Constitutions and Political Economy: The Privatisation of Public Enterprises in France and Great Britain

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Introduction

This article will be concerned with the effects of differing constitutional traditions and constitutional provisions on policy-making and on policy-delivery, as suggested by a comparison of the implementation of the programmes of privatisation of public enterprises in France and Great Britain. This should provide a particularly useful case study for students of comparative law and politics, as both nations adopted extensive privatisation with the ascent to power of governments of the Right; indeed, the earlier British privatisation programme offered an important source of inspiration for France. However, there have been major differences in the nature of the enterprises to be sold, in the means of evaluation and share pricing adopted and in relations with government after privatisation. I will concentrate on discussion of France, referring to Britain for comparative purposes, as material on British experience is more easily available. Indeed, in some ways this article can be seen as complementing earlier work done in this journal by myself and a colleague on the constitutional implications of privatisation on this side of the Channel.[1]

A number of different aspects of the comparative privatisation process will be of interest to lawyers. Thus, for example, the legal forms and instruments adopted have been very different in the two nations, and this raises themes receiving increasing attention in valuable recent studies of law as an instrument of economic policy.[2] However, this type of comparison will not be made here.[3] Rather, the central theme will be the degree to which the different constitutional arrangements of the two nations have imposed constraints on the freedom of manoeuvre of governments implementing their privatisation programmes, and, in particular, the degree to which they have succeeded in imposing some degree of public scrutiny on the process of policy implementation. In particular, I will examine the role of the written constitution as interpreted by the Conseil constitutionnel in France in imposing structural constraints on the relationship between governmental policy and broader conceptions of public interest and citizenship.

In examining this subject, one finds a major theme in the literature of comparative political economy to be that different patterns of economic development in the two nations can be ascribed in part to differences in the role and organisation of the state. Thus Shonfield, in his pioneering and influential study, associates economic liberalism with a particularly British type of capitalist development:

> Classical economics, which was largely a British invention, converted the British experience ... into something very like the Platonic idea of capitalism. Out of Ricardo's preference for 'strong cases', there came the picture of a perfect market, unimpeded by the influence of any public authority.[4]

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1 Cosmo Graham and Tony Prosser, 'Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques' (1987) 50 MLR 16.

2 Daintith, (ed) *Law as an Instrument of Economic Policy: Comparative and Critical Approaches*, (Berlin, de Gruyter, 1988).

3 For an analysis of the legal forms used for privatisation, see C. Graham and T. Prosser, *Privatising Public Enterprises: A Comparative Study* (Oxford University Press, forthcoming).

4 Shonfield, *Modern Capitalism*, (Oxford University Press, 1965), p71.

By contrast, France was characterised by an 'étatist' tradition:

> The essential French view, which goes back to well before the Revolution of 1789, is that the effective conduct of a nation's economic life must depend on the concentration of power in the hands of a small number of exceptionally able people, exercising foresight and judgement of a kind not possessed by the average successful man of business. The long view and the wide experience, systematically analysed by persons of authority, are the intellectual foundations of the system. The design and efficiency of the machine of government then determine the degree of practical success achieved.[5]

Thus '[t]here is no doubt that the British way makes for an unpompous state, a state which embarks on any venture with an intense consciousness of its own limitations . . . but its inhibitions also make it less active in pursuit of positive social goals.'[6] Moreover, the French penchant for the drawing up of national plans has also contributed to the image of a nation in which the state takes a far more central role in the purposive process of economic management. Much more recently, Hall has compared (in somewhat qualified terms) the state-led growth of France with the more market-oriented pattern of economic development in Britain.[7] Indeed, it is striking when examining the rhetoric of privatisation in the two nations that the treatment of the state has been different; thus whereas in Britain stress has been laid on the 'rolling back of the frontiers of the state' as a justification of privatisation,[8] care has been taken in official statements in France to avoid the suggestion that it represents a weakening of the state's role; to quote the Minister of Finance largely responsible for the privatisation programme:

> The dynamism of our society assumes the existence of a strong state, confident of its mission. It is incompatible with an all-embracing state substituting itself for economic actors. That is why the privatisation programme was needed.[9]

It must straightaway be admitted that any conception of France as a nation of a strong state as compared to the relatively stateless society of Britain represents a gross over-simplification of a highly complex reality. Indeed, a recent survey of comparative government-industry relations has rejected the dichotomy of nations into those with strong and weak states as 'positively misleading' through disguising common sets of informal relations and influence and as creating a false sense of coherence and consistency as regards state actions.[10] Moreover, recent changes in national politics have created an unprecedented degree of centralisation in British government, whilst in France some degree of decentralisation has taken place, and more importantly, many older instruments of economic management have been abandoned in favour of more market-oriented relations. As a result, at least some credence can be given to the recent claim of the French Minister of Industry that the image of French governments as interventionist is no longer justified.[11]

Nevertheless, the analysis of France as traditionally a nation characterised by a greater degree of state intervention than Britain suggests a preliminary hypothesis that governments would find themselves relatively untrammelled in the implementation of economic policy; certainly in the past an impressive range of instruments were available to them for this purpose.[12] However, when one comes to consider other differences between the concept

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5 *ibid* pp71–2.
6 *ibid* pp119–20.
7 Hall, P. *Governing the Economy*, (Cambridge, Polity Press, 1986): see also Hayward, *The State and the Market Economy*, (Wheatsheaf, Brighton, 1986).
8 For example in the famous Bruges speech: 'We have not successfully rolled back the frontiers of the state in Britain, only to see them reimposed at a European level', *The Financial Times*, 21 December 1988.
9 Journal Officiel, Assemblée Nationale, 27 octobre 1987, 4893.
10 Wilks and Wright, *Comparative Government–Industry Relations*, (Oxford, Clarendon Press, 1987).
11 *Le Monde*, 6 juin 1989.
12 Hall, *op cit* esp. 151–5.

of state in Britain and in France, one finds rather different considerations come into play. In particular, a more sophisticated form of legal scrutiny of public policy implementation exists. On this side of the Channel there has been no development of a separate system of administrative courts; nor, despite occasional judicial claims to the contrary, have the common law courts erected a coherent and distinct system of legal principle relating to public decision-making. In France, the Conseil d'Etat has over many years developed distinctive principles of review of administrative action.[13] Moreover the English principle of absolute Parliamentary sovereignty (subject now, of course, to reservations in relation to European Community law) has prevented judicial review of primary legislation in the form of statute. In France, from the early 1970s the French Conseil constitutionnel developed a highly important form of constitutional review of the legality of primary legislation passed by parliament in the form of *lois*, indeed in the process borrowing extensively from the jurisprudence of the Conseil d'Etat. This will be discussed more fully in a moment; the point to be made here is that the constitutional and administrative law principles associated with a developed state tradition may, in contrast to my earlier hypothesis concerning relative freedom in policy implementation, be more constraining than in a nation characterised as stateless.

