PRIVATISING NATIONALISED INDUSTRIES: CONSTITUTIONAL ISSUES AND NEW LEGAL TECHNIQUES

PERHAPS the dominant theme in Government policy since 1979 has been reduction in the extent of the public sector, in particular by the sale of nationalised industries to private buyers. In this article we will attempt an assessment of some of the legal issues raised by this process. Previous work has in general concentrated on the economic issues surrounding privatisation. However, we share the view of an economist[1] that no economic case for privatisation of state enterprises has been firmly established, and that the process is best interpreted in terms of changes in the institutional regimes for dealing with failures of the market mechanism. This raises many issues of importance for legal scholars.

Our background concern is essentially constitutional. A constitution serves to define the public sphere and to legitimate state action. Privatisation is claimed to represent a substantial shift in the boundaries between the state and private interests. It also carries with it implicit claims as to the legitimate role of the state. There is thus an inevitable constitutional dimension to privatisation, and this is a sufficiently fundamental innovation to deserve open and public debate of its implications. We shall describe the new legal techniques adopted and will attempt some assessment of the degree of openness and debate which has accompanied them. Moreover, justifications for privatisation have stressed the claim that, once sold, enterprises will be free from state intervention and subject only to the discipline of market forces as is allegedly the case with other privately-owned concerns. We will examine this claim sceptically, and point to a variety of techniques of company and contract law which may permit continued close governmental involvement. We will also examine critically claims that the limited political accountability of nationalised industries will be replaced by more effective shareholder accountability.

A further aspect of privatisation of the greatest legal importance will not be discussed here: the arrangements adopted for regulation after disposal to the private sector. This is omitted both for reasons of space and because an adequate assessment must await the fuller development of the new regulatory machinery.[2]

A word is also necessary on the meaning of "privatisation" which we shall adopt. We shall limit it to the sale of state enterprises, in whole or in part. This is, of course, only a

[1] Rees, "Is There an Economic Case for Privatisation?" (1986) *Public Money* (March), 19.

[2] See T. Prosser, *Nationalised Industries and Public Control* (1986), 90–97, 225–230, and D. Thompson, J. A. Kay, and C. Mayer (eds.), *Privatisation and Regulation: The U.K. Experience* (1986).

very particular aspect of the general privatisation process, for "privatisation" is in current usage a portmanteau term also covering the removal of restrictions on competition (liberalisation) and various changes affecting local authorities and health authorities; these will be outside the scope of this article, although reference to liberalisation will sometimes become necessary.

THE PRIVATISATION PROGRAMME

In the absence of overarching and explicit constitutional principles, in modern Britain the election manifesto has to a large extent become the central means of political legitimation. With this in mind it is surprising to find how little stress was placed on the sale of nationalised industries in the Conservative Party Manifestos of 1979 and 1983, and many of the most important examples were not referred to, for example the sale of the British Gas Corporation.

One can, in fact, discern three stages in the privatisation programme. The first was under the 1979–83 Government and in the early period after 1983. During this period there were extensive disposals, but it would be an exaggeration to talk of a "programme" in the sense of anything thought out coherently in advance; motives appeared mixed, with the short-term effect on the Public Sector Borrowing Requirement dominant. Most of the industries sold were in some sense competitive, and disposals did not include the major public utilities.

The second stage came with the development of a programme, initially for the disposal of £2 billion worth of state assets in each year of the Government's life, a plan incorporated in the 1984 Public Expenditure White Paper.[3] In the Chancellor's Autumn Statement of November 1985, the target for net proceeds from asset sales was raised to £4.75 billion for each of the following three years.[4] It is to this phase that the sale of the major non-competitive public utilities of gas and water belongs, and it remains prominent in ministerial rhetoric; thus as late as April 1986 the Financial Secretary to the Treasury, who was responsible for preparing the programme, said "the programme will continue until all state-owned commercial industries are returned to where they belong—to the private sector."[5]

One can also detect, however, a third phase, that of confusion. The beginning of this was signalled by the Westland affair in the winter of 1984–85. Although this did not directly concern privatisation, one of the leading actors was the recently-sold British Aerospace, and the eventual outcome served to throw considerable doubt on claims of shareholder accountability used to justify

[3] Cmnd. 9143, *The Government's Expenditure Plans 1984–5 to 1986–87.*
[4] H.C. 22, 1985–6.
[5] Moore, *Britain's Privatisation Programme Sets World Example,* H.M. Treasury Press Release 51/86, also published by Aims of Industry as *Privatisation in the United Kingdom* (1986).

privatisation; we shall consider this aspect of the affair below. It also cast some doubt on the competence of the Government in matters of trade and industry, which was reinforced soon afterwards in its ineffective attempts to dispose of British Leyland. Other major problems included the indefinite postponement of the sale of British Airways,[6] the postponement of the sale of the water authorities until after the next election,[7] and the abandonment of the plan for a flotation of the Royal Ordnance factories.[8] Legal difficulties over the proprietary rights of depositors also delayed flotation of the Trustee Savings Bank,[9] and indeed one of the reasons for the postponement of sale of the water authorities appears to have been a judicial review action brought by the trade unions, for which leave had been obtained. This sought to challenge the *vires* of the preparations for sale undertaken by the authorities before the relevant legislation had been passed.[10] As we shall see further test cases challenging inadequate consultation of the workforce before other sales are in prospect. In Summer 1986 the *will* to privatise clearly remains (and indeed much criticism has been made of an apparent determination to push through sales regardless of the consequences), but the *practice* appears ill thought out.

Privatisation has been presented by ministers as more than a set of individual sales, however: it is claimed to be a coherent programme marking out a new and clear divide between the legitimate public and private domains. Thus the Financial Secretary to the Treasury, who was largely responsible for drawing up the programme, has asserted that the "privatisation programme is coherent, and well thought-out" and that "our approach to competition and privatisation is pervading all aspects of the government and the public sector. Attitudes and perceptions have been changed irreversibly."[11] Despite such claims, when one examines the arguments used to justify particular examples of privatisation one finds not the overarching and coherent programme suggested in ministerial speeches but a variety of themes often with conflicting implications as to how they should be implemented.[12]

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[6] H.C.Deb., Vol. 93, cols. *482–483* (Written Answers) (March 12, 1986).

[7] H.C.Deb., Vol. 100, cols. *594–595* (Written Answers) (July 3, 1986), and cols. 1261–1270 (July 3, 1986).

[8] H.C.Deb., Vol. 99, col. 492 (June 17, 1986), cols. 1034–1039 (June 18, 1986) and H.C.Deb., Vol. 102, cols. 618–628 (July 24, 1986).

[9] *T.S.B. Central Board and Another* v. *Vincent and Another, The Times,* April 29, 1986, and *Ross* v. *Lord Advocate and Another, Trustee Savings Banks Central Board and Others* v. *Vincent and Others, The Times,* August 2, 1986.

[10] *Financial Times,* June 28, 1986, and see Nicholas Ridley at H.C.Deb., Vol. 100, col. 1262 (July 3, 1986).

[11] Moore, *The Financial Secretary Speaks Out on Privatisation,* H.M. Treasury Press Release 190/83, *The Financial Secretary Reviews Privatisation Achievements,* H.M. Treasury Press Release 122/84, and the work cited in note 5 above.

[12] For excellent coverage see Steel and Heald, "Privatising Public Enterprises—An Analysis of the Government's Case" (1982) 53 *Political Quarterly* 333, Heald, "Will the Privatisation of Public Enterprises Solve the Problem of Control?" (1985) 63 *Public Administration* 7, and Rees, *op. cit.* note 1 above.

In the early years of privatisation, the justifications were largely economic; although sale of state enterprises and liberalisation are conceptually quite distinct, the theme of increasing competition pervaded official justifications.[13] When pressed, ministers tended to justify this by the suggestion that a nationalised industry in difficulties would have recourse to public money and so gain an unfair competitive advantage. However, past history, for example involving the rescue of Rolls-Royce under a previous Conservative Government, suggests that the strategic role of an industry in the economy, and possible defence commitments, will be more important than formal ownership in determining whether a rescue will take place. Indeed, it appears that the option of winding-up the state-owned British Shipbuilders was seriously considered by the Government in 1986.[14] Furthermore, it can be convincingly argued that the desire of the Government to obtain a successful flotation at a good price has led to lost opportunities for liberalisation in telecommunications and civil aviation, where proposals by the Civil Aviation Authority for route reallocation to increase competition were not accepted.[15] There is, of course, no pretence that the sales of the British Gas Corporation and of the water authorities would do anything but create private sector monopolies; hence the proposed regulatory arrangements.[16]

A further economic theme has been less explicitly developed in ministerial speeches, but has assumed particular importance in practice. This is the reduction of public borrowing through the proceeds of sale and through the resulting exclusion of the industries' external finance from the Public Sector Borrowing Requirement. Recent ministerial statements have played down this theme,[17] but it has been important both in decisions on whether sale is to be accompanied by liberalisation, and in the method and timing of sales.[18] The successful flotation of British Gas remains crucial to any remaining Government plans for tax cuts before the next election.

In the forefront of more recent justifications for privatisation has been the political theme that it will free the enterprises from political control and interference. This claim has been made in several different senses. Thus it has been made clear that the

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[13] See note 11 above, and Sir Geoffrey Howe, *Privatisation,* Conservative Central Office Press Release 533/81.

[14] *The Observer,* May 8, 1986.

[15] See Kay and Silberstron, "The New Industrial Policy—Privatisation and Competition"; (1984) *Midland Bank Review* (Spring), 8, Kay, "The Privatisation of British Telecommunications" in D. Steel and D. Heald (eds.), *Privatising Public Enterprises* (1984), and Cmnd. 9366, *Airline Competition Policy.*

[16] See H.C.Deb., Vol. 78, col. 641 (May 7, 1985) and Cmnd. 9734, *Privatisation of the Water Authorities in England and Wales,* para. 54.

[17] See *e.g.* Moore 1984 and 1986, *op. cit.* notes 5 and 11 above. *Cf.* Norman Lamont in relation to Amersham International at H.C.Deb., Vol. 998, col. 747 (February 10, 1981).

[18] Heald, *op. cit.* note 12 and Buckland and Davis, "Privatisation Techniques and the P.S.B.R." (1984) 5 *Fiscal Studies* 44.

privatised industries will be able to raise finance without the restraint of the strict external financing limits imposed on nationalised industries in recent years, a matter of considerable importance to those faced with the need to raise extensive funds for investment in the near future. As the Secretary of State for Trade put it in debate on the Civil Aviation Bill, "I want to get the Treasury off the back of British Airways."[19] It should be remembered, however, that these restrictions are not intrinsic in public ownership but are a result of particular Government policies in relation to public borrowing. A related claim is that privatisation will free the industries from bureaucratic controls on their commercial judgment: "The fundamental advantage offered by the Bill is that it will ensure that people employed in the industry, managers and customers will be able to participate in the industry's success. That is a much better system than the present one, which involves politicians and civil servants."[20] It is further suggested that privatisation will prevent governmental interference in the commercial judgment of the industries and their use for macro-economic purposes; the first reason stated for sale of the water authorities was that "the authorities will be free of Government intervention in day to day management and protected from fluctuating political pressures . . ."[21] Such short-term intervention has indeed bedevilled relations between government and nationalised industries in the past; it is a different matter whether privatisation will take them outside politics.

