- ries (Shs' 000)
Agriculture	19281	55768	19406	53216	15534	53321	11596	85402
Mining	2399	29570	2684	31200	2790	30274	3079	129608
Manufact.	15454	94330	24836	118941	25387	150140	29359	187603
Electricity	2343	16731	2318	21093	2412	22153	2661	24241
Construct.	2168	12388	3240	17466	2862	22188	3371	25638
Commerce	5457	52491	7536	60385	8564	81548	10587	114378
Transport	3614	33408	3496	34631	4156	38122	3951	36111
Finance	3274	41005	4209	49277	5404	58989	5838	64106
Real Estate and Business Services	39	589	122	1970	595	4441	762	6903
Other Services	584	3900	123	3483	798	6460	890	7360
Total	54613	340180	67988	391737	68502	467536	72094	581345

Table III. *Investment by parastatal enterprises. . . (Shs million).*

	1966	1967	1968	1969	1970	1971	1972	1973
Land improvement	3.4	4.4	0.6	1.4	4.2	33.3	14.1	14.3
Residential buildings	5.7	11.9	11.2	14.6	30.5	59.6	35.8	50.9
Non-residential buildings	21.7	61.7	68.5	48.7	84.4	105.5	268.7	62.6
Other works	14.1	76.5	85.3	14.4	43.7	87.8	218.9	230.9
Transport equipments	14.9	32.1	16.0	15.9	17.9	24.1	43.3	43.6
Other machinery and equipments	31.6	96.7	59.3	69.8	204.9	158.2	119.6	113.2
Total fixed capital formation	91.4	283.3	240.9	164.8	385.6	467.5	500.4	515.5
Financial investments	28.7	115.5	194.6	327.6	268.5	492.2	562.4	589.5
Grand total	120.1	398.8	435.5	492.4	654.1	959.7	1062.8	1105.0

Source: *Analysis of Accounts of Parastatals, 1966-1973*. Dar es Salaam, 1974.

Problems and issues

The rapid development of the public productive sector has raised a large number of issues and problems for the legal system. It introduced an institution with which the law had had little to do. It will be argued that slowly, and almost imperceptibly, a new law of public enterprise has grown up, although the organisational forms of public enterprise are the ones rooted in the traditional common law. The need for the new law has arisen less from the fact that new institutional forms have evolved, as that the old forms have proliferated and have been used in a more intensive and extensive manner than envisaged in the legal theory that gave birth to them. The developments in Tanzania lend support to the Marxist insight into the relationship between law and economics, which asserts the supremacy of the latter over the former. The determining factor has been economic forces, and the law has tried to catch up as best as it can, with economic development and necessities.

The heavy reliance on public enterprise raised a number of key issues. With the commitment to socialist or state capitalist values and development, a large part of the burden of social transformation fell on public enterprises. On the one hand, they were responsible for ensuring social equality, regional parity, and new work ethics. On the other hand, they were expected to be the major sources of investible surpluses, and so to generate profits. Until then, they had operated largely on the basis of practices and criteria in the private sector. If the goals of socialist development were to be achieved, it was necessary to change the mode of operation of enterprises. The mode of operation would include both the relations of the enterprise with the outside economy, and comprise such matters as criteria for investment and links with other enterprises, and internal organisation, such as questions of work ethics, participation, and control. It was recognised that unless clear steps were taken to formulate new guidelines and criteria, the former practices of the private enterprises would continue to characterise the new public enterprises.

The second issue was to define the place of public enterprise in the political

system. The issue was complicated in Tanzania because of its one party constitution. Under common law theory, the public enterprises would be largely autonomous in their routine operations, but subordinate to the government on broad matters of policy. The government in turn would be responsible to the legislature for the latter. There would be little question of political party involvement. In Tanzania, a one party constitution was adopted in 1965, under which all political activity is the monopoly of TANU. The Constitution was unclear as to the precise relationship between the government (and the legislature) on the one hand, and the party on the other, on a number of points, including the question of control over administrative bodies. In so far as the Constitution and attendant legislation did not provide explicitly to the contrary, as it did not, the existing legislative and common law rules would apply, whereby the responsibility of the enterprises would be to the government, and through it ultimately to the legislature. But as the socialist and political values of development were emphasised, it was clear that TANU would not give up claims to guide public enterprise. The relationship between the state and party institutions themselves were undergoing changes, and the status of public enterprise in this context was unclear, but in view of the growing importance of public enterprise was likely to arise.

The increasing role of public enterprise also required an effective co-ordination of the public sector, clarification of their relationship with the governmental authorities, and conformity to development planning. Many of the problems of the general economy were transferred to or at least reflected in the public enterprises. Public enterprises could not be left to carry on their business as they liked. The need for government direction, based on some general economic plan, was obvious. The need to regulate the public sector was accentuated by the behaviour of the corporations. While some of the nationalised firms and financial institutions coped successfully with the problems of nationalisation and management, several of the corporations went in for costly investments, unwise joint ventures, constructed expensive and grandiose headquarters, turned in poor economic performances, showed poor co-ordination of the various enterprises under their control, and appeared to be largely unaffected by the governmental planning and policy directives.²¹

Most of these issues related ultimately to the organisation and structure of public enterprise. The Five-Year Plan published in 1969 stated that as a result of the Arusha Declaration the main responsibility for industrialisation lay with the public sector, and the "creation of an organisational structure of sufficient capacity to carry out this task to the full is a central purpose of the Second Plan".²² President Nyerere noted in a circular in 1969 the proliferation of state corporations, whose "numbers and structure. . . is not the result of any well thought comprehensive plan."²³ The result was overlapping jurisdictions, complexity of structure, unclear lines of responsibility, and gaps in some important sectors of the economy. Structural re-organisation was needed in order to promote the more aggressive and far reaching aims of public enterprise. It would be important to retain a measure of flexibility and the ability to respond to changing circumstances.

The issues varied widely in their nature and significance, and it was therefore unlikely that the same approach would apply in all cases. In a somewhat simple form, one may state four possible approaches: the "rule oriented" approach (i.e., the use of general rules as set out in legislation, and their application by courts and other tribunals constituted to resolve controversies), the "discretionary" approach (i.e., administrative directions, regulations, and re-organisations by means of authorised powers of the administration); extra-legal (meaning the use of procedures and powers not sanctioned under the law, e.g., directives by the executive on a matter it has no legal powers to make); and political (persuasion, ideology, and use of party political institutions). This is admittedly a crude categorisation; one and two overlap, and the last category is vague, and may not be easy to distinguish from the third. Furthermore, in relation to any particular problem, elements of various approaches are likely to be present. Crude as the categorisation is, its use is justified on the basis that it may enable us to learn something about the distinctiveness of law, and its techniques, and so gain some insight into the role of law and the legal system in the administration of the economy.

The Structure of the enterprises

Sine many of the problems would seem to hang on the organisation and structure of the enterprises, we first turn to that. We shall see that there is often no particular logic which explains the choice of the form. In this regard, one can advance two alternative hypotheses. One is that the heterogeneity and the apparent confusion of legal forms is due to either a lack of clear policy of the role of public enterprise or that the roles envisaged for it vary widely from one enterprise to another. The other alternative is that the form does not matter, in terms of the organisation and operation of an enterprise, and so little thought is paid to it.

The first intrusions of the state into the commercial and industrial sectors were not inspired by any firm policy on the use of government investments. These were largely a device to help the private sector promote certain desirable industries, and were in the nature of subsidisation of the private sector. The form of organisation for the private sector, the limited company, was accordingly used. At first such investments were entered in the books of the company concerned in the name of the government, but as doubts arose if the government could be a shareholder, legislation was passed in 1959 to establish the office of the Treasury Registrar as a corporation sole, with perpetual succession and with all the powers of ownership of the stock.²⁴ The stock was held in trust for the government, and the powers are exercised at the direction of the Minister for Finance. Although the legislation vested the usual powers of shareholders in the Registrar, for a long time management appears to have been left to the companies in which the shares were held. Even now, though the Treasury plays a more active role in the decisions made by the companies in which the government has shares, it seldom does so under this legislation. In the agricultural sector, the government departments played an important role in the beginning. The Veterinary Department, for

example, ran ranching operations for a number of years. At the same time, one of the earliest corporations, the Tanganyika Agricultural Corporation (TAC), was established in this area, although it is likely that this organisational form, separate from the Tanganyika Government, was chosen since the assets that it was to take over belonged to the British Government. It is significant that while the principal activity of the TAC was the management of ranches, not all the public sector ranches were transferred to it, as some continued to be managed departmentally.

Since independence, the situation has continued to be confused. If there is one clear bias, it is against the departmental form. While managerial or productive functions might be assigned to departments (of which the outstanding example is the Registrar of Buildings, in the Ministry of Lands, and established under the Acquisition of Buildings Act, 1971 although proposals to convert the Registrar into a corporation have been made), the conventional theory that departments lack separate budgetary mechanisms, flexibility, etc., has been persuasive. (It is, however, possible under the Exchequer and Audit Ordinance, cap. 439, to set up funds which are separate from the Consolidated Fund, and which retain their integrity and autonomy from one year to another, sec. 17.) It has been assumed that the departmental form is inappropriate, and so the choice has been seen to lie between the company and the public or statutory corporation. While the rationale for a form distinct from the government itself has often been presented²⁵ there has been little discussion of whether the corporate or the company form is more appropriate. The major industrial, agricultural and tourist concerns are state corporations, while the major insurance concern is a company, as is the electricity authority. In part the reason is an accident of history. The electricity enterprise was at first a private sector company which was bought by the government, while the insurance company was a company sponsored by the government to compete with insurance companies in the private sector, before the nationalisation of the insurance business.

The feature that the state corporation and company forms share is that they are not part of the government; they enjoy distinct legal personalities, have their separate finances, and are not ordinarily subject to the law which governs the administration. They are thus free from bureaucratic procedure and various limitations on governmental institutions and are accordingly able to operate in a more businesslike manner. They are free to recruit their own staff and attract them by giving salaries in excess of the scales binding the civil service proper. The difference between them is that the company is governed by what is essentially a regime of private law, while the corporation is subject to some of the rules of administrative bodies. The company is subject to an extensive body of written and unwritten laws which regulate in considerable detail the establishment, management and dissolution of the company. These laws derive from the English law, and are geared primarily to companies in a free enterprise economy. The corporation has much fewer rules on these matters, and fewer rules on the subject have travelled from England as part of the reception. (But see, *Patel v. Commissioner of Income Tax* [1961] EA 698, where common law principles on the liability of governmental corporations were purported to be applied.) Such English

rules as apply do so through Tanzania legislation.

The form of the public corporation in Tanzania is modelled closely on the British pattern, as established for the post-World War II nationalisations. It would appear that both the form and the principles of the British institution were accepted. The principles derive from the nature of the British political system, and are determined in large part by the fact that Britain is a free enterprise economy, in which the role of public enterprise is controversial. Thus one important principle is that the extension of state enterprise cannot be finally determined by the executive. It is a political matter which requires the approval of the legislature, and indeed public corporations can generally only be set up by an Act of Parliament. Although the principle of state enterprise is and has generally been above controversy in Tanzania, the principle of parliamentary sanction for the extension of state enterprise was operative until 1969. The extension of state economic power in this way was acceptable in Britain only subject to certain institutional arrangements for its organisation. These arrangements are also sanctioned by Parliament, and it is not possible for the executive to alter them on its own. Thus any basic changes in the functions, organisation or institutions of a public corporation are, if not difficult, at least cumbersome to achieve. The institutional arrangements are designed to ensure that there is no day to day political interference in the operations of the enterprises. Thus the enterprise enjoys considerable operational and financial autonomy. It is run by a Board of Directors, who, subject to directives of a general nature, are responsible for the management of the enterprise. The enterprise is free to recruit its own employees, who are not public servants. The enterprise can hold property in its own name, and can sue and be sued for its actions. Many of these assumptions are irrelevant in Tanzania because of its political system—a one-party state with self-professed policies of socialism, and although Tanzania has now, by virtue of the Public Corporations Act, 1969 considerable flexibility in re-organising the public sector, the form and the rules that derive from the British theory still apply as far as the law is concerned.

Another development of interest is the Corporations Sole which can be established under a 1974 legislation (Corporations Sole (Establishment) Act), under which the President can designate any office in a public department as a corporation sole, with the usual characteristics of a corporation—perpetual succession and the right to sue or be sued. The corporation may be authorised to carry on a commercial or industrial enterprise, and has its own separate finances. Many of the rules of financial control and other mechanisms for government control (e.g., general and specific ministerial directives) apply to a corporation sole, but the interesting point about it is that it is a device to use the department for managing enterprises without the usual disadvantages of the departmental form. There is no board of directors and management is vested in the public officer (designated as corporation sole) who in turn is responsible to his minister. As we argue later, the model of this legislation reflects more accurately the operational realities even of those corporations with different structural arrangements, which derive from the 1969 Act.

While the pattern as to the forms chosen for public enterprise is unclear (some companies are directly responsible to a ministry, as Mwanachi

Engineering and Contracting Co. Ltd. (Mecco), to the Treasury, some to a corporation, and so only indirectly to a ministry), it may be said that a trend has emerged, as to the structural and institutional form of public enterprise. A number of public corporations have been set up with a basic responsibility for a section of the economy. The earlier "omnibus" corporation covering a variety of sectors has been replaced by more specialised corporations, covering a single sector, or even a sub-sector. The corporations are as a rule not directly engaged in productive or business activities. Their function is to ensure the development of their sector of the economy, but as set out in the Second Five-Year Plan, their basic responsibility is for the implementation, rather than the identification or initiation of projects. The responsibility for planning and feasibility studies lies with the sectoral ministry and the ministry for planning and the final decision to start a project normally rests with the Economic Committee of the Cabinet. The legislation for the establishment and re-organisation of the corporation as a result of the Second Five-Year Plan, does not, however, make such a division clear. Thus the instrument setting up the National Agricultural and Food Corporation (NAFCO) specifies among its functions "to promote agricultural development and the production of food",²⁶ while that setting up the National Development Corporation (NDC) specifies as one of its functions "to promote the development of manufacturing, processing and mining industries".²⁷ While the sectoral minister has the powers to give directions of a general or specific character to the Corporation, (sec. 10 of the Orders), there is no legal provision which requires the corporation to seek the approval of the government before it can make an investment or enter into a transaction. In law the corporation has full legal capacity to enter into contracts with any other person or institution which it thinks would facilitate the performance of its functions. It has its own board, including representatives of the government, which makes policy decisions.

In practice the corporations have until recently been quite autonomous in their decisions about investments, and indeed their active investment activities, unrelated to clear governmental guidelines or policies, precipitated major foreign exchange and liquidity crises.²⁸ On the other hand there are instances where the government has decided upon a project which a corporation has to carry out, although the corporation has declared itself opposed to the project.²⁹ At other times the government has asked a corporation to establish a project and has either chosen a foreign company to collaborate with or left that choice to the corporation.³⁰ The re-organisation of the corporations has meant that an enterprise has been transferred from one corporation to another, and when an enterprise is nationalised, it is vested in a corporation (the character and importance of the NDC changed as a result of the firms nationalised in 1967 being vested in it—arrangements over which the corporations themselves have little control). Who has taken the initiative or made the decision depended on various factors: the clarity of government policy, the effectiveness of the planning process, the relative dispersal of expertise between the corporation and the government, the personality of the manager of the corporation.³¹ It is clear, however, that over the years the autonomy of the corporations to launch new projects has been

severely curtailed, and it is most improbable that a new project would now be started if the initiative did not come from the parent ministry and was not approved by the Economic Committee of the Cabinet. In that sense the legislation gives little idea of the decision-making structure and procedure.

Once the decision about a new investment has been made, it is turned over to the corporation for implementation and operations. The corporation in turn sets up a company under the Companies Ordinance to establish the enterprise responsible for the project. These companies are either wholly owned by the corporation (subsidiary), or partly owned in conjunction with private parties, generally a foreign company (associated). The incorporation of a company under the Companies Ordinance attaches to it the code of company law. The management and operations of the company are then subject to the terms of the Ordinance. The Ordinance, Cap. 12, is based on the English Companies Act of 1929 and was passed in Tanzania in 1932. Although a new Ordinance, Cap. 419, based on the 1948 English Act was passed, it has not been brought into force, and the older legislation continues to govern companies in Tanzania. The legislation is not comprehensive, as it is drawn up against the background of the common law precedents, which contain much of the law on some key matters dealing with companies. The Tanzania legislation therefore suffers from two serious disadvantages: it is grossly outdated and is effectively dependent on the development of case law in England. The Companies' Ordinance is not intelligible except in the context of a great deal of complex case law. So long as some of the basic concepts underlying the subject are embodied in the case law and liable to reinterpretation by courts, including foreign courts, the attempts to formulate an appropriate law for Tanzania will remain problematic.³² (This point is illustrative of the general problem of law reform in legal systems whose underlying basis is the common law, with its distinct philosophy and technique, when the aim of the reform is the re-orientation of basic values or institutions.)

The specific problems arising from the establishment and operation of government owned companies under the Ordinance will be discussed later. In some respects the Ordinance makes life harder for companies than the more recent English legislation; in others it makes it easier.³³ Whether the old or the new version suits the government as shareholder depends on a variety of factors: whether it is in partnership with another agency, and then whether it is majority or minority shareholder, whether the government wants to direct the companies through its representation on the board of directors or directly through administrative instructions. As a general rule, the Ordinance gives a greater autonomy to (or imposes fewer controls on) a company and its directors than the current English law. It is not possible to say *a priori* which is better from the point of the government as a shareholder, as much depends on the mode of control the government chooses, its expertise and knowledge *vis-a-vis* the foreign partner, the presence and strength of controlling political agencies to whom the government is accountable (the autonomy which restricts the accountability of the company being preferred if there are agencies to whom the government might otherwise be accountable).

We now draw the implications of the corporation and company form for our study. Both institutions were provided under legislation with considerable autonomy. They had their own decision-making bodies, and they had ample legal capacity to enter into transactions with other private or public institutions and to deal with their property as they wished; in other words, by using the common law institutions of contract and property, they could open to themselves a wide range of policies and activities. Their capacity to act was enhanced by their legal powers to borrow money (although these powers, as we shall see, were not unrestricted). By the devise of their legal personality, they (and consequently their staff) escaped many of the restrictions on and control over government institutions. As far as the companies were concerned, they enjoyed in addition a certain distance from the government. The company was responsible immediately to the parent corporation through its members on the company's board of directors, and the control by the government was only indirect, mediated through its control over the corporation. Indeed it is likely that in the early period the novelty of the government owned company led to a relaxation in relation to them of the ordinary governmental instruments of control over the companies generally, like foreign exchange, import and export controls. How far would the government be able to achieve its purpose of regulating and directing the economy through such structures?

The second major implication was that there was not much flexibility in the organisation and re-organisation of the corporation and the company, an important desideratum if the optimum form for the public sector was to emerge through trial and error. The corporations were established by Acts of Parliament, and needed legislative authority for any changes in their structure or operating rules. In the so far as it was desired to transfer assets from one corporation to another, it was necessary to go through the whole legislative process. In the case of the companies, there were specific provisions in the Companies Ordinance for the restructuring of financial arrangements, alterations in the articles and memoranda of the companies, for the raising of loans as well as the declaring of dividends, winding up and bankruptcy. The Ordinance is particularly detailed on procedures, and assumes that in any matter, a number of parties, shareholders as well as creditors, would be interested. Apart from the complexity of these rules and procedures, the wholly owned company was a minor anomaly, since the company developed as a form for the association of several parties.

A number of steps were taken to mitigate the rigidity. As far as the corporations were concerned the most important measure was the promulgation in 1969 of the Public Corporations Act, which was passed to facilitate the re-organisation of the public sector consequent upon the adoption of the Second Five-Year Plan. The Act confers upon the President the authority to establish a public corporation, with the usual characteristics of such a corporation.³⁴ He has extensive powers to re-organise public corporations (defined as those set up under the Act) or other corporations, called "statutory corporations" which include all corporations established by or under any written law (except those of the East African Community) and initially excluded all companies but now includes fully owned subsidiaries of one or

more corporations.³⁵ He can dissolve such a corporation, transfer its assets to another, and transfer its employees to another corporation.³⁶ When the assets to be transferred include company, the President may modify in relation to such a company any of the provisions of the Companies Ordinance or any subsidiary legislation made thereunder or of the Articles of Association or instrument of the company, and any terms, which provide for any consequence to follow when there is a sole holder, are to be disregarded.³⁷

The Act thus introduced considerable flexibility in the re-organisation of the public sector, and in fact, if not in name, made inroads into the legal personality of the corporations. The freedom of a corporation to recruit its staff and to acquire or dispose of its property is curtailed. As far as the Presidential powers are concerned, the Act and its use have gone a long way to abolish some of the distinctions between the government and the state corporations, for traditionally the President has had general prerogative powers to re-organise the government departments in his discretion, and to transfer civil servants from one department to another. Although the Act is not absolutely clear whether the transfer of assets or personnel can take place even though no corporation is actually dissolved, it seems that there is a general power to move assets and persons. Again in practice though not in theory, this goes a long way towards producing the concept of a unified parastatal service. It should be noted that until an amendment in 1974, the President had no power to re-organise a company, other than transfer shares in it from one corporation to another. The identity of the company persisted. Now he has power to re-organise, dissolve, etc., a wholly owned subsidiary.³⁸

As far as the companies were concerned, it was necessary to provide for the continued existence of those companies which passed into the sole ownership of a corporation or the Treasury Registrar. For the formation of a private company, at least two members are required, and for a public company, at least seven.³⁹ If the number of members falls below that required for its formation, the company does not thereby cease to be a legal person, but the remaining members can be liable in their personal capacity for certain liabilities of the company incurred six months after the fall in numbers.⁴⁰ Thus after six months the limitation of liability which is secured through incorporation is lost. The various nationalisation Acts of 1967 took care of this problem by enacting that any provision of law or an agreement about the effect the reduction of the number of members to a single share holder shall be disregarded in the case of companies which passed into the sole ownership of the government.⁴¹ Such a provision was not necessary when the government acquired only part of the equity.⁴² In both cases there was the need to ensure appropriate changes in the boards of directors of the companies. Directors cannot normally be removed, except by a special resolution of 3/4ths of the members. In the case of the companies where all the shares were acquired, the nationalisation legislation provided for the abolition of the boards of directors, and to fill the gap, the Board of Directors of the parent corporation in which the government shares of the company were vested, the State Trading Company, and the National Agricultural Products Board, was to act as the board of the companies, notwithstanding any provisions of the Companies Ordinance or other legal instrument.⁴³ The Sisal Corporation

Act 1967 provided that notwithstanding any law or any charter or instrument of the company, the Board of the Corporation may "appoint as many persons to the Board of Directors of each scheduled firm as will give it through its appointees a simple majority in each Board".⁴⁴ The Board could appoint a manager to run a company with the approval of the relevant Minister.⁴⁵ In relation to those firms in which the government was authorised to acquire controlling shares (up to sixty per cent of the issued capital), the Minister of Finance was empowered to make regulations to modify the articles of association or other instrument or charter of an acquired company.⁴⁶ Under the other nationalisation acts, the relevant ministers were given powers to modify both the Companies Ordinance in relation to the subsidiary or associate companies and their articles of association and memorandum.⁴⁷ Subsequent legislation provided the relevant ministers with powers to transfer the assets as well as the employees of the Corporations to an associate or subsidiary company.⁴⁸

While these provisions rendered it easier to use the company form for public enterprises, there remained a number of difficulties especially in regard to the re-organisation of companies. Many of these complexities were sought to be removed by amendments to the Companies Ordinance in 1969, which did away with the necessity of *ad hoc* provisions as in the 1967 nationalisation laws, as well as simplified various provisions of the Ordinance in relation to wholly public sector owned companies.⁴⁹ These amendments come close to setting up an alternative code for public sector companies, that is companies wholly owned by a public corporation or a wholly owned subsidiary of such a company. It is now provided that a corporation or a subsidiary can acquire all the shares in a company, thus dispensing with the need for a second shareholder, and that any consequence to follow the reduction of numbers below a certain minimum would be of no effect in relation to such a company.⁵⁰ The minister for legal affairs is given the authority to dissolve a subsidiary company by an order in the Gazette.⁵¹ Such an order avoids the lengthy proceedings otherwise necessary for winding up a company. The rights and liabilities of the dissolved company pass either to the corporation or to a subsidiary of the corporation, as may be specified by the minister, and may be enforceable by and against the transferee. The minister is authorised to transfer an employee of the dissolved company to the corporation or to a subsidiary of it, and when a person is so transferred, his terms of service with the employer are to be no less favourable than previously, and his pension rights, etc., are preserved. (As the legislation stands, the minister is not obliged to find new employment for all the employees of the dissolved company. Those transferred to the corporation or a subsidiary have presumably no action for breach of contract, but what about those who are not transferred? Could it be argued that since the employer has ceased to exist, the contract has come to an end? This defence is probably not available since all contractual liabilities of the dissolved company pass on to its successor.)⁵² The minister is also vested with the general power to disapply any provision of the Ordinance to a subsidiary company.⁵³ A further amendment in 1971 empowered the minister to amend the 1st Schedule of the Ordinance so as to prescribe the memorandum and articles of association of a

subsidiary of a corporation.⁵⁴

The company form is thus freed from many of the checks and constraints of the Ordinance, although it does not provide for the same degree of flexibility as the Public Corporations Act does *vis-a-vis* public corporations. However, as we have seen, an amendment to the latter Act in 1974 brings wholly owned subsidiaries within it, and so the extensive presidential powers thereunder are now available in relation to such companies.

The statutory amendments that have been discussed so far do not apply to "associated" companies, that is, those companies in which the government or a parastatal has only part of the equity. These are still subject to the general provisions of the Ordinance. In practice a large number of government companies fall into this category. The re-organisation of such companies would therefore normally require the consent of the private party shareholders. In any event the affairs of such companies are often the subject of management contracts (discussed later), which complicate their re-organisation. Legislation has, however, been enacted to give the government greater control over companies generally. In 1969 an amendment to the Ordinance empowered the Minister for legal affairs to require *any* registered company to be wound up, if he considered it in the public interest to do so.⁵⁵ Another provision enabled him to order any company registered outside the country and carrying on business within the country to cease operations in the country.⁵⁶ These two provisions, the former of which represents a massive assault on the whole scheme of the Ordinance, were abolished the following year. Instead, the government acquired the power to refuse the registration of new companies, by giving the registrar of companies the right to refuse to register, at his discretion and without giving reasons, the articles of association and the memorandum of a proposed company.⁵⁷ Companies incorporated outside the country cannot establish a place of business within the country unless they have first applied for and obtained the approval of the registrar which he can likewise refuse in his absolute discretion and need give no reasons. A bill to amend the Companies Ordinance published in 1975 propose the restoration of the repealed provisions. It seeks to replace the provision about the Registrar's refusal to register the articles of association. It is now proposed that the "registrar may, in his absolute discretion, and shall, if so directed by the Minister, refuse to register the memorandum and the articles delivered to him". He need give no reason for his refusal. The same bill propose to give to the President the power to order the winding up of any registered company if he considers it in the public interest to do so. He will also be able to order a company incorporated abroad to cease to carry on business in the country; severe penalties are proposed for the violation of this order.⁵⁸ Thus while the law facilitates the use of the company form for the state participation in the economy, it narrows it for the private sector.

We conclude this section by making some general comments. Tanzania has continued to use the public corporation and company forms, but has undermined the original bases of the forms. Some indication has been given of the inroads into the autonomy of these institutions, and subsequent sections will show other ways in which the autonomy has been eroded. It could be argued that the nature and the problems of the emerging economic

order could not be accommodated within the old forms, and they were ripped apart. A judgement on this point has better await the discussion of the more specific problems arising from the management of the economy through the public sector institutions. What we can note here is the very decisive shift that has accrued in the power over the public sector issues to the civil service bureaucracy, although the rationale of the forms was to vest many of these powers in the public sector bureaucracy. The civil service bureaucracy has also to some extent displaced judicial institutions; winding up of subsidiary companies becomes a mere administrative matter outside any supervision of the courts. While the law has done nothing directly to the concepts and rules of property and contract, given the key economic role of the parastatals and given the wide powers that the government has acquired over the disposal of their resources, there can now be a sharp distinction between the ownership of property and the modes of its disposal, while the notion of contract may also have undergone a qualitative change, since as a result of administrative measures, a contracting party is liable to find itself in a relationship, in quite altered circumstances, with new institutions, while the concept of employment itself takes on a different significance. We will need to look later again at the impact on some traditional legal concepts of the developments in the public sector and its organisation.

Finally, we should notice that most of the changes that we have discussed in this section have been achieved through careful amendments of the law, and therefore have the sanction of the law. The first set of changes effected private, often foreign, interests, when there were both domestic and international obligations on the part of the government. It is therefore not surprising that a cloak of legality was considered important. The corporations and companies continue to deal with foreign institutions, either as investors, equity partners, lenders and donors, and this fact no doubt counsels attention to legal proprieties. The law on companies is comprehensive, and any adjustments or dealing with, unless following rather complex procedures, ran the risk of being unlawful. Again, some of the rules of the Ordinance were either in logic or practice inapplicable to the wholly owned government company, and had to be changed if a long-term role for that institution was to be sustained. While attention has been paid to proprieties of legal change, it is equally important to note that the thrust of these changes has been to give increasing discretionary powers to government administrators to organise and re-organise the public sector. Action which could previously be done only through the application of general rules and by following prescribed criteria and procedure, e.g., legislative change, amendments of the articles or memoranda, can now be accomplished through simple administrative measures, as a rule without any procedural requirements and generally unsupervised by other institutions. The law has been used to widen the area of administration.

Values, norms and the operating principles

Given Tanzania's self-professed policies of socialist development it was recognised that the nationalisation of the means of production and the establishment of state enterprises were not in themselves a sufficient, though they may be a necessary, condition. New modes of the operation of the enterprises, new criteria for investment and dividends, and a more meaningful role for the workers had to be devised. The task was particularly difficult. Until then, despite extensive state intervention in the economy, the economy was essentially organised by the private sector, and so the norms of private enterprise had become established in the commercial and industrial sectors. As in the capitalist countries, it would have been quite natural for the public enterprises to conform to the dominant pattern—that of private enterprise. Since the government was initially unable to run the enterprises it had acquired or established for the lack of the necessary domestic expertise, it had to enter into contracts for the management of these enterprises with the former owners or other private sector companies, local or overseas and under the circumstances it was probable that the norms of the private sector would govern the public enterprises. This tendency would be re-inforced by Tanzania's membership in the East African Community, under which a common market in manufactured goods was established among Kenya, Tanzania and Uganda. The Treaty was signed in 1967 and there was a strong emphasis on free competition, and forms of state intervention which discriminated in favour of domestic producers were prohibited. The general assumption of the Treaty was that the economy of each state would essentially be private enterprise economy.⁵⁹ Two provisions in particular tied the hands of the government: one channel marketing was prohibited, and it was not possible to discriminate through fiscal or similar devices against products of the other states.⁶⁰ Various other instruments of economic policy, like excise and import rates, could not be deployed by Tanzania unilaterally. The Treaty thus not only assumed that the economies of the states would be market economies, but also restricted the action that the government could take to regulate the economy. Another relevant factor was the forms of organisation employed for public enterprises: the corporation and the company, both derived from the common law and saddled with a great deal of legal baggage purporting to uphold the principles and values of capitalism.

If Tanzania had been unencumbered by these factors—membership of the East African Community, ambivalence towards the private sector, the need for management contracts, the organisational forms—it may have been easier to formulate new principles. Even then, two important ingredients were missing: a coherent political philosophy of national goals and development, and an efficient planning process. Considerable help was available from the Arusha Declaration which purported to lay down the national philosophy, but it was weak on detail and did not obviate the necessity of elaborating and operationalising its broad principles. The planning machinery was rudimentary, having been called into existence to regulate essentially a private based economy. For a variety of reasons, Tanzania was unlikely to engage in the tight central planning of the kind used by East European states

in their early days—it lacked the necessary statistics, an adequate communication system, a sufficiently monetarised economy, the centralisation of political power and processes. Tanzania was, at best, in a state of transition to a more centralised economy, and had in the meanwhile to operate public enterprise in a context where the general environment was that of the private enterprise, and many controls associated with the regulation of a private economy were likely to be continued, e.g., the Industrial Licensing Act, 1967. It was considered necessary to be cautious, the nationalised industries must continue to be profitable, and it was assumed that this result required the autonomy of decision-making within the public enterprises.⁶¹

In this section we look at various measures designed to define and implement new values and procedures, mainly through the medium of the law, the plan and ideology. The law has played relatively little role in defining the norms or even the procedures. As far as the norms are concerned, this is not entirely surprising, since it is not in the British tradition of drafting to formulate the broad political principles for the exercise of power granted under statute, although the need for such a formulation becomes important when new principles are intended to operate. The lack of concern with procedures is more surprising, since law is regarded as a particularly suitable mode to regulate procedure. When we turn to the 1967 nationalisation legislation, we find that there was some reference to the operating principles, but these were in a form that would either provide little real guidance or merely encourage the continuance of the previous principles.