It is tempting to contrast the British and French systems as representing Parliamentary and legal forms of control. This however is somewhat misleading, for, as we shall see, the most important forms of legal constraint on the privatisation process have been laid down by the Conseil constitutionnel after reference by opposition parliamentarians. Not only does this give members of the French parliament an important resource for influencing legislative proposals not available to their British counterparts, it also involves the Conseil intimately in the legislative process; as a recent commentator has put it:

> the Council is permanently politicised, to the extent that it is systematically involved in the day-to-day partisan struggles of Parliament: politicians use and think of the Council as a tool of obstruction, and its decisions, whatever their jurisprudential import, are viewed as *political* victories or defeats. ... Politicians, especially those in the opposition who refer a given law to the Council, have understandably been conditioned to viewing the coming decision as the final step in the policy-making process, an ultimate effort to influence or to obstruct legislation.[14]

As we shall see, a more sensible view (though itself over-simplified) is to see the French system of control as having operated to a large degree *a priori* through the imposition of constraints by the Conseil before laws come into operation, whereas that in Britain has operated *a posteriori* through scrutiny by parliamentary committee. Before discussing these constraints in detail, however, it is necessary to say something more about the French constitutional background.

The French parliament, unlike the British, is not sovereign in the sense of being able to legislate on any subject whatsoever. Article 34 of the Constitution sets out exhaustively the subjects on which the parliament may pass legislation in the form of *lois*. These include such matters as civil rights, nationality, criminal procedure and penalties and, of particular importance here, 'the nationalisation of enterprises and transfers of the property of enterprises from the public to the private sector'. We shall see that the interpretation of these provisions by the Conseil d'Etat and the Conseil Constitutionnel have been of crucial importance. Matters not listed in Article 34 are, by virtue of Article 37, a matter for the issue of decrees by the executive without the need for parliamentary approval. The government may also obtain consent for a limited period to employ *ordonnances* in the areas normally reserved for *lois* by virtue of Article 38.

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13 Brown, N. and Garner, J. *French Administrative Law* (London, Butterworths, third ed 1983).

14 Stone, 'In the Shadow of the Constitutional Council' (1989) 12(2) *West European Politics* 12, 13–14 (emphasis retained). This is an excellent general introduction to the recent role of the Conseil.

Both executive and parliamentary legislation are subject to judicial review. A decree will come within the category of an administrative act reviewable by the Conseil d'Etat, which can ensure that it does not trespass on the area reserved for parliament and does not infringe the 'general principles of law'.[15] However, a *loi* does not fall within the reviewing powers of the Conseil d'Etat, but can be referred to the Conseil constitutionnel. This institution was introduced with the birth of the Fifth Republic in 1958 and was intended as a means of keeping parliament within the limits imposed on its powers by the new Constitution; its 'main function and early activities marked it down as a watchdog on behalf of executive supremacy'.[16] It is composed of nine members, not necessarily lawyers, three being appointed by each of the President of the Republic, the President of the Senate and the President of the National Assembly for a period of nine years. Appointments have not always been free of political controversy; thus the cases to be described below were immediately preceded by the appointment by President Mitterand, on the eve of the legislative elections in which the Socialist Government lost control, of his Minister of Justice as President of the Conseil.[17]

All this would seem to be an unpromising basis for the development of a system by which *lois* would be subjected to control on the basis of broader concepts of legality, especially those *lois* central to governmental strategies. However, two changes since 1958 have marked out the Conseil as a protector of basic rights against both government and legislature. Firstly, the Conseil has recognised a growing body of constitutional principle as enforceable and thus providing the basis of the annulment of proposed *lois*. This is drawn from the Declaration of the Rights of Man of August 1789, from the 'political, economic and social principles especially necessary to our time' in the preamble to the 1946 Constitution, incorporated into that of 1958 by reference, and increasingly through the development of a jurisprudence of rights by the Conseil of its own accord; for example that based on the concept of the equality of citizens.[18] Doubts as to the enforceability of such rights in relation to proposed *lois* were dispelled by the decision of the Conseil of 16 July 1971 holding provisions of such a statute unconstitutional as infringing the right to freedom of association; the number of such enforceable rights has steadily increased since.[19]

The second important change concerns the question of who can refer proposed legislation to the Conseil; it is this which gives the body much of its peculiar character. Currently, the legality of *lois* can only be determined *before* they are finally promulgated. Originally, proposed legislation could be referred only by the President of the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate. However, in 1974 an important constitutional amendment was introduced to permit reference by 60 deputies or 60 senators; this is now the source of the great majority of references, and has greatly increased the ability of the parliamentary opposition to influence legislation, either through the effect of a reference itself or through the effect of the threat of reference in causing governments to rethink proposals or never to introduce those which might be subject to constitutional censure; '[t]he expansion of control is much like a continual supply line of arms to the opposition'.[20] The number of references has steadily grown; it is no exaggeration to claim that any important controversial legislation is now likely to be referred.

We may be on the verge of seeing a further development of the Conseil constitutionnel into something more closely resembling a conventional supreme court. In his Bastille day

15 Brown and Garner, *op cit*, 8 and 134–43.
16 Hayward, *Governing France: The One and Indivisible Republic*, (London, Weidenfeld and Nicholson), 139.
17 See Stone, *op cit* 12.
18 Bell, 'Equality in the Case-law of the Conseil Constitutionnel', [1987] *Public Law* 426.
19 Decision of July 16 1971; see Nicholas, 'Fundamental Rights and Judicial Review in France', [1978] *Public Law* 82, 155, at 87–92, and Rivero, *Le Conseil constitutionnel et les libertés*, (Paris, Economica, 1984).
20 Stone, *op cit* p18; see also pp16–18 for 'self limitation and corrective revision'.

broadcast of July 1989 President Mitterand proposed a constitutional amendment to permit individuals to refer cases directly to the Conseil if they considered their basic rights to be infringed; the Conseil's president has also recently proposed such a right of referral by individuals of questions concerning any law not already considered by the Conseil.[21] The procedure for such references remains uncertain, if indeed the proposal is to be implemented at all, so for the moment the Conseil retains its peculiar mixture of the judicial and the political and occupies a place firmly within the legislative process. We can now consider the effect of its presence on the implementation of the privatisation programme by the Chirac Government, elected on a programme advocating extensive privatisation in March 1986.

