

THE NATURE AND UTILITY OF PUBLIC
CORPORATIONS IN KENYA: A CASE STUDY
OF THE INDUSTRIAL AND COMMERCIAL
DEVELOPMENT CORPORATION (THE ICDC).

By

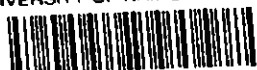
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DECLARATION


I, WANYAMA KULUNDU-BITONYE, do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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A.C.	- Appeal Cases (House of Lords and Privy Council).
Ch. or Ch.D.	- Chancery or Chancery Division.
E.A.L.P.	- East African Law Report.
E.A.C.A.	- Eastern Africa Court of Appeal Law Report.
E.A.L.J.	- East African Law Journal.
E.A.L.R.	- East Africa Law Review.
(Ed.)	- Editor(s).
W.L.R.	- Weekly Law Review.
K.B.	- King's Bench
K.L.R.	- Kenya Law Report
Q.B.	- Queen's Bench.
L.Q.R.	- Law Quarterly Review.
J.C.C.P.	- Journal of Commonwealth Comparative Politics.

TABLE OF CASES

<u>Ashbury Railway Carriage Co. Ltd. v. Riche</u>	(1875) L.R., 7.
<u>B.B.C. v. Johns</u>	(1965) Ch., 32
<u>Bell House Co. Ltd. v. City Wall Properties Ltd.</u>	(1966) 2 Q.B. 625.
<u>Cotman v. Brougham</u>	(1918) A.C., 514
<u>Eastern Countries Railway v. Hawkes</u>	(1855) 5 H.L.C., 331.
<u>Isak Wainaina wa Kamotho and Another v. Murito wa Indangara and Another and the Attorney-General</u>	9 E.A.L.R., 102.
<u>Issa and Suleman v. Michael and Co. Ltd.</u>	(1948) 23(11) K.L.R., 12.
<u>Hubble v. Commissioner for Transport</u>	(1925) 19 E.A.C.A. 97.
<u>Katete v. Nyakutukura</u>	(1956) 7 U.L.R., 47
<u>Launceston Corporation v. Hydro Electric Commission</u>	(1959) 100 C.L.R., 654.
<u>Nairobi City Council v. Wadhwa</u>	(1968) E.A., 406
<u>Patel v. Commissioner of Income Tax</u>	(1961) E.A., 693.

<u>Patel v. Plateau Licencing Court</u>	(1954) 27 K.L.R. 147.
<u>Parker v. The Daily News Ltd.</u>	(1962) Ch., 927
<u>Peter Luqayula v. R.</u>	(1969) H.C.D. Case no. 69.
<u>Rashid s/o Ramadhani v. R.</u>	(1968) H.C.D. Case no. 323.
<u>Re City Equitable Fire Insurance Co. Ltd.</u>	(1925) Ch., 507
<u>Re Crown Bank</u>	(1890) 44 Ch.D., 634.
<u>Re Jon Beanforte (London) Ltd.</u>	(1953) Ch., 131
<u>Re Lee Behrens & Co. Ltd.</u>	(1932) 2Ch., 46.
<u>Re Roith</u>	(1967) 1 W.L.R. 432.
<u>Ridge v. Beldwin</u>	(1964) A.C. 40.
<u>Salomon v. Salomon & Co. Ltd.</u>	(1897) A.C. 30.
<u>Selangor United Rubber Estates Co. Ltd. v. Craddock</u>	(1968) 2 All E.R. 1073.
<u>Scottish Co-operative Wholesale Society Co. Ltd. v. Meyers</u>	(1959) A.C. 324.
<u>Tamlin v. Hannaford</u>	(1950) 1 K.B., 18.

TABLE OF STATUTES

Companies Act, Cap.486 of the Laws of Kenya.

Co-operative Act, Cap.490 of the Laws of Kenya.

Credit to Africans (Control) Ordinance, Cap. 104 of the Laws of Kenya.

Credit with Natives Ordinance, Cap.130 of the Laws of Kenya.

Crown Lands Ordinance, no.140 of 1926.

The Exchange Control Act, Cap. 113 of the Laws of Kenya.

The Foreign Investments Protection Act, Cap. 518 of the Laws of Kenya.

The Industrial and Commercial Development Corporation Act, Cap. 517 of the Laws of Kenya.

The Immigration Act, No.25 of 1967

The Native Land Trust Ordinance, no.9 of 1930.

The Overseas Resources Development Act (UK), 1948.

The Trade Licencing Act, no.33 of 1967.