In one of its early incarnations, the NDC was instructed simply to promote the economic development of the country, although a later amendment required it to “use its best endeavours to secure that its business as a whole is carried on at a new profit, taking one year with another.”⁶² In relation to the more specialised corporations, there is generally a reference to the traditions of the trade; for example, the NBC is instructed to “provide in accordance with the conditions appropriate in the normal and proper conduct of banking business, adequate and proper banking services and facilities throughout the United Republic; to conduct its business without discrimination except on such grounds as are appropriate in the normal and proper conduct of banking business.”⁶³ The STC was required to “conduct its business in an efficient manner and in accordance with the best mercantile traditions;” and “to conduct its business without discrimination except on such grounds as are appropriate in the normal and proper conduct of mercantile business.”⁶⁴ The NIC is referred to the “normal and proper conduct of the insurance business.”⁶⁵

The public enterprises were seen to be operating on general commercial principles, which in the context of the legislation must have meant capitalist commercial principles. While it is understandable that there should be a requirement of non-discrimination in the operations of the corporations (given the practices of discrimination against the Africans by banks and other commercial institutions in the past), it restricts the competence of the corporations to discriminate in favour of policies and institutions (like the co-operatives and government companies) that would promote socialism and self-reliance. It would not be possible to have differential lending and rate

policies for the private and public sectors, and it would not be possible to provide concessional treatment for the state and co-operative institutions which might be necessary if the new public sector was to compete successfully with the established private sector. In practice, both the Bank and the STC have followed policies and practices which have favoured the public and co-operative sectors.⁶⁶

The reference to general commercial practices had also the effect that the legal forms of security, like mortgages, continued to have an important impact on lending practices, and on investment by public corporations of their reserves. An economist, familiar with the operations of the public sector, wrote in 1973 that the "system of decision taking in Tanzania resembles very closely that of a capitalist economy and accordingly, orthodox western financial techniques, laws, and procedures are in widespread use."⁶⁷ It is not possible to say how far this state of affairs was the result of the manner in which the goals were formulated in the legislation. At the least it can be said that the formulation did not actively require the corporations to pay explicit attention to socialist goals and planning, and was often used to justify the continuation of the old practices of the nationalised industry.⁶⁸ Subsequent legislation on parastatals is no more specific on the goals of the enterprises, although some other economic legislation, like the Permanent Labour Tribunal Act and the Prices Act, do set out generalised criteria for decision-making.⁶⁹

The scheme of the legislation does not of course imply that the policies and practices of the public sector could or should not be oriented towards socialist development. The corporations are expected to carry out governmental policies. The legal mechanisms for ensuring this include the representation of the government on the boards of the corporations⁷⁰ and the powers of the President or minister to give directions to the corporation. The boards have played little role in policy formulation, and the practice has grown up whereby orders are issued directly to the manager of a corporation or enterprise.⁷¹ The area of detailed policy and decision-taking has moved to the government (as we shall see). The boards have in fact become largely redundant, although they may still have a role to play in the region between the macro-policy decisions of the government, and the micro-policy cum administrative decisions of the operating enterprises. It may seriously be questioned whether the boards as presently constituted and operating have any useful role. The notion of the corporation sole (discussed earlier) with direct responsibility to the ministry is an alternative, and is more accurately reflective of the practice, in terms of the relationship between the manager and the government than the public corporation, which assumes a board between the manager and the government.

The second mechanism for ensuring the implementation of governmental policy is the power to give directives. At first such directives could only be of a "general" character; subsequent legislation provided also for "specific" directives.⁷² In practice the directives are little used. This could be because there is a close consultation between the board and the government, obviating the need for directives. It could also be that the government has such a battery of controls over the investments and operations of the corporations that its

influence is brought to bear in other ways. As we shall see, the latter is the more probable explanation.

We may sum up this subsection by the following comments. Little effort has been made to use the law to spell out the objectives of the public enterprises. In the general literature on public enterprise, it is often stated that the lack of specificity in the legislation is a cause of the poor performance of the enterprises. While such a statement probably ascribes an exaggerated importance to the legislative formulation, it is the case that the lack of a clear formulation helps the management to carry on in the manner it wishes and lessens the possibility of holding it accountable for the implementation of broad national goals. The specification of goals, principles and criteria in legislation is not an easy task, especially as there is generally a multiplicity of goals; and if the goals are stated in too great a detail, there would be a danger of rigidity. Nevertheless some specification of goals beyond general terms, which are as at present, meaningless, would not only provide guidance for the management, but also enable criticism of the operations of the enterprises by reference to specific criteria. If the law does not at present specify goals, at least it sets out a broad framework within which governmental policy can be conveyed to the enterprises and which they are required to implement. The framework does not appear to be used, and in so far as governmental policy is communicated and enforced, one has to look outside the contours of the legislation on public corporations and their subsidiaries.

If the law was (and is) unclear on the operating principles, the Plan was scarcely less. The plans have not specified in any detail the programmes of the corporations; indeed in the First Five-Year Plan, it was observed that detailed planning of this kind was difficult for it was not possible to predict how the private sector, with whom the corporations were to collaborate, would plan its investments. Since that time of course there has been much firmer control of economic decisions by the government, but the plan still does not purport to lay down precise programmes. The relative failure of the First Five-Year Plan cautioned against rigid programmes, but the subsequent exercises in annual planning suggests that there is a revival of confidence in the ability to influence decisions through the Plan mechanism. Even the Second Five-Year Plan, formulated after the Arusha Declaration, had no detailed discussion of the role of public enterprise, beyond setting forth some broad investment criteria. The precise role, functions and investments of the enterprises were left to be determined during the early years of the plan period. Not only did the plan not provide guidance for socialist development but it has been alleged that it might have led towards *ad hoc* investments without any clear purpose, since the plan did contain a list of projects but which were not scrutinised to see if they fitted into a strategy of socialist development, and which at the same time involved expenditures of foreign and domestic reserves.⁷³

Traditionally the government had attempted to control or influence investments through interventions in the market mechanism at strategic points: industrial and commercial licensing, exchange control legislation, tariff policies and custom rebates, etc., which are the hall mark of control in most developing countries. It soon became obvious that such controls would

not do if they were intended to achieve the precise projects of the plan targets. The reliance on controls of this kind—which are controls on actors which cannot be otherwise influenced—became less imperative once more and more of the economic resources came under state ownership. These controls have not been abandoned, since the private sector is still not insignificant, but they had gradually been relaxed in application to the public sector; for example the NBC was not bound by the Banking Ordinance,⁷⁴ the STC was not subject to trade licensing,⁷⁵ the Industrial Investment Licensing Board,⁷⁶ which makes the decisions on applications to set up an industrial plant, had members from among the key officials of the state corporations. The relaxation of the “market controls” and the failure or inability to strengthen the planning process, posed the danger of economic “anarchy”, rapid but unbalanced development, since the corporations were active and keen to show projects, and so grasped at every investment offer, regardless of the criteria for investment. The response of the government, as we shall see, was not to use the planning process to articulate the goals and principles for the enterprises, but to devise new forms of *control* over the enterprises.

We turn now to the role of ideology in defining the norms and principles for public enterprises.⁷⁷ At the same time we shall examine the place of the public sector in the political system in Tanzania by looking at the relationship between it, the government and the Party. In some circumstances deficiencies or omissions in the provisions of the law might be made up by a body of ideological prescriptions. The criteria for the exercise of discretionary powers granted under the law might be found in ideology. The function of ideology as a regulator of conduct might become important if for some reasons like the lack of an adequate supply of legal skills, it is not possible to employ the legal system extensively. At the same time the importance and role of ideology might help one to explore the relationship between different institutions in a society. In Tanzania, for example, one can regard the Party as the initiator and custodian of ideology, the bureaucracy as the regulator of administration. The more important the ideology as setting goals and defining conduct, the more important is the Party.

Tanzania has elaborated its own ideology of socialism, *ujamaa*, through a number of Party and Presidential papers and documents. At a general level, there is a certain measure of coherence in it: notions of equality, human dignity, co-operation, participation, and democracy are strongly emphasised. The role of ideology is constantly stressed, and much of governmental and private action is criticised or justified on the basis of *ujamaa*. In that sense Tanzania is a highly ideological state, and it is clear that ideology has been consciously used as an instrument of legitimacy. It is equally clear, however, that the Tanzanian ideology has not been an effective guide when it comes to detailed planning and action. The deficiency may not be in the coherence in the ideology (although it is that too, for it overlooks numerous contradictions in the society), but in the lack of an adequate understanding of it so as to be able to operationalise it. The style of Tanzania politics has been to state broad and general principles, and then to rely on individuals or institutions to carry them into detailed operation, relying almost, as it were, on their intuition. A contradiction in Tanzania is that the Party has relied on bureaucrats to carry

the socialist transformation into effect. These bureaucrats have been socialised into a different set of values and perspectives from the ones they are being asked to implement. This points to at least one serious shortcoming of ideology as a basic instrument of governance.

The ideology says little about the public sector or the way it should be organised and function. The Arusha Declaration emphasised the importance of public enterprise as a means to bring about socialist development, but did not provide a blueprint for its operations. Subsequent TANU documents have done little to clarify the position. The most important of these, *Mwongozo*, the TANU Guidelines, 1971, states that the enterprises are to be guided by the political leadership of the Party. It calls for greater supervision of the enterprises by both the Party and the government, and urges the government to exercise greater control over the use of surpluses arising from their activities. As far as the modes of operation are concerned, the Guidelines emphasised the importance of the people, as opposed to experts, making decisions. The Guidelines are significant in that they underline the need for the Party to gain firmer control over the affairs of the enterprises. The legislative scheme concerning the public enterprises does not provide for any direct control or supervision by the Party over them, and for a long time after the Arusha Declaration the Party did not concern itself with the affairs of the enterprises. But as the affairs of the public enterprises came under increasing criticism, and as the Party attempted to redefine its own relationship to the government, it began to take an interest in the public sector. Under the 1965 Constitution which established a one-party state, the role of the Party and the government was not very clearly defined, or at least there arose some doubts about that relationship, particularly as regards the superiority between them. The most plausible interpretation is that the Constitution assumed rather than stated the supremacy of the Party. The Party was to determine broad policy, while the government was to be responsible for carrying it out, and for the general administration of the country. The Party's control over administrative institutions (and the public sector of the economy) was to be indirect—through its power to direct governmental policy. From 1970 the Party became more directly involved in detailed administrative matters—in rural development as well as the public sector of the economy. The National Executive Committee (NEC) of TANU began to call the managers of the public corporations to explain their policies and answer the criticism levelled against them. The NEC has also attempted to formulate policies for public enterprises. It has thus taken a direct, if somewhat sporadic, control over the public sector, and not only through the intermediary of the government. Meanwhile, as we shall see, the government's own control over public enterprises has increased. The relationship between the Party, the government and the public sector is therefore far from clear. A constitutional amendment in 1975 asserted the supremacy of the Party, but left unresolved the question of its role as a direct supervisor of administrative and economic institutions.⁷⁸

The clarification of ideology and the attempts to hammer it home have been bolstered occasionally by direct and sharp interventions by the Party or the government. Two of the most publicised cases are as follows. In 1969 the

NBC, through a subsidiary, Karadha, set up to provide hire purchase finance for vehicles, announced a scheme to provide finance for the purchases of private vehicles by Party and government leaders, and senior civil servants. The NEC reacted strongly, criticised the decision as contrary to the Tanzania ethic of frugality, egalitarianism, and the need to conserve foreign exchange, and instructed the government to issue directives for the scrapping of the scheme. The second occasion, in June 1972, concerned a decision by the Board of Directors of the same bank to award bonuses to its officers and employees, of an amount equal to 10 per cent of their annual salaries. There was considerable criticism in the papers when the news came out, as being contrary to the national ethic. There was evidence that other corporations and their subsidiaries also had a practice of bonuses, and indeed the workers of some other institutions had already demanded them. Under the law, the decision to award bonuses lay with the Directors, and there was no requirement that they seek any one else's approval. Again the NEC intervened: it denounced the bonus decision as contrary to the principles of fair distribution and as pandering to base motives. The government was asked to take appropriate action, which was done by an order from the Treasury to the top employees of the corporation to return the bonus, the highest paid officials immediately, the rest within 6 months.

The hire-purchase incident indicated what could not be done by public enterprises, but did not lead to the elaboration of any general principles. The bonus incident, on the other hand, led to new standards and guidelines. TANU set up a commission to inquire into the laws on bonuses or *ex gratia* payment to parastatal workers, to look into the profit and loss economically resulting from such payments, to decide if they were in line with the Arusha Declaration and to put forward recommendations on whether or not to continue with the practice, or if they should continue, the machinery for doing so.⁷⁹ The commission, whose proposals were accepted by the NEC, recommended that bonus be allowed.⁸⁰ The President issued a directive which is the basis for the granting of bonuses. Under it the Permanent Labour Tribunal, set up by an act in 1967, determines whether the bonus should be allowed. Each enterprise has to produce an annual production target for approval by the Tribunal. Bonuses can only be paid if the production target is exceeded and the increase is attributable to workers' increased productivity. Bonus payments would be paid to all the workers in equal proportions, regardless of their salary differentials. No new legislation was deemed necessary to give effect to the directive.

In concluding this section, we look at the attempt to change the structure of decision-making in public enterprises, as an example of the effort to re-define the modes of operation of the public sector, and which also relates to the debates on incentives and management procedures around the role of the workers. In 1970 President Nyerere issued a circular on worker participation, in which he argued for a greater role of workers in decisions about production, sales and the general organisation of the enterprise in order to enhance industrial democracy.⁸¹ Workers tended to be looked upon as "factors of production" instead of as the major part of the enterprise. "When we first began to own industrial and agricultural enterprises as a community,

and especially when we expanded public ownership so rapidly after the Arusha Declaration, we inevitably—and rightly—concentrated on the sheer mechanics of setting up, or taking over, economic concerns.” It was now necessary, however, to move towards greater worker participation. This would not only enhance the goals of Tanzanian socialism, but also act as a form of incentive resulting in higher productivity.

The Circular required all parastatal organisations to establish two new institutions, the Workers’ Council and the Executive Committee, before the end of 1970. There existed a workers’ committee under a 1964 legislation in every business in which ten or more Union members are employed.⁸² The committee’s functions relate to disciplinary matters, periodic consultation with the employers on promoting efficiency and productivity, and to investigate and report to the appropriate authorities on infringements of wage orders, arbitration awards, and collective agreements. In practice the workers committees have tended to be concerned largely, if not exclusively, with disciplinary matters. They have also been seen as agents of the single trade union, NUTA, which has often been accused of not protecting the interests of the workers. Proposals were made in 1975 in the Labour Laws (Miscellaneous Amendment) Bill to require all categories with more than 10 employees, members of the NUTA, to establish a field branch of NUTA which is to replace the workers’ committee and to acquire all its powers and functions. In addition to the statutory workers committees, many enterprises have TANU branches; their functions are not clearly specified, and the mode of their operation and their impact vary from one enterprise to another. These branches are regarded as political bodies without a legislative mandate. In practice they have not been a mechanism of worker participation in the decision-making in the enterprises.⁸³

The institutions to be established under the Circular were an important advance on the previous committees because they were perceived as involving the workers in decision-making. They were to be established in all parastatal organisations with more than 10 employees. The Workers’ Council consists of both elected and ex-officio members; the former constituted by the members of the workers committee and the elected members to the Council (so that this category does not exceed three-fourths of the total number of members), the latter by the manager, heads of departments or sections, and the chairman of the TANU branch. The functions of the Council are wide-ranging: to advise on the requirements of the government’s wages and incomes policy, marketing aspects of the commodity produced, quality and quantity of production, planning and productivity, including organisational and educational aspects. It is entitled to receive and discuss the balance sheet of the enterprise. It is to meet at least twice a year, but may hold additional meetings. While its functions are wide, it is merely advisory to the Board of Directors, in whom reside the legal powers to make decisions. Its effectiveness would be impaired by the general provision that it is required to meet only twice a year (although additional meetings are possible) as well as by the provision that its secretary is to be appointed by the management.

The Executive Committee consists of the manager as chairman, heads of sections or departments, and workers’ representatives elected from and by the

Council (so that their membership does not exceed one third of the total membership). Its major functions relate to the scrutiny of financial and production estimates prepared by the management; labour programmes prepared by the management and NUTA; finance, production, quality, export and marketing programmes in consultation with the relevant bodies, and to advise on the execution of general policy as proposed by the Workers' Council and approved by the Board of Directors, and on the efficient running of the day-to-day work of the industry. It is, however, merely advisory to the manager, in whom executive powers are vested.

The steps in the Circular represent therefore a rather cautious approach to the question of worker participation. The basic structure of and powers in relation to decision-making remain unaltered. The new advisory bodies have a significant managerial representation, and given the colonial legacy of authoritarianism (and its acceptance by the people), it is probable that the professional staff would dominate their deliberations.

There are few studies of the manner in which these bodies have functioned, and whether they have in any significant manner led to worker participation in decision-making.⁸⁴ It is clear that the managements were considerably upset by the provisions of the Circular, and tended in any case to view them merely as means towards better industrial relations. The Councils and Committees have been set up in most public enterprises, but their performance is uneven. The Committee, which has a more precise function (and is smaller) than the Council, has been more successful than the latter. Some factors which have hindered better results are the multiplicity of institutions which now operate at the enterprise level, dealing with various aspects of the workers and the management of the enterprise, at best with ill-defined jurisdiction, and often overlapping; the managers have been hostile to a greater role of the workers; there have been restrictions on the dissemination of information necessary to arrive at a decision, and even where the information has been available to those on the committees, it is often in a form that is not easily understood by the workers. The powers of the new institutions are not executive, they are merely advisory and consultative. Under conditions where information is available in adequate quantity and in good time, where the political situation is favourable, and where there is good and meaningful contact by the representatives with their constituency, the power to be consulted with and to advise can be a source of real power. But in the Tanzania context of a tradition of authoritarian work habits, hierarchical structures of authority, the conduct of business in a foreign language, the ambivalence of both the political and bureaucratic leaders to the notion of worker participation, the right to be consulted and to advise has not been a source of any shift of power to the workers.

There was one provision in the Circular which was aimed at giving the workers some direct access to the decision-making institution—the Board of the company. The Circular had stated that the Board of Directors should have at least one of its members nominated by the NUTA. It was not stated whether such a member should be a worker within the enterprise, and presumably he need not be. In practice this provision has been difficult to implement. A large number of enterprises are joint ventures with a private investor, and the

composition of the board is often determined in agreement between the parent corporation and the other party. It is not then easy to nominate a new member on the board, and if a NUTA member were to be placed on the board, the corporation would have to remove one of its own nominees. A study found that in no instance of a joint venture government company had the provision been implemented.⁸⁵

It is worth examining the mode by which these changes to bring about worker participation were made. A Presidential Circular was issued addressed to no one in particular. The 1969 Public Corporation Act does enable the President to give directives to the corporations, although this power had in most cases been delegated to the relevant sectoral ministers. Moreover, in 1969 the President had no power to issue directives to a company, the power to do so being acquired by an amendment in 1974,⁸⁶ and in any event that power extends only to fully owned government companies ("subsidiaries") and not where the government is part owner ("associates"). At the time of the Circular, there was no legal definition of a parastatal, although the term was used and defined in an administrative order setting up a Standing Committee on Parastatals (SCOPO), discussed later. That definition included companies where the government had 50 per cent or more shares, "or other forms of governmental participation and effective influence in all the main aspects of management of the enterprise". If the Circular extended to all institutions covered by that unclear definition, then it is obvious that the President was acting in excess of his legal powers. It is significant that there was no questioning of the legal status of the Circular;⁸⁷ Presidential Circulars have become a more important method of regulating the affairs and management of the public sector than legislation. But in so far as the Circulars impose new standards, norms, institutions and procedures on an existing body of law, there may well result in confusion as to the operating rules and uncertainty as to procedures and enforcement mechanisms. Some instructions may only be capable of fulfilment through non-lawful means. In the case of non-compliance, there may be no sanction, but resort to harsh administrative measures, the legality of which would be, at best, questionable. All of these consequences seem to have followed the Circular; although its enforcement was entrusted to labour officers, the basis of their jurisdiction was not clear, nor was it clear what kind of sanctions they could bear to bring on the recalcitrant. The conflict between the rule of the confidentiality of information given to directors⁸⁸ and the aim to involve as many workers as possible in decision-making was not faced up to. If the strict letter of the law was to be observed, surely the aims of the Circular would have been frustrated. The Circular was addressed to no one in particular and it was unclear as to who was to take initiatives in its implementation. These defects do not, of course, necessarily show the superiority of working through legislative amendment as opposed to the Presidential Circular. The Circular could have been drafted with greater care and precision, and avoided the ambiguities discussed here. The Circular cannot, however, completely replace legislative action, so long as the existing body of law is regarded as a valid part of the legal system.

If little attention was paid to law in the promulgation and the enforcement

of the Circular, further developments in the area of worker participation showed the ambiguity of the official authorities to the law and its use. Inspired partly by the feeling that too little progress had been made on worker participation (and by other considerations), TANU issued strong Guidelines in 1971.⁸⁹ Among other things, the Guidelines called for new work methods and attitudes, and decision-making. "The truth is that we have not only inherited a colonial governmental structure but have also adopted colonial working habits and leadership methods. For example, we have inherited in the government, industries and other institutions the habit in which one man gives the orders and the rest just obey them. If you do not involve the people in work plans, the result is to make them feel a national institution is not theirs, and consequently workers adopt the habits of hired employees."⁹⁰ Coupled with another section which decried the arrogance, extravagance and the contemptuous attitude of the leaders and the managers,⁹¹ the Guidelines became for many workers the manifesto for a new industrial democracy, if not workers' control.⁹² The announcement of the Guidelines was followed by strikes both in the private and public sector, locking out of the management, and worker take-over of enterprises. The workers had various grievances: poor working conditions, arrogant bosses, unequal terms of remuneration, discriminatory practices. At first the government's reaction was to support the workers, and in at least one case of a public enterprise, Prime Minister Kawawa told the workers to make decisions about the sacking of the management and by-passed the established procedure for the settlement of industrial disputes. But the attitude of the government and the bureaucrats changed soon, and in a number of cases, the leaders of the workers were dismissed or charged with the violation of the law. The workers were accused of being lazy and indisciplined, and the government appears to have used the heavy hand of the law and the police force to bring such industrial action to an end. Attempts were made in 1975 to abolish the Workers' Committees, which have been among the most militant of the various enterprise institutions, so to replace them with NUTA branches established by NUTA itself, which has a poor record of trade union activity, and which appears to have lost the support of a large section of the workers. The role, extent and mode of worker participation thus remain ambiguous and stalemated.

We may now summarise this section. It is obvious that while it is realised that the former principles and methods of work and institutional organisation are not suited for a socialist organisation of the economy, there is little awareness of what is suitable. The legislation itself gives no indication of what the aims and operating methods of public enterprises are or should be. There has been no reliance on the law for the formulation and establishment of aims, principles and standards for the public sector. Administrative directives have scarcely been more helpful. There is, as we shall see, increasing control over the activities of the enterprises, but this control has yet to transcend the period of *ad hoc* instructions and periodic approvals to a stage of generalised norms. The few attempts that have been made towards definitions of new aims and methods have been through the medium of ideology or the political process. But the ideology is "pure" rather than "practical",⁹³ and few managers and bureaucrats show a real

understanding of the imperatives and implications of the national political philosophy.⁹⁴

That there are some constraints on the transition to new working methods is obvious. Much of the legal infrastructure is still based on the old laws, geared to a capitalistic mode of organisation. This is particularly important at the level where the actual operations of production take place—the company. While many of the features of that law—exclusion of workers from boards and other institutions for decision-making, the emphasis on the benefit to the company as the ultimate criteria of policy, the autonomy of the management—are not necessarily indispensable for a capitalist mode of production—indeed some West European laws go well beyond the present Tanzanian law in giving protection to and providing participation of workers in industry, the British common and statutory law (the basis of the Tanzania system) is particularly backward in this regard. If a genuine industrial democracy is to be achieved, an overhaul of the law is essential. The government's ambivalent attitude to law clearly does not help: it is ignored when inconvenient, as in the attempts to introduce the reforms outlined in the Presidential Circular, and enforced when it suits the government's interest, as in its use to bring the leaders of the industrial "unrest" to book.

Another constraint is the economic contradiction of the Tanzania situation. Committed to a socialist mode of production, it is operating capitalist-type institutions in essentially a pre-Arusha Declaration situation of dependence on external economic factors, when foreign exchange needs compel some adherence to if not intensification of previous patterns of production. The public enterprises play an important role in this process, and any departures from the conservative notions of "profit" are regarded as too risky.⁹⁵ The transition to a new system of economic organisation is obviously seen as a long term process, and the modalities to that transition are not yet clearly perceived. If new values are to be established, it will be necessary to engage in and allow freer debate than has been the case so far. The Presidential Circular on worker participation was not preceded by any debate;⁹⁶ the Circular itself was in the form of a directive. When the workers took initiatives in what they thought were ways to implement the relevant sections of the Guidelines, the government's and the Party's reaction was to suppress the initiatives, rather than use them as the basis of a debate on the form, implications and limitations of worker participation. As with law, so with ideology: the government seems only too anxious to use it as a one-way sword; it could surely afford to take a few more risks with law and ideology as double-edged instruments?

Control over public enterprises

The concept of control in the literature on public enterprise is wide but imprecise. At its widest, it means the enunciation of policy and the supervision of its implementation. Here we are not concerned with the enunciation of policy, but control over the activities of the enterprises. Even

so, control would cover many matters; only some of them are discussed here. We have already touched on some of the organisational aspects of control: the autonomy given by the law to corporations and companies, and the steady encroachment on that autonomy. But we have not elaborated on the various ways in which the government can intervene in the management of the enterprises. Before we do that, we look at the structure of hierarchy and authority in relation to an enterprise.

We have already seen that at first the NDC, then the major development corporation, had a wide responsibility cutting across all sectors of the economy, and that its board was reconstituted to include several senior ministers. The nature of its wide responsibilities as well as the composition of its board meant that it was difficult for any single government agency to exercise any meaningful control over it. Its wide sectoral responsibilities meant that no single ministry could claim control over it, while its board with the strong ministerial representatives ensured to ward off attempts at control of it. If the ministerial members were able effectively to determine the policy of the corporation, the problem of control would not have arisen, but this they were not able to do, for a variety of reasons, including the lack of adequate information.⁹⁷ Important steps were taken in 1969 to re-organise the structure of authority. The omnibus corporation was split into a number of specialised corporations, each with responsibility to one "parent" ministry.⁹⁸ Ministerial membership of the boards was discontinued, and the relevant minister was given the power to issue general as well as specific directives. What was not clearly established, however, was the control over and powers in relation to the corporations of the two general ministries of development planning and finance.

Also unclear was the control to be exercised by the ministries over the enterprises themselves—the operating companies. As the companies came under the Companies Ordinance, the ministry would have little direct control or powers of instructions. Such control would have to be exercised indirectly, by its control over the corporation. The corporation would in turn exercise control over the company through its representatives on the board of the company. In so far as it was a majority share-holder, it would have a decisive say in the board decisions. This chapter does not examine the control by the corporation over its companies, but three general points of law may be made here. First, that the companies' law does not permit a director to take instructions from some one else. He is required to exercise his own discretion, and it is unlawful for him to allow that discretion to be fettered by prior agreement on how it should be exercised.⁹⁹ In so far as a corporation seeks to control a company by holding special meetings of its director representatives in advance of the board meeting, or by giving them instructions on how to vote at the board meeting, it does so through a contravention of the law. Second, in so far as a corporation tries to co-ordinate the activities of its various companies and to rationalise their production methods and targets, by instructing its representatives to vote for particular forms of re-structuring and amalgamation of the companies, there is again a risk that the action may be unlawful. The interests of the particular company as such may conflict with these of the corporation. The directors of a company have to act

according to the interests of the company, and not some general wider interest.¹⁰⁰ Both these problems arise of course when the company is an associate, i.e., that the corporation shares equity with another party. The third problem relates to the nature of the agreement between the corporation and that other party. We shall discuss later some of the difficulties which have arisen in relation to these agreements, generally designated management contracts, but we note here that the agreements quite frequently set out the powers of management and vest them in the other party. Thus the recruitment to and dismissal from certain specified appointments in the company, the technology to be used, the marketing and price policies to be pursued, are the sole responsibility of that party, and the board cannot interfere in the discharge of that responsibility. The terms of the management contract can seriously impair the ability of the corporation to determine the policies of the company and to exercise control over its activities.

Fiscal control

It appears that despite the re-organisation of the public sector, the degree of governmental control over its activities was not significantly increased. The re-organisation was essentially an administrative re-organisation, and was not accompanied by an enunciation of new principles or strategies. The sectoral or parent ministries were not able to influence the investment and expenditure policies of their corporations, and in so far as there was any control at all, it was by the ministries of finance and planning.¹⁰¹ The performance of the public enterprises was unsatisfactory; loss rather than profit was the norm; there were bottlenecks in distribution of essential items; and the managements were accused of conspicuous and extravagant consumption. For both political and financial reasons, it became imperative for the government to exercise greater control over the operations of and expenditures by the enterprises.

The government has been able to acquire control over the enterprises through the regulation of finance. At first the public corporations had wide financial independence and powers. They were vested with an initial portfolio and provided with a grant. The corporations were free to raise their own loans, domestically and internationally, although they might require the consent of the minister of finance; they were free to enter into equity partnerships, and so obtain resources from elsewhere for investments; they were free to dispose of the surpluses of profits made by their associate and subsidiary companies. In the late sixties there were considerable sums of money available for investment (partly through domestic mobilisation and partly through foreign aid). There was little scrutiny over investment decisions. The answer to the problem of controls over investments came through non-legal factors. Partly the "reckless" investment and expenditure policies of the corporations, and partly the increasing shortage of foreign reserves, opened the way to control through the fiscal and budgetary process.¹⁰² Through the monopoly of its financial intermediaries, the

National Bank of Commerce and the National Insurance Corporation, the government was able to exert close control on the allocation of financial resources. Between them, the Bank of Tanzania and the Treasury were able to control the allocation of foreign reserves.

The shortage of money meant that the government was able to exercise significant control over the investments of the corporations. The corporations were not able to generate significant surpluses of their own, and so were heavily dependent on government grants and loans for their development and often also for their operational activities. In 1973, for example, the profits accounted for just over a quarter of the investments of public enterprises, and in previous years the proportion of profits as part of the total investments was even lower, as the following table shows.

Table IV. *Financing of investment of the public enterprise (Shs million)*

	1966	1967	1968	1969	1970	1971	1972	1973
Loans from government	4.7	55.0	46.2	33.7	77.6	85.4	97.0	139.8
Grants from government	8.1	18.8	52.2	32.2	144.9	170.0	157.7	250.5
Loans from abroad	6.3	24.2	126.2	24.6	23.7	254.5	236.5	158.9
Grants from abroad	7.8	0.7	0.8	14.4	16.9	—	1.4	5.0
Local borrowing	4.5	62.7	76.7	97.6	438.7	480.1	455.4	541.3
Profit retained	46.0	63.2	121.9	119.0	121.4	183.9	231.3	327.7
Depreciation provision	27.8	51.7	81.6	88.0	110.9	129.8	144.3	172.3
Other (including changes in cash balances, liabilities, etc.)	35.6	118.3	—33.4	98.4	204.5	13.3	—214.7	—407.3
Total	134.1	394.6	472.2	507.8	729.6	1217.8	1108.9	1188.2

Source: *Analysis of Accounts of Parastatals*, 1966–1973. Dar es Salaam, 1974.

In 1970 the government began a process of annual planning, which had been projected in the Second Five-Year Plan.¹⁰³ The annual plans attempt to make a detailed and careful assessment of the financial resources available to the government and to allocate it for different purposes. As the annual plans have become more sophisticated, they have included various financial plans and allocations. They have become the basis of the development budget. The plan allocates the investible surplus for the coming year to the parastatal sector for designated projects. There is in addition, a foreign exchange budget which allocates the foreign currencies available for the following year to the parastatals. These measures have resulted in tighter control over financial allocations. As the public sector has so far generated little surplus of its own, the budget has become a major source of policy and control.¹⁰⁴ As we shall see, various provisions have been enacted to ensure that the surplus from different public institutions goes into government revenues, enhancing the importance of the budget as a means of control over the public sector.

Before control through the special budgets could be really tight, it was necessary to close at least two "loopholes". It was necessary to control the borrowing policies of the corporations. The legislation in relation to most

corporations sets out their sources of finance—initial grants, special government subventions and loans, profits, and loans negotiated independently by the corporations. On the last, there are sometimes but not always, limitations, and generally, but not always, ministerial approval has to be sought before the loan can be negotiated.¹⁰⁵ (The loans could be, and were, raised in foreign capital markets.)¹⁰⁶ It was often necessary to get some kind of government underwriting for the loans, and the government therefore had the possibility of control there. Also, in cases where ministerial approval was required, that approval could be used to influence and control. Or the borrowing powers could be more closely regulated. In fact what has been done is to leave such provisions relatively undisturbed, but make their applications somewhat redundant through the establishment of new institutions. The Tanzania Investment Bank (TIB)¹⁰⁷ and the Rural Development Bank (RDB)¹⁰⁸ have been set up to negotiate all foreign loans on behalf of the public sector. Grants which may be given to the government by foreign agencies (which were previously channelled directly to the corporations) are now given to the TIB and the RDB to administer for the industrial and agricultural sectors respectively. (For a period of time, the government attempted to use the NBC for such long-term loan policy controls, although the NBC was geared essentially towards short term loans.) Through the powers of the Minister of Finance to give general directives to their boards, as well as his power to appoint a majority of the members (the other nominating bodies are the NCB and the NIC, who, along with the Government, are shareholders of TIB),¹⁰⁹ the Government is now in a position to control the loan policies, and thus the investment programmes of the corporations.

It was still necessary, however, to control the income from profits. If the corporations were supposed to be profit generating, and if some corporations had initially been vested with profitable enterprises, like the Diamond Mines, it was clear that they might still have considerable leeway. The surplus of some corporations could be ordered to be paid to the Consolidated Fund, but in relation to most corporations, there was no such provision, and indeed the early philosophy had been to make them financially independent by increasing profits and building up reserves—the charters of most big corporations actually have provisions for reserve funds. While ministerial directives could be used in some instances to require the surplus to be turned over to the government (although it is doubtful if such directives for transfer of funds to the Consolidated Fund could in fact be issued without explicit legislation on the subject), an additional difficulty was that in relation to some corporations, especially the NDC, the largest of them all, the surplus of the corporation itself might not amount to much. Its income came from the dividends from its shares in the subsidiary companies. The Companies Ordinance, under which these are incorporated, provides for the decision about dividends to be made by their directors, and while in the case of subsidiaries the corporation's board can direct the decision of the directors through its nominees, its control over associates may not be so easy. The internal rules of the company as set out in its memorandum and articles, might require the use of surplus in particular ways. It might in any case be

difficult for the government to supervise and monitor the implementation of such directives on the part of recalcitrant corporation or company boards. Indeed, it seems that the government's attempts to control the use of surpluses had failed, through the use of its other legal powers.