The Form and Scope of Privatisation in France

Limited privatisation was by no means unheard of in France before the election of the Chirac Government in 1986; indeed this was rendered inevitable by the blurring of the boundaries between the public and the private sectors through the existence of a large number of subsidiaries owned, in whole or in part, by nationalised holding companies. The sale of such subsidiaries, which became known as the 'respiration' of the public sector, had indeed given rise to serious legal problems before 1986 due to the constitutional requirement of a *loi* to fix the rules for the transfer of the property of enterprises from the public to the private sectors. The Conseil d'Etat had held a number of transfers carried out without the enactment of such a law to be unlawful.[22] The passing of such a *loi* proved to be politically impossible under the Socialist Government, and such transfers continued unlawfully; thus from the time of the Conseil's decision applying the constitutional principle to the sale of subsidiaries in 1978 to 1986, 160 cases of unlawful transfer took place, including 66 to overseas enterprises.[23] In addition, since 1983 the major public enterprises had increasingly raised money on the financial markets through a variety of techniques designed to supplement their reliance on government finance; indeed, such reliance on private investment soon became the major source of their investment funds.

The programme envisaged by the Chirac Government was, however, far more ambitious. The adoption of this policy had been quite sudden before the election, and, despite a revival of neo-liberal ideas in France, there had been no major proposals for a large-scale programme until British experience showed that privatisation was not only political possible but offered considerable advantages of a short-term nature for government. Thus in a real sense the French privatisation programme was parasitic on British experience; it also contained a strongly ideological element similar to that of Britain and differentiating it from the more pragmatic approaches adopted in other countries. Its scale was extremely large; 65 enterprises were to be sold by March 1991; including their subsidiaries, this would mean that 1,454 companies would pass to the private sector, representing 57% of those in which the state had majority control. Most controversially, the proposals were not limited to recently nationalised enterprises, but included a number nationalised after the end of the second world war. In addition, the leading television chain was to be sold under separate legislation.

The implementation of privatisation immediately became the subject of constitutional controversy. The first announcement by the new Prime Minister stated that this would

21 *Le Monde*, 3 mars, 16–17 juillet 1989.

22 See Rapp, 'Les lois de privatisation et la "respiration" du secteur public', [1987] RFDA, 153–169, and *Syndicat du personnel de l'energie atomique (espèce Cogema)* and *Schwartz (espèce SNEA)* [1979] AJDA 34 and 42.

23 Haut Conseil du Secteur Public, *Evaluation et gestion du secteur public, Rapport 1986*, (Paris, La Documentation française, 1988).

take place through the use of *ordonnances*; this involves the passing of an empowering *loi*, after which the government may legislate for a limited period in the domain normally reserved for parliament. The effect is, of course, to remove the opportunity both for parliamentary scrutiny and for reference to the Conseil constitutionnel of the details of the process. However, *ordonnances* require the signature of the President of the Republic, and the Socialist Mitterrand remained in office. Thus privatisation proved the first test of the unprecedented situation of cohabitation between a government and a president of different political persuasions. The importance of the presidential role was quickly confirmed when he announced that he would refuse to sign certain privatisation *ordonnances*. As we shall see below, the empowering *loi* was referred to the Conseil constitutionnel which laid down important conditions for the implementation of the programme.[24] President Mitterrand then reaffirmed his refusal to sign certain *ordonnances* as he considered them to be in breach of the principle laid down by the Conseil that sufficient guarantees for the preservation of national independence must be included in the implementation of the programme.[25] He justified this by reference to his position as guardian of the Constitution; whether he was in fact justified in using his position in this way was highly controversial,[26] but the effects were limited; the *ordonnance* was transformed immediately into a *loi* which was rushed through parliament and enacted in a largely unchanged form.[27]

Though the effects of this controversy on the form of the privatisation legislation turned out to be minimal, it is important in showing that constitutional issues were to pervade the implementation of the privatisation programme in a way quite unfamiliar from Great Britain. The effect of constitutional constraints also became important in relation to the choice of enterprises to be privatised. In Britain, it is of course inconceivable that constitutional constraints could affect the scope of the privatisation programme; such choices are at the heart of the area of policy reserved for government. Nevertheless, extensive political controversy has developed in relation to this question; in particular, the sales of enterprises which are in whole or in part monopolies has been heavily criticised as giving priority to a successful sale over the development of competition. It has been alleged that the desire to make sales politically successful, to gain management support for the disposal, and to increase flotation proceeds, has prevented any moves to split enterprises into competing units and hindered attempts to encourage competition by new market entrants. This criticism is by no means confined to the political Left, but seems to be a pervasive theme in discussions of privatisation by economists. To quote the conclusion of one account, '[t]he conflict between privatisation and liberalisation ... is no longer a conflict but a rout.'[28]

It is not necessary here to take sides in this argument, but merely to note that no special legal constraints exist in the domestic English legal system in relation to the privatisation of monopoly utilities. However, such constraints exist in a number of other countries, including France. In France, the privatisation programme was aimed solely at the *competitive* sector of public ownership: the monopoly utilities, and enterprises in highly regulated markets, were not included. How can we explain this major difference in the scope of the programmes? Firstly, there is the character of the French public sector. This was large

24 *Loi* no 86–793 du 2 juillet 1986; décision no 86–207 DC des 25 et 26 juin 1986, [1986] AJDA 575.
25 For the text of his announcement see Balladur, *Je crois en l'homme plus qu'en l'Etat* (Paris, Flammarion, 1987), Annex 2.
26 See Mathieu, 'Les rôles respectifs du Parlement, du Président de la Répubique et du Conseil constitutionnel dans l'édiction des ordonnances de l'article 38' (1987) 3(5) RFDA 700 at 712–719.
27 *Loi* no 86–912 du 6 aout 1986.
28 Kay and Thompson, 'Privatisation; a Policy in Search of a Rationale' (1986) 96 *Economic Journal*, 18 at 31: see also Kay and Silberstron, 'The New Industrial Policy — Privatisation and Competition' [1984] *Midland Bank Review* (Spring), 8; Vickers and Yarrow, *Privatisation — An Economic Analysis* (Cambridge, Mass. and London: MIT Press, 1988), 235–9, 267–8, 290–4, 314–5, 338–9, 349–54, 363–4, 427–9.

enough to permit a large-scale programme of disposals without touching monopoly enterprises; unlike the case in Britain, public enterprise entered deep into the heart of many sectors where extensive competition, including international competition, existed. These included banking, insurance, electronics and chemicals. Moreover, after serious financial problems in the early 1980s these enterprises were approaching financial stability, in contrast to the ailing British enterprises such as the Rover Group and British Steel. Secondly, the aim of raising funds was less central to the French programme than that in Britain; indeed, the Government actually prohibited the use of privatisation receipts for the funding of current government expenditure.[29] Thus the aim of freeing competitive enterprises from government influence was able to take a higher place in France.