A further political theme concerns the development of wider share ownership, which is seen as increasing individual responsibility, independence and freedom and as providing for accountability of the industry to its shareholders; we shall assess this below.[22] Other justifications for privatisation have been the weakening of the bargaining power of the trade unions and the bringing of industry performance up to the allegedly higher level of the private sector.

These, then, are some of the arguments used to justify the privatisation programme. Despite the apparent coherence of Government policy, on closer examination it appears that there is no straightforward rationale behind it, but rather a mix of motives combining discontent with the apparent failures of public ownership and a general distrust of state intervention in markets; "Privatisation forces issues to be grasped and provides a discipline that State ownership can never match. Once industries are in the marketplace, it is their own endeavours which count and this concentrates the mind wonderfully."[23] No doubt the deceptive simplicity of such a

[19] H.C.Deb., Vol. 989, col. 540 (July 23, 1980).
[20] H.C.Deb., Vol. 88, col. 768 (December 10, 1985).
[21] Cmnd. 9734, para. 3.
[22] See *e.g.* the Secretary of State for Trade in relation to the Telecommunications Bill at H.C.Deb., Vol. 46, cols. 26–38 (July 18, 1983). *Cf.* A. Berle and G. Means, *The Modern Corporation and Private Property* (1932).
[23] Moore 1986, *op. cit.* note 5 above, para. 5, and see also John Kay, *Who Benefits from Privatisation?* The City Association Lecture (1986).

view is to blame for the problems of implementation now apparent. How has privatisation of nationalised industries been implemented?

IMPLEMENTING PRIVATISATION

Transformation into a Public Company and Sale

This is the means adopted for de-nationalising a public corporation where the whole of the enterprise is to be sold. the most important example so far has been that of British Telecommunications. The Corporation had already been split off from the Post Office by the British Telecommunications Act 1981, and on April 1, 1984, a limited company of the same name was incorporated with the authorised share capital owned by the Secretary of State. On August 6, 1984 the business of the Corporation was transferred to the company in accordance with section 60 of the Telecommunications Act 1984. In accordance with section 61, shares were issued to the Secretary of State, and by virtue of section 62 outstanding debts to the National Loans Fund were cancelled and debentures issued to the Secretary of State. The opportunity was taken to reduce some of the debt to assist future borrowing by the company. On November 16, 1984 the Secretary of State's advisers offered 50.2 per cent. of the ordinary shares for sale on his behalf; in some other cases 100 per cent. of the holding has been sold.[24]

This form of privatisation requires legislation, and the other important examples have been the British Aerospace Act 1980, the Transport Act 1984, Part II of which provided for the sale of the British Transport Docks Board as Associated British Ports, and the Civil Aviation Act 1980 providing for the sale of British Airways. Provision is made for the disposal of the British Gas Corporation in the Gas Act 1986, and it was also intended that the water authorities be restructured as public limited companies initially wholly-owned by the Secretary of State and then floated individually.[25]

Simpler provision has been made for the disposal of concerns not in the public corporation form where there is no need to set up a successor company: thus section 79 of the British Telecommunications Act 1981 provided for the disposal of shares in Cable and Wireless, and the Atomic Energy (Miscellaneous Provisions) Act 1981 enables the Atomic Energy Authority and the Secretary of State to dispose of shares in the Radiochemical Company (now Amersham International), British Nuclear Fuels Limited and the National Nuclear Corporation.

A variation has occurred where the concern to be sold is comprised of several elements which are intended to be sold as separate entities or established as subsidiaries after sale. Thus in

[24] See also Pickering, "The Mechanics of Disposal" in Steel and Heald, *op. cit.* note 15 above, p.45. For further details in relation to British Telecom, see H.C. 495, 1984–5.
[25] Cmnd. 9734.

the case of the National Bus Company, the Transport Act 1985 obliges it to submit a programme for disposal of its undertaking to the Secretary of State, who may approve or modify it, or replace it with proposals of his own. The Company is placed under a duty to implement the programme and after its completion the Secretary of State may dissolve the Company by order.[26] The Airports Act 1986 empowers the Secretary of State to require the British Airports Authority to submit proposals for the carrying out of its business by nominated companies and a scheme for the transfer of assets to them. The Secretary of State may approve or modify these, and provision is also made for the transformation of the Authority into a public company and sale in the usual way.[27] Though the Authority is to be sold as a whole, each airport has been established as a separate subsidiary company. Provision is also made for the Secretary of State to direct that the major local authority airports be operated by companies limited by shares and registered under the Companies Act, although there is as yet no obligation to introduce any private capital into them.[28]

In some cases provision has been made for a target investment limit in the legislation. This enables the Secretary of State to set a figure for the maximum government holding in the company, which may be replaced only by a new *lower* limit.[29] The intention is clearly to prevent a future attempt at renationalisation through the purchase of shares; for British Telecom the initial limit has been set at 49.803 per cent.[30]

There has been lengthy and strongly contested parliamentary debate on some privatisation legislation. However, each statute is very much a skeleton and little provision is made in it as regards the design of the privatised company; the Articles of Association will be much more important in this respect and we shall discuss them below. The result is that parliamentary debate has tended to centre around the principle of privatisation (on which the Government is unlikely to change its position), and it has not been possible to discuss in detail such important matters as the method of sale and relations with government after disposal.[31]

What provision has been made for the gathering of outside views before parliamentary debate? In some cases, such as airports and water, White Papers have been issued in advance, sometimes accompanied by consultation papers on particular issues.[32] In the case of British Telecom, however, the White Paper was quite

[26] Transport Act 1985, ss.47–48.
[27] Airports Act 1986, ss.1–11.
[28] ss.12–28 and see H.C.Deb., Vol. 90, col. 695 (January 27, 1986).
[29] British Aerospace Act 1980, s.7; Civil Aviation Act 1980, s.7; Telecommunications Act 1984, s.65; Gas Act 1986, s.54; Airports Act 1986, s.7.
[30] The Telecommunications Act 1984 (Government Shareholding) Order 1985 (S.I. 1985 No. 496).
[31] Pickering, *op. cit.* note 24 above, p.52.
[32] Cmnd. 9542, *Airports Policy*: Cmnd. 9734, and *The Water Environment: The Next Steps* (1986).

inadequate and merely consisted of a copy of a ministerial statement and very brief background information.[33] The proposals for the sale of British Gas were not preceded by any White Paper or considered consultative document, and the Government was severely criticised by the Energy Select Committee for this.[34] The Committee decided to undertake a pre-legislative report on the regulation of the gas industry in the hope of assisting better informed debate in Parliament.[35] A similar strategy had been employed earlier by the Transport Select Committee at the time of the Transport Bill liberalising bus services; a highly critical Report had been issued in time for the Committee stage in the Commons, but had virtually no success in providing the basis for amendment to the Bill's provision.[36]

The Energy Committee Report was also extremely critical of the proposals in a number of respects. Important recommendations included the removal of restrictions on the import and export of gas, various extensions of the regulatory authority's powers beyond the directly controlled tariff market, and the imposition on the regulator of a general duty to promote competition. There should be improved provision for the supply of information to the regulator, for example on profits from the regulated market, a power for the regulator to require performance objectives, and explicit provision of wider powers for the proposed Gas Users' Council; this would also have to be consulted more effectively on codes of practice on gas supply and payment of bills. The Committee also recommended an explicit statutory requirement for public gas suppliers to promote the efficient use of gas.[37]

These proposals met with a very mixed response from the Government. It was agreed that restrictions on import and export of gas would be liberalised, but the remaining requirements for Government consent would still permit quite extensive restrictions on both of these.[38] In its reply to the report, the Government did not accept the need to extend the scope of regulation nor to supply information as to the profits from the regulated market, nor to empower the regulator to require performance objectives. It was however agreed that the powers of the (renamed) Gas Consumers' Council be clarified, and a Government amendment was introduced to that effect. An amendment was also accepted in Committee to impose a duty to promote competition in the industrial market on the regulator, but this was in terms far more limited than the Committee had recommended.[39]

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[33] Cmnd. 8610, *The Future of Telecommunications in Britain.*
[34] H.C. 15, 1985–6, para. 3.
[35] H.C. 15, 1985–6.
[36] H.C. 38, 1984–5; see also H.C.Deb., Vol. 79, cols. 1069–1082 (May 22, 1985).
[37] H.C. 15, 1985–6, paras. 33, 37, 53, 55, 58, 60–61, 67, 69, 72–77, 88, 90–97.
[38] See H.C.Deb., Vol. 93, cols. *211–212* (Written Answers) (March 6, 1986), and see *Financial Times,* March 11, 1986.
[39] Cmnd. 9759, *Regulation of the Gas Industry,* and H.C.Deb., Vol. 94, cols. 29–44 (March 17, 1986). The specification of the Consumer Council's powers is now s.33 of the Gas Act 1986; the competition provision is s.4(2)(*d*).

After being quoted in the Press as expressing dissatisfaction with this, the Conservative Chairman of the Select Committee introduced amendments (signed by all except one member of the Committee) at the Report Stage to impose the duty for gas suppliers to promote the efficient use of gas and to require a publication of profits from the regulated market. The first of these was voted down and the second withdrawn; apart from the Chairman, only one Conservative member of the Committee voted in favour.[40] After further amendments were moved in the Lords, the authorisation under which the British Gas Corporation is to operate was amended to require the Corporation to publish information about the efficient use of gas.[41] Other changes were made in the authorisation , but "[t]he final legislative package falls well short of the energy committee's recommendations and fails to assuage many of its doubts about a privatised British Gas."[42]

Even in the case of the major, well-publicised examples of privatisation, there has thus been limited provision for effective outside debate feeding into parliamentary consideration of the measures. However, there have been other examples of privatisation conducted well away from the public gaze; and we will now go on to consider them.

Disposal of Subsidiaries and Assets

In some cases, only part of a nationalised concern has been disposed of. Thus the Oil and Gas (Enterprise) Act 1982 enabled a subsidiary of the British National Oil Corporation to be established and sold. The production functions of the Corporation were transferred to a subsidiary called Britoil, shares in which were then sold by the Secretary of State. The legislation also made provision for the disposal of subsidiaries by the British Gas Corporation and, as with the British National Oil Corporation, the Secretary of Sate was given powers of direction to bring about disposal.[43] The Gas Corporation's offshore oil interests were disposed of in this way as Enterprise Oil. Other provisions relating to the disposal of subsidiaries have been enacted in the Transport Act 1981 (for British Rail), the Transport Acts 1982 and 1985 (for the National Bus Company) and the British Shipbuilders Act 1983. Thus, for example, British Rail has lost its hotels, hovercraft and Sealink ferries. The National Enterprise Board was also forced to dispose of assets.[44]

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[40] H.C.Deb., Vol. 94, cols. 109–133 (March 17, 1986); *cf. The Guardian,* March 17, 1986 and Mr. Lofthouse at H.C.Deb., Vol. 94, col. 828 (March 25, 1980).