In 1972 the government began to tighten its control over the operations of the actual productive enterprises. In that year the Companies (Regulation of Dividends and Surpluses and Miscell. Provisions)¹¹⁰ Act was enacted, which gave wide powers to the Minister of Finance. The Act applies to institutions specified in the Schedule, and the minister has the power to "amend, add to, delete from, vary or replace the Schedule".¹¹¹ The specified institutions include both purely private sector companies as well as public enterprises, and constitute the more important economic enterprises in the country. The Act limits the dividends that such companies or any other company can pay to its shareholders; the limits are defined by reference to a percentage of the profits (80 per cent) or the average of the profits of the three previous years, or to the level of the assets of the company after the payment of the dividends (not less than 120 per cent of the par value of the paid up share capital).¹¹² The minister has powers to vary these limitations; he can approve a higher rate of dividends (after parliamentary approval),¹¹³ or he can reduce the level of dividends (in the case of a specified company).¹¹⁴ In addition the minister can require a specified company to declare dividends and specify the minimum rate if "in his opinion it is in the national interest or in the interests of the shareholders desirable to do so."¹¹⁵ Every specified company is required to submit to him, not later than thirty days before the commencement of each financial year, a cash flow budget setting out the estimated income, the sources of income, and the particulars of the estimated expenditure. The minister can require a specified company to invest a specified part of its estimated income in such government securities or other investment specified in the order of the minister.¹¹⁶ In order to ensure that the specified companies do not try to escape from these provisions, the Act forbids the dissolution or winding up of such companies without the written consent of the minister.¹¹⁷ The Act was strengthened two years later by an amendment which prohibits the reduction of the share capital of a specified company without the consent of the Treasury Registrar.¹¹⁸

In 1974 the control over public enterprises through the regulation of their finances was taken a step forward by requiring all of the specified companies which are also parastatals to submit additional information to the Treasury Registrar; apart from the cash flow, an enterprise has also to provide its projected production and investment levels for the following financial year.¹¹⁹ The proposed financial "and other operations" of the parastatal are subject to review by the Registrar in consultation with the sectoral and planning ministers. In his review the Registrar shall take into account the "(a) adequacy, feasibility and realism of the proposed financial and physical results; (b) the standards of the past and proposed financial management and budgetary control; and (c) the consistency or otherwise of the proposed operations with the national planning and policy objectives, with particular reference to fiscal, credit, surplus generation and output expansion objectives".¹²⁰ He has no specific powers beyond a review, the results of which

are to be sent to the manager of the enterprise, and to the ministries of planning and finance, in addition to the sectoral ministry. An Act of 1975, however, empowers the Minister of Finance, with the consent of the President, to direct *any* parastatal organisation to pay to the government as dividend, loan, contribution or otherwise such portion of its net profits or surplus as he specifies.¹²¹

These provisions have created a new financial system for not only the public enterprises, but also some major companies in the private sector. The legislation dealing with the regulation of dividends and the submission of cash flow information does not apply to the public corporations, except in a few cases.¹²² In so far as their income depends on dividends, the legislation can, however, have a significant effect on their finances. The borrowing powers of the older corporations are not amended in law, but in practice they are now bound by the new scheme, whereby they have little authority or opportunity to raise loans independently. Nevertheless, the legislation on the newer corporations is beginning to prescribe more accurately the legal position as regards borrowing and other financial matters. The Small Industries Development Corporation, set up in 1973, requires the consent of the minister for industries for borrowing, although the sources from which money may be borrowed are not specified.¹²³ The Corporation Sole (Est.) Act of 1974 does so specify, in addition to requiring ministerial consent.¹²⁴ A corporation sole can borrow only from the Government, the NBC, TIB or RDB, unless the regulations under the Act enable it to borrow from additional sources also. The newer corporations are also required to submit to the sectoral minister two months before their financial year the detailed budget of income and expenditure during the year. The budget is subject to ministerial approval, with amendments if the minister deems it necessary, and thereupon it becomes binding on the corporation. Only very limited deviation is allowed from the budget allocations.¹²⁵

The new provisions not only make a massive assault upon the financial autonomy of public enterprises, but also give the government very significant powers to direct the affairs of the productive units or enterprises, by-passing the parent corporation. The former system whereby the corporations had the basic responsibility for the conduct of the companies has been breached in important ways. If this trend continues, one may question the need for a corporation at all. Should not all enterprises be directly responsible to a ministry? Should not the logic of the corporation sole be extended to the entire productive public sector?

Control over the affairs of the enterprises became easier with the scarcity of financial resources. At first the administrative mechanism of the budget was used to assert and consolidate this control. When the limits of control through the national budget were reached, additional legislative powers were sought to control cash flows of the enterprises, and to influence the enterprise budgets. The private sector has not entirely escaped new mechanisms of control; that is scarcely surprising. The operating methods will increasingly be set up by the public sector, and the private sector will be required to conform to these norms. An additional point may be made: control has been devised largely through fiscal rather than production devices. This has meant

that the importance of the Treasury *vis-à-vis* other ministries in the influence over the public sector has enhanced (and therefore perhaps it was logical to merge the ministries of finance and planning in late 1975). The increasing financial control has not been accompanied by the elaboration of new norms. The increased powers may therefore be difficult to administer, requiring a vast array of officials in the government bureaucracy, with the danger of a great number of *ad hoc*, inconsistent decisions. The dominance of the Treasury may also tend towards an excessive concern with fiscal devices, at the expense of over-all production targets, and the co-ordination of the production programmes of different enterprises.

Control over management contracts

Another area where control was indicated was the relationship of the corporations with its private enterprise partners, who were generally foreigners. Most corporations were either expressly authorised, or were entitled as a consequence of their general legal capacity, to enter into partnership agreements with private parties, for the purposes of setting up joint ventures. In this way, a corporation could, using its own limited resources, establish a large number of projects, by taking only a small part of the equity. These projects might not make the most economic sense from the country's point of view, and there was the danger of both unplanned development in their rapid proliferation and that the corporations would not be able to keep a proper control over the operations and policies of the enterprises. In 1966 the President issued a directive to the NDC that in all cases of joint ventures, the corporation was to acquire majority equity. But the more serious problems in the relationship with outside private parties turned on the management contracts, which term has been used in Tanzania to refer to a number of different contractual arrangements whereby a foreign company supplies patents, copyrights, trade marks, marketing services, as well as the management of the enterprise.¹²⁶ These contracts raise a number of different issues. On the one hand, they concern questions of the transfer of technology—whether unsuitable technology gets purchased, whether it is paid for too dearly, and whether the conditions that accompany the transfer of technology are too restrictive and exploitative, and whether they impose a heavy drain on foreign reserves as payments are made in foreign currency. At another level, the question concerns control. If there is an agreement for management with a private partner, the corporations' majority equity may not be sufficient to enable it to control the policy and operations of the enterprise. The management contract concerns itself not only with the services to be rendered, but deals in considerable detail with the principles and rules of operation. Some time the potentiality of control which is implicit in the majority or full holding by the corporation is bargained away in a parallel management contract. It is not uncommon to find provisions that give the agent the right to decide issues of employment, and salary, as well as give it considerable role in the selection and purchase of machinery

and marketing. Occasionally, an agreement, after setting out the functions and rights of the agent will enjoin the company not to interfere with the management. Also objectionable are certain practices of some managements, as well as the high scales of remuneration which are not related to the profits of the enterprise. Disputes between the corporations (or the enterprise) and the external partner are to be adjudicated not by the courts of the land, nor even, as a rule, by arbitration within the country, but by some form of international arbitration, the Paris headquarters of the International Chambers of Commerce being much favoured. Some agreements go so far as to specify that the relevant law is not that of Tanzania, but of a foreign land, either that of the agent's country or a third country.¹²⁷

A number of scandals were uncovered in 1970 and 1971 in relation to particular managing agents, and received wide publicity in the press. The government's response was to centralise control over the negotiations as well as the contents of these contracts. The corporations were instructed not to enter into any management contract without the prior permission of the ministry of planning, which in turn required the permission of the Economic Committee of the Cabinet. The ministry has set up a committee with representatives from itself, the Central Bank, the Audit Corporation, and the Attorney-General's office to scrutinise proposed agreements. The Bank of Tanzania requires a separate permission for aspects which involve dealings in foreign exchange or lending overseas. No specific guidelines have been laid down as to the content of the contracts, but special emphasis is placed on provisions for localisation of management staff, that fees are related to efficiency or profitability and not to turn over or a flat rate. We notice, again the reluctance or failure to spell out clear guidelines. Again, though the corporations have now a serious restriction on their contract making capacity, the legislation does not reflect this. Control over the management and partnership agreements was asserted without any change in the law. Administrative orders have replaced general legislation on the capacity of the corporations.

Control through the provision of professional services

The government has centralised certain key professional services for the public sector and placed them under its influence, if not control. This has happened in relation to auditing, legal and consultancy services. Let us first look at the legal services. Control of public enterprises was one of the reasons for the establishment of the Legal Corporation (TLC) in 1971, for the provision of legal services to the parastatal sector.¹²⁸ Prior to its establishment, each corporation or enterprise had its own counsel or retained the services of private law firms, in many instances the same firms which had handled the business before nationalisation. Now all the house counsel have been transferred to the TLC, which has recruited some others as well. The TLC itself has the usual characteristics of a corporation but its services are

provided directly and not through intermediaries. All parastatals can be required by orders of the Attorney-General to use its services, and since July 1971 no parastatal has been allowed to use private legal practitioners. The TLC is subject to the general directives of the Attorney-General, who can ask it to perform particular services. It is intended to be self-financing, and to charge such fees as are prescribed in law or if not so prescribed, as are negotiated.

It is probable that the centralisation of legal services has led to greater control over the negotiations conducted by the corporations, as well as the content of their agreements. One may draw up two broad models of the delivery of legal services in the public sector; first, in which each government department or agency has its own lawyers, and the other where all the lawyers are located in the ministry of justice or a similar institution. In the former case, the lawyers are more likely to identify with the agency, and to interpret rules and regulations as to promote the wishes and policies of the agency, when there may be a conflict between general government policies and its own aims. The lawyers will tend to facilitate the latter. In the second case, the opposite will be true. The lawyers are located nearer to the government and are likely to be more loyal to it than to the other agencies they service. In the case of the TLC, the powers of the Attorney-General to give general directives should reinforce the general tendency towards compliance with the law and official guidelines. In addition, there may be a shift from "the private sector" ethos of the lawyers who used to service the enterprises to the more "public interest" orientation of the TLC.

More important than legal services have been consultancy services. Parastatals have been free to hire consultants from abroad, and two of the major corporations, the NDC and the STC (now abolished) had their organisations restructured following the recommendations of foreign consultants. In addition feasibility studies are generally carried by foreign consultants, and there is little doubt that these studies have played a key role in investment and marketing decisions, on the nature and scale of technology, the purchase of equipment, etc.¹²⁹ Early in 1976 the government proposed and Parliament approved legislation to set up an Industrial Studies and Consulting Organisation (in the form of a public corporation), whose function it will be to provide consultancy and advisory services in the area of industrial development to the government and other public institutions, and would include feasibility studies.¹³⁰ The Organisation shall also determine when and under what conditions foreign consultants may be employed in Tanzania. Whenever any person or institution wishes to employ an outside consultant for industrial purposes, he or it has to submit an application for the purpose to the Organisation, which may, after consultation with the applicant, grant or refuse the application. The Organisation may with the approval of the minister for industries issue guidelines specifying the conditions which should be observed in making proposals and the matters to which the Organisation shall have regard to in making a decision. The minister may exempt an institution from this particular provision. The Organisation is potentially very important, not only in providing control over individual investment decisions, but also in providing some coherence

in and co-ordination of the investment decisions and process as a whole in the public sector. It could mean that more attention will be paid to the Tanzanian political aims, constraints and capacities in decision-making, something which has been woefully lacking in the past.¹³¹ It could mean that decision-makers are provided with adequate information, and that when Tanzanian institutions negotiate with foreign partners and institutions, their bargaining position would be stronger than if they were not armed with studies by the Organisation.

The Tanzania Audit Corporation is much more of a control institution than the other two. The Audit Corporation preceded the TLC, being set up in 1968.¹³² Its functions are "to provide audit services and services ancillary or incidental thereto, including advisory and accounting services"¹³³ to parastatal institutions specified in the schedules of the Act, which now practically cover the entire range of such institutions. The Corporation is under the general direction of the Controller and Auditor-General for the performance of its duties, but he must consult with the Board of the Corporation before he gives any directions. The centralisation of audits can help towards a better use of scarce resources as well as the imposition of uniform standards. The experience gained in such an agency can lead to a more appropriate form of auditing for public enterprises. There has been criticism in the country that the traditional auditing of the balance sheets and profit and loss accounts do not go far enough, and that there is a need for an efficiency auditing related to socialist aims. The Corporation does not appear to have introduced innovations in this regard, but as its staff expands, perhaps it could broaden its approach to auditing.

The watch-dog functions which the Corporation does not appear to have performed have been vested in a new institution, the Inspectorate for Control and Supervision of Parastatal Funds, which is under the general direction of the Minister of Finance.¹³⁴ The Inspectorate has jurisdiction over all parastatals, but the definition of parastatals in the legislation includes only those companies the whole of whose share capital is owned by the government (which is different from the usual definition of parastatal company—a company in which the government has 50 per cent or more interest). The Inspectorate has wide functions in relation to the funds of the parastatals, including the examination of their expenditure, investigation of the conduct and the performance of their functions by parastatal employees responsible for the control or maintenance of the accounts of the parastatals, and reviewing the financial regulations of the parastatals. The minister is authorised to make regulations for the management of the funds of parastatals. The regulations are binding on the parastatal, despite inconsistency with other written law or the instruments of the company.¹³⁵ The minister can attach penalties to the breach of such regulations. Up to the time of writing, the Inspectorate has not begun to function. What its relation to the Audit Corporation will be or to the functions of the Attorney-General as regards the prosecution of the employees of the parastatals for various offences (discussed below) remains unclear. This legislation is another instance of the extension of the control by the Treasury over the affairs of the parastatals. Serious deficiencies in the account-keeping of the parastatals, as

well as inefficiency and corruption in the public sector, are not uncommon, but it might have been thought that the existing provisions would have sufficed to deal with them. We now turn to a discussion of these other provisions.

Control over and regulation of conduct of the public sector employees

We have so far been concentrating on the control over and accountability of public enterprises as institutions. An important element in the system of control relates to the regulation of the conduct of individuals who are vested with significant powers through their management of or employment within a public enterprise. The kind of problems that may arise range from the abuse of one's influence to obtain special advantages for oneself and one's relatives, negligence and incompetence, to corruption, theft or embezzlement of the funds of the enterprise. At first there were few rules on the subject (apart from the general provisions of the criminal law). Although there were a number of rules which governed the conduct of and provided for the liability of civil servants (e.g., the Minimum Sentences Act, 1963, the Prevention of Corruption Ordinance, Cap. 400, the Civil Service Regulations), these did not apply to the employees in the public enterprises. Public enterprises and corporations were distinct legal persons as defined in those Acts,¹³⁶ and not part of the government. Public enterprise employees were in a particularly favoured position; free of many of the restrictions (e.g., standing as parliamentary candidates) and rules of liability of civil servants, they generally obtained better salaries, had considerable possibilities to formulate public policies, and dispensed a vast amount of public resources with a minimum of public accountability. In view of the ethical standards set out in the Arusha Declaration, and the growing size of the public sector, it was unlikely that this situation would continue for long.

The attack on the superior salary and other privileges of the public sector employees came first. In late 1966 President Nyerere and the members of his Cabinet had voluntarily accepted cuts in their salaries ranging up to 25 per cent in the case of the President, and over the next few days most of the senior civil servants were "urged" to accept cuts in accordance with a sliding scale. Some other benefits, like subsidised housing, were gradually eliminated. In 1967 public servants, local government officials, parliamentarians and party officials came under the leadership code, which gave a wide ranging effect to the conflict of interest principle. The leadership code resulted from the Arusha Declaration. Those to whom it applies cannot own property for rental purposes, own shares or stocks, hold directorships (except as representatives of the government or other public bodies), employ labour to generate income (with some exceptions in the agricultural sector), and earn more than one salary. The code was brought into effect in different ways for different categories of "leaders", for the members of Parliament by constitutional amendment, for local government leaders by amendments to

the electoral law, and for the civil servants by amendments to the Civil Service Regulations.¹³⁷ None of these amendments affected the employees of public corporations or their companies. They continued their higher salaries on account of their superior "expertise" and their housing and other benefits were unaffected. The rationale for the superior conditions of employment in the public sector—the need to compete with the private sector for the services of scarce managerial talent—did not apply so long as the majority of the senior public sector employees were drawn from roughly the same pool as the civil servants, the private sector was shrinking, and the government could place university graduates anywhere in the public service, by virtue of the bond to work for the government the latter had entered into to qualify for government assistance to pursue their university studies.

In September 1967 it was decided to bring the corporations into line. This was achieved through the establishment of a Standing Committee on Parastatals (SCOPO), whose functions were to ensure proper training programmes for the needs of the public sector, to establish procedures for the transfer of staff from the government or one corporation to another, and to eliminate the preferential salary terms for those in the public sector.¹³⁸ The Committee was established administratively by the President, and consists of the Principal Secretaries of the key economic ministries and managers of the three of the largest corporations. The Committee issues directives to the corporations which are "binding". The Committee has to date issued several directives, whose primary effect is to reduce salaries and eliminate fringe benefits (ranging from car allowances to purchases by employees of the goods produced or distributed by the corporation at special prices) in the public sector and to make the senior officers conform to the conditions of the leadership through signing an appropriate declaration. The legal basis of much of this activity is unclear; it is true that the Corporations Act of 1969 authorises the President to delegate to an official the authority to issue directives, but there is no evidence that he had done so to the Committee, and in any event the Committee was set before that authorisation was possible; the directives are not issued to the Boards of the corporations, but to their managers for immediate implementation, and affected the vested, contractual rights of those concerned.¹³⁹ Clearly this is an instance of "extra-legal" solution, efficacious for all that.

The assimilation of the conditions of employment of those in the public sector to the civil service is highlighted by provisions which enable the government to transfer a person employed in one sector to another, and which preserves the pension rights of such persons on the transfer.¹⁴⁰ (On the reverse side, the ineligibility of public servants to stand for Parliament has been removed, bringing them into line with public sector employees.)¹⁴¹ There has been a substantial movement of persons from one sector to another, although the trend of the movement is from the civil service to the public sector. This has meant that many of the managers in the public sector are former bureaucrats, and it has been stated that they carry their bureaucratic working habits and procedures with them to their new industrial or commercial positions, and that this constitutes one of the major reasons for the relatively poor performance of the public enterprises.¹⁴² In course of time

Tanzania will build up a cadre of managers and business organisers, and already one can discern the beginning of a "public sector" service, a pool of managers who can be transferred from one enterprise to another.

There has been much concern about corruption among public officers. The machinery to deal with corrupt practices by parastatal employees was, however, considered to be inadequate. In 1970 the Audit Corporation was amended to empower the President to direct a special audit inspection of any authority specified under the Act or of any person dealing with such an authority.¹⁴³ Such enquiries can be instituted when there is reason to believe that some bribery or other corrupt practices has taken place. Only one instance of the use of this procedure has been traced. The law with regard to the application of criminal penalties to the employees of the public sector has also been tightened. We have already noticed that the courts held that public corporations were not a "government body" so that the Minimum Sentences Act did not apply to theft by a servant of the NDC, or the National Development Credit Agency, nor therefore was the property of the corporations government property so that its theft attracted the application of the Minimum Sentences Act.¹⁴⁴ The Minimum Sentences Act was passed in 1963 to deal with what was perceived to be the increase in cases, *inter alia*, of theft by public officials or theft of government property.¹⁴⁵ Apart from the government, various other bodies, including political parties, missions and co-operatives were specified in the Act, but there was no reference to public corporations or their companies. The Act prescribed as a rule a minimum sentence of two years and 24 strokes for an offence to which the Act applied. The courts, which have not liked the severity of the Act, excluded its application as regards the employees or property of public corporations, on the ground of their separate legal personality, although the then Chief Justice was willing to extend the spirit of the Act to convict an employee of a public corporation, on the ground that a corporation was established to increase and safeguard public property.¹⁴⁶ The matter was put beyond doubt by the repeal and replacement of the Act by a new Act of the same name in 1972.¹⁴⁷ Under it theft by employees of parastatals is covered, as well as theft of the property of parastatals.

Apart from the theft of public property, there has been considerable corruption of official powers. The basic instrument to deal with official corruption was the Prevention of Corruption Ordinance passed in 1958 (Cap 400). The Ordinance made an offence acts of corruption by public servants, but the definition of public servants did not include employees in the parastatal sector. In 1970 an amendment was made to the Ordinance which tightened the Ordinance, and made the new provisions applicable to employees in the public sector.¹⁴⁸ (We discuss these amendments below.) The Ordinance still did not apply in its entirety to them. It was not until the new Prevention of Corruption Act in 1971 that the parastatal employees were fully brought under the scheme of the Act. The new Act applies to public officers, a term which is widely defined, and includes the employees of corporations as well as their companies in which the public holdings is 50 per cent or more. The Act creates three basic offences of corruption: (a) the giving or receiving, soliciting or offering of a benefit or advantage to an agent for doing or

forbearing, or having done or forborne to do anything in relation to his principal's affairs or business;¹⁴⁹ b) the use of documents by an agent or another person relating to the business of the agent's principal when the document is false, erroneous or defective in any material particular, and which is intended to mislead the principal;¹⁵⁰ and c) the obtaining or attempting to obtain by a public officer an advantage without a lawful or an inadequate consideration from a person who he has reason to believe has been, or is likely to be concerned in any matter or transaction with him in his capacity as a public officer.¹⁵¹ The wording of all the offences is broad enough to cover a wide variety of attempts at or transactions of official corruption. The last offence is particularly broad, and no illegal action as such needs to be proved.¹⁵²

The Act also includes the 1970 amendments to the now repealed Ordinance referred to earlier. A public officer can be required by an authorisation of the President or the Attorney-General to give an account of all or a class of property which he has in his possession or has had at any time while he was a public officer, and he may also be required to give an explanation of how he acquired it. Failure to give answers to or give false answers constitutes an offence.¹⁵³ The Attorney-General has powers also to cause an examination of the bank account of a public officer if he considers that such an examination is likely to reveal the commission of corruption.¹⁵⁴ The Director of Public Prosecutions can authorise the search of a person or premises if he thinks that goods corruptly obtained are stored there.¹⁵⁵ If any of these activities reveals that the public officer has or has had in his possession property which he "may reasonably be suspected of having corruptly acquired", a presumption of his guilt arises. Unless he satisfies the court that he did not acquire the property corruptly, he is convicted of corruption, and may be sentenced up to five years.¹⁵⁶ The Act creates a presumption of guilt also in prosecutions for the first of the three offences discussed above, (i.e., of obtaining or soliciting or giving or offering of an advantage), when it is proved that " $\alpha - \alpha\theta\gamma\alpha - \alpha^{\circ}\epsilon\alpha\α of giving or offering of an advantage), when it is proved that "any advantage has been offered, promised or given to, or solicited, accepted or obtained or agreed to be accepted or obtained by a public officer by or from a specified authority"¹⁵⁷ (presumably even if the authority is not the one in which he is employed). In other words the law presumes the guilty intention from a mere act. The Act also established special rules of evidence in any prosecution under it, to the extent that when an accused is found in possession of or is shown to have had in his possession property or money the value of which is disproportionate to his known sources of income, and for which he is unable to give a satisfactory account, the court may regard that as corroborating any other evidence of corruption.¹⁵⁸

As part of the general drive to exact higher accountability from public officers, an amendment was passed to the Penal Code in 1970 which creates the offence of causing economic loss to the government or a parastatal.¹⁵⁹ An employee of a specified authority (which term includes the parastatal sector) is guilty of an offence for which he can be imprisoned for up to two years if "by any wilful act or omission, or by his negligence or misconduct, or by any reason of his failure to take reasonable care or to discharge his duties in a

reasonable manner, causes his employer to suffer a pecuniary loss or causes any damage to any property owned by or in the possession of his employer". The amendment covers loss caused even before the amendment came into effect. If a person is convicted, he may be ordered by the court to pay compensation to the employer of an amount up to the amount of the loss.

These legislative initiatives have considerably broadened the reach of the criminal law. They represent departures from what have been regarded as fundamental pre-requisites of criminal liability and procedure: that no one is guilty of a criminal offence unless he has had an intent to commit the wrong (mere negligence does not suffice), that an act which was not a criminal offence when it was performed should not be made an offence retroactively, and that the onus of proof of the commission of an offence (both the *mens rea* and the *actus reus*) should lie on the prosecution. The serious risk to which these laws can put innocent persons is recognised in the provisions that prosecutions for most of the offences can only be carried out under the permission of the Director of Public Prosecutions.¹⁶⁰ The retroactive application of the offences of corruption may be justified on some moral grounds, but it is much harder to make a case for making mere negligence an offence and making it an offence retroactively. The government has promoted these amendments because it considers the problems of corruption and public waste serious, as indeed they are. As property and the management of enterprises move into the public sector, one cannot rely on privately initiated civil law action to protect property or ensure efficient management. The corollary of the "publicisation" of property and economic management is not that the civil law should be "criminalised". Better administrative and accounting practices and greater use of the civil law process can achieve more than can be achieved through an occasional prosecution under these wide provisions. The government has reduced procedural safeguards in part because many of these offences are inherently difficult to prove, and also because prosecutions have as a rule been weak. The supply of legal skills available to the government for prosecutions has until recently been limited both in number and quality, and the government has generally been unable to use the legal process as an effective instrument of deterrence and punishment.

Corruption and waste persist, and it is not surprising that there are frequent calls for further relaxation of the law. It is probable that the consequence will be that law is applied more and more "administratively" rather than judicially; that short cuts are made in court procedures; that increasing powers are given for investigatory activities;¹⁶¹ and even that resort will be had to administrative measures, unsanctioned by or even contrary to the law. The President has used the Preventive Detention Act, enacted to deal with political subversion, to lock up people suspected of corruption.¹⁶² The Prime Minister has imposed penalties in the form of dismissal from public service or cuts in salary on senior officials of the public enterprises for "inefficiency", without any legal justification. These developments pose serious problems for the integrity and the future effectiveness of the legal process and the legal system.¹⁶³

Control over controllers: democratic checks over the public sector

The increasing legislative and administrative powers available to the government to direct and control the affairs of the public enterprises and its personnel raises another dimension of control: who controls the controllers? What is the nature and measure of democratic control over the governmental regulation of the public sector, and over the public sector itself? The establishment of the public economic sector has resulted in the shift of significant power from the private sector, as well as the creation of new powers. What political accountability is there over these powers? The increased powers of the government over the public sector may not lead to increased accountability if the government leaders and bureaucrats themselves are not responsible to a democratic body, or if the interests and outlooks of bureaucrats and public enterprise managers are so intertwined or identical that one group has neither the will nor the ability to control the other.

The legislative provisions assume that public control would be exercised through Parliament. The Public Corporations Act provides that the accounts of the corporations have to be prepared and audited annually, and presented to the minister for submission to the National Assembly.¹⁶⁴ This provision does not apply to all corporations, e.g., the new investment banks, although their accounts have to be published. In relation to certain corporations, there is the additional requirement of an annual report. These are intended to provide the basis for parliamentary scrutiny. Normally, the submission of the accounts and reports should be the occasion for a debate. In practice, this occurs rarely. Accounts are seldom presented on time.¹⁶⁵ It has been more usual for the Assembly to have a debate on the corporation when legislation to amend its charter is presented, and the Corporations Act, which enables the President to bypass the Assembly now, would mean that there are fewer formal occasions when there would be an opportunity for debate. Similarly, the organisation of government loans and subventions through the investment banks, rather than through direct appropriations, would mean less parliamentary scrutiny. All these developments would indicate an even smaller role of the National Assembly, which has never been very energetic in its scrutiny over state corporations. The highly technical nature of much of the legislation about the public sector reduces possibilities of meaningful scrutiny or debate by the members.

On the other hand, however, there are certain factors which suggest that the Assembly may concern itself more with the affairs of the corporations. The corporations are now beginning to play a key role in the economic life of the country, and their operations touch the common man at various points—including what he has to pay for basic commodities and whether he can even obtain these. Inevitably, the malfunctioning of institutions for the distribution of basic food stuffs, the importation of essential medical and other supplies, is going to affect the common man adversely, and to lead to discontent with these institutions. It is equally likely that this discontent is going to be reflected in the Assembly. There is evidence to suggest that as the

activities of the corporations extend in their range and affect the lives of ordinary people more and more directly, the Assembly would move to greater scrutiny over them. Early in 1972, it set up a special committee to investigate the functioning of the STC, which reported in strongly critical terms, and made recommendations for its reorganisation.

The STC had been run most inefficiently; had imported certain commodities in supplies large enough to last ten years; had failed to order some essential items; the distribution system was weak; and it had operated for two years without a balance sheet. As shortages of essential goods were experienced by the public, there was considerable criticism of the STC, and the National Assembly set up a committee of its own to investigate the matter—a rare event in the legislative history of Tanzania. The report was influential, and led to the reorganisation of import and distribution system,¹⁶⁶ and to the abolition of the STC.¹⁶⁷ However, the promise of parliamentary control implicit in this initiative has not been realised, and given the Tanzanian political system, it is unlikely that the National Assembly will play the role of watch-dog over the public sector or the government's conduct of the public sector.

To an extent, the diminution of the importance of the Assembly resulted from the increasing role ascribed to the Party. We have noted that the Party has been proclaimed as the supreme body in the country, and that it does not consider that its functions are exhausted by the enunciation of policy. In the Guidelines of 1971, it committed itself to a greater supervisory role over governmental and public sector activities, in an attempt to ensure that its policies are in fact carried out. It has increased its own staff dealing with economic affairs, and restructured its committee system in order to do so. It remains to see how far the Party will succeed in exacting accountability from the government and the public sector. Its deliberations are seldom public, which makes it difficult to assess its effectiveness in this regard.

Apart from these political controls, the newspapers have occasionally investigated and criticised the public sector. The critical writing has come generally from a few scholars based at the University of Dar es Salaam. The University critics have been the most persistent critics. The most radical form of criticism has already been touched on in this and the first chapter: that public enterprises were used by the African petty bourgeoisie to eliminate Asians and Europeans from the economic sectors, not for the good of the nation, but for its own aggrandisement, and that the policies pursued through them have the purpose to enhance the social and economic benefits to this group. Some other criticism has focussed on the linkages that public enterprise engenders between the local economy and the international capital.¹⁶⁸ Others have discussed the inefficiency and lack of socialist planning within and in relation to the public sector.¹⁶⁹ While much of this criticism is tolerated (and occasionally even encouraged) there is considerable secrecy about the affairs of the public enterprises (as indeed about much of government policy and administration). Precise information is difficult to come by, especially since the late sixties when the public sector began to come under heavy attack. In the absence of relevant information, it is difficult to assess the policies and performance of the public enterprises, and it is

significant that a great deal of the debate has been at a general rather than a particular level, that it is not clear how far one can generalise from a few case studies, that a reliable overall picture has not emerged, and that the policy assumptions of the criticism are often not made explicit. There is need for more information and a debate where issues are clearly delineated and joined. A discussion of political, democratic control over the government and the public sector can be realistic and meaningful only if it is situated in the politico-constitutional system of the country, a task beyond the scope of this chapter, although some of the constituent elements of the system have been mentioned.

Public enterprise and the legal system

The establishment, regulation and control of the public economic sector have led to considerable legislative activity. A large body of law has grown up. And yet we have seen that regulation and control through the law has been only partially successful, that resort has often been had to extra-legal, administrative, and sometimes plainly unlawful means. We have seen instances where the practice has not conformed to the law, and has indeed been against the express terms of the law. At other times we have seen the attempts of the law to catch up with evolving practice. Again, we have seen activities and control not contemplated in the law at all. On the whole, however, we have seen that the concern with legal forms has not been abandoned. This is more evident in the public economic sector than in some other areas of national life. The role of the law in the functioning of the corporations is more extensive than it is in some other important areas, like agricultural development. The explanation lies in various factors. In the areas where the corporations now operate, there was an extensive regulation by law previously; an elaborate code for corporations and other business organisations; strict rules about financial appropriations, etc. In order to ensure that the operations of the corporations and their agencies were not actually illegal, the repeal or amendments of laws was necessary. The finances and operations of the corporations touch on foreign investors, or credits provided by foreign agencies. These relationships are regulated through legal instruments and emphasise the need to ensure that the relevant rules of law are suitably and clearly amended, and adhered to. The third reason is that the law is seen to provide an element of discipline which is important when huge investments are made and mistakes can be costly. The law can be used to minimise deviations from the general rule or standard.

Even in the area of public corporations, nevertheless, there are signs of an ambiguity towards laws and the legal system. We have noted that in the early days, reliance was placed on the intuition and good sense of particular persons as managers. In so far as general standards are created it is through refinements of the ideology and the political process. I would suggest that there are three basic reasons for the ambiguity. The leadership by the Party means that basic rules are enunciated through the political process and in the

political rather than the legal rhetoric. The leaders of the Party are happy in the language of moral norms and ethics, not in that of regulations and administration. There is emphasis on internalisation of the norms. The second reason, which is more relevant to an explanation of the attitude of the Government, is an anxiety at the unpredictability of the results through the legal process. The underlying principles and procedures of the legal system are among the state institutions in Tanzania to undergo the least change since independence. The independence of the courts has been maintained, and the adversary system as well, so that the availability of legal skills is considered to be one of the key factors determining the success of the litigation. The control by the executive over and through the legal system is perceived to be less effective than over the administrative process, and produces the tendency towards either moving the matters in question to the administrative sector or altering the balance in the legal process. We have seen instances of both—control through administrative devices, and shifting the onus of proof, and lessening the burden of proof through the concept of the crime of “economic” negligence. The tension between the legal and the extra-legal is becoming a characteristic of the Tanzania system.