Finally, however, the privatisation of monopoly enterprises would have been far more difficult than that of competitive enterprises due to a provision in the Preamble to the 1946 Constitution. This provides that:

> Any resource or enterprise whose operation has acquired or is in the process of acquiring the character of a public service or of a monopoly of fact, must become public property.[30]

For many years such principles had been considered not to be legally enforceable, but, as we have seen, the Conseil constitutionnel has in recent years been increasingly keen to employ such principles as limits on the legislative power. When the empowering *loi* for the privatisation programme was referred to it, it did treat this principle as having enforceable constitutional value.[31]

This had been anticipated by the Government, and in its list of enterprises to be included in the programme only competitive enterprises were to be found. As the Minister of Finance responsible for privatisation put it when presenting the proposed *loi* to parliament;

> which enterprises must we privatise? Once more, the principles are clear; there is no question of privatising enterprises which operate a public service or have control of a monopoly. To do so would be contrary to the Constitution. It would also be contrary to our beliefs. So don't accuse us of that![32]

Of course, the meaning of a national public service and of a monopoly of fact is by no means clear. In its decision in relation to the former, the Conseil limited itself to stating that it did not include every activity designated as a public service by the legislator; there was a more limited (and undefined) constitutional core to the concept, and none of the enterprises listed fell within it. It should be mentioned parenthetically here that the provision and distribution of water is in France a *local* public service and thus escapes the scope of the constitutional provision, thus enabling there to be substantial private involvement in the water industry. However, the legal form of a public service concession by which the right to provide water services is given to private or mixed public/private companies permits extensive public control, and cannot be made in any simple way analagous to British privatisation.[33]

As regards the concept of a monopoly of fact, there is of course no straightforward distinction between monopoly and competitive enterprises but rather a graduated distinction applying to different markets. Indeed, it could be argued that some of enterprises listed in the privatisation *loi* came close to a monopoly position in relation to the supply of certain goods, for example Compagnie générale d'Electricité and Compagnie générale de Constructions téléphoniques in the supply of telecommunications equipment, and the deputies

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29 *Loi* no 86–824 du 11 juillet 1986, art 33.
30 Préamble de la Constitution de 1946, alinéa 9.
31 See n 27 above, and Bourdon *et al* 'Les privatisation en France' in Debbasch (ed), *Les privatisations en Europe* (Paris, CNRS, 1989), 129–30.
32 *Journal officiel*, Assemblée Nationale, 22 avril 1986 211.
33 See eg Linotte *et al*, *Service public et droit public*, (1982), Tome I, 296–324.

who referred the empowering *loi* did indeed make this allegation. The Conseil responded by giving the government a margin of appreciation in its decision of whether an enterprise constituted a monopoly or not. This had to be determined with reference to the whole of the domestic market in which the enterprise operated, and temporary positions of advantage were to be disregarded, as were aspects of production representing only a part of the enterprise's activities. The Conseil would only intervene where the government had made a manifest error in its decision as to monopoly status, and no such error was apparent here.

Nevertheless, it is evident that constitutional considerations have had considerable importance in shaping the scope of privatisation available to a French government. This does not of course mean that privatisation of national public services or of monopolies is impossible (and such privatisation has indeed since been proposed in opposition by the ex-finance minister responsible for the programme under Chirac),[34] but that certain special impediments are placed in the way of a government wishing to do so. Such a government could proceed by way of ordinary legislation and risk it being held to be unconstitutional after a reference by opposition parliamentarians, or in future perhaps by an individual. Alternatively, the government could move a constitutional amendment either by Presidential consent and a special parliamentary majority (not a realistic possibility in 1986) or by referendum. Thus such privatisation would be feasible, but would require a specially demanding form of democratic scrutiny; that such change is possible is illustrated by the recent constitutional amendment in Portugal removing special protection against privatisation for enterprises nationalised after the 1974 revolution.[35] Finally, it could break up the enterprises into competing units or otherwise open up markets to competition, precisely what has not occurred in general in the British privatisations. What remains to be seen is the effect of the opening up of European markets from 1992, when the extent of competition will have to be seen in a European rather than domestic context.[36]

Pricing and Evaluation in Privatisaton

Probably the most controversial question of all in the relation to the privatisaton programmes of Great Britain and France was the question of whether enterprises were underpriced. In both nations there have been allegations that such underpricing took place; examination of the process by which pricing took place offers us with a particularly useful comparison because in France the Conseil constitutionnel imposed a form of *a priori* control over pricing, whilst in Britain control was after the event through parliamentary means.

In Britain, allegations of underpricing have taken two forms. The first is that the flotations of enterprises through the sale of shares on the stock market have involved the share price being set too low. Possible motives are the desire to make the sale a political success and the desire to spread shareholding as widely as possible through encouraging small shareholders to participate. Thus:

> Large premiums to investors have become a regular feature of privatizations ... providing shareholders with considerable incentive to sell for short term gain. ... There is little doubt that this has mostly been intentional, rather than the product of poor valuation. Minsters appear to regard the level of oversubscription as a measure of the popularity of the policy, so to fix the price to ensure an excess of applications.[37]

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34 *Le Monde*, 17 décembre 1988.

35 *Keesings Contemporary Archives*, (1989) 35, 36857; *The Financial Times* 23 June 1989.

36 Bourdon *et al, op cit*, 130.

37 Bishop, M. and Kay, *Does Privatisation Work?* (London Business School, 1988) 29–30; see also Meyer and Meadowcroft, 'Selling Public Assets: Techniques and Financial Implications', (1985) 6(4) *Fiscal Studies*, 43: Vickers and Yarrow, *op cit*, pp171–2, 178, 180, 184, 193: and Jenkinson and Meyer, 'The Privatisation Process in France and the UK', (1988) 32 *European Economic Review*, 482.

The second concern has been with the private sale of enterprises. Though less well publicised than the large flotations, a large number of enterprises have been sold to other companies through negotiation; the total value of such enterprises now comes close to £2.5 billion. In these cases concern has centred around the lack of competitive tendering in some cases, the undervaluation of property assets and the large cash injections and debt write-offs which have accompanied the sales.

As regards the flotations, the first point to be made is one noted by the Public Accounts Committee; this is that the process is premised on the assumption that the sale of public assets is no different from a private transaction; there is no special protection for the public interest.[38] Merchant banks are employed as financial advisers giving advice as to the price to be set, with an independent adviser also appointed by the Secretary of State in some cases as a means of cross-checking. Public scrutiny only occurs later with examination by the National Audit Office and the Public Accounts Committee. After such examination, the Committee has made repeated criticisms of underpricing.[39] However, the very fact that these criticisms have been repeated suggests that the extent to which lessons for the future have been learned has been limited, a point reinforced by the generally bland government responses to the Committee's reports.[40] Moreover, the general level of underpricing has not reduced in more recent sales.