[41] See H.L.Deb., Vol. 475, cols. 755–759 (June 3, 1986) and H.L.Deb., Vol. 478, cols. 52–55 (July 7, 1986).

[42] *Financial Times,* July 24, 1986, which summarises the changes.

[43] Oil and Gas Enterprises Act 1982, ss.1–4, 9–11.

[44] Industry Act 1980, s.1(1)(*b*) and National Enterprise Board (Guidelines) Direction 1980.

A major problem with this type of privatisation is lack of openness. When the large corporations are sold and there is a stock market flotation, at least one has the advantage of some degree of open debate on the legislation involved and a considerable amount of information about the company must be given in the prospectus and offer for sale. The process of disposal of subsidiaries, by contrast, may be highly secretive. In this context sale by private treaty has been criticised by the Public Accounts Committee as resulting in a price which may not reflect true market values where there is not strong competition in the tendering process, as failing to provide information about the whole market's view of the selling price, and as loading the dice in favour of the purchaser in those cases where tax losses were a factor in agreeing the price.[45]

A notable example of this sort of problem is the case of the British Shipbuilders warship yards. The British Shipbuilders Act 1983 modified the functions of British Shipbuilders to make it easier for it to withdraw from particular activities and empowered the Secretary of State to direct it to discontinue activities and dispose of assets.[46] Although there had been talk of limited privatisation for some time, the Corporation was told to sell its profitable warship yards only a matter of hours before the Secretary of State made a public announcement to that effect.[47] No flotation took place; instead private bidding for the yards was adopted thus making unnecessary public disclosure of information through a full prospectus. The process was shrouded in secrecy, and the "prospectus" issued to the bidders warned them that they should not "copy, reproduce or distribute to others this memorandum without the prior notice of British Shipbuilders."[48]

Similarly, the path for the privatisation of parts of the British Steel Corporation was prepared by the Iron and Steel Act 1981 (now consolidated in the Iron and Steel Act 1982) amending the duties of the Corporation in such a way as to remove those which might hinder privatisation and giving the Secretary of State power to order the discontinuance of activities or disposal of assets.[49] On the appointment of Robert Haslam as Chairman, his non-statutory objectives included "to privatise BSC as quickly as practicable, with priority being given to those areas of business which overlap with the private sector and to activities outside the mainstream of BSC's steel businesses."[50] Extensive disposals have taken place together with a number of joint ventures with the private sector. These have enjoyed mixed success and the arrangements by which they were established have been criticised by the Public Accounts

[45] See H.C. 34, 1985–6, para. 24; *cf.* Cmnd. 9755, para. 12.
[46] British Shipbuilders Act 1983, ss.1–2.
[47] H.C. 577 (iii), 1983–4.
[48] Spence, "Nice Work If You Can Get It," *New Statesman,* February 22, 1985, p.8.
[49] Iron and Steel Act 1981, ss.1–2; see now Iron and Steel Act 1982, ss.2 and 5.
[50] British Steel Corporation Annual Report and Accounts 1983–4, p.4.

Committee as having favoured the private sector.[51] A further example of disposal without a flotation is the case of the Royal Ordnance factories. The planned flotation was called off against the wishes of the Company's Board and instead negotiations relating to one factory were carried out with the only competitor, and bids invited on the basis of a selling memorandum for the rest.[52]

The possibility of even more extensive governmental pressure for the disposal of subsidiaries and assets were raised by the Treasury consultative proposals on nationalised industries legislation of December 1984.[53] These envisaged the passing of general enabling legislation to allow private capital to be introduced into the industries and the sale of assets. Most importantly, the Secretary of State sponsoring the industry would be given power to require that assets and activities be privatised, and that the industry discontinue specified activities. He would also be be given the power to modify any statute applicable to a nationalised industry by statutory instrument under the negative procedure to facilitate the exercise of his powers. These proposals have now been shelved, at least for the time being,[54] but they illustrate the fact that an important type of privatisation is that which takes place away from the public gaze with minimal debate and minimal information even for the workforce concerned. As the TUC has put it, "[i]t's not hard to imagine Fleet Street's response should a future Labour Government pass a similar single 'enabling Act' that then allowed it to nationalise any company in any industry, wherever it wanted, solely by decree," but the Treasury proposals merely represented a widening of existing practice.[55]

The issue of secrecy in the disposal of parts of nationalised industries came to the forefront of the political stage, however, in relation to the disposal of parts of British Leyland (BL) in Spring 1986. Earlier, the Trade and Industry Committee had criticised the splitting off and sale of Jaguar as likely to be detrimental to the rest of BL.[56] The Opposition Deputy Leader now obtained information that the Government had been secretly negotiating to sell BL to overseas competitors. In replying to a private notice question, the Secretary of State for Trade and Industry confirmed that discussions were at an advanced stage with General Motors for the sale of Leyland Trucks, Land-Rover, Freight-Rover and associated operations, and talks were proceeding with Ford for

[51] H.C. 307, 1984–5, paras. 6, 32, 36.
[52] see H.C.Deb., Vol. 99, col. *492* (Written Answers) (June 17, 1986), cols. 1034–1039 (June 18, 1986), H.C.Deb., Vol. 102, cols. 618–628 (July 24, 1986) and *The Observer,* July 27, 1986.
[53] H.M. Treasury, *Nationalised Industries Consultation Proposals* (1984).
[54] H.C.Deb., Vol 86, col. *316* (Written Answers) (November 15, 1985).
[55] Trades Union Congress, *T.U.C. General Council's Response to the Government's Consultation Proposals,* para. 10.
[56] H.C. 490, 1983–4; H.C. 607, 1983–4.

disposal of the Austin Rover car business.[57] Extensive opposition was expressed to this, much of it coming from the Government's own backbenchers.[58] The Cabinet quickly vetoed the proposed sale of the car business to Ford, the reason given being that this would end public concern and uncertainty.[59] Other concerns then expressed interest in acquiring parts of the business, and bids were received from various sources, including management consortia, for those in relation to which the talks with General Motors were taking place. A short deadline was set for such bids, and this was heavily criticised as putting new bidders under a disadvantage; there was also criticism of inadequate information being supplied to bidders other than General Motors.[60] The Government then attempted to negotiate a compromise with General Motors in which it was to acquire an initial 49 per cent. stake in Land-Rover together with the Trucks business, but this proved unacceptable and the talks broke down.[61] Further bids were invited for Land-Rover and Freight-Rover, but it was decided in Cabinet to follow a recommendation of the BL Board that none were to be accepted and so the companies would remain in public ownership for the time being.[62] Finally, agreement was reached for the sale of Leyland Bus and Unipart (the retail spares division) to management consortia; as the original negotiations for Leyland Bus had been with another company, the result was that none of the Government's original plan for disposal of BL had been implemented.[63]

The importance of the BL saga lies not only in the incompetence shown by the Government, but also in its apparent contradiction of the principles said to underly the programme. Thus allegedly disposals take place on a commercial basis and competition is encouraged, but the Government was content to negotiate in secret with competitors about a take-over, with no apparent interest in competitive bids to achieve the highest price. It seemed that the simple political goal of getting rid of a company in public ownership had overtaken any commercial aim of obtaining a good price, and initially the expressed preference for management buy-outs on disposal was ignored. This is also borne out by the extreme secrecy surrounding the negotiations; they were not discussed in Cabinet, nor were the trade unions told of them. As the Conservative ex-Prime Minister, Edward Heath, put it;

> "Never again must there be an attempt by the Government to sell off state-owned assets to people of their own choice in a behind-the-scenes deal. The privatisation of such assets is a

[57] H.C.Deb., Vol. 91, cols. 21–26 (February 3, 1986).
[58] See H.C.Deb., Vol. 91, cols. 310–354 (Febraury 5, 1986).
[59] 91 H.C.Deb., Vol. 91, cols. 460–468 (February 6, 1986).
[60] See *e.g.* H.C.Deb., Vol. 93, cols. 21–22 (March 3, 1986), and *The Observer,* March 9, 1986.
[61] H.C.Deb., Vol. 94, cols. 787–798 (March 25, 1986).
[62] H.C.Deb., Vol. 96, cols. 443–452 (April 24, 1986).
[63] H.C.Deb., Vol. 102, cols. 629–636 (July 24, 1986).

> public matter requiring public participation either through share purchase or through open bidding.
>
> Second, the timing must be right. The Government gave the impression, once the matter became public knowledge, not of wanting to sell a going concern at a good price in the customary manner, but of being determined to get BL off its back."[64]

As has been shown, however, BL is not the only example of secretive privatisation, but merely caught the public and political eye more clearly because of its role as the last surviving major British motor manufacturer. The effect of the bungled attempt at privatisation on the firm itself was disastrous; according to the managing director of Austin Rover, the upheaval had cost up to 40,000 lost car orders, worth about £200 million.[65]

An especial problem with this sort of privatisation has been lack of consultation with employees. For example, the sale of the Yarrow Yard of British Shipbuilders led to a week-long sit-in by the workforce who claimed that the Corporation had reneged on a commitment to consult them before arranging a sale. The establishment of the first of the British Steel Corporation joint ventures resulted in a complaint in the House of Commons that it was "outrageous" that the trade unions had been given only one hour's notice of the venture, but the Secretary of State refused to give an assurance that there would be consultation before further ventures were established.[66] The steel unions have repeatedly complained since of secrecy in the setting up of joint ventures, and a Select Committee criticised the fact that a major works closure related to the joint ventures had not been made the subject of consultation until after it had been announced.[67]

Matters came to a political head in relation to the Royal Dockyards in Devonport and Rosyth, where privatisation was proposed through contracting in commercial management whilst retaining the physical assets in public ownership. The plans had been subject to extensive criticism by both the Public Accounts Committee and the Defence Select Committee. The former had been highly sceptical of alleged cost advantages of the proposals[68]; the latter had concentrated on the process of consultation with the unions. The Committee concluded that the period allowed for consultation had been too short and the information provided inadequate; the Ministry's handling of the process had been "inept and insensitive" and indeed "consultation" had been a misnomer as

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[64] *The Observer,* April 6, 1986.
[65] *The Guardian,* April 9, 1986.
[66] H.C.Deb., Vol 1000, cols. 599–600 (March 9, 1981).
[67] See evidence to H.C. 336, 1980–1; H.C. 212, 1982–3; H.C. 344, 1983–4, and H.C. 474, 1984–5.
[68] H.C. 440, 1984–5, and H.C. 286, 1985–6.

it had already decided on its preferred option. The Government reply was also severely criticised in a further report.[69]

The short Dockyard Services Bill was introduced to make provision for the changes, and during its passage the unions received assistance from none other than Lord Denning. The Bill purported to ensure that workers transferred under the proposed arrangements were covered by the Transfer of Undertakings (Protection of Employment) Regulations adopted to implement the EEC Acquired Rights Directive.[70] The Regulations apply to the transfer of undertakings in the nature of commercial ventures and preserve rights and obligations arising out of contracts of employment, collective agreements and union recognition. More importantly for our purpose, they impose a duty for the transferor to inform union representatives of the transfer and its legal, economic and social implications for employees, and the measures to be taken in relation to those employees by the transferor and transferee. This must occur long enough before the transfer to enable consultations with the unions to take place. Where measures are to be taken in relation to union members, there is a further duty on the employer to consult the unions and to give reasons for rejecting their representations. Remedy for breach of these requirements takes the form of compensation awarded by an industrial tribunal.[71]

During the passage of the Bill, Lord Denning doubted whether the Regulations would in fact apply to the dockyard workers and successfully moved an amendment to incorporate the consultation provisions explicitly into the Bill. In the Commons this was accepted and an alternative remedy of seeking a declaration in the High Court added.[72] This could have important implications. The Government claimed that adequate consultation was taking place and so the requirements of the Regulations were fulfilled, but it was pointed out that this could not occur until the transferee company had been chosen, which would leave very little time before the planned vesting day of April 1, 1987. Indeed, Lord Denning considered that the only possible outcome of proper consultation would be that the companies would be retained wholly in government hands.[73] There is a strong likelihood of challenge to the adequacy of the consultations by the unions.