The third reason is connected with the second. Although judicial institutions have played little role in the determination or application of any key decisions in relation to the public sector, there is an impatience with detailed rules and procedures. Either because of this impatience or the inability to plan ahead sufficiently, there is a clear departure away from general rules of conduct to grants of broad discretion to the government. It is clear that broad discretionary powers are important when it comes to the management of the economy, specially if the intention is to move away from private sector oriented economy. But the question is: what should be the nature of this discretion? In whom should it be vested? What discretionary powers should be vested in which bodies—what should be their distribution vertically and horizontally? There is little evidence that serious thought has been given to this question. The trend has been towards a concentration of power in the civil service bureaucracy, and away from the public enterprises. While it would not be accurate to say that law has quite dissolved in administration, the trend is in that direction: the making, applying and adjudication of rules are all increasingly being vested in the government, leaving less and less for the National Assembly on the one hand, and the courts, on the other. The bringing under administrative regulation of more and more institutions provides a further opportunity for resort to change outside the legal system. The ability of the Government to issue directions to the parastatals means, for example, that important changes in industrial relations are made through administrative directives rather than directly through the law.

Partly because recourse is so often made to the extra-legal, the changes in the laws and the legal system tend to be *ad hoc* and piecemeal. The reliance on the powers of the ministers to alter the provisions of the Companies Ordinance, and of the President in relation to the reorganisation of the corporations, results not only in the blurring of the distinctions between the administrative and legislative powers and processes, but encourages “*ad*

hocism” in legal change. If the law is to be used to impose discipline, such *“ad hocism”* is clearly counterproductive, whatever the short-term gains.

That a trend towards the imposition of discipline through the law is emerging is likely. The use of the law to attack corruption and theft, and the new financial legislation, are signs. It seems clear that with the emergence and identification of the key influence of financial stringencies, a way has been opened for control. The law has been used to build on control through financial control. In so far as there is a trend, it provides some insights into the limits of the law. The law was used for nationalisation, when the consensus on that was clear. The law was poor and ineffective in regulating the corporations, because (a) there was no clear consensus on what the principles should be, and (b) the law was unable to build on key factors which influenced the pattern of corporation activity. In a period of rapid changes, the element of stability that the law pre-supposes is missing, and reduces its effectiveness. Once the goals become defined, the law can proceed to institutionalise them. Another limitation arises from the lack of “supporting infrastructure”. The law sets out relationships, but these relationships do not become effective unless the various parties can make good their claims. As long as the ministries were understaffed and lacked persons with the technical skills, and the corporations were better endowed in this respect, no number of directives were going to be effective. In the absence of a distribution of resources which enables the effectuation of relationships in which the forms of influence are broad and subtle, there is a tendency to rely on more clearly outright forms of domination.

We may briefly review the impact of the organisation of the legal services for the public sector on the legal system and the profession. There are three changes of significance. First, the marshalling of lawyers in the TLC means that the influence of lawyers on policy-making must decline. Second, the amendment of the Advocates Act whereby lawyers from the TLC practise without being called to the Bar means that the social and professional distance between the private practitioner and the government attorney will widen. As an accident of history, the government lawyers have tended to be less skilled and experienced than the private ones, and to block the access of the corporation to the latter may mean further tinkering of the law to tilt it in favour of the corporation. It also means the weakening of the legal profession as a professional group, and the continuation of the division between the “immigrant private practitioner” and the black government attorney. The third is even more radical. The establishment of the TLC was followed by the nationalisation of rented property in 1971. At one stroke, the major source of income for many private lawyers—land transactions—was removed. There was an exodus of the private practitioners from the country. The effect was perhaps felt most strongly in the criminal law area, for it was no longer possible to find lawyers in smaller urban centres to assign dock briefs to, when the judge felt that the accused ought to have legal aid. Either the procedures of the adversary system have to be abandoned in favour of the inquisitorial, or some form of public defenders’ office has to be instituted, thus accelerating the pace towards the total nationalisation of the legal profession. In either event, the change will be momentous.

It is obviously too early to assess the impact on the legal system of public enterprise, and the other way round. The contours of both the public sector and the legal system have been changing rapidly. The law has tried to catch up with the evolving economic realities; its own influence on the operation of public enterprise is more subtle and difficult to detect and assess. What is clear is that the pre-independence legal system was inappropriate for the kind of economic system that has been established in Tanzania. There have been a series of changes in the law to cope with the problems, so that the nature of the legal system is now different from that ten years ago. These changes do not, however, add up to a new pattern. The old and the new live side by side in disharmony. At best one can say that some trends are emerging: the unimportance of form, with the growth of common, general or specific rules about "parastatals"; increasing administrative controls over the economy; the importance of discretionary power; the role of the financial regulations; the merging of the bureaucratic and entrepreneurial groups, etc. If the trends continue, they may indicate the basis of a new "codification" of the law. On the other hand, this partial and admittedly impressionistic survey shows that the basis is not a promising one, for the public sector still remains outside any real regulation and control, there is dearth of policy and administrative discretion can never be a proper substitute for it, and the public sector is wasteful and inefficient.

Notes

1. There are various definitions of a parastatal. When the Standing Committee on Parastatals was established in 1967 (which is discussed below), a parastatal was defined in the administrative order setting it up as:

An institution, organization or agency which is wholly or mainly financed or owned and controlled by the Government. The criterion of such public enterprises would be ownership by the Government of 50 per cent or more of the capital shares, or other forms of governmental participation and effective influence in all the main aspects of management of the enterprise. (General Notice 1976 of 1967.)

The first time that the term was used in legislation was in the order establishing the Legal Corporation, as follows:

(a) a body corporate established by or under any written law other than—(i) a company incorporated under the Companies Ordinance; (ii) a body corporate established by or under any Act of the Community; (iii) a Local Authority.

(b) any company registered under the Companies Ordinance, not less than fifty per centum of the issued share capital of which is owned by the Government, a Local Authority or any parastatal organization or, where the company is limited by guarantee, a company in respect of which the amount that the Government, a Local Authority or a parastatal organization which is a member of such company has undertaken to contribute in the event of the company being wound up is not less than fifty per centum of the aggregate amount which all members have undertaken to contribute; and references in this paragraph to a parastatal organization include reference to any such company.

(c) any body of persons, whether corporate or unincorporate, which is designated by the Minister by Notice in the Gazette to be a parastatal organization for the purposes of this Order. (G.N. 32/1971.)

Since then the term has been defined and used in many laws which have the effect of establishing the same set of rules and regulations for various public institutions, regardless of the precise form and status.

This paper is concerned with national industrial and commercial enterprises. It does not deal with the social service type corporations, public enterprises at the district level (incorporated as provided under the District Corporations Act, no. 16 of 1973), or public enterprises in Zanzibar.

2. The debate can be traced to a paper by I.G. Shivji, "Tanzania: The Silent Class Struggle", written in 1970. The paper with various commentaries on it was published in 1973 as *The Silent Class Struggle*, Dar es Salaam. Shivji's recent book, *Class Struggles in Tanzania*, 1976, London, continues and elaborates his earlier themes that the state in Tanzania has been used by the African petty bourgeoisie to eliminate the economically stronger Asian and European communities and to entrench itself in power, for its own benefit. The Shivji thesis has been influential among certain academic critics of Tanzania. For a left wing position on the question different from Shivji's, see J.S. Saul, "The State in Post-Colonial Societies—Tanzania", Miliband and Saville (ed.), *The Socialist Register 1974*, London, 1974. See also R.H. Green "Towards Ujamaa and Kujitegemea: Income Distribution and Absolute Poverty Eradication Aspects of the Tanzania Transition to Socialism", I.D.S. Discussion Paper, no. 66 of 1974 (Sussex).

The official ideology of Tanzania is best gathered from the published speeches and pamphlets of President Julius Nyerere.

3. For an elaboration of the sense in which I use the term "legal system", see my article, "Notes Towards a Theory of Law and Ideology: Tanzanian Perspectives", *East African Law Journal*, 1975.

4. African Agricultural Products (Control and Marketing) Ordinance, cap. 284, repealed and replaced by the Agricultural Products (Control and Marketing) Act, 1962, cap. 486.

5. See *The Economic Development of Tanganyika*, Baltimore, 1961 (IBRD report) pp. 241-42 for details of government holdings in 1960.

6. The Tanganyika Development Corporation Act, 1962.

7. IBRD report, pp. 241-44.

8. *Tanganyika Industrial Development* (Arthur D. Little, 1961).

9. *Hansard*, 5 June, 1962 (cols 26-30).

10. *Five-Year Plan for Economic and Social Development 1st July 1964-30 June 1969*, Dar es Salaam 1964. See Presidential Circular no. 5 of 1964, "Reorganisation of the Tanganyika Development Corporation/Tanganyika Agricultural Corporation". The changes were implemented by the Tanganyika Development Corporation (Amendment) Act, 1964.

11. The 1962 Act had stated that in "carrying on its business the corporation shall have regard to the economic and commercial merits of any undertaking it promotes, finances, develops, manages or assists" (sec. 4 (2)). The 1964 Act added "and the Corporation shall use its best endeavours to secure that its business as a whole is carried on at a net profit, taking one year with another" (sec. 6).

12. *Arusha Declaration*, 1967, Dar es Salaam.

13. National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act, 1967. For accounts of the nationalisations in Tanzania, see A.W. Bradley, "Legal Aspects of Nationalisation Laws in Tanzania" 3 *E.A.L.J.* (1967) pp. 149-6; S.C. Jain, "Nationalisation in Tanzania: Some Legal Aspects", *Africa Quarterly*, Vol. 9 (1969) pp. 141-148; D.O. Nsereko, "The Tanzania Nationalisation Laws" 3 *E.A.L.R.* (1970) pp. 1-t3; C.J. Dias, "Tanzanian Nationalisations", *Cornell Journal of International Law*, Fall 1970.

14. Insurance (Vesting of Interests and Regulations) Act, 1967.

15. National Agricultural Products Board (Vesting of Interests) Act, 1967.

16. State Trading Corporation (Establishment and Vesting of Interests) Act, 1967.

17. The government was authorized to acquire shares by the Industrial Shares (Acquisition) Act, 1967.

18. Tanganyika Sisal Corporation (Establishment and Vesting of Interests) Act, 1967.

19. *Second Five-Year Plan for Economic and Social Development*, Vol. I, Dar es Salaam, 1969, p. 3.

20. *Ibid.* p. 68.

21. See I.G. Shivji, *The Silent Class Struggle*, op.cit., T.B. Mushi, "The Problems and Prospects of the Public Sector in Tanzania", *Rasilimali*, Vol. 5 (Jan. 1976), pp. 9-13.

22. Op.cit., p. 75.
23. Presidential Circular no. 2 of 1969, *Rationalisation of Parastatal Organisations*.
24. Treasury Registrar Ordinance, cap. 418.
25. Among others, by President Nyerere, "Productive and commercial organisations cannot be run on the same lines as a government department, although they must take public interests into full account. Greater flexibility of organisation and day-to-day administration is essential if real service is to be given to the people by the public sector of the economy. Further, these are not "spending organisations"; they provide goods and services in return for payment, and in all circumstances they must not only pay their own way but also take part in capital creation", Pres. Cir. no 2/1969.
26. G.N. 89 of 1969, sec. 4 (a).
27. G.N. 90 of 1969, sec. 4 (a). See also the Tanzania Tourist Corporation (Est.) Order, G.N. 91 of 1969, sec. 4 (c).
28. See the *Annual Plans*, 1971 to 1974, Dar es Salaam.
29. See, for example, A. Coulson, "The SIDA Silo Project: A Case Study", *Rasilimali* (Jan 1973) pp. 16-18.
30. Thus the decision to set up a tyre factory was made by the President in the form of instructions to the N.D.C. (Information from an official of the N.D.C.). The decision to transfer the location of the fertiliser factory from Dar es Salaam to Tanga was made by the government. (George Kahama, then general manager of the N.D.C., in *The Standard* 29 June 1971).
31. See, e.g., K.E. Svendsen, "Decision-making in the National Development Corporation", reprinted in L. Cliffe and J.S. Saul (eds.), *Socialism in Tanzania*, 1973, Nairobi, Vol. 2, pp. 89-96.
32. For the binding effect of English court decisions in Tanzania, see G.F.A. Sawyerr and J. Hiller, *Precedent in East Africa*, 1971, Dar es Salaam; and Sir Charles Newbold, "The Value of Precedents Arising from Cases Decided in East Africa as Compared with Those Decided in England", *E.A.L.R.* Vol 2 (1969), pp. 1-10. For the relevance of English decisions in company law in East Africa, see Katende, Chesterman, Thomas and Mann, *The Law of Associations*, Nairobi 1976.
33. J. Katende, "Company Law in East Africa: Present and Future", *E.A.L.R.* Vol 2 (1969) pp. 135-177.
34. s. 3.
35. ss. 2 and 8. Such companies were included in the definition of a "statutory corporation" by the Written Laws (Miscell. Amend.) Act, 1974.
36. s. 8.
37. s. 8 (6).
38. Written Laws (Miscell. Amend.) Act, 1974.
39. s. 3 (1) Companies' Ordinance.
40. s. 29.
41. e.g. Insurance (Vesting of Interests and Regulation) Act, 1967, s. 4; State Trading (Establishment and Vesting of Interest) Act, 1967, s. 21.
42. e.g. under the Sisal Corporation Act, 1967 or under the Industrial Shares (Acquisition) Act, 1967.
43. STC Act, ss. 18-19; NAPB Act (1967), ss. 13 and 14.
44. s. 20.
45. STC Act, s. 19 (b); NAPB Act (1967), s. 14 (1) (b).
46. Ind. Shares (Acq.) Act, s. 5.
47. STC Act, s. 20; NAPB Act (1967) s. 15.
48. NAPB (Vesting of Interests) Amend. Act, 1967, s. 21 (a) and (b); STC (Est. and Vest.) Amend. Act, 1967, s. 24 (A) and (B).
49. Written Laws (Miscell. Amend.) Act, 1969.
50. The new section (331 B) in the Companies Ordinance. A further amendment in 1970 made clear that a subsidiary could become the sole member of a company, Written Laws (Miscell. Amend.) Act, 1970.
51. The new section 331 C. We may also note that the District Development Corporations, which are companies under the Ordinance, can be dissolved by order of the minister for regional administration, or in the absence of such an appointment, by the Prime Minister, s. 11.
52. s. 331 C (2) (c).
53. s. 331 C (B) (3).

54. Written Laws (Miscell. Amend.) Act, 1971 (which provision becomes s. 13 (2) of the Ordinance).

55. Written Laws (Amend.) Act, 1969 (now s. 331D of the Ordinance).

56. *Ibid.*, now s. 331 E.

57. Written Laws (Amendment) Act, 1970.

58. Companies Ordinance (Amend) Bill.

59. See Yash Ghai, *Reflection on Law and Economic Integration in East Africa*, 1976, Uppsala; Dharam Ghai, "State Trading and Regional Economic Integration: The East African Experience", *Journal of Common Market Studies*, Vol. XII, no. 3 (1974), pp. 296-318.

60. s. 16, Treaty for East African Cooperation, 1967.

61. In his budget speech (14 June 1967) the Minister of Finance stated, "Government is absolutely determined that those enterprises shall run on clear commercial principles, where no wastage of any kind will be acceptable and where service and production must meet the true needs of users and consumers". He also said, "From the Treasury point of view, a very close cooperation with the NDC at a respectable distance is a recipe for the continued good health of the nation's economy".

62. The Tanganyika Development Corporation Act, 1962, amended by the Tanganyika Development Corporation (Amendment) Act, 1964.

63. NBC (Est. and Vesting of Assets and Liabilities) Act, 1967, s. 4 (1).

64. STC (Est. and Vesting of Interests) Act, 1967, s. 4 (1) (b) and (c).

65. Insurance (Vest. of Interests and Reg.) Act, 1967, s. 7 (a), s. 7 (b) prohibits discrimination.

66. For an account of the policy and operation of the NBC see an article by A.J. Nsekela, its former chairman and managing director, "The Public Enterprise as an Instrument of Economic Development in Tanzania" in G. Ruhumbika (ed.), *Towards Ujamaa*, 1974, Nairobi.

67. J. Loxley, "Principles of Financial Management in Capitalist and Socialist Economies", *Rasilimali*, January 1973, Dar es Salaam, p. 15.

68. For an examination of the activities of the NIC, see I.G. Shivji, "Insurance and Development", Vol. 3, No. 2, *E.A.L.R.*, pp. 143-173.

69. The Permanent Labour Tribunal is required to take the following factors, insofar as they may be relevant:

(i) the need to maintain a high level of domestic capital accumulation with a view to increasing the rate of economic growth and to providing greater employment opportunities;

(ii) the need to maintain and expand the level of employment;

(iii) the need to develop payment-by-result schemes, or other wage incentive structures, which will induce an employee to make greater effort and relate increases in remuneration to improvements in labour productivity;

(iv) the need to prevent gains in the wages of employees from being affected adversely by unnecessary and unjustified price increases;

(v) the need to preserve and promote the competitive position of local products in the domestic market as well as in the overseas markets;

(vi) the need to establish and maintain reasonable differentials in rewards between different categories of skills and levels of responsibility;

(vii) the need for the United Republic to maintain a favourable balance of trade and balance of payments;

(viii) the need to ensure the continued ability of Government to finance development programmes and recurrent expenditure in the public sector;

(ix) the need to maintain a fair relation between the incomes of different sectors of the community; and

(x) such other factors as the President may specify in directives which he may, from time to time, issue to the chairman. (Permanent Labour Tribunal Act, 1967, s. 22 (e)).

The Regulation of Prices Act, 1973, provides that in determining the price structure of any goods or services, the Price Commission shall have regard to:

(a) the commodities and services essential to the community;

(b) the need to avoid unduly rapid or frequent variations in prices;

(c) the need to preserve and promote the competitive position of local products in the domestic market as well as in foreign markets;

(d) the need to prevent the income of peasants and workers in the United Republic from

- being affected adversely by unnecessary and unjustified price increases;
- (e) the need to maintain fair relationships among the incomes of different sectors of the community;
- (f) the need to ensure the continued ability of the Government to finance development programmes and recurrent expenditure;
- (g) the need to provide circumstances under which local manufacturing, processing and service industries are able to maintain efficiency and expand their business;
- (h) the need to provide circumstances conducive to a healthy and orderly development of trade and commerce in rural as well as urban areas;
- (i) such guide lines as to margins or otherwise as the Minister may, from time to time issue. (s. 12 (1)).

70. As a general rule the chairman of a Corporation is appointed by the President and other members by the relevant minister, e.g., s. 5 of the NDC (Establishment) Order, 1969.

71. Svendsen, op.cit., (note 31); P.C. Packard, "Management and Control of Parastatal Organisations", in *Towards Socialist Planning*, 1972, Dar es Salaam. The Standing Committee on Parastatals (SCOPO) addresses its directives to the managers of the corporations for implementation.

72. S. 6 of the Public Corporation Act empowers the President to give to the Board of Directors or any other person entrusted with the management of the corporation, directives of a general or specific character as to the exercise and performance by such board or such person of their or his functions. The power of giving directives can be delegated to a minister (s. 11 (2)) or a public officer (Written Laws (Miscell. Amend.) Act, 1971).

In the earlier legislation on public corporations, (e.g. the NDC Acts of 1972 and 1975) there was provision only for general directives.

73. J. Loxley, "Financial Planning and Control in Tanzania", in *Towards Socialist Planning*, op.cit., p. 62.

74. NBC Act, s. 16.

75. STC Act, s. 25.

76. National Industries (Licensing and Registration) Act, 1967.

77. Much of this part is based on my article "Notes Towards a Theory of Law and Ideology: Tanzanian Perspectives", op.cit. (note 3).

78. Interim Constitution of Tanzania (Amend.) Act, 1975.

79. *Daily News*, 9/8/1972.

80. *Daily News*, 30/3/1973.

81. Presidential Circular, 1 of 1970, *The Establishment of Workers Councils, Executive Committees and Boards of Directors*.

82. The Security of Employment Act, 1964.

83. See H. Mapolu, "The Organisation and Participation of Workers in Tanzania", *The African Review*, Vol. 2 No. 3, (1972), pp. 381-415.

84. But see Mapolu, *ibid.*; G. Kahama, "Participation in Tanzania: The Role of National Development Corporation", *Mbioni*, Vol. VI, No. 11 (1972), pp. 6-35; P. Mihyo, "Labour Unrest and the Quest for Workers' Control in Tanzania: Three Case Studies", *E.A.L.R.*, Vol. 1, No. 1 (1974), pp. 1-64; J.V. Mwapacho, "Industrial Labour Protest in Tanzania: An Analysis of Influential Variables", *The African Review*, Vol. 3, No. 3 (1973), pp. 383-401; P. Msekwa, "Workers' Participation in Management in Tanzania", *The African Review*, Vol. 5, No. 2 (1975) pp. 127-140; K.F. Ileti, "Post-Mwongozo Workers' Dispute in Tanzania: Two Case Studies", *E.A.L.R.*, Vol. 7, No. 2 (1974), pp. 157-188; R.H. Baguma, "Inefficiency, Irresponsiveness and Irresponsibility in the Public Services. Is Mwongozo to Blame?", *The African Review*, Vol. 5, No. 2 (1975), pp. 195-200.

85. R.W. James and S. Ligunya, "Organisational Relationships and the Control of Parastatals in Tanzania", *E.A.L.R.*, Vol. 5, Nos. 1-2 (1972), pp. 45-46.

86. Written Laws (Amend.) Act, 1974.

87. Both Msekwa and Mapolu in articles cited in footnote 84 assume that a Presidential Circular cannot be questioned.

88. See L.C.B. Gower, *The Principles of Modern Company Law*, 1969, London, p. 555.

89. The *T.A.N.U. Guidelines on Guarding, Consolidating and Advancing Revolution of Tanzania and of Africa* 1971, Dar es Salaam, were issued in the wake of the coup against Obote in Uganda and the unsuccessful attempt by the Portuguese to overthrow Seko Toure's regime in

Guinea. On the *Guidelines*, see Bismark U. Mwansasu, *The African Review*, Vol. 1, No. 4 (1972), pp. 9-27.

90. Art. 13.

91. Art. 15.

92. For the considerable writing on the impact of the *Guidelines* on industrial behaviour, see references in footnote 84.

93. For a distinction between "pure ideology" and "practical ideology", see Frank Schurman, *Ideology and Organisation in Communist China*, 1968, Berkeley and Los Angeles, p. 24 etc.

94. This point is discussed and elaborated in my article cited in footnote 3.

95. An extensive, although not very enlightening, debate has gone on in Tanzania on the role of "profitability" in a socialist economy. It is not possible to summarise the debate here, or to place it in the Tanzanian context, except to note the absence of a coherent government position on the subject. For a discussion of the relevance of the concept of "profitability", see E. Penrose, "Some Problems of Policy in the Management of the Parastatal Sector in Tanzania: A Comment", *The African Review*, Vol. 1 No. 3 (1972), pp. 48-53.

96. Both Msekwa and Mapolu (footnote 84) state that there was no prior discussion on the Circular. The then Minister of Labour, Job Lusinde, however, told a group of NDC managers that the Circular was the result of consultations with the NUTA, the Employers' Association and public officers. *Third Group Managers' Conference: Full Report of Conference Proceedings*, 1970, Dar es Salaam, p. 35.

97. Svendsen, op. cit., (footnote 31).

98. Presidential Circular no. 2, 1969, *The Rationalisation of Parastatal Organisations*. The Circular pointed to the proliferation of public corporations, whose "number and structure. . . is not the result of any well-thought out comprehensive plan. . . The result is that we now have a number of parastatal organisations whose responsibilities overlap, and one whose responsibilities are so large and diverse that almost every economic ministry of Government is involved in its activities. As a result of this organisational complexity, many servants of the parastatal organisations have to spend a great deal of time on co-ordination work, and at the same time the section ministries have difficulty in ensuring the full implementation of Government policies for which they are responsible".

99. See Gower (footnote 88), pp. 525-26.

100. See R.W. James and S. Lingunya, "Organisational Relationships and the Control of Parastatals in Tanzania", (in *E.A.L.R.*, Vol. 5 No 1-2 (1972) for a conflict between the interests of a particular company and its parent corporation, p. 55.

101. See Packard (footnote 71).

102. See the *First Annual Plan*, 1970/71, Dar es Salaam, for a discussion of the problems of the public sector, including over expenditure of resources.

103. For annual plans, see Loxley, op.cit., (footnote 73).

104. See Loxley, "The finance of government spending in Tanzania since Independence", *Rasilimali* (no date, 1972?), pp. 22-25.

105. The National Development Corporation Act, 1962, e.g., provided that

"S. 7 (1) The Corporation may with the approval of the Minister (which shall be given with the concurrence of the Minister for the time being responsible for finance) and subject to such conditions as he (with such concurrence) may determine, borrow sums required by it for meeting any of its obligations or for the purposes of its business;

Provided that the Corporation shall not borrow under this subsection so as to have outstanding at any time an aggregate amount exceeding five million pounds of such other sum as may from time to time be approved by resolution of the National Assembly.

(2) The powers of the Minister under this section shall extend to the amount (within the maximum specified in the proviso to subsection (1) the nature and sources of the borrowing and the terms and conditions on which the borrowing may be effected, and the Minister's approval may be either general or limited to a particular borrowing.

(3) The Government may guarantee, in such manner and on such conditions as it may think fit, the repayment of the principal of, and the payment interest and other charges, on, any borrowings of the Corporation under and in accordance with this section, and any sums required for the fulfilling of any such guarantee shall be charged on and issued out of the Consolidated Fund. . .

(5) Without prejudice to the generality of section 4, the Corporation shall have power to secure

the payment of money by mortgage, charge or lien of its undertakings or property (both present and future) or any part thereof, and by the issue of debentures, debenture stock, bills and bonds.

8. (1) The Corporation shall establish and maintain a Reserve Fund and shall pay into such Fund such part of the net profit earned by the Corporation in any financial year of the Corporation as the Minister may direct.

(2) The Reserve Fund shall be applied by the Corporation in making good any loss or deficiency which may occur in the course of the business of the Corporation.

9. (1) The Corporation may, with the approval of the Minister and subject to such conditions as he may determine, invest such part of its funds as are not required for the purposes of its business, and the moneys comprising the Reserve Fund or any provident fund established by the Corporation.

(2) The powers of the Minister under this section shall extend to the amount which may be invested, the nature of the investment and the terms and conditions thereof, and the Minister's approval may be either general or limited to particular investment".

106. Thus in 1967 the NDC negotiated a loan from the Export-Import Bank of Japan of 40 million shillings. See *N.D.C. Third Annual Report and Accounts 1967-68*, Dar es Salaam.

107. Tanzania Investment Bank Act, 1970.

108. Tanzania Rural Development Bank Act, 1971.

109. The shares in TIB are held by the Government (30), NBC (15), and NIC (15) (s. 6(1)). The chairman of the Board is appointed by the President; of the remaining 6 members 3 are appointed by the Minister of Finance, 2 by the NBC, and 1 by NIC (s. 20 (4) (5)). As far as the RDB is concerned, all its shares are held by the Government (s. 6 (1)). The chairman of the Board is appointed by the President and the other eight directors by the Minister of Finance.

110. Act 22.

111. *Ibid.*, s. 4 (1).

112. s. 7 (1).

113. s. 7 (2).

114. s. 9.

115. s. 10.

116. s. 11.

117. s. 6.

118. Finance Act, 1974, Pt. VI, s. 28 (adding s. 6A to parent Act).

119. Finance Act, 1974, Pt. VI, s. 30 (adding s. 11A to parent Act).

120. s. 11A (3).

121. Parastatal Organisations (Financial Supervision and Control) Act, 1975, s. 5.

122. Those included so far are: The Lint and Seed Marketing Board, NAPB, The Tobacco Authority, the Registrar of Buildings, and all the corporations sole established under the Corporations Sole Act, 1974.

123. s. 17.

124. s. 5 (2).

125. s. 14 of Small Industries Act; s. 5 (3)-(9) of Corporation Sole (Est.) Act. See also the financial provisions of the National Milling Corporation Act, 1975, s. 25-29.

126. For the general literature on this subject, see E. Penrose, "Ownership and Control: Multinational Firms in Less Developed Countries", in G. Helleiner (ed.), *A World Divided: The Less Developed Countries in the World Economy*, 1970, Cambridge; V.N. Carvalho, "The Control of Managing Agents in Tanzania with Special Reference to the NDC", and P.E. Temu, "The Economic Implications of Management Agreements in Tanzania Parastatals", both in *E.A.L.R.*, Vol. 5, No 1-2, (1972); I.G. Shivji, "Capitalism Unlimited: Public Corporations in Partnership with Multinational Corporations", *The African Review*, Vol. 3, No. 3 (1973), pp. 359-382.

127. This analysis is based on a study of a number of contracts of one of the major corporations. An undertaking was given to it not to divulge the names of the enterprises.

128. Tanzania Legal Corporation (Est.) Order, 1970, G.N. 32/1971. There were other reasons for the establishment of the Corporation. It was considered that the corporation would provide legal services at a smaller charge than the private profession; that the private bar and the personnel in the Attorney-General's office were not able to provide adequate and specialised services, and there was an element of the "nationalisation" of the legal profession.

129. A. Coulson, *op.cit.*, (footnote 29); and "The Fertiliser Factory" (1972) *Maji Maji*, No. 8, p.

26; see R.H. Green, chap. 5, in this volume.

130. Tanzania Industrial Studies and Consulting Organisation Act, 1976.

131. R.H. Green, *op.cit.*, (footnote 130).

132. Tanzania Audit Corporation Act, 1968.

133. s. 4 (1).

134. Parastatal Organisations (Financial Supervision and Control) Act, 1975.

135. The exceptions are (i) where the regulations would offend against any specific requirement of the written law by or under which the parastatal organisation is established; or (ii) they would authorise the parastatal organisation to borrow or disburse money in excess of limits specified by law. (s. 4 (3) (a) and (b)).

136. In an English decision, *Tamlin v. Hannaford* [1950] I.K.B. 18, it was held that a public corporation is a body distinct from the government (the Crown) and not subject to the special rules pertaining to the legal immunities and liabilities of the government. In that case the effect of the decision was to broaden the liability of the corporations, but the same rule can in certain circumstances serve to narrow the liability of a corporation or its employees. For some implications of the legal "separateness" of the corporations and public enterprises from the government, see James and Ligunya, p. 42-43, *op. cit.*, (footnote 100).

137. B. Rahim, "The Legislative Implementation of the Arusha Declaration", *East Africa Law Journal*, Vol. 4, No. 4 (1968), pp. 183-202.

138. G.N. 1976 of 1967.

139. The local staff of the firms nationalised by the government were given statutory guarantees that the terms of their service would not be adversely affected, e.g. s. 8 of NAPB Act (1967); s. 13 of STC Act (1967); s. 12 of NBC Act (1967).

140. Financial Laws (Miscell. Amend.) Act, 1974, amending s. 14 of the Pensions Ordinance, Cap. 371.

141. Public Officers (Eligibility for Elections As Constituency Members) Act, 1972.

142. See Packard, *op. cit.*, (footnote 71), and by the same writer, "Corporate Structure in Agriculture and Socialist Development in Tanzania", *E.A. Journal of Rural Development*, Vol. 5, Nos. 1-2, 1972, pp. 163-182.

143. Tanzania Audit Corporation (Amendment) Act, 1970.

144. *Joseph Michael v. R.*, October 1968, *High Court Digest*, No. 435; *Jumnanne Dumwalla v. R.*, *ibid.*, No. 437.

145. For a background to the Act, see James S. Read, "Minimum Sentences in Tanzania", *Journal of African Law*, Vol. 9, No. 1 (1965), pp. 20-39.

146. See the comments of Georges, C.J., in *Peter Lugayula v. R.*, [1969] *H.C.D.*, No. 69.

147. The new Act abolished the punishment by strokes, but increased the minimum prison sentence in some instances to three years.

148. The Prevention of Corruption (Amendment) Ordinance, 1970. See O.E. C. Chirwa, "The Prevention of Corruption by Legislation (The Tanzania Act of 1971)", *E.A.L.R.*, Vol. 5, No. 3, (1972) pp. 225-243, for an account of the development of the law on the subject.

149. s. 3, Prevention of Corruption Act, 1971.

150. s. 5.

151. s. 6.

152. See the case of *Haining v. R.*, [1970] *H.C.D.*, Nos. 171 and 302 for the discussion and application of this section.

153. s. 8.

154. s. 12.

155. s. 13. Under the Prevention of Corruption (Amend.) Act, 1974, this power has been transferred to the Director of the Anti Corruption Squad. See footnote 161.

156. s. 9. It is probable, though not clear from authorities, that the burden of proof on the accused is discharged when he has proved a matter on a balance of probabilities rather than beyond reasonable doubt. See *Haining* case (footnote 152).

157. s. 10.

158. s. 14.

159. Written Laws (Miscell. Amend.) Act, 1970 (now s. 284A of the Penal Code, cap. 16).

160. Prosecutions under ss. 6, 8 or 9 of the Corruption Act, and under s. 284A of the Penal Code require the consent of the D.P.P.

161. The Prevention of Corruption Act was amended in 1974 to enable the President to

establish an Anti Corruption Squad, under the control and supervision of the Prime Minister. The Squad is to investigate suspected cases of corruption and to advise the government on the measures to prevent corruption in the public, parastatal and private sectors. Its Director has the powers to order examinations of bank accounts, search of person or premises, or to require a public officer to give an account of his assets (powers which are available to the President, A-G or D.P.P. under the Act). Act no 2 of 1974.

In 1973 a committee for the enforcement of the Leadership Code was set up. Its members are appointed by the President and it has powers to investigate any alleged or suspected breach of the leadership code by any public officer. Committee for the Enforcement of the Leadership Code Act, 1973.