As regards private sales, disposals are similarly treated as a private matter with scrutiny after the event by the Parliamentary bodies. However, this raises major problems in that by the time the examination has taken place it will be too late to unravel the sale. For example, the most controversial private sales have been those of Royal Ordnance and of the Rover Group to the already-privatised British Aerospace. In the first example the initial examination by the Committee was critical of the Department's failure to evaluate the development value of redundant sites acquired as part of the purchase.[41] Soon afterwards a securities firm reporting on British Aerospace suggested that such value might be as high as £462 million; they had been valued in the sale at £13.6 million. A further report from the National Audit Office, whilst not accepting so high an estimate, suggested that a clawback provision should have been incorporated in the sale arrangements so as to allow taxpayers to share in the benefits.[42] However, in May 1989 British Aerospace entered into agreements with a property company for redevelopment of the sites, and shortly afterwards purchased a property development company, to which the sites will be handed over. In view of its other extensive interests, it will be difficult or impossible to discover the precise profits made from the development of the Royal Ordnance sites.[43] In the case of the Rover Group, after exclusive negotiations British Aerospace paid £150 million for its purchase, but it was accompanied by an agreement by the Government to inject £547 million into the Group, and in addition certain tax advantages were made available. A National Audit Office Report was later highly critical of the deal: 'the Department's negotiating resulted in British Aerospace paying £150 million for a business which made a profit before interest and tax of £65 million in 1989; and which also had surplus assets and other benefits worth at least £250 million, of which it has so far realised £126 million.'[44] The matter later became more complicated when it emerged that the Government had not disclosed certain payments accompanying the sale to the European

38 HC 189 (1981–2), para 25.
39 HC 189 (1981–2); HC 443 (1983–4); HC 35 (1985–6); HC 211 (1987–8).
40 *Treasury Minute on the 7th, 9th to 18th and 20th to 29th Reports from the Committee of Public Accounts, Session 1981–2*, Cmnd 8759; *Treasury Minute on the 13th to 18th Reports from the Committee of Pubilc Accounts, Session 1983–4*, Cmnd 9325; *Treasury Minute on the First to Fourth Reports from the Committee of Public Accounts, Session 1987–8*, Cm 509.
41 HC 206, 1987–8.
42 HC 448, 1988–9.
43 *The Financial Times*, 20 July 1989.
44 HC 9, 1989–90, para 6(d), references omitted.

Commission. The Commission is currently investigating this and it is possible that this will have to be repayed. However, it is too late to unravel the purchase itself and it is hard to see how British Aerospace could be made to return the rest of the undervaluation.

It can thus be seen that there are serious limits to the effectiveness of scrutiny after the event as a means of avoiding underpricing on privatisation. Indeed, there is now a form of advance scrutiny from another source, as the European Commission, using its powers under Article 93 of the Treaty of Rome relating to state aids, examines the financial arrangements for privatisation before giving its consent for sales to go ahead. Apart from the Rover investigation, which resulted in the Government's cash injection being cut by £253 million,[45] it has examined the sales of BREL (the British Rail engineering subsidiary), Harland and Woolf and Short Brothers. Nevertheless, it should be stressed that advance scrutiny of pricing matters is so limited as to be virtually non-existent in British domestic law. In particular, the chances of successfully obtaining judicial review of a pricing decision are effectively non-existent. Apart from the general reluctance of British courts to review pre-contractual decisions,[46] further obstacles to review are provided by the difficulty of satisfying standing requirements and the fact that the sale of shares is carried out by the minister using common law rather than statutory powers.[47]

Although many aspects of the sale of shares on privatisation in France were similar to those in Britain, the form of constitutional control was radically different; in brief, the Conseil constitutionnel established that a form of scrutiny in advance was required. The decision was influenced by the principles laid down by the Conseil when the draft *loi* on the 1982 nationalisations had been referred to it.[48] This was held to be unconstitutional because Article 17 of the Declaration of the Rights of Man requiring fair compensation for the taking of property applied to nationalisation, and the method of assessing compensation to be adopted on nationalisation was not adequate to comply with it. In the new *loi* introduced after the Conseil's decision, an administrative commission was established to evaluate the banks which were not quoted on the stock exchange, and this was held to comply with the requirements of the Constitution.[49]

In considering the empowering *loi* for the privatisation programme, the Conseil came to the conclusion that it was not in breach of the Constitution, but this was subject to a number of highly important qualifications with respect to the way in which the implementation of the programme was to take place.[50] Amongst the most important were those relating to evaluation and pricing. The deputies who had referred the *loi* had argued that it would be unconstitutional to sell enterprises below their true value as this would breach constitutional principles of equality and would give purchasers an unfair advantage over citizens as a whole. The Conseil accepted that both this constitutional principle of equality and the protection offered to the rights of property by the Declaration of the Rights of Man applied to the property of the state as well as to that of private persons, and so did indeed prohibit disposal of public assets at below their true value. However, the Government had indicated that valuation would take place by independent experts who would ensure that underpricing would not take place. Thus the Conseil laid down that the *ordonnance* implementing privatisation must include arrangements

> by which the evaluation of the enterprises to be transferred is to be made by experts completely

45 Bull, E.C. 3–1988, point 2.1.83; Bull, E.C. 7/8–1988, point 2.1.65.

46 Daintith, 'Regulation by Contract: The New Prerogative' in Lloyd, Rideout and Guest (eds), *Current Legal Problems 1979* (London, Stevens, 1979), and Oliver, 'Is the *Ultra Vires* Rule the Basis of Judicial Review?', [1987] PL 543, at 551–67; and *R* v *Trent Regional Health Authority ex parte Jones, The Times*, June 19, 1986.

47 See Daintith, *ibid* 43–5.

48 Décision no 81–132 DC du 16 janvier 1982; see also Favoreu, ed, *Nationalisations et consittution*, (Paris, Economica, 1982).

49 Décision no 82–139 DC du 11 février 1982.

50 Décision no 86–207 DC des 25 et 26 juin 1986.

> independent from the purchasers, and is to be carried out according to the objective techniques currently employed in relation to the sale of company assets, taking into account, and balancing as appropriate in each case, the value of shares on the stock market, the value of assets, the profits achieved, the existence of subsidiaries and future prospects. Moreover, the *ordonnance* is to forbid disposal where the price offered by the purchasers is not higher than, or at least equal to, the evaluation. The choice of purchasers is to be unbiased and national independence is to be preserved. Any other interpretation would be unconstitutional.