The renewed interest in the Regulations might be even more important in relation to other sales. A Government spokesman in the House of Lords gave an assurance that the Regulations applied to the sale of British Gas; he maintained that they had been

[69] H.C. 453, 1984–5, paras. 19–26, 48–50; H.C. 18, 1985–6.

[70] S.I. 1981 No. 1794; for a summary see Hepple (1982) 11 I.L.J. 29. The Directive is Council Directive No. 77/187/EEC of February 14, 1977, O.J. L61/26 (March 5, 1977).

[71] Regs. 10–11.

[72] H.L.Deb., Vol. 478, cols. 521–532 (July 10, 1986), H.C.Deb., Vol. 102, cols. 547–566 (July 23, 1986); see now Dockyard Services Act 1986, ss.1(4)–(11), 2(1)–(3).

[73] H.L.Deb., Vol. 478, cols. 524–525 (July 10, 1986).

observed but this was strongly contested by Opposition speakers.[74] At the time of writing, the gas unions are contemplating legal action based on the Regulations; even if this is unsuccessful it might substantially delay flotation, as occurred with the Trustee Savings Bank.[75]

Finally, brief reference should be made to an earlier example in which the Government forced a nationalised industry to dispose of assets against its will. In June 1981 the Secretary of State for Energy laid before Parliament a draft direction under section 7 of the Gas Act 1972 requiring the British Gas Corporation to dispose of its interest in the Wytch Farm onshore oilfield, and this entered into force in October 1981.[76] The Corporation was concerned that offers received were well below its valuation of the field and lengthy negotiations ensued, but in March 1983 the Secretary of State issued "instructions" to the Corporation to carry forward negotiations with the Dorset Group of oil companies.[77] These did not take the form of a direction under statutory powers and the Corporation was advised that they were not legally binding, but sale to the Group was agreed in May 1984.

Of especial interest here is the use of informal "instructions" in a way reminiscent of the most secretive dealings of government with nationalised industries in the past. This was particularly inappropriate as the Secretary of State had been given the power to make such directions in the form of a statutory instrument subject to annulment by either House by the Oil and Gas (Enterprise) Act 1982.[78] The method adopted seemed to be an attempt to avoid openness and debate on the issue: it remains to be seen whether similar powers to order the disposal of assets, for example in relation to the Post Office,[79] will be used in an open way rather than back-door methods being resorted to.

Relations with Government After Privatisation

This brings us to the second major theme of this article; the possible means for the exertion of pressure on privatised concerns by government. As we have seen, official justifications for privatisation have been based increasingly around the claim that it will remove the industries from political pressure and will instead leave them subject only to the impersonal disciplines of the market, as it is alleged is the case with ordinary private concerns. In other words, it is claimed that a radical separation between public and

[74] H.L.Deb., Vol. 478, cols. 1052–1062 (July 17, 1986).
[75] *The Guardian*, July 19, 1986.
[76] British Gas Corporation (Disposal of Wytch Farm Oilfield Interest) Direction (S.I. 1981 No. 1459).
[77] See H.C. 358, 1983–4.
[78] Oil and Gas (Enterprise) Act 1982, ss.11 and 32. Such a direction has now been issued to direct that the proceeds of the sale be transferred to the Treasury; The British Gas Corporation (Disposal of Wytch Farm Oilfield Rights) Directive (S.I. 1986 No. 980).
[79] British Telecommunications Act 1981, s.62(3).

private spheres can be established. As other writers have pointed out, however, it is not hard to think of a range of circumstances in which even a government committed to non-intervention in its public utterances might wish to intervene in practice.[80] These include the threat of bankruptcy (particularly of industries with defence commitments or of major strategic importance such as British Telecom), the threatened curtailment of socially desirable services, the abandonment of British suppliers, industrial action threatening the rest of the economy, pressure from foreign governments having contracts with the privatised concerns, and other types of political pressure.

Moreover, certain industries will necessarily be surrounded by a pattern of strategic decisions taken by government; for example the Airports Act provides for a considerable number of governmental regulatory powers through directions relating to national security and international obligations, and powers to make traffic distribution rules and to limit aircraft movements.[81] To give a similar example, despite some liberalisation of gas import and export policy, important governmental powers remain. Thus imports will be allowed subject to consent for laying pipelines across the Continental Shelf (paraphrased by one commentator as meaning "if we don't like your next gas import, you will only be able to get the stuff into the U.K. in balloons,")[82] and in appropriate cases the conclusion of appropriate inter-governmental treaties; British Gas has given the Government an assurance that the Government will be consulted on its import plans as they develop. On exports, the Government will consider waiving the requirement to land gas in the United Kingdom on a case by case basis.[83] The Government would also retain a major regulatory role in relation to the water environment.[84]

Less formal intervention was evident during the Westland affair in relation to British Aerospace. Thus the Secretary of State for Trade and Industry certainly expressed considerable concern to the Chairman of the wholly-privatised British Aerospace about the failure to consult him before the Company entered into the European consortium forming a rival to the rescue favoured by the Secretary of State.[85] This issue came to a head in the meeting between the British Aerospace Chief Executive and the Trade Secretary on January 8, 1986, originally arranged with the Minister of State for Industry and Information Technology to discuss £300 million of aid being sought by the Company in relation to the

[80] Steel, "Government and the New Hybrids," in Steel and Heald *op. cit.* note 15, p.101, at 105–108.
[81] Airports Act 1986, ss.30–33.
[82] *Financial Times,* March 11, 1986.
[83] H.C.Deb., Vol. 93, cols. *211–212* (Written Answers) (March 6, 1986).
[84] See *The Water Environment: The Next Steps, op. cit.* note 32 above.
[85] M. Linklater and D. Leigh, *Not With Honour* (1986), pp.102, 106. For the story of the quite extraordinary process of Government decision-making in relation to Westland, see H.C. 519, 1985–6.

European airbus project. The accounts of the meeting differ, but the Chief Executive claimed that the Secretary of State, after describing himself as the Company's "sponsoring minister" who should have been consulted before the Company had entered the consortium, exerted forceful pressure to persuade the Company to withdraw as its participation was not in the national interest; "[w]e parted . . . with a final reminder, looking at me fixedly, that the D.T.I. was our sponsoring Department." The version recorded by the Secretary of State's Private Secretary also referred to the "sponsoring minister," but merely noted that he would have preferred to have been consulted earlier and was concerned about overtones of anti-American sentiment accompanying the European bid.[86] The Chief Executive was later to accept that the differences could have been based on "an unfortunate misunderstanding" as to whether the remarks were addressed to him personally or to his Company. Nevertheless, it is clear from both accounts that, at the mildest, considerable pressure, both explicit and implicit, was being exerted by the Secretary of State, and it was assumed, by, among others, the Chairman of British Aerospace, that behind this lay an implicit threat to withdraw Government financial support on which the airbus project was dependent.[87] In any event, the discussions

> "certainly indicated that the Government's talk about leaving the decision on Westland to 'market forces' was open to question; BAe had been privatised in order to take what commercial decisions it wished. The D.T.I. was scarcely more of a shareholder in BAe than it was in Westland. Yet, given the chance to exert behind-the-scenes pressure, Brittan, it seemed to him, was treating its Managing Director like a schoolboy."[88]

It should also be noted that future governments may not share the expressed anti-interventionist posture of the privatising administration. In particular, it may be difficult for an incoming Labour Government to find time for legislation to re-nationalise major industries, and so it may find itself under pressure to use less formal means of intervention. The danger is that any government may use any available means for intervention in privatised concerns without proper scrutiny or accountability.[89] Do such means exist? We shall begin by discussing those provided by company law.

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[86] For the rival texts see H.C. 169, 1985–6, pp.360–363.

[87] Linklater and Leigh, *op. cit.* note 85 above, pp.145–148. For Sir Raymond Lygo's account of a possible "misunderstanding," see H.C. 519, 1985–6, paras. 206–212, H.C. 169, 1985–6, p.369, and H.C. 193(vii), 1985–6, p.121 and Qs 869–883. For the views of the Secretary of State, see H.C. 193(v), 1985–6, Qs 546–553, 558–585 and H.C. 169, 1985–6, Qs 781–800, 883–885. For those of the Chairman of British Aerospace, see H.C. 169, 1985–6, p.365, and for those of the Minister of State for Industry and Information Technology, see H.C. 193(i), 1985–6, Q 144.

[88] *Ibid.* pp.147–148.

[89] Commission Directive 80/723, O.J. 1980 L195/35 on the transparency of financial relations between Member States and public undertakings is worth mentioning as a limited attempt to regulate a similar area of government discretion. There are a number of exceptions and it would not appear to apply to fully privatised companies. However its validity was unsuccessfully challenged in *Re Public Undertakings* [1982] 3 C.M.L.R. 144.