162. See R. Martin, *Personal Freedom and the Law in Tanzania*, 1974, Nairobi, pp. 92-93.

163. The Prime Minister's action was reported in the *Daily News*, 5 Dec. 1973. For a discussion of the role of the legal system, see my article cited in footnote 3.

164. s. 7.

165. The accounts of the corporations and the enterprises are generally years in arrear, see *Daily News*, 15 November 1974. See also A. W. Bradley and J.P.W.B. McAuslan, "Public Corporations in East Africa" in W. Friedmann & J.F. Garner, *Government Enterprise*, 1970, London.

166. Board of Internal Trade Act, 1973.

167. S.T.C. (Dissolution) Act, 1973.

168. See the references cited in footnote 126.

169. See particularly, *Towards Socialist Planning*, op.cit.

Akilagpa Sawyerr

Multinational Corporations and Development:

The Case of the Rubber Industry in Ghana*

I. Introduction

A public enterprise sometimes starts from the nationalisation of private assets. It may initially take the form of a joint venture, or be coupled with a management contract, but is often intended to lead to full state ownership and control. Occasionally, however, a public enterprise in the form of a joint venture may start the process of de-nationalisation, so that the previously full state ownership and control are then shared with a private party, generally a multinational corporation. A study of this phenomenon is worth while, for whether it leads to full private ownership and control or not, it shows at best ambiguities towards the public sector, and also brings out the many sidedness of public enterprise.

It is a fundamental law of the development of capital that its organic composition tends to increase, that is, with improvements in the technical basis of production, capitalist enterprises, in order to remain competitive, are driven to invest increasingly larger amounts of money in plant, machinery and raw materials, and to do so at an accelerating rate, without a proportionate increase in employed labour. This drive to expand the technical base of production under capitalism has historically resulted in the increasing concentration of production in larger units, the centralisation of capital in fewer hands and a general tendency for the average rate of profit on invested capital to fall. These tendencies to monopoly and decreasing profitability are the basic contradictions of the capitalist mode of production.¹

Among the measures resorted to by capital to resolve these contradictions was the export of capital to colonial and semi-colonial dependencies. The change from the primacy of the export of commodities to that of the export of capital by the leading industrial nations which was accentuated towards the end of the nineteenth century was thus dictated by the objective requirements of the development of the capitalist mode of production in the exporting countries, and had the purpose of helping to counter the tendency for the average rate of profit to fall.² This was achieved by seeking investment under

* Owing to the extreme difficulty of getting at relevant information, especially that under the control of government officials, this study has had to be based on as yet incomplete information. The views here expressed are therefore highly, and unusually, provisional.

conditions which ensured that invested capital yielded returns far in excess of that recoverable on the average in its home country. Investment in colonial countries where, due to the relative backwardness of production, the organic composition of capital was lower, and where wages could be kept to the minimum by the naked exercise of the power of the colonial state, ensured the recovery of such "super-profits".

As important as this quest for higher profit, was the concern to invest in such fields as would complement production in the home country. Thus colonial investment was historically concentrated in the production of food and industrial raw materials. Cheap labour ensured that these products were imported cheap by the home countries. There, cheap food had the effect of holding down the cost of living, and helping to keep the wages of the workers low, thereby tending to keep the profitability of invested capital up. Further, cheap raw materials helped cheapen the cost of constant capital, thereby tending to counter the tendency noted above for the organic composition of capital to rise causing profitability to drop.

Thus the objective basis for this investment dictated its function and the areas of concentration within the dependencies. It encouraged the opening up of the dependencies by the creation of such infra-structural facilities as railways, harbours, and roads, in order to bring within exploitable reach the food and raw materials needed by metropolitan industry. It also constituted these dependencies into markets for the products of such industry. This set in train the breaking up of local economic formations and the integration of the leading sectors into the expanding capitalist order, thereby internationalising the capitalist mode of production. But the systematic extraction of surplus from the colonies prevented the accumulation of local capital and therefore the possibility of independent development there.

The impact of the introduction of outside capital, finance capital, on the economies of the colonial territories was thus to disrupt their economies, create a relationship of dependence between the metropolitan centres and the periphery, and ensure the extraction of colonial super-profits. This it was that set the economies of the periphery on a trajectory of underdevelopment.

This dialectical relationship between the spurt of production and development in the metropolises and the contrasting despoliation and underdevelopment in the periphery is now beyond dispute. We can only refer the reader to the increasingly substantial literature on the subject for detailed documentation and argument.³

The multinational corporation, the prime manifestation of the capital in its monopoly phase, has been the main vehicle for the export of capital. Its activities therefore constitute the concrete operations of capital. In what follows it is proposed to focus narrowly on the activities of one such corporation—Firestone Tire and Rubber Company of Ohio, U.S.A.—in one underdeveloped country—Ghana. Specifically, the acquisition by Firestone of control over the operation of a Rubber Tyre Project set up in Ghana will be examined with a view to ascertaining in the concrete:

a) the conditions in Ghana which provided the setting for this assertion of domination, and

b) the mechanics of control over rubber production and the appropriation of surplus values.

The relevance of this examination to the problem of industrial development or the lack of it in the underdeveloped countries stands out when it is realised that the rate and direction of economic development depends on the manner in which surplus value is created, appropriated and utilised. To the extent that such value is generated in an underdeveloped country, is appropriated and is repatriated by a multinational corporation, to that extent is the size of the resources available for productive investment in that country reduced. But even such value as is not repatriated may be used in a manner contrary to the true development needs of the country if it is at the disposal of a multinational corporation, which will invariably employ it to advance *its* world-wide interests.

In what follows we set out and discuss the terms and the impact of the agreement by which the take-over of the rubber project was effected. This agreement is set in its local context by outlining the political and economic conditions in Ghana at the time of its negotiation. It is then viewed against the background of the general question of the extraction of colonial monopoly super-profits by multi-national corporations and their domination of the economies of underdeveloped countries.

II. The Firestone agreement

By an agreement signed on September 2, 1967 between the Republic of Ghana and Firestone Tire and Rubber Company of Akron, Ohio, the Ghana Government handed over to the Company complete control over the running of a rubber project, consisting of a vast rubber plantation and a tyre factory, set up as part of the programme for industrial development in the country. It is proposed to examine this agreement in this section. In this examination a brief sketch of the history of rubber production in Ghana will be followed by an analysis of the main features of the agreement and some of its direct consequences against the background of the political and economic conditions under which it was concluded.

A. Antecedent Developments

Rubber being but a minor product, not much has been written about it in the literature on the economy of Ghana. What little there is consists of essentially statistical information scattered throughout the various surveys of the economy. Some idea of the production situation can be obtained from Table I a and I b:

It is moreover reported that by the end of 1966 there were 6 factories manufacturing such rubber products as mattresses, polythene foam, glues, adhesives, slippers and canvas shoes (*Handbook of Commerce and Industry*, 1967, 80).

The picture that emerges is, one of substantial importation of rubber, both

Table 1 a. Value of imports of rubber (in £Gooo)

	1957	1958	1959	1960	1961	1962	1963
Crude (including synthetic and reclaimed)						117	20
Manufactured	2155	1894	2127	2251	2458	2006	2133

Table 1 b. Value of exports of rubber (in £Gooo)

	1957	1958	1959	1960	1961	1962	1963
Crude (including synthetic and reclaimed)	45	58	79	71	67	58	73
Manufactured	3	31	4	6	23	21	3

(Culled from *Statistical Yearbook*, 1963, Tables 118 and 119.)

crude and manufactured, as against small-scale local production and manufacture for export. It is no part of our task to attempt any explanations of the violent fluctuations of the figures from year to year, nor to analyse the relationship between imports and exports—our purpose here is simply to emphasize the smallness of scale of the whole enterprise and the heavy dependence on imports.

This situation, stemming as it did from small-holder production and private manufacture, was destined to be radically altered by the setting up of a large state-owned plantation capable of producing enough rubber to meet a substantial proportion of local needs, leaving something over for export. This project was initiated in the mid-1950's with the acquisition of over 100,000 acres of land around the Bonsaso area in the Western Region. Planting proceeded rapidly, and by the mid-1960's over 20,000 acres had been planted.⁴ As rubber took 7-8 years to mature, it was not expected to be ready for tapping before 1967, after which mature rubber would come under tapping at the rate of 2,000 additional acres each year.⁵

A little after the establishment of the plantation, plans were initiated for establishing a factory that would use local rubber for the production of rubber tyres. A contract for the supply of machinery and equipment for a complete factory was signed in 1961 between the Industrial Development Corporation (I.D.C.) and Techno-Export of Praha, Czechoslovakia, within the terms of an Agreement on Economic Co-operation between Ghana and Czechoslovakia which provided for very easy repayment terms for Czech loans. The main provisions of these agreements as later modified were:

- I) £10 million credit (for all projects, not just this factory);
- II) interest at 2 1/2%;
- III) repayment over a period of 7 years;
- IV) repayment in Ghana currency (£G) to the extent that it is used to pay for Czech purchases of Ghanaian goods, the balance to be payable in convertible currency;
- V) 9 months training in tyre production techniques for 12 Ghanaians; and

VI) the provision of a Czech expert as Managing Director on a 3-year contract.

By the time of the *coup d'état* in February 1966⁶ all the machinery had been delivered, the construction of the factory had started and was proceeding fast, and a total sum of £350,640 had been expended on various aspects of the project. It was then anticipated that the factory building would be completed, and the equipment installed ready for production by the end of 1967, when, incidentally, the plantation would begin producing crude rubber.

The position at the time of the *coup d'état* then was that there was a state-owned and state-controlled integrated rubber project for the manufacture of tyres and other rubber products. Though it would be necessary to import some of the raw rubber initially, production on the state plantation was expected to exceed the capacity of the factory in a matter of a few years, after which there would be enough for the factory and for export.

The financial position was then far from gloomy. It was estimated that by the end of 1965 the State Farms Corporation had spent £1 3/4 m. on the plantation, and would need £10 3/4 m. more over the next 14 years, bringing total expenditures by 1979 to £12 1/2 m. Projected revenue for this period was expected to exceed this amount by 1980—the break-even year. It was emphasised that if investment is speeded-up this break-even period could be brought forward to 1974 or 1975, after which the Government's investment would have been recovered, surpluses being thereafter pure profit.

It should be stressed that these projections were made for the plantation only, and did not include the admittedly more profitable factory. Clearly if the two were taken together as an integrated whole the break-even year was more than likely to be hastened by 2 or 3 more years. It is therefore not unreasonable to suggest that a realistic assessment of the rubber project at the time of the *coup d'état* was that *given adequate and timely investment, the state stood to own and control absolutely an integrated rubber project, the investment in which would have been amortised by 1973 or 1974.*

Thus the rubber project, in addition to being in line with correct industrial development strategy, was also good business. Further, the state had by the end of 1967 invested all of £5 m. in it.

We have become familiar with instances of the state in many a developing country insisting on participating in the equity of established private, usually foreign, enterprises, or joining with private interests in setting up joint-enterprises. The fact that the private partner is invariably the beneficiary in such transactions has been amply documented and commented on (Botchwey, 1973; Coulson, 1972; Shivji, 1973, *passim*). What is unusual about the situation of the Ghana rubber project is the almost gratuitous way in which control over an established project was handed over to a foreign private body. More striking yet was the fact that, as the discussion of the terms of the Master Agreement will show, the entire project was just about literally given away for a song. The explanation for this unusual situation must be found, it is believed, in the very peculiar conditions that existed in Ghana in the period immediately preceding the signing of the Firestone Agreement. It is therefore necessary to pause awhile and identify the salient features of that period.

B. Political and economic context

The regime of Kwame Nkrumah was overthrown on February 24, 1966, in a combined operation of the armed forces and police which then formed the National Liberation Council (N.L.C.). Among the ostensible grounds for this *coup d'état* were the arbitrariness and alleged cruelty of the regime, its denial of basic human rights, the hardships its economic policies were alleged to have imposed upon the people and his disregard of the comfort and safety of the armed forces. These were the concerns that may have moved the more naive of the leaders of the coup (Afrifa, 1966, *passim*), and that explain the short-lived joy with which the coup is reported to have been greeted by people generally.

Clearly such superficial considerations could not explain an event of the magnitude of the 1966 *coup*. For unlike the 1972 *coup* which removed the Busia regime,⁷ the earlier *coup* did not effect a mere change of government. It constituted a determined effort to keep Ghana firmly within the control of imperialism, from which it was, under the Nkrumah regime, showing signs of straying. The explanation can only be found in powerful social forces which gained momentum especially in the early sixties and which exposed and destroyed the social bases of the regime.

It is beyond the scope of this paper, to discuss the nature and conjunction of these forces.⁸ It should be sufficient for present purposes to indicate that the collapse of the regime resulted from its failure to escape the contradictory pressures to which it was subjected by the neo-colonial economy it inherited at independence. The prime feature of this economy was its underdeveloped and underdeveloping nature. You had there all the indicia: a primary-producing export-oriented mono-crop economy; lack of integration between the various sectors; petty bourgeois control over the state and party apparatus, and excessive dependence for trade and "aid" upon imperialist countries.

At the same time the leadership especially after about 1960 attempted to escape from the more obviously pernicious aspects of neo-colonial dependency. This attempt could be seen in such actions as the increase in relations with the socialist countries of Eastern Europe and China, and the setting up of state-owned industrial enterprises. But the strategy was clearly inadequate since, being based upon an incomplete understanding of the nature of imperialism and the causes of underdevelopment, it did not seek to break completely from the domination of monopoly capitalism. Thus as late as 1966 Kwame Nkrumah could describe the Volta Project as "living proof that nations and people can cooperate and coexist peacefully with mutual advantage to themselves, despite differences of economic and political opinions".⁹

Another feature of the inadequacy of the post-1961 strategy, and one intimately connected with the failure on the economic front, was the failure to effect the political and institutional changes that were vital to any attempt to defeat imperialism. While rhetoric about revolution filled the air the popular base of the C.P.P. was allowed to disintegrate to such an extent that the overthrow of the supposedly mass-based regime was greeted by *popular* rejoicing, with not a voice, let alone an arm, raised in protest.

Immediately upon seizing power, the National Liberation Council (N.L.C.), made up of army and police officers, and supported by a group of civilian Commissioners, set about correcting the "evils" of the Nkrumah regime. Key among such evils, for our purposes, were the Seven Year Development Plan (which embodied much of the post-1961 economic strategy); the state enterprises set up as part of the industrialisation plan; the presence of Eastern European and Chinese technicians and specialists, all of which can be summed as in the one mortal sin—the attempt to remove private enterprise from its natural "kingly" position in the economy of Ghana. It hardly bears noting that these evils were all aspects of what we have described as the post-1961 strategy. Inadequate as that strategy was, neo-colonial as it left the economy and politics of Ghana, it still displayed tendencies that called for summary corrective action by imperialism and its local allies.

In exorcising these evils, the NLC regime took some actions so bizarre that they are not explicable solely in terms of a concern to return Ghana to the safe haven of imperialism's bosom. In not dealing with such actions as the public burning of books, official documents and other records of the Nkrumah period; the unceremonious treatment of personnel of embassies of socialist states; the callous and gleeful exposure and humiliation of the African freedom fighters being trained in Ghana, it is not intended to minimise the enormity of those excesses. It is the case, though, that our topic makes it necessary to focus discussion on actions related to the state sector of the economy. These consisted essentially in the cancellation of several projects under construction, the suspension of those already in operation, the wholesale abandonment of machinery imported at great public expense for the production of admittedly needed agricultural and industrial goods.

In order to understand such actions it is necessary to advert if only briefly to the ideology of the coup-makers and the specific conditions of the post-coup period.

To begin with ideology, we find this incredible statement in an official government policy paper put out in 1967:

Government adheres to the principle that primary responsibility for running and developing certain sectors of the economy belongs to the private sector. In particular agriculture, industry and commerce are activities of this sort. On the other hand provision of basic services—water, electricity, roads, railways, harbours and social services—belong in the public sector. (*Outline of Government Economic Policy*, 1967.)

This not only reversed the strategy of the Seven Year Plan, but actually looked back to the colonial policies of the early years of this country!

Closely linked to this primitive view of capitalism was a touching faith in the efficacy of Western-type political and economic institutions, and the easy availability of Western aid in the form of capital and expertise. One has only to read the infantile account of the antecedents and purposes of the coup given by A.A. Afrifa, one of the key architects of the *coup*, later Commissioner for Finance, later still Chairman of the Presidential Commission, to gauge the depth of this faith in Western models (Afrifa, 1966, Chaps. 3-5). As to faith in Western aid, this emerges from the numerous I.B.R.D., I.M.F., U.N.D.P. etc. commissions and reports undertaken, not to mention the endless and ultimately futile chain of trips and meetings to negotiate a rescheduling of

the onerous short-term debts owed to Western creditors.

Operating somewhat independently of this ideological orientation, but in the same direction, were a set of factors arising directly from the objective situation of the NLC regime at the beginning of its rule.

The first such factor was the need to ensure the security and stability of the new regime. One way of doing this was to justify the coup by painting a picture of the unrelieved evil that the Nkrumah regime was. Given the hardships and pockets of irrationality that had characterised the final years of the regime, it was not too difficult to whip up a frenzied outpouring of anti-Nkrumah emotion. To sustain this hysteria it was necessary to ensure that no action of the regime could be seen as having any positive features. Thus any projects then established had to be denigrated and sabotaged, any still a-building to be "suspended", any equipment *they* had imported left unused, and foreign technicians working on those projects sent packing. This, although all recognised the desperate need for machinery and technical "know-how". Indeed, as we shall see below, one of the justifications for selling off those projects was the need for just such "know-how".

A second factor was the need to secure the blessing of the Western countries, whose "aid", it was expected, would sustain the new regime and justify the overthrow of Nkrumah's regime. This accounts for such things as the reliance on I.M.F., I.B.R.D. and U.N.D.P. advice, and in particular the circumspection with which the new regime approached the question of the debts owed to Western European, American and Japanese creditors, whose business conduct was admitted to have been, to put it mildly, open to question. Attempts to reschedule these debts in a way to relieve their crushing burden on the country's balance of payments position have continued unsuccessfully to this day, nine years after the *coup*. It also accounts in part for the shabby treatment meted out to the embassies of Socialist countries, many of which were shut down.

We now turn from the general background to the details of the Rubber Project itself. It has been extremely difficult to find out the specific bases for the decision to surrender control over it to Firestone. It is fair to say however that whatever the particular reasons were, they were likely to partake of the general ideology prevailing at the time and the specific complaints levelled at the time against state enterprises in general.

We have already referred to the simplistic principle seriously advocated and applied in the N.L.C. period that the state should keep its nose out of such activities as agriculture, industry and commerce. We have also referred to the practical underpinning of this ideological position in the need to move directly counter to any feature associated with the Nkrumah regime. The upshot of these considerations was a policy of withdrawal of the state from industrial activity by selling off as many of the state-owned enterprises and inviting private participation in, and control over, as many of the remainder, as possible.

As a preliminary step a report was commissioned from the State Enterprises Secretariat on the status of the various enterprises. The report described the administration and operation of projects under the Secretariat, commenting briefly on each of those projects. Of special interest to our study are its general

comments on the causes of difficulty in the operation of the projects. The major causes identified were

1. bad management and accounting systems;
2. shortage of skilled workers
3. lack of planning and financial controls
4. inadequate feasibility studies
5. overstaffing, and
6. lack of working capital. (*Report*, 1966).

It is fashionable to use this list as a basis for a blanket condemnation of all Nkrumah's enterprises, or, worse, state enterprise in general, which in turn provides justification for the surrender to private interests. A minimally careful reading of the report, however, shows clearly that no such blanket condemnation can be based upon it. For, without glossing over them, it explains how many of those difficulties arose and not only shows that they are eminently remediable, but also provides evidence that they were by and large on the mend.

The Report indicates that one year after the introduction of the State Enterprises Secretariat as a centralised supervisory body there was an improvement in the efficiency of the operation of the 26 corporations under its control. Part of the reason for this was the upgrading of the quality and supporting supervisory staff. This was done by the organisation of courses and seminars in collaboration with the National Productivity Centre and the Ghana Association for the Advancement of Management. This, supplemented by the use of Management Agents in some cases, had led to an increase in the general profitability of the corporations. Moreover the United Nations Center for Industrial Development had been invited to send in experts to help improve the operation of the Secretariat itself.

Statistical evidence for the trend to improvement is provided by some figures set out in the Report. These are that

1. gross output for the manufacturing enterprises increased from C12,000,000 in 1964 to C20,000,000 in 1965, an increase of 66.6 %
2. while the cost of production increased by 12% over the same period, sales increased by 33%.

Again, it was noted that export orders were beginning to come in for the products of some of the establishments. The result of the detailed examination was that out of 19 corporations in operation, 8 were breaking even or better, and 5 had very good prospects of doing so.

Among the interesting observations made in the Report was the fact that state enterprises tended to do badly where competition with imported goods was intense, and that prices would be competitive if taxes and duties on raw materials and local manufactures were waived. In sum, local enterprises would show more success if they had the usual protections of "infant industries". It is not without significance that, as would appear below, Firestone like all other private investors, was careful to obtain all these protections for the Rubber Project before it took it on.

When it is considered that the enterprises in question were mainly manufacturing establishments set up in the 1960's, many of them in

operation for less than two years at the time of the Report, it becomes difficult to see what more could have been expected of them. No doubt errors in conception and operation were properly noted and emphasised, but one would have thought that at the early phase of the development of such industries, such errors should have been the basis for correction, not virtual abandonment. That this was not the case, that the failures were exaggerated, can only be explained on the basis of the ideological perspective from which the Report was viewed.

This opinion is substantiated by the case of the Rubber Project, to which we now turn. Since at the time of the decision to invite "participation" by Firestone the Factory had not even been completed, charges of bad management and overstaffing (grounds 1, 2 and 5 above) could not be made against it. Indeed the agreement with Techno-Export provided for the secondment of a Czech expert as manager and the training of 12 Ghanaians in rubber technology. Again, the factory was based upon excellent feasibility studies, emphasising the availability of raw rubber from the Plantation and the existence of a ready market for its product, thereby eliminating ground 4. There is no evidence of a lack of financial controls—in any event that could always be provided before the factory began operation. The only conceivable concern would be ground 6, lack of working capital. There is no evidence in anything I have seen of any attempt to secure this capital whether from the Czechs or the banks or from anybody else.

When we turn to the Plantation, we see no evidence of grounds 1-4. Overstaffing was a problem—but that was obviously remediable. Lack of working capital was a more serious problem, but here again no attempt appears to have been made to secure it.

In sum, whatever bases there were for the complaints against state enterprises in general, no incorrigible defects were identified in the Rubber Project, such as would justify or even explain the decision to surrender it to private control.

The story is not finished yet. It is most instructive in light of what has been said so far, that the original intention was to invite participation *in the Factory only*, the Plantation remaining in full state ownership. That is, *the state keeps the less profitable raw-material—producing aspect, while disposing of the more profitable manufacturing aspect—preserving in the Rubber Project the usual division of labour between periphery and centre in the international capitalist order!*

When it was found that the capital requirements of the Plantation made it necessary to treat the Project as a whole, it was not surprising that the multinational tyre companies invited wanted none of the Plantation. PROMOCI of France is reported to have rejected it, among other things, because of the prospect of the growth of communism among the Plantation workers! Goodyear Tire and Rubber Co, of the U.S.A. sought an 80% share in the Factory and 20% in the Plantation, knowing that the former would yield returns fastest on investment. In the end Firestone agreed to take 60% in the Factory as against 45% in the Plantation.

We have, we hope, in this section, done enough to sketch the circumstances in which a decision was taken to dispose of substantial interests in, and

control over, a project which made sound business sense and good industrial strategy.

We now turn to an examination of the nature and degree of the surrender that the Firestone Agreement constituted.

C. Terms and implementation

On September 9, 1967, a Master Agreement (the Agreement) was signed by the Commissioner of Industries on behalf of the Government, and by a solicitor for Firestone Tire and Rubber Company, formally setting out the terms agreed upon in the course of negotiations spanning months. This Agreement, as modified by letters of agreement dated September 15, 1967 and June 3, 1968, came into effect on December 8, 1967. It makes provision among other things for:

1. the setting up of 2 private companies with shares jointly held by the Ghana Government and Firestone to run the plantation and the factory;
2. financial arrangements, including the contribution to be made by the partners to the equity of the companies; and
3. the guarantees and privileges to be accorded Firestone and the companies.

1. *Incorporation of companies:* Two companies, Ghana Rubber Estates Ltd. (GREL) and Firestone Ghana Ltd. (FGL) were incorporated under the Companies Code on September 30, 1967, as provided for under Articles 1 and 3 of the Agreement. GREL took a lease of the plantation and bought the buildings, equipment etc. attached to the plantation, while FGL acquired the factory and all its plant. Ghana took 55% of the shares in GREL, and 40% of the shares in FGL, in return, broadly speaking, for surrendering a proportion of her interest in the plantation and the factory respectively.¹⁰ The remaining shares were taken by Firestone (45% in GREL and 60% in FGL) in return for cash payments, and, as to 6.8% of the FGL shares, for engineering procurement services to be rendered.

In spite of its majority shareholding in GREL, however, Ghana did not acquire a voting majority in the company. This was because her holdings, valued at the New Cedi equivalent of US\$3,900,000^{10a} as against Firestone's New Cedi equivalent of US\$3,060,000, were split into preference shares and equity shares. Since by the Regulations preference shareholders were effectively excluded from voting (Art. 8) Ghana's voting strength was restricted to her equity shares, which accounted for only 47% of the total equity in the company. This minority in voting strength is reflected in the composition of the Board of Directors, with 3 representatives of Firestone to Ghana's 2.

As to FGL, in which Firestone held a majority of the shares, there was no difficulty. Firestone obtained 60% of the votes and has appointed 3 Directors to Ghana's 2. Indeed the company is described as a Firestone subsidiary.

Thus Firestone commands a majority of the votes on the Boards of both

companies. The formal control conferred by this majority is given substance by the appointment of one of the Firestone representatives as Managing Director of the companies.

Under the lease GREL acquired a large citrus farm set up on part of the rubber estate. By 1970 this farm covered 435 acres of which 245 acres were in full production by 1974. This unbargained-for, unintended bonus, was the result most probably, of the haste and the inadequacy of the inventory-taking that characterised the whole process of the disposal of state enterprises in the immediate *post-coup d'etat* period.

2. *Financial arrangements.* The Agreement provided for cash payments to be made to Ghana, and for working capital to be made available to the companies in the following manner:

a) In return for 53% and 60% of the equity in the plantation (including all its buildings, furniture, equipment, vehicles etc.) and the factory (together with machinery, equipment, vehicles etc.) respectively, and control over both, Ghana was to receive:

(1) in cash the new cedi equivalent of US\$1,833,000 plus a further sum to be determined under formulae set out in Schedules "C" and "F" to the Agreement (out of which sums Ghana was to pay the new cedi equivalent of US\$825,000 unpaid on her allotment of unissued GREL shares) [Arts. 2.a) and 4.a)]; and

(2) C10,000 a year as rental for the lease of the plantation [Sched. C].

b) Firestone was to make available to the companies in cash the new cedi equivalent of US\$6,188,000 (out of which to pay the sums due to Ghana under a) (1) above. [Arts. 2.6) and 4.b)].

c. Ghana and Firestone agreed to use their best endeavours to secure for FGL

(1) a loan of not less than the new cedi equivalent of US\$2,900,00 at commercial rates or better;

(2) overdraft facilities of not less than the new cedi equivalent of US\$1,000,000 at similar rates; and

(3) a foreign currency loan in an amount sufficient to finance the importation of equipment for FGL on terms "not less favourable than those obtainable from the Export Import Bank of Washington". [Art. 13].

3. *Special guarantees and privileges.* Firestone's investment is protected in two ways: by guarantees given it directly and by the privileges given to the companies as incentives to an "infant" industry.

a) (1) Firestone's cash investment of the new cedi equivalent of US\$6,188,000 and the capitalised management and procurement fee of the new cedi equivalent of US\$400,000 are to be registered by the Bank of Ghana as Firestone's investment in Ghana, thereby giving it the protection of the provisions of Part III of the Capital Investments Act (Act 172). These include (a) freedom from expropriation; and (b) freedom from restrictions on remittance of capital, profits, and interest.

(2) By the use of the "best endeavours" of the parties, Firestone obtained the added protection of the investment guarantees given American investors by

the U.S. Agency for International Development (U.S.A.I.D.).

(3) Ghana agreed to the submission of disputes arising from the investment to the International Centre for Settlement of Investment Disputes, and undertook to waive her claim to sovereign immunity in any proceedings on such disputes.

b) (1) GREL and FGL were given generous incentives under Act 172. These included exemptions from the payment of

(a) income tax for a period of 10 years after the commencement of commercial production;

(b) property taxes for a period of 5 years from the dates of incorporation;

(c) import duties and sales taxes on fuel, machinery, spare parts and raw materials for a period of 10 years from the dates of incorporation; and

(d) export duties on their products for a period of 10 years from the date of incorporation.

(2) Employees of the companies were entitled to repatriate up to 50% of their salaries.

(3) The companies were entitled to the free remittance of foreign exchange under technical services contracts made with Firestone.

(4) The companies were given monopoly control over the market in processed rubber and rubber tyres, in that Ghana agreed

(a) not to control the selling price of those items;

(b) that until FGL started commercial production she will not licence the importation of tyre tubes and retread materials in quantities in excess of normal market requirements;

(c) that after FGL started commercial production,¹¹ no licences were to be issued for the importation of any items that could be supplied by FGL—not even as parts of unassembled vehicles.

Thus was the Firestone Tire and Rubber Company of Ohio given *monopoly control* over the manufacture and distribution of tyres and related rubber products in Ghana by an investment which by reason of the guarantees given it was entirely without risk of loss.

4. *Implementation.* GREL and FGL, incorporated on September 30, 1967, commenced production on a commercial basis on September 1, 1969, and May 2, 1969, respectively. First profits were realised in the year 1969-70, £61,414 for GREL and for FGL £275,400. By the end of 1970, the second year of commercial production, the total balances on surplus accounts of the two companies stood at £1,851,189.

D. Immediate results

Under this heading it is proposed to mention only the effects of the Agreement to date on the rubber and tyre markets in Ghana and on small-holder production of rubber.

1. *Production and marketing.* The production and marketing record of GREL can be seen from Tables 2 a and 2 b.

Table 2 a. *GREL production data*

As of October 31, 1974	1968	1969	1970	1971	1972	1973	1974	1975**
Immature Acres Maintained	18,600	16,630	16,140	15,340	18,300	19,300	18,000	17,900
Mature Acres Tapped	—	1,970	2,460	3,260	3,300	4,700	6,000	7,600
<i>Total Planted Acres</i>	<i>18,600</i>	<i>18,600</i>	<i>18,600</i>	<i>18,600</i>	<i>21,600</i>	<i>24,000</i>	<i>24,000</i>	<i>25,500</i>
Purchased Rubber (000lbs)	—	2	338	223	298	450	764	860
Sold (000lbs.)	—	176	1,813	2,500	3,000	3,350	3,850	6,000
Average Selling Price Lb. \$	—	.222	.189	.116	.129	.258	.330	.194
Total Sales M \$	—	39	342	291	388	863	1,272	1,763
*Profit	—	—	—	—	—	—	—	—

*Deleted by Management

**Estimated

Source: GREL office figures

Table 2 b. *Marketing of GREL rubber (in lbs)*

	Local Consumption		Export	Total
	FGL	Other Customers		
1969	175,582	—	—	175,582
1970	1,611,436	201,600	—	1,813,036
1971	1,994,325	511,625	—	2,505,950
1972	2,828,175	219,375	—	3,047,550
1973	3,559,094	294,144	—	3,853,238
1974*	—	—	—	—
1975**	5,300,000	700,000	—	6,000,000
1976**	6,000,000	900,000	—	6,900,000
1977**	6,500,000	1,650,000	1,150,000	9,300,000
1978**	6,900,000	1,800,000	3,600,000	12,300,000
1979**	7,500,000	2,000,000	5,800,000	15,300,000
1980**	8,000,000	2,200,000	6,700,000	16,900,000
1981**	8,600,000	2,400,000	8,450,000	19,450,000

* Figures not available.

** Estimates.

Source: Figures supplied by GREL office.

Emerging from these tables is a picture the salient features of which can be summarised as follows for present purposes:

a) Starting in the 1968-69 season an increasing acreage of rubber came under tapping, amounting by 1975 to almost 30% of the total planted acreage, which had itself been increasing at a slightly slower pace. This was reflected in the rising volume of raw rubber produced and sold.

b) The vast bulk of this product has been sold or is projected to be sold directly to FGL as tyre grade rubber, other local customers accounting for only a small proportion of total purchases, never more than 21%, averaging around 13% for period in question.

c) As from 1977 it is projected that production will exceed local demands, making possible the exportation of a rising surplus. This surplus for export is anticipated to account for 46.2% of total production by 1981.

When we turn to the situation in FGL, the following is the position:

d) The vast bulk of FGL's rubber needs is met by GREL's supply of tyre grade rubber. Undisclosed amounts imported from the Firestone Plantations Company, Liberia, supplement this supply.

e) At present FGL produces most of the tyres sold in Ghana. A small proportion, less than 10%, is imported. This is made up of what are described as "odd" sizes, that is, those whose production would be uneconomical because of the small size of the Ghanaian market for such sizes of tyre.

f) An undisclosed number of FGL-produced tyres were exported at the beginning of operations. But it is reported that since the beginning of 1974 only small amounts of retread material have been sent to Gambia. Further, the Ghana tire market is reported to be expanding so rapidly that it is expected to absorb FGL's total production for several years to come.

2. *Effect on small-holder production.* Not much is known about this, and general conclusions must await empirical study. It is believed however that the story, only partially known,¹² of one small group of producers is indicative.