I N T R O D U C T I O N

The relationship between socio-economic institutions as legal forms, and the politico-economic conditions in which these institutions perform the economic functions assigned to them, has generated a great deal of interest and debate for the legal writer. It is only by exploring these relationships that one can understand the true nature and roles being played by these socio-economic institutions, whose relationships with governments and other governmental organs have raised a lot of interest. Indeed, public corporations are historically the most important of the recent developments in governmental institutions, and they must be understood properly, if we must understand the roles and uses of the modern state governments. To understand the role public corporations play as agents of socio-economic development in Kenya, it is necessary that we relate their roles and functions to the political and economic climates in which they work. This study attempts to assess the nature and uses of public corporations in Kenya and how these uses reflect the political and economic conditions of present day Kenya. This is a study of public corporations in the political economy of Kenya.

The use of public corporations has grown from strength to strength in recent years. This is true of both socialist and capitalist countries, including Kenya, Britain, Tanzania and the U.S.S.R. These

countries, use public corporations in one form or another. This is so, notwithstanding the widely divergent geographical locations, the economic strengths, the levels of industrialisation and the ideological positions their governments espouse. The ever increasing role being played by public corporations in the social, political and economic development of various countries is a phenomenon of the greatest interest to the student of legal theory.

What makes public corporations subject to such diverse applications? This is a question whose answer will form an important theme in trying to understand what characteristics make public corporations such "universal" institutions, transcending the bounds of geography and ideology in their use by state governments. A correspondingly important theme on the nature and use of public corporations will be made up of or comprise an analysis of the time dimension in the development of public corporation. In this respect, we shall attempt to grapple with the question: why did public corporations become important governmental agencies only in the 20th century and not earlier? The themes which underlie these two questions are important, if we must genuinely try to understand the nature and role of public corporations in their historical context.

The evolution of public corporations has been the subject of controversy. There are those who assert that public corporations as institutions

of socio-economic development, transcend economics, politics and ideology. This school of thought insists that public corporations evolved spontaneously, to meet "practical needs", which society could not answer at the time. Professor Friedmann, a leading exponent of this school of thought asserts that: "they (governments) have all found it necessary, especially since the First World War, to develop public corporations, which could fulfil some of the many complex new tasks in forms other than those of the departmental administration. Public corporations as a whole should not be judged predominantly by ideological preconceptions. In most cases, public corporations have been established in response to practical needs and they have often been successful in ideologically uncongenial surroundings".¹

On the other hand, there are those who view the evolution of public corporations as an historical phenomenon, growing out of the ever-sharpening contradictions of capitalist development. This school of thought has its theoretical base in the prediction of Karl Marx that Laissez Faire economics, epitomised by free competition and the free market mechanism, would give way to the concentration and centralisation of wealth into fewer and fewer hands, and thus, usher in monopoly capitalism. In other words, free competition logically led to monopolies. During this new phase of capitalist development, the state, itself a creature of class society at a certain stage of development, when the contradictions arising from private property ownership, were no longer non-antagonistic,² and which had

hitherto contented itself with the "keeping of law and order", became an active participant, as an economic actor, in the economy of the country by establishing its own economic units of production to administer what became known as "wasteful production".³ The best known economic units used by the State in this role are public corporations. These institutions were used by the state to create conditions for class oppression by increasing the productivity of labour and filling in the gaps left by private enterprise, by establishing enterprises in areas of the economy where private entrepreneurs were unwilling for one reason or another to undertake development. This theory, views public corporations as creatures whose evolution is tainted from the very onset, with the birth mark of monopoly capital. In the final analysis therefore, this theory posits that public corporations were tailored in both theory and form to serve the interests of monopoly capitalism.

We shall view the evolution and development of public corporations in the light of these two theories. From the onset, the inadequacies of the former school of thought are obvious, in so far as this school asserts that the evolution of public corporations should be seen as an isolated event, free from the influence of politics, economics and ideology. Public corporations became agents of economic development of governments at a particular time in the development of capitalist production: when society could no longer boast of the free market mechanism of the early 19th century. Society was qualitatively changed by the productive relations that were ushered in by the advent of monopoly

capitalism whose major identifying mark was the centralisation and concentration of property into fewer and fewer hands. We therefore view the evolution of public corporations, in Kenya as elsewhere, in the totality of the development effort of that society. More importantly, we shall seek to explain the evolution of this new governmental agent by looking at the economic relations prevalent at the turn of the last century, that is, the productive relations of monopoly capitalism in Europe at the turn of the 19th century and their consequential exportation to the colonies with colonialism.