COMPANY LAW TECHNIQUES

Our substantive discussion will embrace four areas; government shareholding, government directors, special shares and accountability to shareholders. Before embarking on this, a word of warning is necessary as once more the Treasury has not imposed any common pattern of techniques on the Departments.[90] This is due partly to the absence of appropriate public law forms and partly to the English version of empiricism; an ad hoc, unprincipled, case by case approach to problems. Description of the existing state of affairs is therefore made difficult as the articles of association of privatised companies differ widely, often in principle and always in detail. However there are enough similarities for us to try to elucidate the major themes.[91]

Government shareholding

Although the Government has expressed a wish to divest itself of all its shareholdings this has not always been practicable, particularly in the case of giant flotations such as British Telecom. Thus the Government has been left with substantial minority stakes, sometimes of the order of 48 per cent. This gives de facto control over the company, if desired, and it is trite company law that shareholders need consider only their own interests when voting.[92] However, as regards such shareholdings, it has been said:

> "The Government do not *intend* to control the company or to use their rights as a shareholder to intervene in the company's commercial decisions . . . Except in those circumstances [unacceptable takeover bids], the Government do not *expect* to vote their shareholding in opposition to resolutions supported by a majority of the board, *although they retain the right to do so.*"[93]

The Chief Secretary to the Treasury has explained that to use the shareholdings as a deliberate means of government influence would be quite contrary to the main purpose of the privatisation programme.[94] To put the matter beyond doubt he stated that it was Government policy to sell such residual shareholdings when conditions permitted and that they had been transferred from sponsoring Departments to the Treasury in line with this policy. Although the remaining 49.8 per cent. of ordinary shares in British

[90] See C. Pickering, *op. cit.* note 24 above.

[91] We have examined the articles of association of the following companies: Amersham International, Associated British Ports, British Aerospace, British Telecom, Cable and Wireless, Enterprise Oil. We have looked at the draft articles for British Gas. For Britoil we have relied on H.C. 443, Annex. The National Freight Corporation has been excluded because of the special circumstances surrounding its sale.

[92] *N. W. Transport* v. *Beatty* (1887) 12 App.Cas. 589.

[93] Secretary of State for Energy, H.C.Deb., Vol. 16, col. 171 (January 19, 1982). Emphasis added.

[94] H.C.Deb., Vol. 56, col. 420 (March 14, 1984).

Telecom will not be sold until April 1988, other residual shareholdings have been disposed of quickly, for example Associated British Ports, British Aerospace, Cable and Wireless and Britoil.

Nevertheless there are no devices which can hold governments to non-interventionist claims, particularly as the specific instances were so heavily qualified. Thus a future government with different economic/industrial policies might well use its minority shareholding in a different manner. Indeed in *Social Ownership—A Vision for the 1990s* the Labour Party posits a two-stage process for bringing British Telecom back into public ownership. In the first stage it is claimed that "Labour will make full use of the shares . . . already held by the government."[95] Given the difficulty likely to be faced in the passing of re-nationalisation legislation, the temptation will be to rely on the acquisition of shares by the government, although legislation will be required for this where a target investment limit exists.

Government directors

Whether or not government directors were appropriate for a privatised company does not seem to have been decided on any consistent criteria. Cable and Wireless, British Telecom and Britoil have two government directors each, while British Aerospace has only one.[96] Rather surprisingly, Amersham International and Enterprise Oil, as well as Associated British Ports, do not have any and none are planned for British Gas. Generally these directors cannot vote on contracts between the company and the Crown although the government directors of British Telecom *are* entitled to vote on such contracts.[97]

None of the government directors have any special duties enshrined in the articles and the Government has repeatedly stressed that they are not agents of the Government and, under general company law, owe their duties to the company as a whole. They appear to have been chosen on the basis of external commercial expertise and, for Britoil, they are non-executive and part-time. It is envisaged that they may wish to discuss the affairs of the company with the government; but only after informing the Chairman that they are going to do so.[98] In other words, at most, an informal communication process is envisaged which has potential for direction by nudge and wink. Certainly past experience with

[95] Quoted in Kellner, "Revealed: how Labour will buy back BT—cost-free," *New Statesman,* July 11, 1986.

[96] There is a sliding scale for Britcil. The special shareholder may appoint two directors as long as the Secretary of State holds above 35 per cent. of the voting shares. Between 20 per cent. and 35 per cent., one may be appointed, below 20 per cent. none. See H.C. 443, p.15. As regards British Aerospace the present intention is to nominate a director only so long as a contingent liability in relation to its participation in the Airbus project exists or is in prospect (British Aerospace, *Offer for Sale,* p.8).

[97] Art. 105B.

[98] See *e.g.* Keith Joseph. British Aerospace Bill, 2nd Reading, H.C.Deb., Vol. 974, col. 222 (November 20, 1979).

B.P. suggests that government directors have not played a major role as a means of government intervention, and the De Lorean episode showed that they may be a most ineffective means of monitoring the use of public funds.[99]

In the wake of the De Lorean affair the Public Accounts Committee undertook a general review of the role and responsibilities of nominee directors[1] which recommended a number of changes in current government practice. The Committee took a wider view of nominee directors' functions than did the Government, seeing them not only as a means of strengthening the board of a company but also having an important role to play in ensuring that public funds provided to a company are adequately protected and applied for the purposes for which they were given. In order to do this, the Committee felt that better and more precise guidance should be given to nominee directors as to their functions. They suggested that nominee directors should satisfy themselves as to the adequacy of company financial control systems, company management and board procedures, and management information systems. As well as this, there should be written reports to the sponsoring Department and the Treasury should extend its earlier review towards establishing best practices for nominee directors. The Committee recognised, with some misgivings, that in some instances company law prevented directors from carrying out these monitoring functions. They suggested that alternative arrangements, which allowed monitoring to be carried out, be adopted whenever possible.

The Treasury's response[2] was typically cautious but indicates that the guidance note for nominee directors is being extended in line with many of the Committee's suggestions. In particular, it is proposed that where public money is invested, as opposed to a residual shareholding, written reports on the progress and financial position of the company should be made where there is no legal impediment to so doing. However, the Treasury still thinks the effectiveness of nominee directors is best considered on a case by case basis, and that it is difficult to draw any general conclusions.

The Committee saw nominee directors as representatives of the government, whose primary duty was to represent and report to the government, whereas company law sees the directors as representatives of *all* the shareholders and the Committee's proposals were criticised by the Institute of Directors on this basis.[3] American experience of nominee directors, public or otherwise, suggests that within the confines of company law as we know it today, such directors can have very little impact on the behaviour

[99] G. Ganz, *Government and Industry* (1977), pp.58–60; and H.C. 127, 1983–4.
[1] H.C. 33, 1985–6.
[2] Cmnd. 9755 (1985–6), paras. 1–10.
[3] *Financial Times,* December 19, 1986.

of the board.[4] Company law treats companies as groups of individuals who have invested in a profit-making enterprise which is carried on owing few duties to outside interests. Thus the implication is that in order for public directors to be effective, company law needs to take on board a wider view of the groups that have a legitimate interest in a company's performance.[5] In the absence of this, government directors are no more than window dressing or a channel for communications that would have taken place anyway.

Special shares and restrictions on shareholdings

This brings us to the special, or "golden," share, a legal device of particular interest in privatised companies. It is designed to allow the government to prevent undesirable takeovers and changes in control. The articles of association do this in two separate ways; the first used in most of the major privatised companies,[6] with the exception of Associated British Ports, where there is no special share, and a second peculiar to Britoil and Enterprise Oil.

The more common mechanism is that if a person, other than certain specified persons,[7] has an interest[8] in shares, exceeding 15 per cent. or more of the total votes attaching to the appropriate share capital, then that person is subject to action by the directors. If the limit is breached the directors are required[9] to serve a written notice on the person, calling for a disposal of such shares as will bring the person under the limit. After service of a notice, the holder of the shares is not entitled to attend, speak or vote at a general meeting. (In British Telecom, British Gas and Amersham International's articles these rights vest in the special shareholder or the chair of the meeting.) If the notice is not complied with the company is required to dispose of the shares at the best price which is reasonably obtainable.

These are substantial powers and they are entrenched against diminution by the articles providing that certain provisions are deemed to be class rights, peculiar to the special share and that they cannot be varied without the consent of the special

[4] Schwartz "Governmentally Appointed Directors in a Private Corporation" (1965) 79 *Harvard Law Review* 350; Solomon, "Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise?" (1978) 76 *Michigan Law Review* 581; Brudney, "The Independent Director—Heavenly City or Potemkin Village?" (1982) *Harvard Law Review* 597.

[5] This is the message of Brudney, *op. cit.* and see also C. Stone, *Where the Law Ends* (1975).

[6] A similar arrangement is planned for the British Airports Authority. See H.C.Deb., Vol. 98, col. *597* (Written Answers) (June 4, 1986).

[7] Who usually include SEPON (Stock Exchange Post Nominees Ltd.), the Government and any trustee of an employee share scheme.

[8] This is defined widely. British Gas, British Telecom and Amersham International use the definitions in Part VI of the Companies Act 1985. Cable and Wireless uses a similar definition as does British Aerospace. The latter's articles are only concerned to prevent *foreign* takeovers (Art. 40) and are limited to this.

[9] Although this power is discretionary as regards Cable and Wireless (Art. 35).

shareholder.[10] These provisions include: articles delimiting the special share's powers, limitations on shareholdings, definitions, government directors and the nationality of directors. Obviously preventing undesirable foreign takeovers is one of the objects of the special share device but, presumably because of EEC law, this has had to be expressed as a general prohibition, with the exception of British Aerospace which falls under the exemption for military production contained in Article 223 of the Treaty of Rome. In the case of Cable and Wireless and Amersham International the disposal of the whole or a material part of the assets of the group is also stated to be a variation of the rights of the special shareholder.

So it can be seen that this is a highly sophisticated device, designed to prevent the build-up of an undesired substantial shareholding. In contrast, the devices used in Britoil and Enterprise Oil are much cruder. In both companies the idea of class rights is used to entrench certain provisions of the articles but there are no limitations on shareholding. Instead the special share has special voting rights in specified circumstances. In Enterprise Oil[11] this occurs either if any person, alone or in a "concert party," makes an offer with a view to becoming interested in more than 50 per cent. of the voting rights, or if any person, alone or in a "concert party," is or are entitled to exercise, or control the exercise of, more than 50 per cent. of the voting rights. Britoil has the same provision but includes a further safeguard in relation to attempts to obtain control over the Board of Directors or its composition.[12] In these circumstances the special share has, in respect of any resolution of the company in general meeting on a poll, a total number of votes which (when added to the total number controlled by the Secretary of State) is one more than the total number of votes which may be cast on such a poll in respect of all voting shares not registered in the Secretary of State's name.[13] Also, the special shareholder has the right to require an extraordinary general meeting.

A number of interesting points are raised by these devices, particularly that of the first type. First of all, the divesting provisions provide for, in effect, compulsory expropriation of property, albeit with fair compensation, if certain conditions are met. It is supposed to be a fundamental principle of company law that shares are freely transferable, subject to restrictions in the articles, and this is a novel form of restriction. Indeed, there are some cases where proposed alterations of the articles to allow such

[10] Amersham International (Art. 19), British Aerospace (Art. 13A), British Gas (Art. 10), British Telecom (Art. 12), Cable and Wireless (Art. 3A).
[11] Art. 2.
[12] H.C. 443, p.13.
[13] The obvious inspiration for this device is *Bushell* v. *Faith* [1970] 2 W.L.R. 272.

expropriation have been successfully challenged.[14] However, it is unclear just how strong these cases are and the articles of the privatised companies do not contain the element of discrimination against one particular person which was present in these cases.