The Foso/Odumasi Co-operative Marketing Society, consisting of over 100 primary producers in the Western Region had between 7,000 and 10,000 acres of rubber, a large proportion of which was mature and ready for tapping by the mid-1960's. Initially they processed their rubber into sheet rubber which was sold to the State Cocoa Marketing Board (CMB) at between 12 and 16np. per pound.

With the increase in their production of raw rubber the Society felt the need for capital with which to get modern tapping and processing equipment. The Ministry of Agriculture, to which the Society first sent an application for a loan, arranged a discussion with FGL. The upshot of these meetings was that FGL was prepared to supply tapping equipment to the Co-ops on loan, deducting percentages of the cost from rubber supplied to their factory. But they were not prepared to buy processed rubber, preferring "cup lump" which was all they needed for their factory. For this they would pay only 5np. per lb., on the ground that rubber in thin form consisted as to 50% by weight of water. This figure of 50% wastage was considered exaggerated by an expert of the Ministry of Agriculture and, not surprisingly, the few co-ops which tried this scheme found it financially disastrous. In consequence tapping had come a virtual standstill by the middle of 1970, threatening the livelihood of the growers and up to 1,000 farm labourers.

What made the position of the primary producers desperate was the fact that in 1969 the CMB stopped the purchase of their product. Moreover GREL had begun to supply rubber to the erstwhile customers of the Society, cutting viciously into their custom, to the extent of 90% in the case of one of their most important customers.

As if this was not grim enough, the Society's application for a loan, with which to modernise their equipment and improve their competitive position,

was bandied back and forth between government departments, the National Investment Bank and the Agricultural Development Bank, before being ultimately rejected—this in spite of the strong advocacy of the Ministry of Agriculture and the State Farms Corporation of the viability and profitability of the Society's proposals.

This left the small producers in the pathetic position of being dependent on the goodwill of FGL, their main competitor!

It is not known how this story developed, but enough has been said to show the beginnings of the familiar process of large-scale private enterprise, especially one with the special competitive advantages of GREL, elbowing small producers into bankruptcy, when not stamping them into the ground.

Before considering the implications of this Agreement for the wider question of the role of multinational corporations in the economies of underdeveloped countries, we pause here briefly to look at the reasons for the appallingly bad bargain struck in this, and indeed, other arrangements for the disposal of state interests in established enterprises in the period we have studied.¹³

It all boils down to the impossibly weak bargaining position from which Ghana operated. Among the factors making for this weakness the following could be considered decisive.

1. The *post-coup* instability of the NCL administration drove it to take prompt action to correct what it saw as basic weakness in the economy and thereby to consolidate its position. This unseemingly haste was reflected in the fact that enterprises were sold without the co-operation of the civil servants most intimately connected with their operation. Thus the government negotiators had frequently to rely on the valuations of the "buyers". It is reported that the foremost Ghanaian expert on rubber, who had managed the Plantation from the beginning, and who was in charge of the State Farms Corporation at the time, not only was not on the team that negotiated with Firestone, but was not even consulted during the negotiations. As it happened he was casually called into the last negotiating session, when as he reports it, he was able to challenge the hitherto accepted valuation of Firestone, which was thereupon substantially raised.¹⁴

2. Having convinced itself that the state had no business running industrial and commercial undertakings, the NLC government was in no position to drive a hard bargain. It was perhaps not too far from feeling that the buyers were doing Ghana a favour, especially when its fixation for Western capital and "know-how" is considered.

3. The government was in the paradoxical position of the person who goes to market declaiming at the top of his voice that the goods he was putting out for sale were rotten and not worth anything. For, the anti-Nkrumah anti-state enterprise campaign had involved the repeated cataloguing of defects, real and imagined, in the enterprises in question, and how the state simply could not run them. No wonder the "buyers" named their price.

4. Not only did the government and its spokesmen detail the deficiencies of the enterprises, but they put them on the market at the same time. This gave the whole enterprise the appearance of a "closing-down" sale, wherefore it is not surprising that Ghana obtained sale prices only.

5. It is not entirely inconceivable that there were those on government side who, for their own personal gain, were not pushing for the best bargain possible. This would explain some of the more bizarre giveaways that characterised the entire episode. But in the absence of firm evidence of this and the spirited assertion of good faith by one of the main actors in the events of that period, we are in no position to say more than this.

III. General Observations

In this section it is proposed to draw out for comment some of the major implications of the material thus far presented for any programme of industrialisation and real development in Ghana. The implications are therefore considered in relation to the crucial questions of the generation and appropriation of surplus within the economy and control over the manner of its utilisation.

A. Integration into Firestone Empire

To ensure that GREL and FGL conformed to Firestone managerial and operational methods, and took their appropriate places within its international empire, Firestone appointed to their Boards three of its seasoned executives. These three held amongst them 23 other directorship in Firestone companies in 16 countries spread over all the continents of the world. One of these three stayed on as Managing Director (?) for the first years of the life of the companies, and the other was replaced by Firestone's Export Sales Manager for Africa and the Middle East. This latter stayed with the companies for 5 years.

There can be little doubt that from such beginnings GREL and FGL are unlikely ever to wander far from the established Firestone pattern even if they were left in the charge of lesser Firestone executives and Ghanaians trained within the Firestone Empire. In any event, if Firestone follows the usual mode of operation of multinational corporations, fundamental decision-making is so highly centralised that the area of discretion of the local management is highly circumscribed (Leys, 1975, 123-124).¹⁵

The upshot is that decisions made on the operation of GREL and FGL will be based more on the global interests of Firestone of Ohio than on the requirements of the economy of Ghana. Hence the importation of rubber from Firestone's Liberian plantation to fill needs that GREL could meet, even as GREL rubber of certain qualities was exported!

B. Control over rubber market

It was noted above that as from 1977 GREL's production is expected to exceed local requirements, putting it in a position to start a serious programme of exporting rubber. What this means for the local market is that the company

will by then have come to occupy the dominating position in rubber production that follows naturally from the scale of its operations and the special protection it is given by the state. The case of the Foso/Odumasi Co-operative Society discussed above gives some indication of the impact of this fact on small-holder production. As to tyre production, FGL's total control over the market will be assured by its numerous competitive advantages even after the expiration of its monopoly over tyre production and distribution. Thus GREL and FGL have between them total and assured control over the production and marketing of rubber and tyre products in Ghana.

But GREL and FGL are nothing but Firestone Tire and Rubber Company of Ohio, U.S.A. Not only does Firestone command a voting majority on the Boards of Directors of the two companies, but it also appoints the Managing Director and Comptrollers (Directors of Finance). Though Firestone, with a complement of 18 Ghanaian to 14 expatriate managerial staff, appears relatively "Africanised", this is nothing but a sham. The Managing Director, the Comptroller and other key personnel are American executives trained in the Firestone empire. Thus Firestone controls not only the policy but also the day to day running of GREL and FGL, and through them the rubber industry in Ghana. The measure of this control must be seen in the context of Firestone's relative autonomy of control by the state *qua* sovereign. For apart from control over its own prices, Firestone enjoys security of its investment and exemption from the taxing power of the State under the Agreement.

Further, Firestone enjoys not only a State-protected market but, at least as important, State-backed access to loan and overdraft facilities with both local and foreign institutions. Thus, over and above a guarantee against nationalisation of its investment, a guaranteed market, all manner of tax exemptions, Firestone enjoys guaranteed access to credit.

When it is added that Firestone did not have to carry out any feasibility or market studies, or tie up its capital while the plantation and factory were being established, we have the perfect situation of a *totally riskless investment*. This conforms with frightening exactitude to what has been described as the new corporate investment strategy in the era of monopoly capitalism—holding back to let others do the vital pioneering work, then moving in, buying out and absorbing the smaller creators. (Baran and Sweezy, 1966, 48-49).

C.. Denationalisation of local capital

By the end of 1971, GREL and FGL represented a fund worth about 24 million cedis by the most conservative estimate. This was made up as follows:¹⁶

1. Original Ghana investment in projects	£13,450,000
2. Cash payment by Ghana for shares in GREL	825,000
3. Dollar loan from Ex-Imp. Bank, Washington	3,220,000
4. Loan from Standard Bank of West Africa	2,072,000
5. Firestone investment in cash	6,188,000
	25,755,000
6. Less amount paid to Ghana in Cash	1,833,000
	23,922,00

Control over this fund was vested in Firestone by reason of its control over the companies. Thus by the investment of just over 6 million cedis over a two-year period Firestone obtained absolute control over assets worth 24 million cedis. Particularly significant is the fact that of this amount well over 16 million cedis, or two thirds, consists in *local* capital. As GREL and FGL and therefore the fund serve the purposes of Firestone, this constitutes an effective *denationalisation of local capital*.

D. Siphoning off of economic surplus

Control over GREL and FGL gives Firestone vast opportunities for the extraction and repatriation of surplus. We indicated in the introductory remarks that one of the main effects of capitalist investment in the colonies and semi-colonies is the extraction of colonial super profits (Baran & Sweezy, 1960, 105; Mandel, 1970, 454). This is to counter the tendency of the average rate of profit in the metropolitan centres to fall, and therefore to push back the crises that follow the deepening of the contradictions inherent in the capitalist mode of production.

The forms of this extraction have changed in response to changes in the operation of capitalism at the centre and in conditions in the underdeveloping periphery. Put very generally, capitalism in its monopoly phase has less and less need for the naked plunder of booty that characterised the early mercantilist phase of its intrusion into what are now underdeveloped countries. We have already seen that in its contemporary phase capitalism needs outlets for the investment of the surplus that it generates in excess of investment possibilities at home. Such foreign investment is called forth and justified by the higher returns it brings. Statistical support for this proposition is abundant. A citation or two should suffice:

Table 3. *Profits of American companies as ratio of book value*

	Companies operating in underdeveloped countries	Companies operating in the U.S.A.
	%	
1945	11.5	7.5
1946	13.4	9.1
1947	18.1	12.0
1948	19.8	13.8

Source: Dernburg, 1950 (quoted in Mandel, 1970, 454).

By one estimate, U.S. corporations extracted from the rest of the world during the period 1950-63, 12 billion dollars more than they invested, while adding 28.8 billion more dollars to their foreign holdings. (Sweezy and Magdoff, 1972, 34.)

When one turns away from U.S. investment to investment by capitalist countries generally, the picture is no less gloomy. It is estimated that for the

years 1964 and 1965 the countries of the Third World recorded a minimum deficit of 7 billion dollars, and for 1966 alone, 5 billion dollars in direct private imperialist investment. (Jalee, 1972, 73.)

In more concrete terms it has been shown that for the period 1964-70, a period of intense foreign "investment" in Kenya, the *net outflow* of private capital was of the order of £80 million. (Leys, 1975, 138). The story in Tanzania, not very different, was that for 1965 and 1966 the average was Shs.810 million a year, or 21% and 32% respectively of gross national investment. (Van der Laar, 1972, 87).

It has been stated as a general proposition that U.S. private enterprise ventures abroad only if its investment will be amortised within at most 5 years. (Baran, 1968, 200; Baran & Sweezy, 1968, 105).

Let us now turn to the methods by which such gigantic surpluses are secreted out. As some of the methods used are not entirely above board it is not difficult to understand why they are next to impossible to document. But there is enough local information and international experience to make intelligent estimates possible.¹⁷

1. *Profits*. Firestone is entitled to 35.3% and 60% of all profits realised by GREL and FGL respectively. Out of these profits it is entitled to the dividends in the same proportions, which dividends are to be freely repatriated under the terms of the Agreement.

What then has been the profit situation of the companies? Here we run into the problem of keeping track of the profitability of private companies. As has been well said "published balance-sheets reflect less and less the *true* position [of companies] and become instead devices for *concealing* this position" (Mandel, 1970, 519). But under the Companies Code, S.269 (Act 179) *private* companies are spared the use of this device. They are *not* obliged to submit their profit and loss account with their Annual Returns if their auditors certify that they are satisfied with the state of the accounts. This means that a private company can perfectly happily and with a clean conscience keep its business to itself. This is precisely what GREL and FGL have been doing since the end of 1970, the last year for which they submitted a profit and loss account with their Returns. It is thus next to impossible, without special access, to find out their profit situation. It is however possible to make reasonable estimates on the basis of available information.

We have noted that at the end of the second year of commercial production the balances on surplus account of the two companies stood at C\$58,636 for GREL and C\$1,792,553 for FGL, a total of C\$1,851,189. In attempting to speculate on the profit position we take GREL, for which we have fuller information.

Looking at the figures in Table 4, we get a picture of a sharply rising volume of sales. If a profit could be realised in the first year of commercial production on a sale of 176,000 lbs at average selling prices of \$0.222 per lb. it is not difficult to imagine the profit situation in those other years when, on a vastly increased volume of sales, the average selling price was higher or at any rate not much lower. It must also be borne in mind that all the major investments in machinery and other infrastructural items tend to be made in

Table 4. *GREL sales data*

	1969	1970	1971	1972	1973	1974	1975
Rubber sold (000lbs)	176	1,813	2,500	2,500	3,000	3,350	6,000
Av. selling price (lb.\$)	0.222	0.189	0.116	0.129	0.258	0.330	0.194
Total sales (M. \$)	39	342	291	388	863	1272	1763
Net Profit (¢)	61,414	-2778	?	?	?	?	?

Source: From figures supplied by GREL office.

the early years. Figures given out by GREL itself thus suggest that the enterprise is certainly not unprofitable.

Though there are no such figures for FGL it is accepted that it is by far the more profitable of the two. This stems from the nature of its product as a finished product—with its vastly increased value added—as against that of unprocessed, raw-material-producing GREL. Again, it has a monopoly over the tyre market in Ghana and is free to fix monopoly prices. Finally, since FGL is the primary customer of GREL rubber, and since Firestone has a greater share of the profits in the former than in the latter, it is not unlikely that it will fix the price of GREL rubber with a view to maximising the profitability of FGL.

The profit positions of the two companies on the figures quoted above bear out this suggestion of their relative profitability.

In sum, though the absence of published figures makes it impossible to be specific, there is enough information to suggest that GREL and FGL have been making profit on an increasing scale, resulting in the repatriation of increasing amounts as dividends on Firestone shares as well as the appreciation of its investment in the companies.

2. *Tax breaks.* It is difficult to put a money value on the tax and duty exemptions given to the companies. These as are noted above included exemptions from tax on their income and property, and from duties on their exports and imports. This must represent quite substantial sums, thus denied to the state exchequer and, in effect, put at the disposal of Firestone.

3. *Interest on loans.* These are not moneys payable to Firestone, but to the extent that they are paid to outside bodies they constitute a drain on Ghana's surplus. The two loans about which we are aware are the Ex-Imp. Bank and the Standard Bank Loans. The former was for \$2,800,000 at 6% interest, the latter NC2,072,000 at between 6 1/2% and 9 1/2% interest. Since both banks are foreign-owned, their interest charges constitute a drain on local surplus. The Annual Returns of FGL for the years 1970 and 1971 show a total payment of C623,963 as interest on loans. There is little doubt that most if not all of this represents payments to foreign-owned banks.

4. *Service charges, patents etc.* In consideration for supplying engineering information and services for the completion of the factory, supervisory personnel during construction and managerial personnel thereafter, and for

procuring machinery, Firestone was given 6.8% of the equity of FGL, valued at the New Cedi equivalent of US\$400,000. When it is considered that by the date of the signing of the agreement the factory was only months away from completion, that Techno-Export had agreed to procure *without extra charge* competent managerial services and facilities for the training of Ghanaian personnel in Czechoslovakia, the ghost nature of Firestone's supposed services becomes clear. What was real enough was its capitalised fee!

Since it has been registered with the Bank of Ghana as Firestone's investment in FGL, this ghost of an investment will appropriate annually to Firestone, U.S.A. 6.8% of all profits declared by Firestone Ghana, until such time as the project is terminated. At which time it will be repatriated in full to the U.S.A. in U.S. dollars, together with such appreciation as had not by then been sent ahead in the form of dividends.

We do not have access to information about payments actually made by GREL and FGL to Firestone U.S.A. for such items as consultancy fees, management fees, royalties for patents, brand-names and so on. However, experience elsewhere shows that such exactions constitute too lucrative a line of exploitation to have escaped the attention of Firestone. An International Labor Organisation (I.L.O.) mission to Kenya after studying a sample of 10 foreign manufacturing companies operating in Kenya, reported that such payments constituted 40% of total remittances, and were equal to 67% of dividends.¹⁸ From the other side, it has been estimated from official surveys that by 1963 payments made by subsidiaries to U.S. parent companies under these heads amounted to \$600,000,000 *every year*, or 20% of direct foreign investment income. (Sweezy and Magdoff, 1972, 36). What reason is there for supposing even for a moment that, with unchecked Firestone control over their management and access to technology, GREL and FGL are not making their due contribution to this flood of other people's surplus pouring into U.S. corporations?

5. *Other forms of capital export.* We have thus far concentrated on forms of capital transfer that, being "legal" and appearing on the books of the companies can be calculated with precision by anyone with access to those books. Key among these are those that result from the over-invoicing of goods imported, usually, but not necessarily, from their parents, by local companies. What happens is that local companies mark up the prices they pay for goods imported from abroad. By this means they are able to transfer abroad the mark up, ostensibly as part of the price of the imported items, but in fact as pure surplus export. On this the I.L.O. mission to Kenya found that manufacturing companies by a mark-up of 5-10% on the price of imports were able in practice to at least double the amount of surplus actually sent out of the country in the form of profit and dividends. The figure for Tanzania has been put at 10-20%. (Yaffey, 1967, Van der Laar, 1972.) The existence of this practice in Ghana is well-known to the government, though it has not been able to do much about it except issue dire warnings and appeal to the good sense and patriotism of local companies. More concrete evidence appeared in two editorials in a local newspaper. This was to the effect that a company registered in Ghana, and acting as local agents for the manufactur-

ers of certain makes of car, by ordering cars for the Ghana market from its parent company in Denmark, rather than from the manufacturers direct, *was able to mark up the price of each car by DM5,000!*¹⁹

We would have to be convinced that given the opportunity Firestone would not indulge in what appears to be "normal" business practice. And the opportunity has certainly been available. We know from the published accounts for the year ending October 31, 1968, that out of the \$2,800,000 Ex-Imp. Bank loan, \$1,201,845 had been spent on importing equipment from the U.S. by the end of 1968. We also have figures for the amount of import licences issued from 1972 to 1975.²⁰ For the importation of raw materials, machinery and spare parts, licences to the value of £17,084,615 have been issued to GREL and FGL during those 4 years.²¹ Added to the value of the equipment bought from the U.S. in 1968, this adds up to a total of £18,286,460 for imports, an annual average of £3,657,292. Assuming that the pattern documented elsewhere and evidenced in other areas of the Ghana economy occurs in the operations of Firestone, those operations can safely and conservatively be taken to have ensured the loss to Ghana of anywhere from £1,828,646 to £3,657,292 for 1968 and the period 1972-75. It must be emphasised that the import figures on which these calculations are based are the published figures, and excludes figures for the 3-year period 1969-71, and any imports made in 1968 outside the Ex-Imp. Bank loan.

The export of capital by transfer pricing according to these calculations works out at an average of between £365,730 and £731,460 each year. It must be remembered that the net profit for the first two years of commercial production of GREL and FGL totalled £1,851,189, an annual average of £925,594, of which Firestone's share was £548,115. Set against the estimates for capital export by transfer pricing given above, and allowing for the crudeness of the calculation of those estimates, these figures more or less bear out the finding of the I.L.O. mission to Kenya that transfer pricing enables companies to more than double the surplus sent out of the country in the form of profits and dividends.

In figures the picture of surplus drain through the rubber project by all the methods indicated above (except tax breaks which we have no means of quantifying) for the years 1970-71, the only year for which we have something like full information, would look as follows:

1970-71

Profits from GREL and FGL	910,292
Management fees, royalties etc.	609,895
Interest on loans	314,888
Transfer pricing	365,730
Total	2,200,804

For the investment of £6,000,000 over a two-year period, more than £2,000,000 sent out of Ghana or accruing to foreign interests in one third year of operation! When it is remembered that this figure leaves out of account the value of income from the bonus citrus plantation and the numerous tax exemptions granted the companies, and includes an estimate of the loss due to transfer pricing using the 10% I.L.O. mission figure rather

than the 20% found for Tanzania, does this not set some sort of record in the annals of post-war plunder of an independent underdeveloped country? It is difficult to disagree with the assertion made independently by 2 Ghanaians with access to official information that Firestone was able to recoup the whole of its investment capital within the first year of commercial production.

In thus talking about the surplus pumped out of the country, sight must not be lost of the fact that at the same time Firestone's holding in GREL and FGL, including the ghost investment referred to above, remain *and grow*. We say no more than this here, except to observe that to the extent that the foreign exchange difficulties of Ghana delay or prevent the legitimate expatriation of surplus, to that extent does the likelihood increase of Firestone branching out into other related and less than related fields if it has not done so already. It would be idle to speculate on likely areas of first exploitation.

The burden of this section has been to show the extent to which the operation of one multinational corporation in one project has led to the diminution of the economic surplus available for reinvestment. Putting the drain of surplus from the Ghanaian economy as a whole as a result of the "international [capitalist] system" at 17% of GDP, one writer has characterised this phenomenon as

"the key to the stagnation of the Ghanaian economy, to its inability to develop despite its high level of investment characterised by a per capita level of available capital equal to that of Japan" (Amin, 1971, 20).

E. Mode of surplus utilisation

The rate and direction of economic development in a country at a given time. . . depend on both the *size* and the *mode of utilisation* of the economic surplus. These in turn are determined by (and themselves determine) the degree of development of productive forces, the corresponding structure of socio-economic relations, and the system of appropriation of the economic surplus that those relations entail. (Baran, 1968, 144).

So wrote Paul Baran in his path-breaking work. We take no more from this, fascinating though it would be to do otherwise, than the notion of the positive aspect of the relation of the size and mode of utilisation of the economic surplus to the development of productive forces. On this aspect the general view of serious economists is that the principal cause of underdevelopment was *not* the shortage of capital but the mode of utilisation of the economic surplus. (Baran, 1968, 226; Mandel, 1970, 478).

What are the lessons of the material presented above on this question? In the first place it illustrates the fact that multinational corporate activity within the economy of Ghana leads to a serious reduction in the *size* of the economic surplus. This is obvious from the amount of capital shown above to have been exported or otherwise put out of the reach of state control.

More subtle, but no less important, is the potential for stifling the development of the productive forces. To the extent that the story of the

Foso/Odumasi Co-op. Society is at all generalisable it demonstrates this quite clearly. It shows both the unwillingness of Firestone to use any of the surplus generated by its operations to encourage any improvement in the means of production of small-holders, and its desire, through its pricing policy to drive them out of business. It is at least arguable that had the Society acquired the needed equipment its members would not only have had a better chance of staying in business, but would have raised the technical efficiency of the production process, with it their productivity and, therefore, their potential contribution to the economic surplus.

As to the amount of surplus that accrues to Firestone, but is not immediately exported in any of the ways indicated above, the first point to note is the obvious one that it is removed from the control of the State and into that of Firestone. Thus the mode of its utilisation is determined by Firestone in a manner to suit the interests, not of Ghanaian economic development, but of Firestone's international empire. This is not the place to discuss the objective contradiction between the two interests.²² It should suffice for us to draw attention to two ways in which this contradiction manifests itself in Firestone's operations here.

For the first we turn back to the Foso/Odumasi Co-op. Society story. We have already noted the failure of Firestone to use any of the surplus to help raise the levels of productivity of small-holder production of rubber. For if such improvement in small-holder production were to attract people to rubber planting, the resulting increase in raw rubber production would offer unwanted competition, not only to Firestone's operations in Ghana, but also to its world-wide, particularly Liberian interests. The denial of assistance thus makes eminent sense from the point of view of *private company* Firestone, but what about the development of productive forces generally in Ghana?

The other illustration of the contradiction arises from the projected relationship between GREL and FGL production. It will be recalled from Table 2 b above that GREL's production of rubber is expected, through natural increases, to exceed the needs of FGL and other local customers by 1977, after which increasing quantities *will be exported as raw rubber*. The intention is not, as far as we are aware, to use some of the surplus generated in the operations to increase the capacity of the factory to take all the rubber produced by FGL and other local producers, thereby increasing the *production of finished goods for export*. Clearly such an event would interfere with the international market in rubber tyres and tyre products, to the inconvenience of Firestone, U.S.A. and the handful of rubber giants with which it monopolises the world market.

The objective interests of Firestone U.S.A. require that even if it could not entirely stop the development of the GREL plantation, it should do its best to squeeze out small-holder production and keep Ghana-made rubber tyres off the international market. On the other hand, true development of the economy of Ghana requires, in the particular case of rubber, increased production of raw rubber to feed an expanded factory or factories producing in increasing quantities *tyres and other finished rubber goods* both for the local market and for export.

This is the irreconcilable contradiction between Ghana's development needs and Firestone's exploitative interests: this is the basis for the importance of the question of who controls the mode of utilisation of the economic surplus.

IV. Conclusion

The conditions for the intervention of Firestone in Ghana's economy and its behaviour thereafter conform in full to the objective laws of the development of monopoly capitalism. Summarily put:

- Firestone came seeking an investment which promised (and delivered) returns far in excess of the average obtainable in the U.S.;
 - it ensured that its investment was subject to no serious risk;
 - its object was to break into a new enterprise within its sphere of influence on the world capitalist market and so manipulate it that it posed no threat to its domination (in concert with a few other giants) of that market;
 - this it did by getting virtual monopoly control over the production and distribution of the commodity, and freezing the development of an integrated industry with serious potential *for exporting finished goods* (no doubt under certain conditions it may suit its purposes better to encourage such export but under its control);
 - it thus captured and sought to abort a serious programme of industrialisation in an underdeveloped country.
- The success of its intervention, too, conforms to the objective laws of the development of underdevelopment. This shows in such things
- the manipulation of petty bourgeois elements in the underdeveloped country by foreign capital;
 - increasing integration of leading sectors of the underdeveloped economy into the world capitalist order, and
 - the reproduction and deepening of relations of dependence, and
 - the massive drain of surplus.

What perhaps deserves a more extended statement is the role of "temporary" conditions in shaping the course of some recent developments. It is clear that once we get past the general conditions in Ghana making for a tendency to surrender to Firestone or any other multinational corporation, the actual terms of surrender in each case are best explained in light of conditions specific to the situation in which it occurs. Thus we could suggest that extremity of the concessions made to Firestone can only be adequately explained by the specific *and unique* factors, objective and especially subjective, that briefly dominated the scene in Ghana immediately after the *coup d'état* of 1966. Chief among the subjective factors was the national loss of confidence which put in abeyance the usual feeble but real "nationalist" counterpoise to imperialist excesses.

Though "normal" neo-colonial conditions and attitudes soon reemerged, we would contend that serious distortions in the economy had been set in

train. Here it is worth repeating that during the period, over a dozen major state enterprises were disposed of on terms not unlike the Firestone Agreement. If it is assumed that each of those enterprises has suffered the same anti-developmental bias and are contributing to the hemorrhage of economic surplus on anything like the same scale as the Rubber Project, then it would be dangerous to underrate the significance of short term, largely subjective, "aberrations" in influencing development.

Notes

1. This "law of the tendency of the rate of profit to fall" discovered by Karl Marx, receives its most lucid and authoritative treatment in Pt. III of Vol. III of his *Capital*.

2. Lenin's *Imperialism* remains the best general exposition of the genesis and laws of development of monopoly capitalism, here stated in barest outline.

3. Among the more interesting are: Beckford, 1972; Frank, 1967; Jalee, 1968; Nkrumah, 1965; Rodney, 1972 and Williams 1964.

4. One of the 6 "top priorities" in agriculture was said to be the establishment of large acreages of rubber in the wet South-West during the period of the Second Development Plan published in 1959: Birmingham, *et al.*, 448.

5. Actual tapping began in 1969 and has continued to expand at an average rate of 1100 acres a year.

6. See later under II B. For contrasting versions see Afrifa, 1966 and Nkrumah, 1966.

7. On January 13, 1972, units of the Ghana armed forces overthrew a civilian regime headed by Kofi Busia. This regime had come to power under a new Constitution promulgated in 1969 by the N.L.C.

8. Reference should be made to studies such as Amin, 1971; Birmingham *et al.*, 1966; Fitch and Oppenheimer, 1966; Kay, 1972; and Szerewski, 1965.

9. Cited in *Africa Report*, April 1966, p. 22.

10. As will appear in the discussion below the consideration was more complex than this, including leases of land.

10a. The rate of exchange of the New Cedi in July 1967 was pegged at 1 New Cedi = 0.98 U.S. dollars. It was devalued at the end of 1971 and revalued within months. The current rate in 1 US\$ = 1.15 New Cedis, now called cedis (C).

11. This monopoly was later limited by the insertion of a clause limiting its operation to a period of 5 years after the commencement of commercial production (Letter of Agreement of September 15, 1967).

12. The story appears on File No. CO.1/TJ of the State Farms Corporation. As the last relevant entry was in May 1971, it is not known what happened thereafter.

13. These arrangements did not always escape from adverse criticism. In a famous debate on national television two university lecturers took the chairman of the Negotiation Committee to task so furiously that the agreement in question—for the surrender of the State Pharmaceutical Corporation to Abbott Laboratories of Illinois, U.S.A.—was subsequently abandoned. It is instructive that the thrust of the criticism was based on the petty-bourgeois nationalist concern with loss of control of "our" industries to "foreign" interests. For the full debate see *The Legon Observer*, December, 1967, pp. 9-28.

14. Source: Interview with H.O. Wilson, February 27, 1975.

15. An indication that this is indeed the case is given by the inability of the head office in Accra to provide information on the specific quantities of rubber exported to Liberia from Ghana, since such matters were handled at "headquarters" in Akron, Ohio, U.S.A.

16. The figures are rounded out to the nearest thousand, and do not include credit in the form of bank overdrafts.

17. This the result of a special formula set out in the Regulations of GREL (set out as Schedule A to the Master Agreement).

18. *Employment, Incomes and Equality*. I.L.O. Geneva, 1972, p. 127.

19. "Freeze Briscoe's Accounts" (Editorial), *Ghanaian Times*, April 12, 1975, p. 2. and "What Investment Has Briscoe made?" (Editorial), *Ghanaian Times*, May 10, 1975, p. 2.

20. No figures are available before 1972 because of the operation of the system of open general licences during the Busia regime.

21. It would be unreasonable to assume that any portion of the import licences remains unused by GREL and FGL. These have the cedis to back imports, always ask for more than what they are given and, as we know, the more they import the more surplus they can "export". Import licence figures are in this case an adequate measure of the amount of imports.

22. Refer to literature cited in footnote 1 above, and in the text.

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Dina Sheikh El Din Osman

Notes Towards the Study of Public Enterprise in Sudan

Caveat

Although the usefulness of law and legal institutions as instruments for bringing about social, political and economic changes cannot be denied, the limitations placed on such usefulness by external international influences and the mechanism of the internal class struggle must always be borne in mind.¹ Legal and administrative problems should not be taken in isolation from their politico-economic context. Thus any study of the laws relating to the formation, structure, management, performance and control of public corporations and their developmental role which fails to address itself to the history, economic structure and policies of the country in question is bound to be, at best, incomplete. In the brief sketch which is to follow I propose to examine research problems relating to public corporations in the Sudan within such context. Before doing so I must however point out that this is not a paper on the laws of public corporation in the Sudan.²

Historical background

Like the histories of most third world countries, the history of the Sudan has been one of external aggression, exploitation, national uprising, liberation and ultimately the inheritance of a legacy of immense poverty and retarded development. Perhaps the only difference worth mentioning is the effect which this has produced: the much-complained-about political awareness of the average Sudanese.

The Mahdist Revolution (1882-5) ended the Turco-Egyptian rule of the country and established an independent Sudan after the liberation of Khartoum in 1885. This independence was, however, short-lived and the country was reconquered by the combined armies of Egypt and Britain in 1898.³ Like all colonial conquests, the motives for this one were partly political and mostly economic. The vast raw material-producing potential of the country was quite evident to the conquerors who soon set out to 'develop' country by the construction of an efficient transport system and the creation of irrigation facilities. Production of cotton on a large-scale basis started in 1925 in one of the most fertile areas in the country (the Gezira), the Gash, Equatoria and White Nile agricultural schemes were established later.⁴

Before 1919 various forms of resistance to the colonial rule were demonstrated in different parts of the country e.g. the Wad Habouba

Uprising in the Gezira, Ali Dinnar's in the West and the Uprisings of the Southern Sudan.

The year 1919 saw the formation of the first organised nationalist nucleus among the educated and city-dwellers. The assassination of Sir Lee Stack in Egypt instigated an Anglo-Egyptian conflict one of the repercussions of which in the Sudan was the unsuccessful 1924 revolution. Egyptian influence in the Sudan was curtailed until it was partially restored by the 1936 Treaty.

In 1938, the Graduates Congress, which was a reformist organisation, was formed. Its first overt anti-colonial act was the demand of the right to self determination in 1943. This year also saw the formation of the two rival parties, of the two rival religious sects, of Al Umma and Al Ashigga. Although the class interests of these two parties were not markedly antagonistic, there was a great difference in their attitude towards Egypt. The Umma party was clearly anti-Egyptian—and was accused of being pro-British—and Al Ashigga was calling for independence from Britain and unity with Egypt under the rulership of the Egyptian King.⁵ The roots of the leftist movement in the Sudan may be traced to the late forties. The first nucleus of the Communist Party of the Sudan was formed in 1946. Worker⁶ and former organisations were also set up around this time and the country witnessed their first organised strike.⁷

Their demands were not purely sectoral and they fought bitterly against the anti-trade-union and liberty-curtailling legislative measures. The government response to their threatened strikes of 1947 and 1952 was severe. Leaders of the Federation of Trade Unions were thrown in jail and denounced as servants of Moscow and international communism.⁸ The strikes were declared illegal and the strikers were denied the protection of trade union law because the strikes were not in furtherance of trade disputes i.e. political. Under the leftist banner one may also bring the United Front for the liberation of the Sudan (1952) and the Anti Imperialist Front (1953).