With Colonialism, legal forms established and nurtured in the womb of monopoly capitalism in Europe, accompanied the export of capital to the colonies. This was so, notwithstanding the fact that the colonies were backward economically, depending on subsistence agriculture, and hence were far from the stage of economic development where capital could play a decisive role. The export of legal forms by the metropolitan colonial powers was not however, difficult to understand, since it was the raison d'etre of colonialism to infuse the colonies which they had carved for themselves, into the developed metropolitan economies in order to facilitate the exploitation of their natural and human resources. Most colonies including Kenya, which was no exception, were used for the production of raw materials for metropolitan industries, food for the urban industrial populations and in their turn, imported manufactured goods processed by the industries in the metropole. The autocratic govern-

ments established in the colonies, to open them up for exploitation, most naturally used legal forms which were familiar to them and commonly used at home. Public corporations as one such legal form, were established in the colonies to bolster the efforts of the colonial governments, in the attainment of the above posited goals. ⁴

Although governments utilised public corporations of some form or another before the Second World War, it was after the war that the modern public corporation became a common-place instrument for implementing government policy. In Britain, a considerable amount of nationalisation had been undertaken by governments before the second World War. In 1908, the Port of London was constituted into an authority; in 1912 telephone and the post office became state monopolies. Between the two World Wars, several public corporations were set up in Britain, including: the Central Electricity Board, the British Broadcasting Corporation, the London Passenger Transport Board and the British Overseas Airways Corporation.⁵ In the United States of America, the Tennessee Valley Authority was established in 1933, and in colonial Kenya, the first public corporation: the Land and Agricultural Bank, was established in 1932. In relation to the attainment of the colonial objectives, two post World War II British public corporations deserve specific mention as the forerunners of most colonial public corporations. These corporations were the: the Colonial Development Corporation (CDC) and the Overseas Food Corporation (OFC). These two corporations were established under

the Overseas Resources Development Act (ORDA),⁶ to co-ordinate the efforts of colonial governments in the production of raw materials and food for the metropole. These two corporations became stereotypical forms that many colonial governments adapted after the second World War. In Kenya, the Industrial Development Corporation (IDC), the precursor of the ICDC was established in 1954 to work in close cooperation with the Colonial Development Corporation and the Overseas Food Corporation.⁷ In Tanganyika, the Tanganyika Agricultural Corporation, whose organisational form was a replica of the Overseas Food Corporation, replaced the latter, after the ill-fated groundnuts scheme. One may therefore say that, the metropolitan requirements and the resultant trends in the development of this new governmental agency, inevitably determined the form and uses to which public corporations were put in the colonial countries.

With decolonisation, multinational imperialism came into the scene under the hegemony of the U.S.A. Europe (particularly Britain, France, Germany and Portugal) which had dominated the colonies during the era of bilateral imperialism, were progressively edged out of their colonial possessions after the Second World War. The U.S.A. advocated an aggressive "open door" policy for the redivision of the world among the monopoly powers. This policy was symbolised by a slogan to the colonised peoples of the World to attain freedom from the bilateral colonialism. A U.S.A. Under-Secretary of State once exclaimed: "the age of imperialism is ended. The right of all peoples to their freedom must be recognised". This right of all peoples

to their freedom was limited to a choice between the U.S.A. capital and that of the colonial powers including Britain, France, Germany, and Portugal. It was not long after the process of decolonisation started, that the hegemonic position of the U.S.A. in world trade was felt. According to Woodruff, the U.S.A.'s share of world capital exports increased from 6.3 per cent in 1914 to 59.1 per cent in 1960. On the other hand, there was a drastic decline in the share of world capital exports in Europe. Britain's share dropped from 50.3 per cent in 1914 to 24.5 per cent in 1960. France and Germany also drastically lost ground from 39.5 per cent in 1914 to 5.8 per cent in 1960.⁹

How does this change at the international economic level affect the nature of public corporations in Kenya? A look at the post-colonial public corporations in Kenya will reveal a strong link with foreign international capital. The Kenyan economy remains dominated by external forces through the continued influence and control by multinational corporations, international lending agencies and foreign governments. The political and commercial African elites, who comprise the "comprador" class have had little motivation to change the colonial structure of the economy which they inherited at independence. For the Kenyan African elite in control of the reigns of political power, independence meant nothing more than replacing the colonial master, with all the institutions colonialism had used to exploit the natural and human resources remaining intact. The economy is now, more than ever before, more responsive

to foreign capital, from all possible sources the world over. This correspondingly means that the nature and structural organisation of public corporations has hardly ever changed since the attainment of independence. In Kenya, public corporations, are the main agency for co-ordinating foreign aid and investments. In our case study, the Industrial and Commercial Development Corporation (ICDC), more than any other public corporation in Kenya, foreign investments account for most of its activities. ¹⁰ Among the multinational corporations with subsidiary companies in Kenya are: Unilever Brothers (East African Industries Ltd), Firestone Rubber Company Inc. (Firestone (1969) East Africa Ltd); Ford Motors (Ford Motors Kenya Ltd); Union Carbide (Union Carbide Kenya Ltd); Lonrho (Tanneries of Kenya Ltd); and Oriental Paper Mills (Pan African Paper Mills East Africa Ltd)."