What has happened is that a so-called fundamental principle has been evaded by clever drafting. In theory such a device could prevent any undesired change of control. There has been a report that other companies, listed on the Stock Exchange, have wanted to include such a provision in their articles but the Stock Exchange has refused to allow this.[15] However, the proposed new Sunday newspaper, the *News on Sunday,* will have a special share in its articles of association.[16] Presumably the decision to allow privatised companies this special provision was reached by negotiation between the Stock Exchange and the Government, which is yet another indication that the privatised companies are not ordinary private sector companies. This may also be illustrated by British Aerospace's desire to remove the limit on foreign investment and by the Chairman's comment that the working relationship with the Department of Trade and Industry has not really changed since privatisation.[17]

This raises a final point. The competition of the market place is supposed to provide two great spurs to efficiency: fear of bankruptcy and fear of takeover. We have previously cast doubt on whether any government could afford to let some of these companies go bankrupt. We can see now that the special share replaces the "market for corporate control"[18] with the need to negotiate a takeover bid with government.

Shareholder accountability

One of the claimed advantages of privatisation is that the management of the newly liberated companies will be accountable to their shareholders. The stress has been on creating a new class of small shareholders, particularly as regards British Telecom. However, the number of small shareholders has fallen substantially in a short period after flotation. This is true even of British Telecom whose small shareholders have fallen from 2.3 million on flotation to 1.58 million in March 1986. In other privatised concerns the decline has been much more extreme; thus for example the number of shareholders in British Aerospace fell in 1981 from 158,000 to 27,000; 70 per cent. of shares not held by government

[14] *Brown* v. *British Abrasive* [1919] 1 Ch. 290; *Dafen Tinplate* v. *Llanelly* [1920] 2 Ch. 124.

[15] *The Guardian,* June 18, 1985. See also Moore *op. cit.* note 11 above, 122/84, para. 39.

[16] *The Guardian,* "Business People," April 21, 1986.

[17] *The Observer,* July 13, 1986; H.C. 193 (vii), 1985–6, p.123, Q 843.

[18] The classic statement of this position is Manne, "Mergers and the Market for Corporate Control" (1965) *Journal of Political Economy* 110.

or employees were in the hands of only 179 shareholders.[19] Thus the claims of shareholder democracy look threadbare.

We will now examine the chances of shareholders holding management to account. Following Stokes[20] we would agree that this rests on the efficacy of two devices; directors' fiduciary duties and the power of shareholders in the general meeting, and that, in the present state of company law, neither of these effectively legitimates management action.

To begin with fiduciary duties, these demand that the directors must act bona fide in the best interests of the company.[21] It is crucial that these duties are owed to the *company*, not to individual shareholders, in the absence of special circumstances, and so the company would, at common law, be the proper plaintiff for a breach of any of these duties.[22] In order to bring a derivative action against directors a shareholder must prove that the wrongdoers control the company and have acted fraudulently.[23]

As regards privatised industries, there may well be difficulties about proving wrongdoer control, given the uncertainty in this area after *Prudential* v. *Newman (No. 2)*[24] Prior to this case the courts tended to look solely at the strict legal position. Control was only proved if the alleged wrongdoers owned the majority of voting shares. However, at first instance in *Prudential* v. *Newman (No. 2)* Vinelott J. took the view that *de facto* wrongdoer control would suffice and that the court would allow such an action if it was in the "interests of justice." However the Court of Appeal were not prepared to accept that the "interests of justice" was a practical test, particularly if it involved a full-dress trial before the test was applied. Although they adverted to the broad spectrum of meanings for control, they were not prepared to go any further. In a privatised company where the government retains a residual shareholding of less than 50 per cent., it is very unclear whether or not, and in what circumstances, the courts would see the government as having control of the company for the purposes of a derivative action.

Proving fraud would be even more difficult. Although wider than the common law meaning of fraud, it has been narrowly interpreted to cover only the appropriation of corporate assets or opportunities at the expense of the company. The heart of the problem is that the courts have always been reluctant to intervene in disputes over what have been perceived as matters of business judgment. As Lord Eldon long ago put it: ". . . This court is not to be required

[19] Generally see (1985) 6(4) *Fiscal Studies* 50–51. On BT see the Annual Report for 1985–6 and *The Guardian*, July 18, 1986.

[20] Stokes, "Company Law and Legal Theory" in W. Twining (ed.), *Common Law and Legal Theory* (1986).

[21] *Re Smith and Fawcett* [1942] Ch. 304.

[22] *Percival* v. *Wright* [1902] 2 Ch. 421; *Foss* v. *Harbottle* (1843) 2 Hare 461.

[23] See A. Boyle and J. Birds, *Company Law* (1983), pp.611–626.

[24] [1981] Ch. 257; [1982] 2 Ch. 204 (C.A.).

on every occasion to take the management of every playhouse and brewhouse in the kingdom."[25] The spirit behind this sentiment remains to this day and appears to underpin the decision of the Court of Appeal in *Prudential* v. *Newman (No. 2)*. The result is a very narrow definition of fraud.

Academics have long been dissatisfied with this position and have attempted to expand minority rights, either by widening the concept of fraud or extending the personal rights exemption.[26] Recently much hope has been placed in the statutory remedy for conduct unfairly prejudicial to the interests of minority shareholders.[27] The attempt to expand minority rights has not met with a sympathetic response from the courts, with some isolated exceptions,[28] while the statutory remedy has not yet fulfilled the high hopes vested in it. We would speculate, as an explanation for this, that if the courts were to move away from the narrow definition of fraud, they would be unable to find acceptable criteria for reviewing management decisions. It is a problem analogous to that of judicial review in public law where it is clear that the British courts have found it very difficult to create consistent and coherent principles to guide their reviewing function.

If the prospect for the enforcement of directors' fiduciary duties appears very limited, there remains the possibility of holding them to account at the general meeting. If shareholding is widely scattered the directors can, through their hold on the proxy machinery, maintain control of the votes at a general meeting and thus escape control by the shareholders.[29] It also seems that most annual general meetings only conduct routine business; there is little discussion of controversial matters or attempts to obtain justification of managerial decisions. Indeed, the recent A.G.M. of British Telecom was criticised on precisely these grounds.[30]

Given the existence of "golden shares" it is not possible to argue that there is a market for corporate control which encourages managerial efficiency. Even in the absence of "golden shares" when there is a dispute, say over a takeover bid, this does not mean that pure market forces will operate. In the Westland affair there was not only a two-tier market, where the institutions received better prices for their share than individuals, but also suggestions that buying had been co-ordinated and that a "concert

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[25] *Carlen* v. *Drury* (1812) 1 V. & B. 154.

[26] *e.g.* L. C. B. Gower, *Principles of Modern Company Law* (4th ed.), p.629; Wedderburn, "Shareholder's Rights and the Rule in *Foss* v. *Harbottle*" [1957] C.L.J. 194, [1958] C.L.J. 93.

[27] Companies Act 1985, s.459.

[28] *e.g. Clemens* v. *Clemens Bros.* [1976] 2 All E.R. 268.

[29] A point noted long ago; see Berle and Means, *op. cit.* note 22.

[30] This is implicitly the message of *Company Donations to Political Parties: A suggested Code of Practice,* Constitutional Reform Centre (1985). See also McMahon, "Shareholders put to the test" (1974) *Social Audit* No. 4, 2. On BT see *The Economist,* September 13, 1985, pp.89–90.

party" was operating.[31] The result was that the decision on Westland was made not by a multitude of small shareholders acting in an open, competitive market but by a few powerful institutions acting secretly, and in collusion, on a matter of public interest. As has been observed:

> "At a critical point in the Westland saga, a handful of powerful City tycoons seem to have reached the same conclusion that the Sikorsky bid must not be allowed to fail. Who took those decisions, where they were taken, and why they were perceived to be so crucial, we can guess at, but we have not managed finally to determine. Once those decisions had been adopted, there was little that opponents could do to stop their relentless progress.[32]

An argument might be put forward that the growth of institutional shareholders, *e.g.* pension funds, marks the rise of shareholders with enough power to hold management to account. The rather sparse empirical evidence indicates that the institutions are reluctant to become involved in the management of companies and, when they do intervene, they often prefer to do so informally, in a private, rather than a public forum.[33]

So it seems that the governmental claims that simply transferring ownership from the public to the private sector will make the privatised industries more efficient and responsible are extremely dubious. In the first place, our existing company law is sadly deficient in the institutional wherewithal to make companies responsive to their constituents, even where their constituents are defined narrowly as shareholders. Secondly, even in company law terms, there are indications that there will be a continuing relationship between government and the industries. They are by no means "pure" private bodies. Such a relationship indicates that the companies' activities will not be determined by anything like pure market forces, which renders a simple profit and loss concept of efficiency problematic. This is especially the case as regards government contracts and we will look at these in the next section.

CONTRACTUAL RELATIONS

We are now entering largely uncharted waters. Quite clearly, contractual relations with government will be of central importance for privatised concerns: government is British Telecom's largest customer, and particularly close relations will continue to exist between government and the defence-orientated British Aerospace

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[31] *Dealings in the Shares of Westland PLC,* Stock Exchange, April 18, 1986.

[32] Linkater and Leigh, *op. cit.* note 85, p.207.

[33] Social Audit, *op. cit.* note 30; Committee to Review the Functioning of the Financial Institutions, Cmnd. 7937 (1980); R. J. Briston and R. Dobbins, *The Growth and Impact of Institutional Investors* (1978); R. Minns, *Pension Funds and British Capitalism* (1980); Farrar and Russell, "The Impact of Institutional Investment on Company Law" (1984) 5 *Company Lawyer* 107.

and the warship yards. Indeed, decisions as to the award of contracts have played a major part in the privatisation process. At first sight, contractual matters might appear simply to belong in private law and not to raise problems of accountability, but the type of contract in question is often far removed from the classic private law model. Rather, it will be "more than a technical device for securing the wanted goods and fixing the reward of the supplier; it is also a kind of treaty, by which the conditions of a relationship of interdependence are established."[34] The formal provisions of private law are in practice of much less importance than other rules drawn from the Treasury, the Public Accounts Committee, the Review Board for Government Contracts and through informal negotiation.[35]

There can be considerable mutual involvement of government and industry in a way reminiscent of relations under nationalisation: "In a situation where support is directed specifically towards one company with frequent contacts with the Department, it is only too easy for Ministers and civil servants to become involved in policy making or even in the company's day-to-day management."[36] To take another example, a recent report of the Public Accounts Committee on the supply of gases to the Health Service revealed a process of negotiation over price setting very similar to that between government and nationalised industries, but without even the minimal requirements of outside consultation associated with the latter process.[37]

After a major Anglo-American conference on areas of public and private interdependence it was reported that there was "general agreement that the U.S. Government has achieved a greater degree of *de facto* management control over the aerospace industry through the contract device than the British Government has achieved by nationalising certain industries."[38] The danger is that a network of links between government and privatised concerns may develop in a similar way but without even the limited degree of published framework or of institutional scrutiny applying to the relations of government with nationalised industries. Moreover,

[34] C. Turpin, *Government Contracts* (1972), p.264. For the classic socio-legal demonstration of the artificiality of the traditional private law conception of contracts see Macauley, "Non-Contractual Relations In Business" (1963) 28 Am.Soc.Rev. 45. *Cf.* also McNeil, "The Many Futures of Contract" (1974) 47 *Southern California Law Review* 691, and McNeil, "Contracts: Adjustments of Long-Term Economic Relations under Classical, Neo-Classical and Relational Contract Law" (1978) 72 *Northwestern University Law Review* 854.