The basic rules for the evaluation are set out in the *loi* on the implementation of privatisation.[51] It is to be carried out by a Privatisation Commission of 7 members nominated by decree from those with experience of matters economic, financial and legal.[52] They are prohibited from having interests in the purchasers of capital in privatised firms, and from acquiring such an interest for 5 years after the ending of their functions. The criteria for evaluation are repeated verbatim from the Conseil's decision in the *loi*, and the evaluation must be rendered public. The price is then set by the minister and must not be below the level suggested by the Commission's evaluation, and it must be consulted once more at this stage; it is also to give its opinion on the procedures for bringing the sale to market. The Commission is also to be consulted and to value the capital in the case of direct sales outside the financial markets to create a 'hard core' of shareholders as a protection against takeovers (see below); in this case a further constraint has been imposed by the Conseil. In its decision on the broadcasting legislation which involved the sale of a leading television channel it held that where a core of shares giving control of a company was ceded, the price must be at a sufficient level to reflect this.[53]

The Conseil d'Etat has also had the opportunity to consider its role in relation to evaluation and pricing. In the case of *Joxe et Bollon*[54] the sale of shares as a partial privatisation of Elf-Acquitaine was challenged by the President of the Socialist group in the National Assembly and by a shareholder in the company. The Commissaire du gouvernement held the view that, though the deputy did not have standing as such, his fellow-litigant had such standing by virtue of his shareholding. The Conseil should take an extended view of its power to review the evaluation process and not be restricted by the technicality of the matter. However, the Privatisation Commission was not required to give reasons for its evaluation, and in this case there was no illegality where the price of shares already quoted on the Bourse were used as the main guide to pricing. Nor was the immediate premium of 14% on the commencement of trading in the shares so serious as to suggest illegality. The Commissaire was careful to stress that in future cases where there were no shares already quoted on the stock market closer control should be exercised. The Conseil gave a brief decision broadly following these propositions.

The rejection of a duty to give reasons for the evaluation has been criticised, and does not maintain symmetry with the valuation body created for nationalisation, which was required to give reasons.[55] Nevertheless, this decision suggests a potential role for judicial review in the evaluation process much greater than anything conceivable in Britain. Most important, however, is the role of the Conseil constitutionnel in requiring an independent valuation before sale. Has this made any difference in practice? It must firstly be stressed that the Privatisation Commission has not been above criticism, and that there have been allegations of the underpricing of shares in France. Indeed, fierce criticisms were made by a Parliamentary Commission established after the ascent to power of the Socialist Government to investigate the implementation of the privatisation programme.[56]

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51 *Loi* no 86–912 du 6 aout 1986, art. 3.
52 For the composition of the Commission see *Notes Bleues*, no 300, 6–12 octobre 1986.
53 Décision no 86–217 DC du 18 septembre 1986.
54 *Joxe et Bollon*, CE 2 février 1987, (1987) 3(2) RFDA 189; for the Commissaire's conclusions see 176.
55 Bazex, 'Note', [1987] AJDA, 351.
56 Assemblé Nationale Document 969 (1989).

Thus the Privatisation Commission was criticised as having been too dependent on the Minister of Finance, as not having adopted properly structured procedures, and as having included one member who retained close links with the subsidiaries of a company being privatised. As regards underpricing, it was claimed that this had caused a total loss of between FFr 8,272 million and FFr 19,540 million. However, the speculative nature of its estimates reduces the credibility of this criticism, and it does not have the authoritative nature of the Reports of the Public Accounts Committee referred to earlier, being a highly politically partisan document signed only by the Socialist members of the Commission; the members from the Right produced a minority report denying underpricing.[57]

There have thus been accusations of underpricing in both nations. One way of roughly assessing the extent of such underpricing is to examine the discount on offer price at the end of the first day of trading in the privatised shares.[58] This gives some idea of the profits to be made from quick sales, which have often been substantial; thus in the case of the water authorities 30% of the entire equity changed hands on the first day. In both countries discounts in privatisation issues have been larger than normal, and indeed one study estimates the total loss due to underpricing in Britain as £1.9 billion, taking into account sales only up to 1987.[59] The largest British sales, those worth more than £1000 million, have been characterised by especially large discounts; they were 92% in the case of British Telecom, 36% in the case of British Gas, 73% in the case of Rolls-Royce, and 31–57% in the case of the water authorities. The only other examples of such large sales were the final BP sale, where the stock market collapse of Autumn 1987 led to shares commencing to trade at below the offer price, and British Steel, where bad trade figures reduced the discount to 5%, though after three months it was trading over 31% over the offer price.

In France, the largest sales were characterised by less spectacular discounts, those of over FFr 10,000 million having discounts of 19% for Saint-Gobain, 24.2% for Paribas, 11.4% for Compagnie générale d'Eléctricité and 6.1% for Société Générale. The largest French discount was 36% for the small bank SOGENAL: in Britain the largest was 92% for British Telecom. In all, in France two discounts out of 13 fixed price sales were over 25%; in Britain seven out of 17.

Of course, these figures can give only a very partial picture of the role of underpricing in the two nations; the first day discounts, whilst important in showing an immediate redistribution of wealth as a result of privatisaton, do not necessarily reflect long-term trends, and other factors apart from the constitutional constraints on pricing will be at work here; for example, shares in France were offered in fully- rather than partly-paid form, and offers were not underwritten. Nevertheless, one can tentatively suggest that there is evidence of less serious underpricing in France than in Britain, and the role of constitutional constraints may well have played a part in this.

Two further points should be noted. The first relates to the effect of the stock market collapse in Autumn 1987. As mentioned above, BP shares commenced trading at below the offer price; the Government responded by encouraging the Bank of England to offer a 'safety net' to investors through which it would buy shares back at the level below the offer price but above the market price. This was little needed in practice because of the extensive purchases made by the Kuwait Investment Office, but its meaning is clear: it was a retrospective price reduction. Similarly, in France, shares offered in Suez were affected by the crash, also commencing trading well below the offer price. A price reduction was also considered, but this would have taken the price below the level suggested by the Privatisation Commission; thus such a reduction was ruled out and replaced by arrangements for deferred payment.[60] The problems of the Suez sale resulted in the

57 *ibid* 237–44.
58 Jenkinson and Meyer, *op cit* (n 40), 486
59 *ibid*, 487.
60 *Le Monde*, 4 novembre 1987.

suspension of the privatisation programme immediately afterwards, and as a result a number of highly important enterprises could not be sold before the 1988 elections which returned the Socialists to power and marked the end of the programme.