These are then the type of public corporations we have in Kenya: corporations which have as their operational base, the promotion of private property, both internally and externally. At the internal level, Kenyan public corporations have played a decisive role in recruiting African capitalists, who form or comprise the "Comprador" class in Kenya. The development of African Capitalists has been achieved at two levels: 1. public corporations have been used by the Government to finance African participation in various sectors of the economy, such as commerce, industry, agriculture and construction to justify the struggle for national independence. True to their name, the "comprador" class so financed, are content to play a subordinate role

to that of international capital in the various sectors of the Kenyan economy. In Commerce, African businessmen own mostly the retail trades and the small wholesale businesses. Most of the larger wholesale businesses are still owned by the European multinational companies and Asian firms.¹² Public corporations in Kenya in response to the external influence and orientation, finance the Africanisation of small retail businesses and village shops. In industry, the role being played by public corporations is not any different. Although there is a lot of talk at the government level, about giving first priority to the industrialisation process in Kenya, to try and remedy the colonial imbalances in this respect, there is very little being done to ensure that the industries being developed are owned locally. Although the Kenya Industrial Estates Ltd, the Industrial Development Bank, an associate company of the ICDC and the Development Finance Company of Kenya, a subsidiary company of the ICDC, are in the forefront to encourage African participation in industry, their impact is still minimal. By 1978, manufacturing contributed about 35 per cent of Kenyas Monetary Gross Domestic Product, an increase of about 15 per cent from 1972. Of this percentage foreign firms contributed about 71.4 per cent. The remaining 28.6 per cent was contributed by local firms, predominantly owned by the non-African Kenya citizens of European and Asian origin. In any event, the activity sector of most industries operating in Kenya are predominantly of two types, import substitution or export oriented firms. Within the first category of industries, we have firms whose operations centre on: the last link in the processing chain, mixing imported chemicals to make or form new

products, assembly of imported components to realise the final products such as the cars, bicycles and the repackaging of bulk imported manufacturing goods. Within the second category of industries, we have extraction and mining industries whose main objective is the extraction of raw materials for export. These types of industries, greatly diminish the impact of the industrial sector's contribution to economy.

*Depth
PWC*

A look at public corporations in Kenya from a functional point of view will reveal that they are one of the most important instruments at the disposal of the government and the multinational corporations, for the exploitation of the natural and the human resources of this country. The solution to the type of problems that public corporations find themselves operating under, cannot lie with the internal re-organisation of the structure of these institutions,¹⁴ but rather with the reorientation of the economy in general. For public corporations to play a leading role in national development, the Kenyan economy in general should be overhauled to be more amenable and responsive to human and domestic needs of the Kenyan peoples. This process would in respect of public corporations mean: the reduction of the dependence on foreign capital by encouraging a more self-reliant approach to the development effort. This will do two things to the contribution of public corporations to the economy: 1. It will reduce the capital outflow from the country in the form of profits, royalties and management fees exported out as returns on investments from the host country by multinational corporations and guaranteed under the Foreign Investments (Protection)

Act.¹⁵ 2. It will reduce the influence of foreign investors and other lending agencies on the investment policies of this country. In Kenya today, the priority of investments is guided by the returns from such investments, rather than their utility in developmental terms for the country as a whole. Short of this prescription, public corporations will continue to serve the interests of international capital, without any beneficial interest being tapped by the Kenyan peoples in general.