[35] Turpin, *ibid.* Chap. 3.

[36] H.C. 309, 1972–3, para. 56. It is worth noting that according to the Chairman of British Aerospace, the working relationship between his company and the Department of Trade and Industry "particularly at the official level, really has not changed at all" since privatisation; H.C. 193 (vii), 1985–6, Q 843.

[37] H.C. 67, 1984–5.

[38] Smith, "Accountability and Independence in the Modern State" in B. L. R. Smith and D. C. Hague (eds.), *The Dilemma of Accountability in Modern Government* (1971), p.19.

this could occur through private law techniques largely immune to public law means of scrutiny.

Since 1979 Conservative Governments have taken important steps to move towards more market-orientated criteria in some areas of contracting. Nevertheless, much contracting remains by its nature non-competitive, particularly in the defence field. Thus, about 60 per cent. by value of Ministry of Defence purchases are non-competitive.[39] In such cases the formula for a target rate of profit based on recommendations from the Review Board for Government Contracts will be used. This is composed of members nominated by the Treasury and the Confederation of British Industry, and sets a formula supposed to provide a profit rate comparable with that of British industry as a whole, though the need to ensure the viability of the defence industry has also been an element in setting the rate. The formula and its application have recently been subject to heavy criticism by the Public Accounts Committee as allowing the defence industry to fare much better than the rest of British industry during the recession: "we feel bound to conclude that the profit formula has, in recent years, been applied in a very one-sided manner in favour of defence contractors." The Committee has concluded that control of expenditure on defence equipment has been "one of the most conspicuous records of failure in the whole field of Public Accounts."[40]

Contractual terms such as those set on the basis of the Board's reports involve complex institutional and political patterns of decision-making, yet there is little open discussion of the implications of the decisions taken. Such contracting is inevitably of central importance in relation to the aerospace and shipbuilding industries, and in the past contracting has been used in both of these as a means of policy intervention by government. More recently, one of the most fascinating aspects of the Westland affair was the way in which it showed the overwhelming importance of governmental policies and financing in relation to the firms in the defence field. To quote an account of the early events in the affair:

> "What is fascinating about these summer manoeuvres is that they demonstrate . . . that the notion of 'market forces' was seen, by Government and companies alike, as a complete pretence. In the real world, no big company would dream of trying to take over or join forces with a firm like Westland unless it got discreet Government permission. To all intents, the Government is the only 'market force' in the game."[41]

Controversy so far has mainly concerned the award of defence contracts to firms which are about to be privatised, where it has

[39] H.C. 56, 1984–5, para. 4.
[40] H.C. 390, 1984–5; H.C. 56, 1985–6, and H.C. 406, 1985–6, para. 12.
[41] Linklater and Leigh, *op. cit.* note 85, p.56. For the complex history of Westland and helicopter procurement, see H.C. 518, 1985–6.

been alleged that the Government has attempted to "fatten them up" and so assist the sale. The first important example concerned the decision by the Defence Minister to award a contract for a Type 22 frigate to Cammell Laird, although it would admittedly have been cheaper to have placed it, together with another order, in a different yard. The Comptroller and Auditor-General reported that this decision appeared to depart from the policy adopted by the Government of better value for money through increased competition and would result in extra costs to public funds. He noted that the decision had taken account of wider industrial relations matters and offered the prospect of the survival of Cammell Laird as a warship builder; widespread allegations were made that it was to attract a private buyer for the yard and to reward its workforce for crossing picket lines in a recent industrial dispute. Indeed, it appears that this was the source of bitter conflict between the Department of Trade and Industry, which wanted the yard closed, and the Ministry of Defence, which supported such a "reward"; it even provoked a threat of resignation from the Defence Minister.[42] The Public Accounts Committee, however, noted that since the award of the contract co-operation and performance from the workforce had been greater than in other yards and so placing the contract was likely to confer competitive advantages generally.[43] It has also been alleged that orders for submarines were placed with the yard in order to assist its sale,[44] and it has been suggested that the general degree of secrecy which surrounded the sale of the warship yards was due to indications of future orders being given to potential buyers.[45]

Cammell Laird was in fact sold in a package with Vickers to a management consortium after tenders for a Trident submarine from the Vickers yard had been requested by the Government. A rival offer for the yards had been higher, but a clause relating to the Trident contract was claimed to be unacceptable by the Government, although it was also suggested that a management bid was more acceptable politically in view of the storm then raging about BL.[46] In this case the sale negotiations were used as an opportunity to gain a reduction in the contract price by £25 million.[47] Further controversy surrounded an order for two Auxiliary Oil Replenishment Vessels which had been expected to go to the newly-privatised Swan Hunter yard. The state-owned yard of Harland and Wolff in Belfast together with the privatised Yarrow

[42] See H.C. 423, 1984–5, paras. 4.20–4.12, H.C.Deb., Vol. 72, cols. 21–27 (January 28, 1985), *The Guardian,* January 29, and February 23, 1985, and Linklater and Leigh, *op. cit.* note 85, pp.37–38.
[43] H.C. 452, 1984–5, para. 27.
[44] *The Guardian,* January 4, 1986.
[45] Spence, *op. cit.* note 48 above.
[46] H.C.Deb., Vol. 93, cols. 596–600 (March 7, 1986); see also *The Guardian,* March 8, 1986.
[47] H.C. 406, 1985–6, para. 7.

yard put in a rival bid, and fierce lobbying took place, with allegations that the state-owned yard had an unfair advantage due to government subsidy. The question reached the Cabinet Economic Committee which at first failed to reach a decision; the Defence Ministry favoured acceptance of the cheaper bid from Harland and Wolff, whilst the Department of Trade and Industry pointed to the damage to the privatisation programme if a newly-privatised business was forced to close. In the end, a compromise was adopted: the first order was placed with Harland and Wolff, and Swan Hunter was invited to match its terms for the second order.[48] A similar compromise was adopted in relation to the new Type 23 frigates; two contracts were awarded competitively to Yarrow and one non-competitively to Swan Hunter to maintain part of the workforce.[49] Once again, the allegedly free-market ideals of privatisation were lost in a sea of political fudge.

Further problems relating to contracting and sale occurred with the Royal Ordnance factories. The original flotation plan was abandoned after strong protests had been received from a competitor about the non-competitive award of a tanks contract to the factories.[50] It was then decided to sell the tank factory to the competitor together with the contract, thereby creating a British monopoly in tank manufacture.[51]

As a final point in relation to contractual terms, it should be noted that in the case of one of the allegedly "private sector, free-standing" joint ventures set up by the British Steel Corporation, steel was being supplied by the Corporation at a special price in order to maintain the company on a reasonably competitive footing.[52]

It is still too early for any final assessment of contractual relations between government and privatised industries, but so far Government policy on procurement and contractual terms shows an uncertain mixture of aims; once again we find no clear distinction between politics and the market. On the one hand, pressures to contain defence spending have led to an increase in competitive tendering,[53] and this fits well with the rhetoric of competition associated with the privatisation programme. On the other hand, following this through in practice would make the sale of some enterprises impossible, and might result in the embarrassing collapse of others soon after sale. These political constraints have limited the application of competitive principles and the result has been an

[48] 96 H.C.Deb., Vol. 96, cols. 434–442 (April 24, 1986).
[49] H.C.Deb., Vol. 101, cols. 853–859 (July 15, 1986) and H.C.Deb., Vol. 72, cols. 21–27 (January 28, 1985).
[50] H.C.Deb., Vol. 99, col. *492* (Written Answers) (June 17, 1986), cols. 1034–1039 (June 18, 1986) and *Financial Times*, June 18 and 19, 1986.
[51] H.C.Deb., Vol. 102, cols. 518–628 (July 24, 1986).
[52] H.C. 307, 1984–5, para. 6; see also Cmnd. 9696, para. 56.
[53] See Robinson and Wainwright "Taking Procurement Seriously: New Policies for Government Purchasing" (1986) *Public Money* (March) 49.

uneasy compromise. Contracting, then, remains a form of policy intervention and so requires outside scrutiny to render it accountable. What means for this exist?

The central institutional means for such scrutiny is the Public Accounts Committee in association with the Comptroller and Auditor-General. The Committee has undertaken extensive work in this area and has played an important role in influencing the guidelines for contracting. However, such scrutiny is inherently *ad hoc* and *ex post facto*. The Report on the application of the profit formula referred to above came too late to prevent the payment of "windfall profits" to contractors of between £220 million and £360 million,[54] and in a different context, the Report on payments to De Lorean Motor Cars Ltd., whilst highly critical of almost all involved, came too late for the recovery of over £70 million of wasted public money.[55] Moreover, the Comptroller and Auditor-General will not have access to the books and records of contractors but only to information in departmental files.[56]

Opportunities for challenge in the courts where it appears that powers of selecting contractors and deciding terms have been abused are limited in the extreme:

> "the Government enjoys almost unfettered freedom and total immunity from judicial review by reason of the absence of general rules of domestic law to control this process . . . [g]overnment enjoys far greater freedom and discretion in the elaboration of contractual schemes of regulation than it could reasonably hope to possess as the operator of a statutory scheme under powers conferred by Parliament."[57]

This is in marked contrast to both United States Federal law and French law; there are however certain constraints in European Community law which may have limited application here.

The foundation for the European Community law of public contracts is a series of Directives and Decisions on public works and public supplies contracts which attempt to prevent discrimination on the grounds of nationality and coordinate procedures for the awarding of contracts.[58] It is important to note that a number of contracts are not subject to these rules. Defence contracting is excluded by virtue of Article 223(*b*) of the Treaty of Rome and the Directive expressly excludes contracts awarded by bodies

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[54] H.C. 390, 1984–5.

[55] H.C. 127, 1983–4.

[56] National Audit Act 1983, s.7(5); see *e.g.* H.C. 286, 1985–6, paras. 22–26, in which the Public Accounts Committee criticises lack of access to the books of the contractors who will manage the Royal Dockyards.

[57] Daintith, "Regulation by Contract—the New Prerogative" (1979) *Current Legal Problems* 41, at 59.