Secondly, it should be noted that the requirement of valuation by the Privatisation Commission did not apply only to share flotations but also to private sales, which, as we have seen, produced highly controversial problems of valuation in Britain. In fact, there were few private sales of entire enterprises in the French programme; much more important was the disposal privately of holdings of companies floated in order to establish 'hard cores' of investors (see below). These were evaluated by the Commission and a premium required to reflect the advantages conferred by such a direct sale, thus reflecting the principle laid down by the Conseil constitutionnel in the case on the broadcasting legislation.[61] In addition, it should be noted that certain protections were written into the provisions of the privatisation *loi* creating a framework for the disposal of subsidiaries by public enterprises themselves. Here valuation by the Commission is not required, but disposal can only take place after evaluation of the subsidiary by independent experts who are to apply the principles laid down by the Conseil constitutionnel. The experts are to be chosen by the enterprise itself, although they must not be remunerated in such a way as to threaten their independence. However, in this case the evaluation need not be rendered public.[62] Disposals of subsidiaries will also come within the scope of the general examination of public enterprises by the Cour des Comptes.[63] In the sale of the Rover Group, by contrast, no valuation of the company's sites had been carried out before its disposal.[64]

Government and Industry after Privatisation

Before I draw my conclusions from this analysis, a brief description should be given of the effect of constitutional constraints in a further area; that of the relations between government and privatised enterprises. It is quite clear that privatisation does not mean the end of governmental influence on enterprises: indeed, one description of the French privatisation programme has concluded that '[f]ar from creating a new economic system in France, the policy of privatisation bolstered up a traditional system of "establishment solidarity" structured around an all-powerful Minister of Finance and constituting "a capitalism without a financial market and without sanctions".'[65] This might seem to be a classic example of French *étatism*, but in Britain also a variety of means of government influence have been retained after privatisation.[66] Here I will be concerned with the devices operating within the capital markets.

In brief, in Great Britain 'golden shares' and related limitations on shareholding have been employed. A variety of detailed techniques have been adopted, but the most common has been to erect a limitation on shareholding of 15%; if this figure is exceeded, the directors are to require disposal of the excess shares. In some cases there are special limitations on foreign shareholdings. The provision in the Articles is protected against amendment by a requirement that the consent of the special shareholder be obtained; the special share is a special rights redeemable share held by the government or its nominee.[67] The effect

61 Décision no 86–217 DC du 18 septembre 1986.
62 *Loi* no 86–912 du 6 aout 1986, art. 20; *décret* no 86–1140 du 24 octobre 1986, art. 5.
63 See generally Magnet, *La Cour des Comptes*, (Paris, Berger-Levrault, Third ed 1986), Ch XV.
64 HC 9 (1989–90), para 4.10.
65 Bauer, 'The Politics of State-Directed Privatisation: The Case of France, 1986–88', (1988) 11(4) *West European Politics*, 49 at 60.
66 See Graham and Prosser, *op cit* n 1, 30–49, and our 'Golden Shares: Industrial Policy by Stealth?', [1988] *Public Law*, 413.
67 For further details of these complex provisions see Graham and Prosser, *ibid* (1988), 414–7.

is thus both to provide the directors with a duty of compulsory expropriation (with compensation) and to provide government with a power of veto over unwelcome takeovers. Some use has been made of these powers; thus a differently drafted form of golden share was used to impose conditions on BP in its takeover of Britoil[68] and the provisions relating to foreign shareholdings in Rolls-Royce had been used to compel West German and Dutch investors, including the Deutsche Bank, to sell shares at a loss, leading to a complaint to the European Commission and a raising of the threshold.[69] There is now some doubt as to government policy as to the use of the golden shares, following Nicholas Ridley's decision as Trade and Industry Secretary to waive the protection offered to Jaguar by such a share allowing a takeover by Ford, and subsequent statements he made to the Trade and Industry Committee suggesting considerable reservations as to their future importance.[70] Nevertheless, golden shares remain a potentially powerful means of influence over the working of the financial markets in relation to privatised companies. It should also be recalled that ministerial powers in relation to merger control may also provide a device for influencing the composition of the capital of these companies, and these powers were indeed used to force the reduction of the Kuwait Investment Office stake in BP from 21.6% to 9.9%.[71]

What is striking is the extent to which the exercise of these controls is insulated from legal scrutiny. Thus the basis for golden shares is nowhere contained in the privatisation statutes; instead it is in the articles of association of the companies. This purely contractual basis is, it seems, in itself adequate to prevent the use of judicial review in relation to their exercise.[72] In addition, provisions in the articles of the companies seek to limit further opportunities for scrutiny; thus, for example, the British Gas articles provide that a disposal of shares authorised by the directors under the restriction on shareholding provisions 'shall be conclusive and binding on all persons concerned and shall not be open to challenge, whether as to its validity or otherwise on any ground whatsoever'.[73] In other cases, in addition to such provisions the giving of reasons is specifically excluded, as in the case of the foreign shareholding provisions in the Rolls Royce articles which have been used to force divestment.[74]

In France, although the power to create golden shares was specifically given by the privatisation legislation, it was rarely used.[75] Instead, other powers to dispose of part of the capital directly outside the financial markets were used to create 'hard cores' of shareholders with limitations on their powers to dispose of their interests for 5 years.[76] These disposals were the most highly criticised aspect of the privatisation programme in France, both because it was alleged that it was a way of rewarding political supporters of the Chirac Government and because of the intense concentration of holdings produced. The process of selection was highly secretive, and was conducted in highly personal style by the Minister of Finance himself; the Privatisation Commission was not involved.[77]

The Socialist Government elected in 1988 proceeded to break up the hard cores through

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68 HC Deb vol 128, col 149, 23 February 1988, and HC 13 (1989–90).

69 Rideau, 'Aperçus du point de vue communautaire sur les privatisation dans les états membres' in Debbasch (ed) *Les privatisation en Europe*, (Paris, CNRS, 1989), 223 at 224–6: *The Financial Times*, 20 July 1989.

70 HC Deb vol 159, cols 177–187, 31 October 1989; *The Financial Times*, 14 December 1989.

71 See *The Government of Kuwait and the British Petroleum Company; A Report on the Merger Situation*, Monopolies and Mergers Commission, Cm 477.

72 See *R* v *Independent Broadcasting Authority ex parte The Rank Organisation*, March 26, 1986, LEXIS; Oliver, *op cit* 562–4. It is uncertain whether this has been changed by the decision in *R* v *Panel on Take-Overs and Mergers, ex parte Datafin* [1987] QB 815; see Graham and Prosser, *op cit* (1988), 430–1.

73 British Gas Article 40(12).

74 Rolls Royce Articles 43(k) and 44(m).

75 *Loi* no 86–912 du 6 aout 1986, art. 10; Graham and Prosser, *op cit* (1988), 419–21.

76 *Loi* no 86–912 du 6 aout 1986, art. 4; Graham and Prosser, *ibid* 421–4.