In Chapters 1 and 2, we shall study the conceptual and historical development of public corporations at both the global and local levels. In these chapters, we attempt to analyse the development of public corporations within the political and economic settings in which they operate. Historically, public corporations became important features of capitalist production at the end of 19th century and it was not until the 1920s and 1930s that public corporations became permanent features of governments. Because public corporations in Europe and Britain in particular were responsive to the demands of monopoly capital, they were exported to the colonies with colonialism. Kenya as a colony, started utilising public corporations as legal forms adapted from the British experience in the early 1930s. Chapter 2, attempts to analyse the Kenya Government's (both colonial and post-colonial) policies and attitudes towards public corporations. In this chapter, we attempt to set out the areas of the Kenyan economy which have been developed by public corporations and how these areas habitually developed by public

corporations relate to the economic policies of the governments. From an analysis of the roles, objectives and areas of the Kenyan economy that public corporations have operated, one important conclusion emerges. This is that, public corporations have been used in Kenya to foster the private property ownership of one group or another. During the colonial period, public corporations were used by the government to cushion the economic interests of monopoly capital, with benefits percolating to the settler community who were the groundsmen in the production of raw materials and food for metropolitan needs, and thus fulfilled the two most important aims of monopoly capital. In post-Colonial Kenya, the predominance of monopoly capital is still intact. The post-colonial public corporation in Kenya, is an instrument^A political and economic climate for the exploitation of the Kenyan natural and human resources by monopoly capitalism. As the quid pro quo for this role, public corporations are also encouraged by the State, with the help of international capital, to perform some subordinate role of financing African participation in the Kenyan economy.

In Chapters 3 and 4, we attempt to study the roles, objectives and the nature of the Kenyan public corporation through our case study, the ICDC. In Chapter 3, we analyse the autonomy principle and its place in the corporate management of public corporations. Although British theory posits the autonomy theory as an important aspect of corporate management, the experience in the ICDC, seems to be different. First the ICDC's enabling Act seems to have subordinated the corporate powers of the managers of the ICDC by allow-

ing the minister responsible for the corporation to give it directives, both of a general and specific nature, over the administration and management of the Corporation. ¹⁶ Secondly, the managers of the corporation in their discharge of corporate functions feel that they are colleagues of their counterparts in the ministry and always feel free to consult with them over any management matters. In this way, the conventional view that the board of directors of the corporation, on one hand and the ministry officials on the other hand, form divergent groups, which must be reconciled, and which forms the basis of the autonomy theory, becomes in the ^{stage of the} ICDC baseless.

Chapter 4 discusses public accountability and the control mechanisms available for the purposes of surveillance and supervision of the activities of public corporations in Kenya. Like the autonomy theory, the public accountability concept is one which cannot stand the conventional tests and assumptions in the ICDC. Corporate managers in Kenyan public corporations need very little external supervision, least of all from the officials of the ministries responsible for them, because of the informal relations and unity of interests that exists between these corporate managers and the political bureaucracy, who manage the ministries. These two groups of officials, the corporate managers and the politicians, comprise the same social class, the "Comprador" class and need not fear anything from each other. In these

circumstances therefore, the formalistic, legal control set out in the statutes of these public corporations become mere formalities. It is because of this relationship that the so called conventional control mechanisms in public corporations are not workable in Kenya. The law as it pertains to public corporations in Kenya, has for some time now, been sidetrucked in preference for the more workable informal relations between the institutions of control and the public corporations.

Chapter 5, is an evaluation of the performance of the ICDC as a typical public corporation in Kenya. This Chapter is mainly concerned with how far the ICDC can claim to have fulfilled the economic and political tasks set for it by the government. Among other matters, this chapter deals with the ICDC and the mobilisation and extension of the money economy to Africans; the Africanisation programme and finally the ICDC and the industrialisation process. A look at the ICDC and its performance over these matters, leaves much to be desired, because of a major contradictory role that the corporation performs, this being, the encouragement and facilitation of foreign investors into the Kenyan economy. This latter role of the ICDC, neutralises its impact in any other fields or matters.

Chapter 6 is made up of conclusions and broad policy observations on public corporations in Kenya in general. In this chapter, we attempt to advocate

for a broad based outlook for public corporations, which does not merely view public corporations from an isolated standpoint. Public corporations being governmental policy instruments, must be looked at in the totality of governmental policy, if their place in national development must be properly ascribed. A look at public corporations from the purely legalistic or organisational point of view is inadequate and does not recognise the fact that they are mere instruments for implementing the political and economic policies of governments.

This study is mainly analytical, although it does make use of considerable field research. This is firstly, because of the factor of time. Within the period under which this study has been in process, it was not possible for us to carry out as much field research as was initially envisaged to test some of our original hypotheses. We therefore relied on secondary data for most of the deductions we have made. Secondly, our field research was hampered by the response we received from the officers of some of the institutions we intended to study. Most of the field officers were totally unwilling to discuss with us any of the matters of our interest, claiming either that the information requested for was "classified" or "confidential". Apart from the ICDC, all other institutions, including the Ministry of Commerce and Industry and the Inspectorate of Public Corporations, Office of the President, were unco-operative in our quest for

information. Also our initial attempts to study some of the management agreements between the ICDC and its joint venture partners failed because, so it was alleged, management agreements are "confidential documents". Lack of some of the materials we expected, has limited the scope of this work. The bulk of our data sources were secondary, made up of: government policy statements and the ICDC Annual Reports and Accounts.