[58] Commission Directive 79/32, O.J. 1970 L13; Council Directive 71/304, O.J. 1971 L185/1; Council Decision 71/306, O.J. 1971 L185/15 as amended by Council Decision 77/63, O.J. 1977 L13/15; Council Directive 71/305, O.J. 1971 L185/5; Council Directive 77/62, O.J. 1977 L13/1. Generally see Turpin, "Public Contracts in the EEC" (1972) 9 C.M.L.Rev. 411.

which administer transport, water, energy or telecommunications services.[59]

The anti-discrimination Directives are reasonably straightforward and, since public contracting in the United Kingdom has never unduly favoured domestic firms, we can pass them over. More interesting are the co-ordination Directives which attempt to lay down common procedures. These rules apply only to competitive contracts, regardless of whether tendering is "open" or "restricted," and there is a list of exceptional circumstances where non-competitive contracting may be used.[60] General rules are set down on technical presentation, advertising and participation but at the heart of the Directives are the provisions for selection and award of contracts. As regards the former, there are limited grounds of disqualification, *e.g.* bankruptcy, and provisions for ensuring that the tenderer is a proper person with the relevant financial and technical capacities. Subject to these conditions being met, contracts are to be awarded either to the lowest or to the most economically advantageous tender, when various criteria, according to the particular contract, may be taken into account.[61] In the latter instance, the contracting authorities shall state the criteria they intend to apply in the contracting documents, in descending order of importance, if possible.[62] If the tenders are abnormally low, the authority shall examine the details of the tenders, requesting explanations from the tenderers and, where appropriate, indicating which parts it finds unacceptable.[63] If the contract is to be awarded at the lowest price and the authority rejects tenders for being too low, the rejection must be justified to the Advisory Committee on Public Contracts.

It is crucial to remember that these Directives may, under certain conditions, give rise to rights enforceable by individuals in their national courts, and that the European Court has shown itself willing to expand the number of Directives which have such an effect.[64] Although there are large gaps in their coverage, these Directives are, in comparison to British law, a sophisticated attempt to grapple with the problem of public contracts. As Turpin has commented, they bring the discretion of public authorities under a measure of control "and the scope is significantly reduced for an arbitrary preference of national suppliers, and to a lesser extent

[59] *e.g.* Council Directive 77/62, Art. 2(*b*).
[60] *Ibid.* Art. 6.
[61] *Ibid.* Art. 25.
[62] *Ibid.* Art. 25(2).
[63] *Ibid.* Art. 25(5). *Cf. S.A. Transporoute* v. *Ministry of Public Works* [1982] E.C.R. 417.
[64] See *e.g. Van Duyn* v. *Home Office* [1975] 1 C.M.L.R. 1; *Becker* v. *Finanzamt Munster* [1982] E.C.R. 53. For academic discussion see *inter alia,* Steiner, "Direct Applicability in EEC Law" (1982) 98 L.Q.R. 220; Pescatore, "The Doctrine of Direct Effect" (1983) 8 E.L.Rev. 155; Green, "Directives, Equity and the Protection of Individual Rights" (1984) 9 E.L.Rev. 295.

even for unequal treatment as between one national supplier and another."[65]

An even greater contrast to the primitive British system is provided by the United States, where government contracting power has been used in aid of numerous policy goals, *e.g.* to encourage small businesses and equal employment opportunities.[66] Here the situation has developed in such a way that all levels of the Federal Government decision-making process are subject to review by a complex network of independent institutions. Prospective bidders are not entitled to be debarred or suspended from further contracting with the Federal Government without proper procedures being followed, which procedures are subject to review by the courts.[67] Unsuccessful bidders on contracts can seek review in the federal courts, in the United States Claims Court or may take their dispute to the General Accounting Office.[68] A formal disputes procedure exists for dealing with grievances over awarded contracts.[69] Finally, although the making of procurement regulations is not subject to the "notice and comment" requirements of the Administrative Procedure Act, the Office of Federal Procurement Policy requires that the views of interested non-governmental parties and organisations be given due consideration in the formulation of Federal procurement policy.[70] It should be mentioned that the development of such a high level of scrutiny was due, in part, to the activism of the courts, in marked contrast to the British courts' failure to grasp the problem.[71]

In France, although a sophisticated regime exists for the oversight of government contracts by the administrative courts,[72] the

[65] Turpin, *op. cit.* note 58 above. See also Daintith, *op. cit.* note 57 above.

[66] Morgan, "Achieving National Goals through Federal Contracts," (1974) *Wisconsin Law Review* 301; Leimkuhler, "Contracts—Enforcing Social and Economic Policy through Government Contracts" (1980) *Annual Survey of American Law* 539.

[67] Calamari, "The Aftermath of *Gonzalez* and *Horne* on the Administrative Department and Suspension of Government Contractors" (1982) 17 *New England Law Review* 1137; Steadman, "Banned in Boston—and Birmingham and Boise and . . . : Due Process in the Debarment and Suspension of Government Contractors" (1976) 27 *Hastings Law Journal* 793.

[68] See Smith, "Government Contracts: Contesting the Federal Government's Award Decision" (1985) 20 *New England Law Review* 31; Hopkins, "The Universe of Remedies for Unsuccessful Offerors on Federal Contracts" (1985) 15 *Public Contract Law Journal* 365.

[69] R. Nash and J. Cibinic, *Federal Procurement Law* (3rd ed.) (1977), Vol. 2, Chap. 30.

[70] See R. Nash and J. Cibinic, *ibid.* Vol. 1, p.42. The Administrative Conference of the U.S. urged repeal of the contract exception to the Administrative Procedure Act in 1969. For criticism of the exception see Grossbaum, "Procedural Fairness in Public Contracts" (1971) 57 *Virginia Law Review* 171.

[71] Compare decisions such as *Gonzalez* v. *Freeman* (1964) 334 F 2d 570 (Contractor could not be debarred without being afforded notice and a hearing); *Scanwell Laboratories* v. *Shaffer* 424 F 2d 859 (1970) (Bidders showing prima facie case of abuse of discretion have standing to sue); *Heyer Products* v. *U.S.* 135 Ct. Cl. 63, (1956) 147 Ct. Cl. 256 (1959). (Government, by soliciting bids, enters into implied in fact contract to evaluate bids fairly) with *Cinnamond* v. *B.A.A.* [1980] 2 All E.R. 368 at 374, *per* Lord Denning.

[72] A summary in English can be found in L. N. Brown and J. Garner, *French Administrative Law* (3rd ed.) (1983). For a brief French introduction see A. de Laubadère, *Traité de Droit Administratif* (9th ed.) (1984), Vol. 1, pp.383–427.

increasing intervention of the state in the economy through contractual and quasi-contractual devices has given rise to much debate on whether the traditional methods of control and conceptualisation of the problem are adequate.[73] With a few notable exceptions, such debates and investigations have not been undertaken by British lawyers, and our institutional means for scrutiny and challenge remain very limited.

CONCLUSION

What we have seen in these pages is something very different from the coherent and innovative programme suggested in some ministerial speeches. Indeed not only have the public justifications varied over time, beginning with the stress on the economic rationale but now emphasising the political one, but the practice has been consistently at odds with the rhetoric. For example, liberalisation has taken a back seat when it might interfere with flotation.

The reason for this inconsistency is that government intervention is endemic in our economy. Putting it in more general terms, it has been argued that the twentieth century response to market failure has been state intervention. The Conservative Government, although disclaiming almost all of the Keynesian legacy, cannot free itself from responsibility for economic performance. We would argue that this means there is no such thing as a free market in any unproblematic sense. Paths to greater competition are *planned* and the rules governing this competition are necessarily laid down by the state. It should not surprise us therefore, that no government can stand aloof from certain strategic decisions of industry. Intervention will depend not on formal ownership or legal status but on the political and economic position of any particular company at a given moment.

If this argument is accepted, the question we should address to the privatisation programme is not whether it has returned nationalised industries to the free market; no such clear division between the public and private spheres is possible. Instead we must ask if the transfer of the nationalised industries to a new legal regime has provided a structure which will allow more coherent open debate about relationships between the public and private

[73] On the techniques see Bergsten, "Administration of economic and social programs in France by the use of the contractual technique" (1975) 48 *Southern California Law Review* 852. For the doctrinal debate see Delmas-Marsalet, "Le Contrôle Juridictionnel des Interventions Économiques de L'État" (1969) 22 *Études et Documents du Conseil D'État* 133; Truchet, "Réfléxions sur le Droit Économique Public en Droit Français" (1980) 96 *Revue du Droit Public* 1009; Nitsch, "Les Principes Généraux du Droit à L'Épreuve du Droit Public Économique" (1981) 97 *Revue du Droit Public* 1549.

spheres, and will this new structure make the companies more responsive to their outside environment, especially consumers?

We have seen how, in the transfer to privatisation, the orthodox constitutional channels have been deficient in providing legitimation. The limited references in the election manifestos do not indicate the scale of the programme, and Parliamentary debate, whilst often tediously prolonged, has not concerned itself with many of the fundamental features of the privatised institutions and anyway has produced little in the way of real amendment. Much privatisation has been conducted in an unpublicised and undebated way: again the urge to dispose of as much of public enterprise as quickly as possible has prevented open discussion of preferred solutions, in marked contrast to the treatment of such issues in the United States.[74] Will the new regime be any different?

The answer to this question must be no. In the first place the Government must deny the argument that intervention is endemic. It is committed to the rhetoric of market forces and non-intervention while acting within a political economy in which it inevitably has to play an interventionist role. The result is ad hoc and incoherent intervention often not publicly justified, of which the most striking example is Westland.

Secondly, neither company law nor contract law provides any coherent structure within which government intervention is to take place. This is hardly surprising since they are conceptualised as fundamentally private law subjects, a view which betrays the late nineteenth century bias of English lawyers and is today too unrealistic to be defensible. Nor do they ensure that the privatised companies will be responsive to their constituents, no matter how defined, again because they are based on a nineteenth century view of how the economy functions.

Such incoherence is not a problem of inherent limits to legal regulation. Our brief references to other systems have indicated that there are more sophisticated devices which could serve as lessons. One argument might be that the new regulatory systems, such as OFTEL, meet our objections. We hope to investigate this further in later work but at the moment remain very sceptical of such an argument. The point is not that these systems necessarily provide the right answers, but that they force the appropriate questions to be posed, which is a step in the right direction.

The task, then, for lawyers is to design institutions which ensure that questions of the relationship between the public and private spheres and the responsiveness of powerful bodies to their outside environment can be debated in an open manner. If we have managed to show the inadequacy of our existing legal institutions

[74] See Lewis and Harden, "Privatisation, De-Regulation and Constitutionality: Some Anglo-American Comparisons" (1983) 34 N.I.L.Q. 207 for excellent discussion of this, and on U.S. deregulation see Breyer, "Analysing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform" (1979) 92 Harvard L.R. 549, esp. pp.604–608.

for doing this in such an important matter as privatisation, then we will have accomplished our task.[75]

COSMO GRAHAM and TONY PROSSER*

[75] For an attempt to develop new critical principles for the constitutional role of nationalised industries, see Prosser, *op. cit.* note 2 above.

* Centre for Criminological and Socio-Legal Studies, University of Sheffield. We are grateful to the University of Sheffield Research Fund for financial support which has assisted us in researching this article. Inevitably, in an area such as this events succeed each other quickly; we describe them up to August 1, 1986.