The British response to the rising nationalist tide was severe at first but concessions were soon made by the formation of the Advisory Council for the Northern Sudan. The self government statute was passed in 1952 and elections to the first legislative Assembly were held in 1953. A transitional period of three years culminated in Parliament's voting for independence in December 1955 and its actual declaration on 1st January 1956.

At this juncture it is perhaps prudent to refer to the basic difference in attitude between these various nationals towards the problems of post-independence. In the various leftist publications, the traditional parties are displayed as showing no concern for and directing no attention towards these problems. The progressive, anti-colonialist nature of these parties was not denied but it was thought to have been coextensive with a reactionary anti-socialist internal policy.⁹ Perhaps the pre-independence slogan of 'liberation not construction' is some evidence of the attention directed by these parties to the post-independence developmental problems of the country. This slogan was much attacked by the left which presented its substitute: a non-capitalist mode of development which would put the country on the path to socialism. The eighth article of the Programme of the Anti-Imperialist Front (1953) speaks of the protection of the national economy from the danger of foreign

companies, the rejection of colonialist business enterprises, the encouragement of local industry, the liberation of the Sudanese currency from colonial dependency, the creation of an agricultural credit bank etc.¹⁰

On the other hand, the ideological difference between the other parties was not great. The transitional government's statement of policy in relation to local and foreign capital in 1955 is indicative. It spoke of the intention of the Government of the Sudan to hand all industries—other than railways and utilities—to the private sector, to encourage private enterprise and to create conditions which would attract foreign capital. Concessions and assurances against discrimination and compulsory acquisition were offered by the Approved Enterprises Concessions Act 1956.¹¹

The abovementioned basic difference in aspirations—a capitalist versus a socialist mode of development—is to underlie so much of the struggle which took place later.

After independence, partisan animosities continued to an even greater extent. Such animosities, the resistance of the left (including the militant faction of Al Ashigga which split to form the Peoples' Democratic Party) to the acceptance of American aid¹² the difficulties created by the cotton crisis of 1956–7¹³ combined to pave the way for the *coup d'état* of November 17th 1958. The new regime was denounced by the Communist Party as reactionary and pro-imperialist less than twenty four hours after the coup.¹⁴ American aid was soon accepted and the new regime continued the private sector-favouring policies of the regimes it had replaced. The Industrial Bank of the Sudan (recommended by the World Bank Mission) was created specifically to "assist in the establishment, expansion and modernisation of the private industrial enterprises in the Sudan".¹⁵ A similar role was expected from the Agricultural Bank of the Sudan. Trade Union and other freedoms were greatly curtailed to provide an appropriate investment climate.¹⁶ This is perhaps why trade unions,¹⁷ communists and members of the democratic movement¹⁸ were the spearhead of resistance. Popular unrest, the worsening economic situation and the intensification of the war in the Southern Sudan led to a successful popular revolution which toppled the military government in October 1964. A transitional government with strong leftist tendencies—with worker and peasant representatives—was formed. The demonstrators who flooded city streets on these days were shouting against the return of the old parties and in favour of socialism and nationalisation. This government was soon forced to resign and was replaced by a more conservative one in February 1965.

By this time, socialist slogans had become so popular with the electorate (in the modern sector) that the old parties could not take the risk of not referring to socialism in their electoral programmes. There was talk about socialism, democratic socialism, Islamic socialism etc.¹⁹ Much was also said about state control of the economy, the leading role of the public sector and the fair distribution of wealth. It is perhaps not without significance that the Communist Party was banned and its twelve representatives in the Constituent Assembly were expelled in 1965.

The two major parties alternated in government until the *coup d'état* of May 25, 1969 took place. The first statement of its leaders recited the evils of neo-colonialism to which the country had been subjected by the previous

regimes, the satellite nature of the economy, the sad lot of the masses etc. The basic problem was economic and it was to be tackled by seeking closer ties with the non-colonialist friends, enlarging the public sector, shaking off the foreign domination of the economy and adopting a more sensible loan-obtaining policy.²⁰

It is against this background of political turmoil and instability that I hope to refer briefly to the economic set up with special emphasis on planning and the role of the public sector.

Economic development strategies

The economy is basically traditional and pastro-agricultural. Subsistence production is predominant though exact figures about its per centage of total production are not available. Some estimates (44 % and 50 %) have been forwarded.²¹

Within the modern productive sector, it is difficult to assess the respective contributions of the public and private sectors (1974 *Economic Survey*). One may, however, venture to state that the overall contribution of the public sector is quite substantial and that a concious effort has always been made to encourage greater participation by the private sector.

The degree and intensity of the contribution of the public sector to the national economic output and the leading role to be (or not to be) played by the public sector underlay the fundamental difference between the leftist and the conservative parties. Whereas the latter accepted state intervention in economic activity as a necessary evil because of the shyness of the private sector and its inability to generate capital²² and because of the rising demand for development, the former's ideological stance was based on the assumption of a central role by the state. Thus, without calling for the abolition or denying the role of the private sector, the left saw the domination of the public sector, liberation of the economy and state control over vital areas of the economy as the *sine qua non* for a balanced socialist-oriented development.²³ The steps taken by the leaders of the May *coup* to liberate the national economy were along these lines.²⁴

Thus, although all politicians were talking about development and the aspirations of the masses, there was a fundamental disagreement about the meaning of development and how it was to be brought about.²⁵

We may now turn to examining the effect of this conflict on the planning of the private sector and the public sector institutions.

Planning

The First National Five Year Plan was launched in 1946. It was followed by a similar one in 1951. These plans were accused of not being development plans in the modern sense (whose?) of the word. Rather, they were expenditure-balancing programmes.²⁶

Different government departments submitted their estimates without much coordination or consideration of the impact of the plan on the whole economy. Between 1956-1960 there were annual development budgets.

The first coherent attempt at comprehensive planning was the Ten Year Plan for Economic and Social Development 1961-1971.²⁷

The plan set clear investment targets at (60 % and 40 % respectively) for the public sector and the private sector which was incorporated in the state's plan for the first time.²⁸ This plan failed for 'the lack of coordination and the unrealistic nature of the plan itself since the sources of financing were not indicated. In various cases, the capital investment consumed had no impact on the national economy'.²⁹ This failure led to the abandonment of the plan in 1965.³⁰

Renewed thinking about a comprehensive development plan started after the May *coup* in 1969. In May 1970, President Numeiri announced measures for the liberation of the Sudanese Economy. These consisted of the establishment of semi-state monopoly over export and import trade and the nationalisation or confiscation of the property of sixty-one firms and ten persons, thereby adding £ 670 m worth of assets to the public sector.³¹ On the completion of these acts of liberation the Five Year Plan 1970-5 was introduced. 'The noticeable feature of this plan is the deliberate intention to gear the economy on a socialist path by enlarging the size of and influencing the composition of public investment. . . the nationalisation measures mentioned earlier created favourable conditions for this shift in the role of the public sector as it covered a wide variety of firms, banking, industrial and foreign trade.³² Public sector investment was expected to amount to £215 m. and private sector investment was estimated at £170 m.

The private sector

Although it received various invitations to come forward and participate in developmental ventures, its capital was not forthcoming. It was expected to contribute about 40 % of the revenue for the Ten Year Plan and about 45 % for the Five Year Plan but in both instances, its response was rather disappointing. Private investors preferred quick profit yielding ventures—especially building and construction and trade. The climate of popular hostility towards private capital (local and foreign) during the sixties is perhaps responsible for this and for a good deal of illegal remittance of currency abroad. Tayfour suggests that the mobilisation of the private sector was adversely affected by the nationalisations and confiscations of 1970.³³

Public corporations

If we are examining the assumptions and policies underlying governmental attitudes towards public corporations, we may discern three eras.

i. Pre-1969³⁴

Between the incorporation of the first public corporation (the Gezira Board) in 1950 and the May *coup*, there came into existence diverse utility and

productive public corporations. They were based on the British model which aims at combining autonomy and control and were expected to operate within the context of parliamentary party politics. Since neither the economy nor the politicians were committed to socialist development or comprehensive central planning, the public corporations—even the major ones like Gezira and Sudan Railways—were not integrated into the policy-making or planning process. Their budgets were retailored by the Ministry of Finance. Most public corporations operated in desolate isolation from one another and from other similarly-involved governmental agencies and departments. As is to be expected, there was no uniform legislation, or even policy pronouncement, relating to these corporations. The development of public corporation law was *ad hoc* and fragmentary.³⁵

ii. 1969-72

This was the golden era for public corporations, in fact for the public sector as a whole. The overt socialistic nature of the May regime was displayed everywhere. Measures for placing the public sector in the forefront as the vanguard of development were taken during this period. State control was established over strategic import and export trade, banking, finance and a substantial part of industry. Public corporations were expected to respond to the socialist call by speeding up production and effecting the desired transformation of the economy.

The Public Sector Corporations Act 1971 was the first coherent, albeit partial, attempt to lay down rules for the establishment, organisation and control of public corporations generally. The Act established six economic sectors for Agriculture, Industry, Transport, Commerce, Banking and Tourism. A Supreme Authority, consisting of eleven ministers, deputies to the Prime Minister for agricultural and economic sectors and the chairman of the board of the central corporation for banks, would establish sectoral corporations which would then establish their branch corporations. The boards of the sectoral or branch corporations would establish, with the approval of the Supreme Authority, new independent companies. The Act is not exhaustive and it may be specifically disappplied to some corporations e.g. Rahad Agricultural Public Corporations. The Act is an interesting experience in so far as it attempts to harmonise the hitherto hapazard provisions relating to public corporations.

Side by side with this, a complete overhaul of the state machinery was underway. The Central Bureau of Public Control was established to ensure central control over the performance of the different governmental units by the detection and eradication of deficiencies and their causes. The Ministry of Planning and the National Planning Commission were established to undertake comprehensive and all-embracing planning.

Just as this era was a golden one for the public sector, it marked the low ebb of the private sector. It is legitimately claimed that both local and foreign private capital were scared off by the extensive nationalisations and confiscations (which were declared without reference to any predetermined legal criteria) and the overtly socialistic nature of the regime.³⁶

iii. 1972

The abortive communist coup of July 1971 brought about the disenchantment of the May regime with communism and the communist block. A shift in government policies was soon to be witnessed. It adopted a more right wing approach. Foreign aid—from any source—was invited. The right climate for the flow of such capital into the country had to be created and one of the major legislative steps taken was the passing of the Development and Promotion of Industrial Investment Act 1972 which was replaced, in 1974, by a similar and more generous one (the Development and Encouragement of Industrial Investment Act) these two Acts offered incentives relating to the grant of concessions, remittance of profits and of capital upon liquidation etc. They also offered the necessary safeguards against discrimination, nationalisations and confiscation.

Although the socialist aspirations of the regime were never denied, a policy of denationalisation was adopted. Fourteen companies operated by the Industrial Production Corporation were fully returned to their former owners. There was also partial disinvestment of seven productive units by 50 % of ownership.³⁷ This, as expected, created 'a favourable change in the investment climate.'³⁸ By 1974, there was a sharp increase in the number of private sector establishments.³⁹ Between 1972-4 there was also a total utilisation of the commercial banks' credit facilities by private industries and financing by these banks rose sharply.⁴⁰ All these banks are public corporations!

This period is also characterised by joint ventures between the public sector and local or foreign partners, and also by an unprecedented flow of foreign capital. In contrast with the preceding period, this period seems to mark the golden age for the private sector.

The object of the above has been to show that a contextual study of public corporations may indicate that the politico-economic climate within which they operate is just as important as the legal provisions relating to the organisation, control etc of such corporations.

Special Research Areas

1. Problem of form

Despite the political turmoil and the changing governmental attitudes during the last two decades, the form of the public corporation, a body corporate with perpetual succession, a common seal and a right to sue and be sued in its own name etc., has been taken for granted.⁴¹

In fact this form has been so beneficial to employees, because of the better conditions of service and the lavish fringe benefits, that pressure has often been exerted by employees for the conversion of government departments into public corporations. Most of the top personnel of some of the public corporations to whom I have talked seem to be convinced that the public corporation is best suited to guarantee better performance because of its

autonomy and detachment from bureaucracy and routine. However a careful reading of the public corporation Acts and an examination of the actual practices of the public corporations themselves denotes that many fetters are attached to this autonomy. The competent Ministers exercise control by the issuance of binding directives and also informally. Most boards may not take action towards which the minister is known to be hostile. The importance of the telephone and of informal encounters has never been denied. In addition to this, a lot of control is exercised by the Ministry of Finance through the external presence of its representative in public corporation boards, its budget and loan approving-powers, its control over the withdrawal from foreign loans either solely or in conjunction with the Ministry of Planning. One must not forget the loan and foreign exchange control powers of the Bank of the Sudan and the complicated procedures of a host of governmental agencies. Thus, at least as far as financial matters are concerned, the public corporations are subjected to almost the same hardships of routine and bureaucracy to which other government departments are subject. If this is so, one may question the usefulness of this expensive model. One may also question the applicability of the underlying assumptions of the British Public Corporation⁴² to the Sudanese situation and whether autonomy of public bodies in a poor and underdeveloped country is really desirable.

2. Impact of public corporation law on legal system

The legal system had not been tailored to cater for or accommodate a public sector of this magnitude. The common law principles of equality of the parties, freedom of contract, etc., are widely accepted and the judicial system has not changed much since Independence. As yet, there is no body of public corporation law. The nationalised companies were to continue to be subject to the Companies Ordinance 'in order to subject them to private law in their operations, relations with employees etc.'. However, the formation of independent companies by branch or sectoral corporations could be affected notwithstanding the provisions of the Companies Ordinance.⁴³

Corporations falling under the public sector Corporations Act 1971 are subject to the general laws of the Sudan which are not inconsistent with the Act.⁴⁴ Inter corporate disputes and disputes between a public corporation and a government unit are to be resolved by the Supreme Authority without reference to the Courts.⁴⁵ The Acts of some corporations give them periods of grace before commencement of judicial proceedings and also before execution.⁴⁶

It may be worthwhile to investigate the effect on the legal system of this inter relationship between the general laws of the country and the special provisions relating to public corporations.

3. Control of public corporations

An important, and less complicated, area is control. The basic problem is that there is too much diversity and lack of coordination between the different

controlling bodies. The general state framework was not prepared to accommodate such a large public sector and therefore, when the need for controlling its operations arose, the result was patchwork and not a complete overhaul or restructuring.

New bodies and agencies were just added to what had hitherto existed. Outcome? That under the present structure a sectoral corporation is controllable by the competent minister, the Ministry of Finance, of Planning, Bank of Sudan, the Auditor General, Government Investments Office (where relevant), the Supreme Authority, the President, the Peoples Council, the Judiciary, the Central Executive Office of the Socialist Union and lastly the press. Branch corporations and productive units are of course subject to the control of their parent sectoral corporation.

One may investigate the effectiveness of these safeguards in the absence of coordination and better channels of consultation and communication. But would the provisions for these, without more, solve the problem?

4. Public corporations and class formation

An area of research which is of special interest is the role which the public corporations might have played in paving the way for the emergence of a strong and well-fed local private sector. This may be tested by reference to the declared objects of the Industrial Bank, the Agricultural Bank, the recent Sudan Development Corporation, the frequent resort to private contractors in the execution of government projects and the disparities in income and landholdings between the tenants of the Gezira Scheme.

Another related problem is whether the key personnel of public corporations, usually middle class civil servants, have played any role, consciously or otherwise, in feeding the private sector at the cost of the public sector or in impeding the realisation by the public corporations of their developmental objectives. In an address to the people of Beit Al Mal⁴⁷ President Numeiri stated that the 'deliberate neglect of developing local resources explains the policies of the autonomous corporations established by the defunct regimes in which most of the earned reserve is squandered. This is best illustrated by the Gezira Board in which most of the revenue is absorbed by salaries'. It may do well to try to find out whether this could have happened if there was any genuine employee participation in the policy-making process and the management of the corporations. So far, employees have enjoyed only token representation—in same cases these token 'representatives' are selected by the competent minister.⁴⁸

Notes

1. See I. G. Shivji, *The Silent Class Struggle*, Dar es Salaam, 1974, on the role played by bureaucrats in hindering governmental development policies in Tanzania; A.H. Hanson, *Public Enterprise and Economic Development*, London 1972, pp. 18–22.

2. For a brief outline of such laws see Dina S. Osman: "Public Corporations in the Sudan", paper presented to the Beirut Conference on Administrative Law and Development, Beirut, 1975.

3. Holt, *A Modern History of the Sudan*, London 1961, Duncan: *The Sudan*, London 1952, The Condominium Agreement between Egypt and Britain placed the Sudan under joint Anglo-Egyptian rule.
4. S.A. Tayfour, *The Role of the Public Sector in the Economic Development of the Sudan*, Dakar 1972. Later referred to as Tayfour.
5. Holt, supra; Shibeika, *The Independent Sudan*, New York, 1959.
6. Mohd. Gasm El Sid in. *The Birth of the Trade Union Movement in the Sudan* (published by Federation of Trade Unions) traces the first signs of worker organisation to 1932.
7. Awad, "Dilemmas in Economic Independence-Lesson from the Sudan", *Economic Independence in Africa* (Ed.) D.P. Ghai, Dar es Salaam, Nairobi, Kampala, 1973.
8. Sudan Weekly News letter 162/52-3/5/1952; Federation Trade Union's telegram to the Civil Secretary 25.4.1952; Bulletin No. 97 28.4.1952.
9. *Communist Party of the Sudan: Glimpses of the History of the Sudanese Communist Party*, Programme of the Communist Party of the Sudan.
10. Available in Sudan Pamphlets No. 159. Also see Document of The Third Conference of the Communist Party 1956, *The Path of the Sudan*, 1956.
11. Also see Programme of the National Unionist Party, the Constitution of the Umma Party.
12. *Against American Aid*, (Communist Party of the Sudan), 1958.
13. M.O. Beshir, "The Gezira Scheme-An Experience in Socio-Economic Development"; *Civilisation*, Vol. XI, No. 1, 1961.
14. *Against the Reactionary Coup d'etat*, (Communist Party), 1958.
15. S. 4, Industrial Bank of Sudan Act 1961.
16. See S. 16, Trade Disputes Act 1960.
17. President Numeiri's address to workers 28.11.1970 (the May revolution appreciates the great role played by the Trade Unions Movement in the struggle against colonialism and its strong and uncompromising stance against the post-independence reactionary regimes and [Abboud's] military regime). Also see *Trade Union Studies*, Second Book, Federation of Trade Unions, p. 22.
18. Between 1958-64 communists and democrats got more than 400 years of imprisonment out of a total of 600 years. *A People's Revolution* (Communist Party), 1965.
19. See in particular the Programmes of the Umma Party and the National Unionist Party. Statement of Government Policy: Address to the Constituent Assembly, June 26, 1965; Budget Speeches 1965, 1966; President Azhari: Speech on Third Anniversary of October Revolution 1968.
20. "First Statement of the Revolution", *Speeches of the Leader of the Revolution 1969-70*, Ministry of National Guidance, Khartoum.
21. P. McLoughlin, 'Income Distribution and Direct Taxation' Quoted by Omer Osman and Ali Suliman: "the Economy of Sudan", *Economies of Africa*, (Ed.) P. Robson & D. Lury, N. Western University Press 1969.
22. *Government Policy in Relation to Local and Foreign Capital*, 1955, "In an undeveloped country where private capital is either shy or not forthcoming, such participation by the state. . . has been proved. . . to be one of the means of making the people industrially minded." "All industries-apart from railways and utilities-should be open to the private sector". Also see programme of National Unionist Party. Also see Umma Party: letter of Central Bureau to Regional Conferences: p. 4: 'The Umma Party believes in free enterprise and private ownership within the framework of the general laws of the state. Also see budget speech (Umma Govt) 1965. Also see President Azhari's speech on the Third Anniversary of October Revolution 1968.
23. The programmes of the left presented this alternative and the practical steps for realising it at a very early stage. See programmes and constitutions of: Communist Party of the Sudan, United Front for the Liberation of the Sudan, Anti-Imperialist Front and the Federation of Trade Unions. The major points of the Document of the Socialist Coalition, April 1968, had already appeared in the political documents of the various signatories. These major points were: 1) The liquidation of foreign companies which control 70 % of foreign trade. 2) Nationalisation of foreign banks. 3) Nationalisation of foreign insurance companies. 4) Reassessment of the foreign loans policy. 5) Strengthening the public sector and guarding it against the liquidatory tactics of neo-colonialism. 6) State monopoly of vital commodities. 7) Liquidation of foreign capital in industry. 8) Strengthening of government agricultural schemes and state monopoly over strategic exports. 9) Encouragement of the cooperative sector and the local private sector which is

not linked with imperialism.

24. President Numeiri, Speech on the 1st Anniversary of the Revolution, 25.5.1970.

25. Sadiq El Mahdi (Umma Prime Minister) in his reply to the critics of the acceptance of IMF and World Bank development loans defended these two institutions as not being different from any other lenders and said that no strings were attached to their loans T.V. statement on the Economic situation 4.10.1966. Also see M. Awad, *supra*.

26. 1969 *Economic Survey*, p. 149 (Commission of National Planning.)

27. The objectives of the Plan were: 1) To raise the per capita income. 2) To change the structure of the economy by the diversification of production. 3) To strengthen the balance of payments. 4) To create chances for productive employment. 5) To improve the social conditions and services. Ten Year Plan: Abdel Rahim Mirghani, Lecture on Ten Year Plan: University of Khartoum Examination Hall 27.11.1962.

28. 1974 *Economic Survey*; Tayfour, *supra* p. 12.

29. 1969 *Economic Survey* pp. 133-7.

30. 1969 *Economic Survey*, *supra*, 1974 *Economic Survey* p. 172.

31. Public Companies Concessions Act, 1970, M. Awad *supra*, p. 217; President Numeiri's May Anniversary Speech 25.5.1970.

32. Tayfour *supra*, p. 17.

33. Tayfour, *supra* p. 26.

34. For the purposes of this period, I shall deliberately ignore the leftist government of October 1964-February 1965 which, despite its socialist tendencies and declarations, was too short-lived to fully realise any of its objectives.

35. Dina Sheikh El Din Osman: "Public Corporations in the Sudan", paper submitted to the Administrative Law and Development Conference, Beirut 10-17 May 1975.

36. Tayfour, *supra*, p. 26.

37. 1974 *Economic Survey* (National Commission for Planning, Khartoum), p. 61.

38. *Ibid.* p. xi.

39. *Ibid.* p. 61.

40. *Ibid.* p. 71.

41. Gezira Scheme Ordinance 1950; Sudan Railways Corporation Act 1960; Rahad Agricultural Public Corporation Act, 1973.

42. R.C. Pozen: *Legal Choices for State Enterprises in the Third World*, New York, 1976.

43. S. 14 (2) (a) (IV), Public Sector Corporations, Act., 1971.

44. Ss. 3-2 Public Sector Corporations Act, 1971.

45. S. 7E, Public Sector Corporations Act, 1971,

46. See Sudan Railways Corporation Act, 1973, Sudan Airways Corporation Act, 1973, and the Public Sector Corporations Act, 1971.

47. 1.8.1969-Speeches of the Leader of the Revolution, 1970 *supra*.

48. See Sudan Airways Corporation Act, 1973, Sudan Railways Corporation Act, 1960.

Tamás Sárközy

The Legal Status of State Enterprises in Socialist Countries, with Special Reference to Hungary

I. The historical background

1. The state enterprise under plan instructions

The economy of the socialist countries is based on the social ownership of the means of production. In the course of the establishment of socialism, the means of production have within a wide range been transferred to state ownership. Private ownership of the means of production has been relegated to the limited field of small-scale industry, or retail trade. Social ownership has two forms, viz. state and cooperative ownership, the fundamental and determining role being assigned to state ownership. Cooperative ownership has the primary role in agriculture. The operative management of the means of production in state ownership has been organized by the central state through state enterprises.

The legal status of a state enterprise basically depends on the following factors:

a) central distribution of goods and services or exchange of goods and services for money—commodity production (except for a short war-time period in the Soviet Union—"War Communism" the latter principle prevails in the European socialist countries)

b) how far the state enterprise is bound by central decisions—a detailed plan which obliges the enterprise to produce specifically determined goods—and how far it is autonomous—depends mainly on the economic and political situation; the general trend is to extend enterprise autonomy without giving up the idea of a comprehensive national planning; in this case a great role is played by the so-called "economic regulators"—credit-, wage, price-, etc. policy; for instance if the enterprise wants to invest, it needs credits which the Bank may grant or refuse, and it sets the conditions of credit on the basis of a Government Directive on credit policy.

Briefly the legal status of a state enterprise depends on the method of economic management established in the socialist state in question. In the initial phase of socialist transformation, in the period of the reconstruction of the system of management reliance on the break down or specification in the Plan was, in view of the potentialities of the vigorous development of national economy, a historical necessity. This system of economic management remained the predominant one in the Soviet Union and, except

for Yugoslavia, in all other European popular democracies until the socialist economic reforms launched in the sixties.

For the state enterprises the break down in the Plan meant a firmly centralized method of control, which was more or less identical with the direct state administrative management. Essentially the break down or specification consisted in the distribution of the production targets expressed in index numbers among the government departments in charge of the particular branches of economy under a statutory National Economic Plan. The production targets were then parcelled out by the respective government department, in general through the intervention of several intermediate agencies (directorates, etc.) among the state enterprises. The Plan indices equalled in their function concrete administrative instructions to be obeyed absolutely by the enterprise and its management to which they had been addressed. Hence the enterprises were directly responsible for the performance of the Plan targets and not for the efficiency of the management of business.

From the above several conclusions may be drawn as to the situation of state enterprises under the system of Plan instructions. Above all economically, the state enterprise of socialist planned economy could be considered an economic enterprise, i.e. a genuine enterprise although limited. It was rather a unit organized on the pattern of a manufacturing plant. On the other hand the method of specification in the Plan was in the nature of a measure of public administration. The state enterprise was a producing-servicing-distributing unit holding the lowest rank of the administrative hierarchy, substantially uniform with the other governmental agencies, especially with state budget financed institutes or institutions.

It was due to the amalgamation of the state enterprises with the administrative chain of control that until the mid-sixties there was no superior provision of law relating to the enterprises in operation in the socialist countries. After the completion of nationalization in the European people's democracies sporadic regulations were promulgated (e.g. in Hungary and in Poland in 1950) applying to state enterprises. These enactments cannot, however, be considered such as would bring under regulation the entire legal status of enterprises. Between 1950 and 1965 a two-level regulation was the characteristic feature of state enterprises: (a) on the one part in countries where civil law had been codified on socialist grounds (Hungary in 1959, the Soviet Union in 1961, Czechoslovakia and Poland in 1964) the state enterprises appeared in these codes as a special variant of the legal person and were brought under regulation in these codes; (b) the legal status of the manager, the engineer-in-chief and the chief accountant was defined in all its details; the dominant theory of the period considered these officers trustees of the authority delegated to the enterprise.

Mention has earlier been made of the legal personality of the state enterprise. This may appear as a contradiction in terms, for the specification in the Plan to minutest details does not seem to require the recognition of the legal personality or of the corporate rights of the enterprise, although the state enterprises concluded contracts with each other on the bases of their plan targets and exchanged their goods or services for money. In the Soviet

Union, in the 'thirties or 'forties, the law did not recognize the legal personality or the corporate rights of enterprises, although the legal personality of the state enterprise nevertheless received recognition through the practice of the board of arbitration in the 'fifties. This recognition of the corporate rights of enterprises received its statutory confirmation in the Fundamentals of Civil Law Legislation of the Union Republics (Soviet Principles). On the other hand in the European people's democracies the legal personality or the corporate status of state enterprises was undisputed from the very beginning. The economic basis of the legal personality of the enterprise was the *khozraschet*, i.e. the autonomous and commercial system of accounting of the enterprise, a system where the enterprises had to cover their expenses by their income, they managed their business in the commodity form, and in the economic transactions the enterprises seemed to act autonomously in their own name. Naturally it was due to the domination of the principle of the Plan specification that contracts made between the enterprises for the delivery of goods were not genuine contracts. As a matter of fact the commodity relations between the enterprises and the contents of these relations were defined through the channels of public administration. The exchange of commodities fundamentally fulfilled the functions and specifications of the Plan. The financial interest of the enterprise in all this was negligible. (The most significant contract law institution of the system of Plan instructions owed its name, *Plan contract*, to this method of contracting.) There was insistence on investing the state enterprises with legal personality, from the point of view of autonomous procedure in economic transactions, notwithstanding the fairly simplified technicalities of commodity relations.

2. The socialist economic reforms and the state enterprise

The consolidation of the socialist production relations, the completion of reconstruction after the world war, the gradual exhaustion of the potentialities of extensive economic development and the need for a change-over to intensive economy, during the mid-'sixties, combined to trigger off a process of socialist economic reforms, the change-over from the administrative-centralized system of Plan absolutism then already living on borrowed time to a system of indirect socialist planned economy. In this process of economic reforms the last word has not yet been said. There is still much experimenting going on and many of the reforms have not yet come to an end. In addition in the particular socialist countries many specific, mutually divergent reforms have been introduced. Nevertheless as a common trait of the socialist economic reforms there is the trend towards the development of commodity and money relations, the increase of enterprises' autonomy and the greater financial interest of the enterprises, the relaxation of the administrative rigidity of specification in the Plan. These developments have taken place however, within the framework of socialist economic planning and central state economic management. As far as the law is concerned the process implies the increase of civil law methods as opposed to those of public administration.

The socialist economic reforms have brought about changes of a decisive nature in the legal status of the state enterprises. The independence of the state enterprise from public administration has received constitutional recognition (as e.g. under the restated Hungarian constitution of 1972 and the constitution of the German Democratic Republic of 1973, where the state enterprise appears in the constitution as an autonomous unit of the social-economic mechanism), and so also its specific functions as distinct from those of other governmental agencies. Simultaneously with the reforms the independent and detailed statutory settlement of the legal status of the state enterprises has been taken up.

The first wave of codification coincides with the period of the introduction of the socialist economic reforms, i.e. about the second half of the 'sixties. This period above all includes the approval of the operating statutes of Soviet state productive enterprises by a resolution of the Council of Ministers in 1965. In 1967 three further enterprise statutes were approved. Similar to these statutes are the decree of the Council of Ministers of the German Democratic Republic on productive enterprises in popular ownership, the decree of the Hungarian government relating to all state enterprises, and finally the Bulgarian enterprise statutes approved by the decree of the Council of Ministers.

The second wave followed upon a certain synthetization of the results and experiences accumulated in the wake of the economic reforms. In some of the countries the government decrees governing the enterprises had been restated and supplemented. In 1970 in Bulgaria the definitive statutes of enterprises in conformity with the reorganization of industrial management, which took place in the meantime, as a basic type of state economic organization, the "association", a large-scale enterprise operating under a specific regime, combining administrative direction with business, has been brought under regulation. Within this association several subordinate state enterprises ("klon") operate. The number of state enterprises independent from the associations is insignificant in Bulgaria since this reform. The Bulgarian regulation cannot be considered a definitive one. Development in the German Democratic Republic is somewhat similar. In 1973 a government decree brought under regulation not only the enterprises in popular ownership, but also the financially autonomous "combinates", or integrated enterprises, and the "associations". The combine of integrated factory of the German Democratic Republic is a large-scale enterprise, whose units, the combine or integrated enterprises, cannot be considered genuinely autonomous enterprises. A number of combines and enterprises operate in a manner subordinate to the associations. Hence the directing powers of the associations are greater than those of the combine, their enterprise character being less marked. Both the German and Bulgarian associations or combines have been organized as branches or sub-branches. As regards their legal status the Bulgarian associations are closer to the combines of the German Democratic Republic.

Similar developments have taken place in economic management also in the Soviet Union, where the significance of the associations as financially autonomous organizations combining powers of direction of economic

activities with business activities has increased considerably. On the other hand, unlike the Bulgarian and German enactments, the Soviet enterprise statutes of 1965 have remained in force. In 1973 the Soviet Council of Ministers issued autonomous statutes for the all-union, union republic and producing associations, the first two categories of associations being closer to the associations, the last mentioned category to the combines, to the German Democratic Republic.

In this second wave of socialist enterprise regulation some of the countries have made attempts at raising enterprise regulation to a statutory level. So in Hungary drafting work is in progress which, following suit of the enactment of the Cooperative Act in 1971, signifies efforts to introduce legislation equally extending to all types of state enterprises. In Rumania this codification work has already been completed: the earlier scattered partial regulations of enterprises were replaced in October 1971 by a consolidated act of legislation on the organization and management of state socialist economic units. In the Rumanian act the state enterprise is still the principal type of the state economic organs; however, important functions have been assigned to the industrial centre, a quasi-combine organ bearing similarities to the Bulgarian association.

In Poland and in Czechoslovakia no comprehensive legislation has been carried through in the process of economic reform. In these countries the development of the relevant law is marked by a number of frequently changing and frequently amended detailed provisions. The basic regulation of enterprises in Poland is still the law-decree of 1950, which has, however, been amended on several occasions, in particular in 1960 and in 1970. The most comprehensive regulation of state enterprises in Czechoslovakia is still the Code of Economy of 1964, with a number of supplementations and amendments.

In the following section we shall offer a survey of the statutory regulation of enterprises in Hungary, as in force at present, with appropriate reference to regulations in other socialist countries when different from the Hungarian.

II. The legal regulation of the state enterprises in Hungary

1. The doctrinal-methodic segregation of enterprise management and enterprise operation; enterprise associations

A peculiarity of the reform of economic management in Hungary is the policy-making and organizational segregation of the levels of economic management and enterprise on the principle that any so-called macro-economic rights essential for the planned, proportionate development of national economy as a whole have to be concentrated at the agencies of economic management, whereas decision-making in matters of operation has to be farmed out to the enterprises. As for its contents economic

management implies a planned direction (mainly through economic regulators) and control of the market. The main point is to place the enterprises into an economic environment where their autonomous decisions generally serve the fulfilment of the national plan. Accordingly the state enterprises have to be transformed into economic enterprises engaged in developed socialist commodity production, socially, economically and legally segregated from economic management. The inter-enterprise relations will under the reformed economic management be turned into market relations by indirect economic regulators, basically by legislative means.