PUBLIC CORPORATIONS:

A GENERAL THEORY AND HISTORICAL DEVELOPMENT

1. THE DEFINITIONAL PROBLEM

What, one may ask, is a public corporation? Is it possible for jurists and economists to define in precise terms what a public corporation is? An institution of the complexity and magnitude of the public corporation cannot be reduced to a mere definition without serious errors of simplicity. This dilemma however does not make completely worthless an attempted definition, for as Professor Lloyd rightly observes: "although in complex matters, definitions cannot afford complete explanations in themselves, they help in the light of functional expositions, to provide an overall picture and to emphasise certain key criteria".¹ The inadequacy of a mere definition in the case of the public corporation is compounded by the dearth of information and literature on which a general theory can be based. Discussing this general dearth of information and literature on the public corporation, Professor Friedmann observed that: "this institution (the public corporation) is still very much an institution and concept in a state of flux and constant development".² It will therefore suffice, considering these two constraints, to indicate in general terms, what a public corporation is, emphasising its most distinguishing features from the other business organisations.

Our starting point in a bid to define the public corporation is the so-called the "Morrisonian" Concept.³ Morrison, a leading exponent of the public corporation, defined public corporations as business organisations or

entities created by the government and either wholly or partially owned by such governments to manage business enterprises or services on "Commercial lines". Although public corporations are creatures of governments, the "Morrisonian" concept asserts that, the business enterprises so created are separate from the government itself, and should be seen as such. This autonomous nature of public corporations allows for the efficient management of the enterprises concerned. At the same time, in contrast to private enterprise and particularly the limited liability company, the management of public corporations submits to a certain amount of control from the parent ministry or department of the government. The ministerial or departmental control is aimed at safeguarding the "public interest" in the "governmental" enterprises.

The "Morrisonian" concept did not pretend to postulate a new legal form for the public corporation. On the contrary, the "Morrisonian" concept of the public corporation adapted in essence the structure provided by the more popular business organisation of the time: the limited liability company⁴. The legal structure of the limited liability company was adapted, with built-in mechanisms for public control and accountability akin to a governmental department or ministry. In this way, the public corporation became a child of two worlds: the world of the private limited liability company, with the attendant freedom on the part of the directors in the day-to-day management of the corporation, to do anything in the bona fide interest of the enterprise,⁵ and on the other hand, the directors of the corporation submit to the general control and direction of the parent ministry through the minister responsible, who, is in turn responsible to the public through parliament. The

public corporation in these dual capacities has been said to be: "torn between the scylla of commercial freedom and the chrybdis of public accountability"⁶ This combination of freedom over management matters and public accountability over the broad and general policies, so it is said, gives a unique opportunity to the public corporation to manage efficiently governmental enterprises in the "public interest".⁷

The balance between managerial autonomy and public accountability within the structural organisation of public corporations makes them the most appropriate organs for discharging efficiently public functions and interests which public corporations necessarily undertake. The advantages of the flexible company organisational structure and the relative freedom with which the directors of limited liability companies operate on the one hand, and the disadvantages of the rigid government department as represented by the civil service regulations and structure: mainly comprising of the impenetrable bureaucracy and the "red-tape", balance each other out to make public corporations the most ideal business organisations for handling governmental investments. In the words of President Roosevelt in 1933: "public corporations are clothed with the power of government, but possessed of the flexibility and initiative of private enterprise".⁸

In legal terms, a public corporation has been defined as:

"an entity established normally by parliament and always by legal authority, charged with the duty of carrying out specified governmental functions in the national

interest, those functions being confined to a comparatively restricted field and subjected to some degree of control by the executive, while the corporation remains juristically an independent entity not directly responsible to parliament".⁹

This definition seeks to distinguish between the general policy directives applied by the corporation, which originate from the politically accountable minister under whom the public corporation falls and the day-to-day management decisions made by the corporate managers, comprising mainly sub-policies for the proper administration of the corporation. The formulation of these sub-policies in the discharge of the day-to-day administration of the corporation is the exclusive responsibility of the board of directors. It is only over the day-to-day management details of corporate affairs that the board of directors has autonomy from the parent ministry or government department. Professor Robson has with characteristic clarity delineated the management roles of these two organs of the public corporation. He said:

"the public corporation is based on the theory that a full measure of accountability cannot be imposed on a public authority without requiring it to be subject to the ministerial control in respect of its managerial decisions and multitudinous routine activities, or liable to comprehensive parliamentary scrutiny of its day-to-day working. The

theory assumes that policy in major matters at least can be distinguished from the management or the administration; and that a successful combination of political control and management freedom can be achieved by reserving certain powers of decision in matters of major importance to the ministers answerable to parliament and leaving everything else to the discretion of the public corporation acting within its corporate or legal competence".¹⁰

In this work, reference to public corporations, will mean, business organisations established and owned (at least the majority equity shareholding) by the government, but which fall outside the direct control of the government department except for matters of general policy. These business organisations have a measure of autonomy in the day-to-day management of the enterprises entrusted to them, but submit to the general policy directives from the parent ministry. In this way the government controls the overall activities of the management of public corporations, while permitting them enough latitude to dispense the management of the enterprise in their best discretion.

In the wide and varying circumstances in which public corporations are used,¹¹ one may generalise that, they are mainly used to compliment and supplement private enterprise in industry, commerce and for the provision of social services.

The main characteristic features which are usually the subject of debate by most legal writers are:

1. Public corporations are established by statute or some other legal authority. By far the majority of public corporations in Kenya as elsewhere, are established by Acts of parliament spelling out the objectives for

which the corporations are set up. In some countries,¹² this method has been standardised by enacting a public Corporations Act, under whose umbrella corporations are established. In a limited number of cases, public corporations are established under statutory authority. In Kenya, this category of public corporations are in the majority of cases subsidiary companies of existing public corporations. The parent public corporations are normally empowered under their constituent statutes to establish such subsidiary companies for the proper management of their enterprises or services. These types of public corporations are set up under existing law, the Companies Act;¹³

2. Public corporations are independent entities from the government which establishes them. This is what has become commonly known as corporate personality which is acquired by public corporations either on registration or incorporation by statute;

3. Public corporations are administered or managed by a board of directors appointed by the minister responsible for the corporation, from among persons with relevant business experience and expert knowledge;

4. The employees of public corporations are not civil servants and therefore are not subject to the bureaucracy and "red tapeism" characteristic of the civil service all over the world. In this way it is hoped that the employees of public corporations will be enabled to manage the business enterprises entrusted to them more efficiently, free of the strict and elaborate procedure characteristic of government departments;

5. Public corporations are wholly or partially owned (at least the majority equity shareholding - 51 per centum or more) by the government. In some cases the public interest in an enterprise may be far below the 51 per centum set above. In such cases the public interest represented by the shareholding of the public corporation becomes so subordinate to the other private interests that it is difficult to identify the enterprise with the government.¹⁴ In most cases, public corporations will be required to balance their revenue and expenditure over a period of time. Profits generated by the corporation are usually ploughed back into the enterprise or transmitted to the treasury for re-allocation by the state;

6. Public corporations are responsible to the government and parliament through a competent parent minister. The minister and his officers control public corporations under his portfolio by issuing general policy statements, which in turn the corporation must comply with, and lastly,

7. Public corporations utilise some of the attributes of the private limited liability company in their day-to-day operations. For example, public corporations are fully liable in law and do not participate in any of the legal immunities of the government.¹⁵ Although public corporations enjoy in law a private status resembling that of the private limited liability company, they are subject to the control of the government within the limits of the governing statutes because of the public tasks and functions they undertake.

From the foregoing delineation of the characteristics of the public corporation, it will be obvious that the public corporation is neither a limited liability company, a partnership nor a co-operative society, business organisations available to the individual private entrepreneur for the enhancement of his private motive and economic status. The distinguishing mark between the public corporation and these other business organisations is its public nature: the public corporation is established by the state as a public investment as contrasted with the other business organisations which are privately motivated.¹⁶ Whereas public corporations are concerned with the provision of public services of one kind or the other, the other business organisations are mainly concerned with the maximisation of economic returns and benefits for a smaller group, comprising mainly the members of such organisations. It has been observed in this connection that:

"....nationalised industries (public corporations) are not governed solely by the same considerations as private companies and private enterprise in general. In addition to their ordinary economic and commercial obligations, they (public corporations) have responsibilities of a national and the non-commercial kind. Their plans for development and capital expenditure are discussed with the government, and in fixing their prices they must give weight to the considerations of the national interest brought to their attention."¹⁷

In the normal course of business therefore, the company, the partnership and/or cooperative society need not have

regard to considerations of the "public interest" which public corporations are obliged by law and practice to consider. Although the phrase "public interest" has not been clearly and exhaustively defined, and in many cases "public interest" has been equated with the interests of the predominant power groups in any particular country, it is true to say that public corporations give consideration to a wider spectrum of issues of a general and public kind than their counterparts in private enterprises.