77 Assemblée Nationale Document 969 (1989), 65–80, 95–136, and *Journal Officiel*, Assemblé Nationale, 27 octobre 1987, 4893–4918.

passing legislation removing restrictions on the disposal of these interests, and replacing them with a requirement of ministerial consent for any acquisition of shares in a privatised company bringing a holding to 10% or more; this will last until the end of 1992.[78] This was referred to the Conseil constitutionnel and was held compatible with the Constitution, but only on condition that the minister is obliged to give reasons for vetoing a participation and that this decision would be subject to judicial review.[79]

Here once more we see some tentative steps to impose constitutional restraints on the powers of the minister, in a form which had no parallel in Britain. This was obviously only partial; the existence of the Conseil constitutionnel did not prevent a highly arbitrary process of selection of the original hard cores. Nevertheless, even in this area traditional notions of French *étatism* must be tempered by the growing importance of such legal constraints.

Conclusions

> The debate about the legitimacy of Council review turns on a simple and simplistic opposition. On the one side, there are those who condemn every new incursion on the sovereignty of Parliament as the establishment of a *gouvernement des juges*. . . . On the other side are those who champion the same incursions as a further perfection of a longed-for *état de droit*.[80]

Both these views are indeed simplistic, but they share one point in common. Government is seen as *constrained* by constitutional norms as pronounced by the Conseil constitutionnel. Thus as well as law providing a means of implementation of governmental policy, as is familiar to us from the British experience of privatisation, it also provides a means of legitimation of policy making and implementation in a way quite unfamiliar to British eyes. In Britain the legitimatory institutions have been mainly Parliamentary, and have had limited effect under present political conditions. In France, constitutional constraints have had a much more important role in shaping the privatisation programme and its implementation. This in itself is enough to suggest that any model of France as a nation of untrammelled *étatism* is seriously defective; instead, the notion of the state as mediated through constitutional principle is becoming much more central to French politics.

Yet France does strongly remain a society within which the concept of the state is central to politics in a way which it is not in Britain. However, there is a difference between sociological examination of the actual role of the state in shaping patterns of economic development, and the concept of state as a legitimating device in politics and, in particular, the legal forms associated with this concept. Thus it is in this sense that Dyson has contrasted the French state tradition with the 'stateless' tradition of Britain. This is not to deny that Britain has a powerful and extended state apparatus, but suggests that what has been absent from the British political and legal tradition has been the concept of the state as the means for 'the rationalist pursuit of order (in its broadest sense) in a society subject to ceaseless change'.[81] There have been only limited and half-hearted attempts to systematise relations between individual and state and, in particular, English law has not evolved 'the idea of the state as a formally recognised legal institution, subject to its own distinct norms and procedures and integrating diverse institutions'.[82] Indeed, the difficulty with which the English courts handle the concept of the state has been illustrated in litigation concerning

78 *Loi* no 89–465 du 4 juillet 1989.
79 Décision no 89–254 DC, du 4 juillet 1989; for the first decision of the Minister on the use of this power see *Le Monde* 4 novembre 1989.
80 Stone, *op cit*, 29.
81 Dyson, *The State Tradition in Western Europe*, (Oxford, Martin Robertson), p7.
82 *ibid* p41; see generally pp36–44, 112–16, 199–201, 210–12.

privatisation, in which the suggestion by the Law Lords that assets of a bank about to be sold belonged to the state served not to clarify ownership but to sow general confusion as to what the concept of the state might refer. Apparently it was not the Government; statute made it quite explicit that it was not the Crown; so what else could it be? Nor was much clarity added by the official conclusion that the state meant a broader concept than the Government, lacking in legal personality but to which assets could be said to belong in the more general sense that they are ultimately at the disposition of Parliament.[83]

It is here that we find that any assumption that governments in state societies have relatively untrammelled powers of policy implementation to be misleading. The concept of the state is not only a description of the actuality of political power, but also a legitimating concept. In particular, it suggests that the state is the representative of a broader conception of the public good than that represented by particular social interests, even the interests of particular governments, and it is this which one finds expressed in the sort of principles imposed by the Conseil in the cases discussed here. Legitimacy is articulated through claims of public law to represent a concept of the state transcending the particular, temporary and unprincipled concerns of governments. Of course, it is only a very partial development; the invocation of constitutional principle is not a magic wand dispelling arbitrary government, as the selection of the hard cores proved. Nevertheless, at the very least one finds a willingness to pose and to face issues of constitutionality notably missing from the British debate.

A criticism, of course, which is frequently made is that this does result in a 'government of judges' taking decisions as to political direction which should be the responsibility of democratically-elected representatives. However, the decisions of the Conseil constitutionnel have not prevented major changes of direction in French politics; the nationalisation programme implemented by the Socialist Government in 1982 was far beyond anything forming part of realistic politics in Britain during the last 30 years, and the Chirac Government was able to implement a far-reaching privatisation programme. The constraints imposed were rather due to the way in which policy was implemented; thus for example the requirement of valuation by the Privatisation Commission did not prevent privatisation but ensured that it took place in a relatively transparent way. Even the substantive constraint in the Constitution preventing the privatisation of monopolies is in reality more a constraint on the way in which the government could act; it could have indeed privatised such enterprises through a constitutional amendment, and the example of Portugal shows that this is not beyond the realm of practical politics. The effect was not to proscribe fundamental political change but to demand that it was exposed to a particularly demanding form of democratic scrutiny.

A further point needs stressing; this is the intimate building of the Conseil into the French political process. The model most frequently invoked in British references to a constitutional court is that of the US Supreme Court, a body quite separate from the legislature and brought into play by private actors. If a right of individual petition to the Conseil is indeed introduced it may move closer to this model. At the moment, however, much of its strength comes from its close links to the Parliamentary process. Indeed, the increased role for reference of legislation by opposition Parliamentarians provides an important additional resource for them.

Thus the strong separation between legal and political controls which tends to dominate British conceptions of constitutionality does not fit the experience of France. However, the British stress on Parliamentary control as the means of legitimating government policy is no longer the sole means of scrutiny available in the areas discussed here. As mentioned

83 *Ross* v *Lord Advocate* [1986] 1 WLR 1077 (HL); for the Government's view see HC 237 (1986–7), Appendix.

above, the European Commission is playing a greatly increased role, and indeed, several examples of privatisation have now been examined in advance by the Commission in a way not dissimilar to the work of the Privatisation Commission in France. We may be witnessing the seeds of a convergence of national principles towards something closer to the continental European model, with the European Community Treaty acting as a constitution for economic life, implemented by the Commission, the Court of Justice and national courts. All the evidence examined in this article suggests that this could fill a gaping void in our domestic constitutional system.