Accordingly enterprise direction and control takes place in the traditional organizational framework and forms of public administration. Enterprise direction and control is directly the function of the various government departments, or as far as enterprises satisfying regional needs are concerned, of the local councils. The transmission of decision-making in economic management to enterprise level is guaranteed by the various economic regulators (income, price, wages, etc. control). In agreement with this policy the significance of the legal element is on the increase in control over the enterprise, inasmuch as of necessity the economic regulators appear overwhelmingly in statutory provisions. Any interference in the management of business by the enterprise can be of an exceptional nature only, as far as permitted by authority received under statute and only on statutory conditions.

The domination of civil law is characteristic of the realm of enterprises. Since relations between the enterprises are of the market-type, the regulation of competition tends to revive. On the other hand the earlier narrow contractual forced tracks in inter-enterprise relations have come to an end. The permissive regulation of contract-making has become established, and consequently in the relations between the enterprises earlier prohibited, or only exceptionally used, types of contracts have become the order of the day, such as e.g. contracts of commission agency and company. Moreover the revival of atypical or mixed forms of contract can also be observed. In the realm of enterprises the earlier coalescence of the civil law and administrative methods has disappeared. Although, as a principle, endeavours are made to keep them separate, this segregation does not prevent these two types of legal means from being used in conjunction for the achievement of the objectives of economic policy.

This policy-making segregation explains in many ways the difference of the Hungarian reform from that of the other socialist countries. In Hungary the intermediate, large-scale financially independent organs combining economic direction with economic activity such as the Soviet, GDR or Bulgarian associations or combinates are unknown. The principal type of state economic organs is the state enterprise. Hungarian law also recognizes organizations given the name of "trust", although the trust comes under enterprise regulation. It is a special type of state large-scale enterprise, but its number and so also its economic significance are negligible in Hungary. The equally few associations in Hungary are not organs of enterprise control, like in other socialist countries. The association is merely an economic

partnership whose principal function is to ensure the coordination of the business operations of its members. Hence for its legal structure the Hungarian type of association is fairly similar to the French *groupement d'intérêt économique*. In general the statement may be made that with the principles of the Hungarian reform of economic management, as far as the concentration of the productive forces is concerned it is the voluntary grouping of the enterprises by way of contracts that is in agreement with the ideas of the reform rather than the concentration of the enterprises (e.g. their merger) brought about by the executive power. It is for this reason that the Hungarian provisions of law have guaranteed the freedom to the enterprises to enter into economic associations, and within these to establish joint enterprises (such as companies limited by shares, limited liability companies, etc.). Joint enterprises established by state enterprises may be considered "secondary state enterprises" inasmuch as they are brought about by contracts for association by the state enterprises, and not by the executive power of the organs of economic management. Another feature of the Hungarian reform is the law of association established in 1967, brought under uniform regulation in 1970, and ever since in the process of development. There are several forms of association, such as for the simple association of the enterprises (without legal personality) and for others vested with legal personality. The law even recognizes the joint associations of state enterprises and cooperatives. Special forms have been established for international associations to be organized in Hungary. Although the Hungarian law of association has several deficiencies noted in professional literature (so e.g. the proliferation of forms of association, the obsolescence of the provisions governing companies limited by shares and limited liability companies, the unsatisfactory economic regulation of the associations) we may nevertheless state that firm foundations have been laid for the associations of Hungarian enterprises within the Council for Mutual Economic Assistance (CMEA), and also for these to be integrated into the scheme of East-West cooperation. The convention on the organizational and operating order of the international enterprises of the member-states of the CMEA has just completed the preparatory stage.

2. Organization and methods of enterprise management

The supreme organ of enterprise management is the Government. In a planned control of the market, economic management by the government has as a matter of course gained in importance. In point of fact the formulation of an economic policy extending to national economy as a whole, the shaping of the structure of a system of economic control, the coordination of a variety of functional and sectoral activities of economic management are tasks of by far greater complexity in planned economy of a long-range and policy-making character than in a plan-specifying system. For the consolidation of the unity of economic management by the government the Council of Ministers in 1973 established the State Planning Committee as a special government committee formed of the deputy prime ministers in charge of matters of economy and the

principal officers of the key government economic departments. The State Planning Committee may issue resolutions binding on the government departments concerned, on organs of all-national competence as well as other authorities.

As compared to the situation before the reform the importance of functional economic management has increased considerably, and therefore that of the National Planning Board, the Ministry of Finance, the Ministry of Labour, the National Board of Supplies and Prices, etc. Essentially the task of functional economic management is to define the government policy of economic management and to formulate the rules of enforcement of the regulatory system. For example, the Government approves the principles of credit policy, which for the enterprises peg out the lines of development, preferred or restricted. The enforcement of the government resolutions defining the principles of credit policy is the primary function of the Minister of Finance and of the National Bank of Hungary. These functional organs of economic management issue provisions of statutory and binding force to the enterprises.

Before the reform in all socialist countries the deciding organ of enterprise management were the sectoral government departments, such as the Ministry of Heavy Industry, the Ministry of Public Construction, etc. It is the general trait of the socialist economic reforms that the function of enterprise management of the sectoral government departments has been more restricted than before. On the other hand tendencies have come to the fore proposing the modification of the operation of these organizations to a certain degree. In the socialist countries, where associations and combines have risen to a controlling position, many of the departmental functions have been transferred to them, whereas policy-making functions and such of long-range development have been assigned to the sectoral departments at a growing rate. There are tendencies, mainly in Bulgaria and the German Democratic Republic, to subordinate the associations and combines of highest importance directly to the government or to government commissions. In the Soviet Union the law subjects certain divisions of government departments to the system of independent accountancy, i.e. the performance of certain enterprise functions by the department itself.

In this respect the Hungarian reform has split the earlier uniform, hierarchically organized, managing activities of the sectoral government departments into two lines of economic management, namely sectoral management and the supervision of enterprise. Within the scope of enterprise supervision the character of the legal relations of the government departments and the enterprises has undergone a radical change.

Essentially sectoral management as a new form of management consists in the duty of the sectoral minister to direct economic activity, by influence or authoritative means, coming within the departmental sector in the entire sphere of the national economy, irrespective of the organizational subordination of the economic organ performing the activity in question. As an example the managing activity of the Ministry of Public Construction of a sectoral nature extends to the operations of any enterprise in the building trade established by any one of the government departments or any local

government council, to building cooperatives, the small-scale building trade and so also to the building activities of the citizens. In practice a number of problems have emerged in connexion with sectoral management, e.g. sectoral supervision and information are still not sufficiently defined. A relevant provision of law is in the drafting stage.

The other function of the sectoral government departments is the supervision of enterprises, a function which the government department in question performs in respect of the hierarchically subordinated enterprises formed by it. Of the provisions of the government decree on the state enterprise those relating to the following deserve mention:

- establishment of the enterprise simultaneously with the definition of the scope of activities and the ascertainment of the starting assets;
- the exercise of the employer's powers in respect of the manager and deputy managers of the enterprise;
- termination of the enterprise by way of reorganization or liquidation;
- information of the enterprise activities, supervision, comprehensive appraisal of the activities of the enterprise
- operative interference in the activities of the enterprise by way of exception, like the issue of concrete instructions, the re-allocation of shop divisions and the economic rehabilitation of the enterprise.

Below we shall discuss the supervisory rights (only those relating to the establishment and termination of the enterprise), contracts and the operative interference in enterprise business.

(a) Establishment of the enterprise and the definition of the scope of activities. A state enterprise may be established by a minister, the principal officer of an administrative agency of all-national competence, or the executive committee of a local government council. In all instances the agreement of the Minister of Finance is required for the establishment of an enterprise. If the principal scope of activities of the enterprise is outside the sector of the founder organ, the minister responsible for the sector of the economy has to be consulted for his opinion. The enterprise is deemed to be established on its being entered on the register of enterprises kept by the financial authorities. Upon request the enterprise may also be entered on the register of firms kept by the court of law. The entry of the enterprise on the register of firms is, however, not a legal condition of establishment. An essential part of the decree establishing the enterprise is the definition of the scope of activities of the enterprise and the ascertainment of its starting assets.

After the introduction of the reform of economic management the limits of the scope of activities of the enterprise are not drawn too closely. In conformity with the government decree the scope of activities of the enterprise has to be defined in a way permitting the exploitation of its productive forces with as high degree of economy as possible. The enterprise has rights to the performance of subsidiary activities for the economical performance of its principal activities. Hence in the decree of establishment, in broad outlines and in general terms, the principal scope of activities of the enterprise will have to be defined, possibly by emphasizing the special line of the enterprise, and its subsidiary activities. The principal scope of activities at the same time qualifies the enterprise for the performance of any partial

activity associated with the principal scope, when no special mention will have to be made of the partial activity in the deed of establishment. The building contractor will, e.g., draw up the plans of the building to be executed by him, the producing enterprise may sell its products also directly. If, however, the building contractor intends to embark on planning activities in conjunction with his building trade, if the producing enterprise transports and sells the products also of other enterprises besides its own, then in the deed of establishment the enterprise will have to be authorized expressly to undertake such subsidiary activities.

(b) Termination and rehabilitation of the enterprise. There are two ways to terminate a state enterprise by the founder organization, viz. by reorganization or liquidation. Reorganization may imply the union, merger or segregation of the units of a state enterprise. Legally this means that the new state enterprise will at the same time be the assignee of all rights and obligations of the terminated enterprise. This reorganization, which means the termination of the enterprise, must not be mistaken for the reallocation of a plant division, an operation which in the government decree has also received the designation of reorganization. In the exceptional interests of national economy the founder organization may decree the allocation of a plant division, plant, etc. of the enterprise to another. In this case the scope of activities of the enterprises concerned will have to be defined once again, and so also their starting assets ascertained.

Liquidation of an enterprise will be decreed if its activities are unprofitable, or the national economy has no need for the enterprise. In this case the manager will be replaced by an appointed committee of liquidation, which will make good the claims of the enterprise and settle its liabilities. In the event of liquidation the enterprise will cease to exist without an assignee. Any residual assets will be returned to the state budget. There is but one exception from main rule of termination without an assignee; on grounds of social policy, for meeting claims arising from employment or such as have to be met by the social insurance scheme, an assignee enterprise has to be appointed.

If the enterprise assets drop below the starting assets or the reserve funds of the enterprise have been depleted, the founder organ has to decree the economic rehabilitation of the enterprise. A committee formed of the representatives of several organs will then examine the ways in which the operations of the enterprise can be turned profitable again. If there is no prospect of change, the founder organ will decree the winding up of the enterprise. Otherwise it will take the necessary action for the improvement of the management of business by the enterprise.

(c) The right to issue instructions. After the reform of economic management the legislator wanted to restrict cases of an operative interference in the management of business by the enterprise to a few exceptional cases. Accordingly the founder organ may issue instructions to the enterprise only for exceptional interests of national economy and only when the economic target cannot be achieved by way of exercising a routine economic influence on the enterprise's business. Unlike the earlier regulation of the German Democratic Republic and Czechoslovakia, the Hungarian

government decree on enterprises does not expressly recognize the subjective right of the enterprise instructed by the respective organ to damages caused by the government instruction. Nevertheless it states that the controlling organ issuing the instruction has within the capacity of the national economy to compensate the enterprise if substantial losses should arise in carrying through the instructions.

The Hungarian Foreign Trading Act of 1974 recognizes special rights to issue instructions to enterprises holding a licence for transacting foreign trade and at the same time extends the rights to issue instructions in the interest of the performance of interstate obligations under international agreements.

As regards the general organization of the management of enterprises, recent legislation has brought about changes of special interest. The changes here referred to concern the settlement of inter-enterprise disputes. With effect from the 31st December, 1972 the state boards of economic arbitration, the forum having jurisdiction in inter-enterprise disputes, have been dissolved and merged with the uniform organization of the judiciary. In accordance with the restatement of the Constitution of 1972 and the Act on the reform of the judiciary, the ordinary court of law have cognizance of all civil law matters, including legal disputes between state enterprises. The supplement to the Code of Civil Procedure classifies the legal disputes between enterprises as actions of economy, where jurisdiction has been entrusted to judges assigned to a new organ, the Economic Branch, organized within the ordinary courts of law. In legal disputes between enterprises the general rules of the Code of Civil Procedure have substantially to be applied, apart from the very few exceptions defined by the supplement to the Code. The economic courts have in this way become part and parcel of the uniform organization of the judiciary, in the same way as the labour courts superseded the earlier committees of arbitration in labour disputes.

The reason why the state boards of economic arbitration have been discontinued is that earlier these boards operated primarily as agencies of public administration. They were not tribunals of arbitration in the genuine meaning of the term, but organs which received instructions from the government, could issue quasi-provisions of law (conditions of delivery), further, subject to the rules of compulsory contract-making, they could negotiate contracts between enterprises *ex officio*, or even modify or terminate such contracts. Hence the focal point of the activities of the boards of arbitration were so-called "pre-contractual disputes", contract disputes of an administrative nature. Only part of their activities was devoted to judicature, mainly to determine dispute arising from a breach of contract. After the introduction of the reform of economic management, the administrative procedure associated with contractual disputes has been relegated to exceptional and marginal cases, and the civil law procedure has come to the fore. In accordance with the declaration of the principle of the autonomy of the enterprise, there was no further need for the maintenance of the autonomous administrative organ, and the constitutional principle proclaiming the unity of judicature could be enforced consistently. Henceforth in the legal matters of enterprises and private persons the courts

of law could proceed on conditions of legality of a yet higher degree. In addition Hungarian legislation devoted greater attention to arbitration, now genuine tribunals of arbitration chosen by the parties concerned. Actually an ever growing number of legal disputes is withdrawn from the jurisdiction of the ordinary courts of law and submitted to arbitration.

Enterprise management primarily relies on provisions of law. The provisions of law in the first place associated with management are as a rule issued in the form of government decrees. For the enforcement of government decrees the functional and sectoral government departments have recourse to two types of sources of law, viz. to the degree or regulation applicable to, and binding on, everybody and, secondly, to normative instructions applicable only to subordinate enterprises.

A large number of economic regulators appear clad in provisions of law. Not all economic regulators are, however, appropriate for promulgation in the form of a provision of law. Part of these are transmitted by the managerial organs in the form of directives or policy-making opinions to the enterprises. Also methods to influence individual enterprises have been developed. One of these is the, legally, still uncoded contract for economic management whose variegated forms are resorted to extensively in practice. The basic feature of this contract is the undertaking by the enterprise to the organ of economic management to adopt a definite policy in its operations (e.g. the carrying through of definite development work, or to refrain from changing the uncontrolled price of certain products, etc.). In return the organ in charge of economic management extends certain definite benefits to the enterprise, e.g. abatement on taxes, preferential credit terms.

3. Rights and obligations of the state enterprise

One of the most characteristic features of the legal status of Hungarian enterprises is that the Hungarian legislation has, unlike recent Soviet, Democratic German, Rumanian and Bulgarian legislation, but similarly to the Czechoslovak Code of Economy of 1964, applied the so-called negative method of regulation of the rights of the enterprise in the government decree on enterprises. Negative regulation involves that in certain spheres of economy the rights and obligations of the enterprises and of the organs of economic management have not been defined in any concrete form. The legislator has declared merely in the form of a principle that the enterprise may in its operations exercise any right by observing the principle of using the right as intended by the legislator, except, however, when a provision of law prohibits or limits the use of a right. On the other hand economic management may interfere actively in the operations of the enterprise only when it has expressly been authorized by a provision of law. On the enterprise the legislator has imposed the obligation, to act according to plan, by continuing a socialist type of commodity production, and to meeting the necessary economic needs to pursue its business in a profitable manner. For the performance of this fundamental obligation the enterprise is entitled to autonomous decision-making in matters of enterprise business and to the free

disposal of enterprise assets. In the following section a synopsis will be given of the principal rights and obligations of enterprises.

(a) Relations of the enterprise to the National Economic Plan. It is the characteristic feature of the economic reform in Hungary that with the separation of economic management and business operations the system of the break down in the Plan, or Plan specification, and of the obligatory system of Plan targets have ceased to exist. (In the other socialist countries, either the earlier form or a reduced number of enterprise obligations under the Plan have remained.) As defined by the Act of 1972 on the Order of National Economic Planning the National Economic Plan is binding on the Government and on the organs in charge of economic management. Accordingly economic management establishes the provisions of law and the system of economic regulators, and eventually these acts of Plan enforcement will be directly binding on the enterprises or influencing them to manage their business in the interest of the achievement of the targets of the National Economic Plan. The reform does not, however, imply the cessation of any obligation on the part of the enterprise to conduct its business in conformity with the Plan. However this obligation involves the elaboration of an independent enterprise schedule of action, and not the strict adherence to Plan indices. The elaboration of an autonomous enterprise plan is a peculiar enterprise right and obligation. Here as a matter of course informative matter relating to the National Plan, principles of the methods of plan-making, etc. are important, although there are no obligatory prescriptions of economic management in force which would direct the enterprise in preparing its plan, nor in defining the contents of this plan. Therefore in the plans of the period following upon the economic reform the definition of plan targets qualifies as an objective of a general nature, and not as a task obligatory for the particular enterprises. The economic organizations are bound to define their plans in a way that "these ensure the realization of the decisions of the national economic plans affecting their activities and of the requirements of the plans expressed in the form of regulatory means".

(b) The financial independence of the state enterprise. In order that an enterprise might perform its economic tasks, it is essential that at the start the capital stock required for the exploitation of its scope of activities is placed at its disposal, or that by way of income control the funds needed for the management of its business or for its development should not be withdrawn from the enterprise. Although it stands to reason that the financial position of the country is in a decisive manner influenced by the rate of freely disposable means left with the enterprises, the statement may be made that since 1968 the enterprises have been properly supplied with current assets and that after taxation on the average about fifty per cent of the net profit is left with the enterprise. Now the figure is about 40%. Anyway, the enterprise has sufficient assets to conduct its normal operations but if it plans a substantial increase in production or an important investment, it needs credits and credits are controlled by the Government. Thus the enterprises are not in the position to bring about macro-economic changes in the national economy.

The various state taxes, e.g. the profit tax, the production tax, the charge on assets, do not seek only the withdrawal of the profit and its redistribution

through the state budget: these are all important economic means to influence the enterprise.

State enterprises are under the obligation to accumulate funds for definite purposes from the profits left with them. The most important of these are (a) the development fund for enterprise investments, overhaul, etc.; (b) the profit sharing fund to which the profit share paid to employees beyond their wages or salaries and certain welfare and social expenses (e.g. such for keeping up the enterprise crèche, day-home, etc.) are charged; (c) the reserve fund to make good possible losses or for the assumption of risks.

The enterprise is free to possess its assets, make use and dispose of them. In conformity with Hungarian Civil Code of 1959 and the Restatement of the Constitution of 1972, the enterprise is now the owner of its assets, the assets of state enterprises being the integral and indivisible property of the state. The enterprise is authorized to manage the assets entrusted to it autonomously. It is in agreement with this right of the independent management of business that the state is not liable for the debts of its enterprises.

In this connexion mention may be made of the extensive discussion which have been going on in Hungary as well as in the other socialist countries (in the first place in the German Democratic Republic, Czechoslovakia and Poland) on the contents of state ownership at the time of the introduction of the reform. The dominant opinion was in favour of the unchanged recognition of state ownership and against the recognition of enterprise ownership in the assets. In these discussions several novel ideas have emerged as to the structure of state ownership and its theoretical foundations.

Several measures have been introduced for the reinforcement of the financial independence of enterprises. Thus the government decree on enterprises has pronounced the prohibition of the regrouping or reshuffling of the assets. On the other hand in 1970 several provisions of law have broken through the earlier rather rigid bank monopoly of credit operations and have authorized the enterprises to lend, transfer against a consideration or gratuitously, machinery, equipment, funds, temporarily or definitively, to their partners. The same provisions have authorized the enterprises to extend commercial credits or advances provided, in both cases, that such credits or donations serve also the purposes of their own production.

(c) The freedom of contract. The reform has lifted the earlier general obligation of contract-making of the enterprises. Exceptions are in the first place single large-scale state investments, where the contractors and suppliers are equally under an obligation of entering into contracts, and foreign trade, where the foreign trading enterprises are under an obligation to contract with home industry and commerce. In domestic goods transactions, central management or the quota system has been maintained only for goods of utmost importance for supply purposes. In general there is also freedom in the choice of the contracting party, i.e. the earlier sectoral or regional limitations have mostly been abolished. For want of Plan specification, in the light of the uniform position taken in literature, there can be no talk of plan contracts between the enterprises. Accordingly contracts made by an enterprise with another closely approximate the traditional types of contracts, such as sales contracts, contracts for work, labour and materials,

commission-agency, etc. These changes will gradually permit the integration of enterprise contracts into the Civil Code and, by maintaining their specialties, their uniform regulation together with the other civil law contracts.

The enterprises are in general free to select the type of contract best suited to their business. In the regulation of the particular contract freedom is predominant. Finally at many places contractual relations have replaced the earlier relations of an administrative nature. Thus the relations between enterprises and banks in matters of credit policy have been placed on a contractual basis.

4. Enterprise liability

The establishment of a system of rules controlling conduct in business has become indispensable at the moment enterprises have begun to come into contact with one another in the market. The change in economic policy has inevitably brought with it the revival of the regulation of competition (the Hungarian act of 1923 on competition is still in force) with the simultaneous adaptation of it to the nature of the socialist system of society. The law of competition, however, protects the interests of the competitor only by traditional civil or criminal law sanctions. The sphere of abuses of enterprise autonomy, however, may extend beyond the simple violation of the interests of the business partner. These abuses may be directed also against the interests of both economic management (transgression of the legitimate scope of activities, disturbance of money and credit operations) and the consumers (deterioration of quality). Within this fairly wide scope the need has arisen for the introduction of new financial sanctions bearing hard on the enterprise profit.

Hungarian legislation imposes the primary sanction of a fine for illicit practices when the enterprise's drive for profit runs counter to the interests of national economy. The relevant provisions were enacted in 1968. By this a new, independent variant of liability under administrative law has come into being. The economic fine can be inflicted on enterprises and cooperatives only and it is the primary and general sanction of enterprise liability. In principle the fine can be imposed on all kinds of abuses usually occurring at enterprises. It affects the enterprise directly and this liability will then reel off to the employees of the enterprise in the form of consequences under labour law, or even criminal law. In general the judge will have recourse to the imposition of an economic fine when the enterprise comes by large profits by violating provisions of law, decrees or regulations of authorities or the principle of the socialist management of business, and thereby causes considerable losses to national economy or gravely endangers the lawful interests of the population. The principles of the socialist management of business cannot be considered fully developed yet. At all events, however, these principles imply the effective stemming of the drive for unfair gain, abuses by superior economic powers and the deterioration of quality by different kinds of manipulation. The exceptional cases of the imposition of an economic fine are those of the management of business to the prejudice of

the interests of national economy even in the absence of any substantial illicit gain or any material damage. Such cases are, e.g., the assumption of obligations by the enterprise without the necessary financial cover, critical disturbance of the order of money transactions, extension of credits or trade in products, the continuation of unlicensed trade in goods of importance by transgressing the legitimate scope of activities, unlawful foreign trading activities, the exposition of the corporeal integrity or health of the enterprise employees to grave hazards by the infringement of labour safety regulations.

As regards civil law liability the earlier rigid and often too rigorous penalty clauses have been mitigated remarkably. Although in contracts made by enterprises the obligation to stipulate penalties has on the whole remained (although in a number of types of contracts, such as e.g. research contracts, contracts of commission-agency in foreign trade, penalties are not usual). However, the penalty funds and the rates of penalty have been reduced considerably and the obligation to enforce claims to penalty has been confined to a very narrow sphere. In general the statement may be made that the earlier penalizing character of the penalty has ceased and that its function of damages has become predominant. By the side of the penalty the importance of the enterprise liability for damages formally imposed for a breach of contract has increased, still in judicial practice in its substance developed to strict liability. Another trend of interest in judicial practice is to reduce the Civil Code in principle to unlimited liability for damages to the rate of the actually predictable, i.e. calculable damage.

5. Enterprise management and internal organization.

At the introduction of the economic reform statutory provisions have in many respects reinforced the competences of the one-man management and individual liability of the manager who, however, must regularly consult with the trade union secretary, the Party secretary and—where many of the employees are young—with the secretary of the youth organisation (“triangle” or “quadrangle” of the enterprise). There are no provisions in force which would define the competences of the deputy managers as was the case earlier, or those of the organizational units absolutely subordinate to them. Deputy managers cannot veto the decisions of the manager, their competences are defined by the manager in the statutes of the enterprise. The manager has received complete authority in defining the internal organization and the operating order of the enterprise. At the same time it is a shortcoming of the regulation that the internal structure of the enterprise has been ignored in the government decree, although the right of the manager to give shape to the structure of the enterprise autonomously does not by itself preclude the definition of the principal traits of the internal structure by a provision of law in conformity with the government directives. In particular the legal guarantees of the independence of the self-financing internal units within the enterprise have been omitted, although here the legislation of enterprise matters of several socialist countries has provided examples. From 1969 onwards work has set in for the modernization of the “internal

mechanism" of the enterprises. The practical results obtained here will in the near future be cast into provisions of law.

This problem is closely associated with that of the development of industrial democracy within the enterprise. For the reinforcement of industrial democracy steps have been taken already by the government decree and the amendment of 1967 of the Labour Code. Thus, e.g., for the institutionalization of the participation of the enterprise trade union organ in enterprise management as a special means of control, the institution of the supervisory committee part of whose members are appointed from among the workers of the enterprise has been established. By comparison with similar regulations of other socialist countries, however, it will be found that as regards the legal expression of the direct methods of industrial democracy the Hungarian regulation is lagging somewhat behind those of the others. Presumably in the coming regulation of enterprises the institutions of direct industrial democracy will be given their proper statutory expression in as much as the XIth Congress of the Hungarian Socialist Workers Party, in 1975, laid stress on the need for the increase of labour participation in management.

Obviously it was part and parcel of the economic policy in the process of the reform, beyond the preservation of the rights of the managers, to integrate the manager and his deputies organically into the enterprise and in this way to bring about the unity of enterprise management and of the collective of the enterprise. This policy is served e.g. by the fundamentally uniform interest of the executives and workers in the business results. In conformity with these ideas of economic policy in legal literature also the opinion is spreading as if the manager of the enterprise were not unilaterally a delegate of the state, but there existed a "dual attachment", the one to the supervisory organ, the other to the collective of the enterprise. This dual attachment has been given expression in the government decree on enterprises in that the manager is appointed and also discharged by the supervisory organ, although in his appointment and discharge indirectly also the collective of the workers of the enterprise have a word to say through the trade union. The appointment establishes relations of employment to the enterprise and not to the supervisory organ; still, in the employment of the manager the supervisory organ exercises the rights of the employer.

Associated with the legal status of the manager of the enterprise there is the change of outlook not only as regards the office of the manager, but also regards the appraisal of his managerial activities in general, an outlook which segregates the liability of the manager as principal officer in a yet sharper way from the liability for the breach of duty in the executive activities. In the system of plan instructions at least in principle the liability for an erroneous decision of the manager and the production of a defective product was established by uniform standards. After the reform the activities of the manager have ceased to be merely functions of the execution of instructions. From this change it follows that at the appraisal of the activities of the manager we have to a certain extent detach ourselves from the appraisal of certain concrete decisions, and as the principal rule the entire economic activities of the manager will have to be valued therefore for a long range. In

this valuation the particular managerial acts will coalesce with the results of the series of actions, mutually and simultaneously compensating one another. Therefore in economic life the general tendency to narrow down the legal liability for the benefit of financial interestedness has in the case of the principal officers of the enterprises received increased emphasis. On the other hand other systems of valuation replacing legal liability have appeared on the scene in a stronger form, and managers of enterprises doing their work unsatisfactorily for extended periods of time are as a rule discharged and in general disciplinary proceedings.

The changes in the principles of liability to a certain extent manifest themselves also in the field of economic criminal law. In direct planned economy substantially the formal safeguard of economy was the order of the day, in the form partly of offences against social property, partly of offences to the prejudice of the Plan. Towards the safeguard of the contents of management the Criminal Code of 1961 took steps already by abolishing the category of criminal offences against the Plan. The regulation of criminal offences against the order of national economy has been modernized by the supplement of 1971 to the Criminal Code. As regards offences infringing the order of the economy, it is in particular the wasteful or lavish conduct of business, irresponsible contraction of debts, and commodity usury which are of special importance for the reform of the criminal law.

Contributors

Björn Beckman, Department of Political Science, University of Uppsala, Sweden, has post-graduate degrees from Stockholm and Uppsala (FL 1966, FD 1976). He wrote a dissertation on colonial administration, and researched in Ghana from 1967 to 1971. His main publication is *Organising the Farmers: Cocoa Politics and National Development in Ghana*, Uppsala 1976. He is a member of the "Working group for studies of development strategies", Uppsala, and is Lecturer in Development Studies, University of Stockholm.

Gyula Eörsi, a Member of the Hungarian Academy of Sciences, is Professor of the Budapest University and Assistant Director of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences. He was a visiting professor in Dar es Salaam (1967, 1970) and in Stockholm (1973). His main fields of interest are: the law of a socialised economy, contracts and torts, comparative civil law.

Yash Ghai, currently a research fellow at the Faculty of Law, University of Uppsala was previously professor of law at Dar es Salaam, and the Director of Research, the International Legal Centre, New York. He has held visiting appointments at Yale and London universities. In addition to various articles on law, economic integration, and ethnic relations, he has written (with Professor J.P.W.B. McAuslan) *Public Law and Political Change in Kenya*, 1970 and co-edited (with Dr. Dharam Ghai) *Portrait of a Minority: Asians in East Africa*, 1971. He has acted as a legal consultant to the East African Community, and as a constitutional consultant to the Governments of Papua New Guinea and the Solomon Islands.

Reginald Herbold Green is currently a Professorial Fellow of the Institute of Development Studies at the University of Sussex. His study of public enterprise in Africa began with the Ghana Cocoa Marketing Board in 1960 and has continued during his subsequent academic posts at the University of Ghana, the East African Institute of Social and Economic Research, the University of Dar es Salaam and IDS and his practising as advisor or consultant to the Uganda Ministry of Planning, the Tanzania Treasury and the Division of Public Administration and Finance of the United Nations. An economist by training he was basically operationally engaged in applied political economy over 1965-1974 and worked closely with lawyers in treaty negotiation, contract formulation and legislative drafting while at a recent seminar he was described by other participants as a sociologist. He has written a number of published articles on public enterprise and was a member of the 1975 United Nations Expert Group on Budgeting and Planning for Development in Developing Countries.

Göran Hydén is currently Professor of Political Science at the University of Dar es Salaam. He has been teaching Political Science, Public Administration and Management for more than ten years at the universities in Kenya, Tanzania and Uganda. During these years he has frequently been called upon to serve as a consultant on management of cooperatives, public enterprises and government organizations. He has written numerous articles and books in his field and served as editor of two important textbooks: *A Decade of Public Administration in Africa* and *Developing Research on African Administration: Some Key Methodological Issues*.

Pheroze Nowrojee, B.A. (Bombay), LL.M. (Yale), of Lincoln's Inn, Barrister-at-Law, Advocate of the High Courts of Kenya and Tanzania is currently Lecturer in Public Enterprise at the Faculty of Law, University of Dar es Salaam, Dar es Salaam.

James C. N. Paul is currently Professor of Law at Rutgers the State University of New Jersey, Adjunct Professor of Law at Columbia University and Director of Research at the International Legal Center, New York. He served as founding Dean of the Faculty of Law and later as Vice-President for Academic Affairs at the Haile Sellassie University (now University of Addis Ababa), Ethiopia and has taught and travelled elsewhere in Africa and participated in numerous workshops concerned with various subjects relating to law and development. He was a member of the international committee (and principal draftsman for it), which prepared a report and monograph, *Legal Education in a Changing World*, which was jointly published by the Scandinavian Institute of African Studies and the International Legal Center in 1975.

Dina Sheikh el Din Osman, LL. B. (Khartoum), B.C.L. (Oxon) is a lecturer at the Faculty of Law, University of Khartoum. She is writing a Ph. D. thesis on the organization and control of public corporations in the Sudan and the impact of such corporations on the socio-economic development of the country. Ms. Osman has written an unpublished paper on public corporations in the Sudan for the Beirut Conference on Administrative Law and Development (May 1975). She has also written an unpublished dissertation on the legal status of Sudanese women for the Wellesley Conference on Women and Development (June 1976). She is currently a graduate student at the Harvard Law School.

Tamás Sárközy is senior research officer at the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences. In 1972 he got the *candidatus* degree from the Academy of Sciences. He also teaches a course on the foundation of economic policy in the Academy of Economic Sciences, Budapest. His research activity has for a long time focussed on the question of ownership. He published in 1973 a monography on socialist state ownership. In one of his other books published in 1973 (factory independence, associations, factory guidance) he examined the foundation of the legal theory of Hungarian economic reform. He is currently working on

problems of economic intervention by the capitalist states and the comparative legal mechanism of the management of the economy in the socialist states. On this subject he has published several studies in Hungarian and foreign reviews.

Akilagpa Sawyerr, formerly of the University of Dar es Salaam, is a Senior Lecturer in the Faculty of Law, University of Ghana. He is currently engaged in the study and teaching of multinational corporate strategy and the problems of underdevelopment.

Yash Ghai and Susanne Linderos

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4. KENYA
5. NIGERIA
6. SUDAN
7. TANZANIA
8. ZAMBIA

List of abbreviations

AR	The African Review
EALJ	East African Law Journal
EALR	Eastern Africa Law Review
IDS	Institute of Development Studies
JAO	Journal of Administration Overseas
JDS	The Journal of Development Studies
NJESS	The Nigerian Journal of Economic and Social Studies
QJA	The Quarterly Journal of Administration

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