II. THE LEGAL ATTRIBUTES OF PUBLIC CORPORATIONS

Public corporations as we have endeavoured to show in the previous section, are creatures of the state. Their evolution is based on the theory that, the management, made principally of the board of directors should be free from the control of the government in the administration of the day-to-day affairs of the corporation, while at the same time, remaining accountable to the government and the public in general, through the line minister on major policy issues. Prime facie, this theory has serious implications so far as the structure and form that public corporation take. This theme will form the subject of our discussion in this section.

As we shall soon see in the next section, on the historical development of the public corporation, the state is not a "mindless organ where contending social forces" meet and their antagonistic interests arbitrated. On the contrary, the state is dominated by considerations of private enterprise and the dominant interests which give effect to the social and economic reproduction of any particular society.¹⁸ Private enterprise could not, in so far as the state was its creature and under its predominant direction, rise above its own legal forms when it came to establishing the form and structure that the new institution, the public corporation was to take. The Company law form, which had been used so successfully for capital accumulation during the phase of capitalist development now known as the industrial revolution, was again used to provide the basic structure on which the public corporation was built.¹⁹ Company Law was however remodelled to take account of the "public" nature of the governmental enterprises run by the public corporations. This as we have already observed was done by requiring the corporate management of public corporations to submit to governmental control, unlike the limited liability company. For public corporations, the board of directors was not the final organ of policy formulation and corporate management as the case was in the limited liability company. The government minister, under whose portfolio the public corporation fell, played an important role in the management of corporate affairs of the corporation by being called upon to formulate broad based policies which the corporation must have regard to in its day-to-day functions. The government minister in his role as a corporate manager is more than a mere official of the corporation who formulates general policies which the corporation must adhere to. The minister is something akin to the members general meeting in the company layout, with far more coherent powers.²⁰ Apart from formulating policies of a general character which the corpo-

-ration must adhere to, the minister is something akin to the members general meeting in the company layout with far more coherent powers.²⁰ Apart from formulating policies of a general character which the corporation must carry out, he is also charged with the function of supervising the activities of the corporation to bring them in line with government ideals.

Public corporations, taking so largely after the limited liability company also became clothed with the legal attributes developed and utilised by the limited liability company.²¹ The common law concepts from the company law which the public corporation adopted include the following:

1. a separate legal personality which is the central attribute of the company.
2. the right to have a name, sue and be sued in that name;
3. the power to own and dispose of property ⁱⁿ its own name;
4. the power to borrow money in its own name--although this power is limited to a certain degree. This will be the subject of discussion in a latter part of this study, and

5. being a separate legal person in law, the public corporation is subject to the ultra vires doctrine. These legal attributes were developed by the common law of England for the limited company in the 18th and 19th centuries²² and imported in this country as part of company law²³ and by stipulation of law.²⁴ We now turn to a discussion of these legal attributes.

1. THE SEPARATE LEGAL PERSONALITY

Public corporations are separate legal persons from the government which establishes them. This follows from the desire to have public corporations freed from the bureaucratic inhibitions and "red tapeism" so closely associated with government departments and ministries, which structures or forms comprise the alternatives which the government might wish to use to run or manage corporate businesses. The concept of separate legal personality makes public corporations autonomous entities, which by law are entitled to manage or administer their day-to-day corporate affairs. The concept of autonomy in the management of the corporate affairs of public corporations is an outgrowth from the limited liability company experience. The government is only in law limited to the formulation of broad policies through the minister responsible or under whose portfolio the corporation falls. As already observed, the autonomy concept in corporate management is closely associated with the efficient management of the corporate enterprise. In the Company law experience, the concept of separate legal personality was set on a firm footing in the famous case of Salomon v Salomon & Co. Ltd.²⁵ In this case, Salomon, one of the seven members of Salomon & Co. Ltd, a company limited by shares, which had gone into liquidation and was not solvent enough to pay its creditors, was held by the high court and the Court of Appeal, to be responsible to the unsecured creditors of the company, because, so it was alleged the company was a "mere sham" and an "agent" of Salomon the previous

proprietor of the shoe business. Salomon it was alleged had remained the proprietor of the business which he had managed for a long time, even after he and his family members, incorporated the Salomon & Company Limited. Overruling the decisions of both the High Court and the Court of Appeal, the House of Lords succinctly said that the company was in law a separate person from the members who subscribe to its memorandum of association. Once the company has gone through the process of incorporation, it becomes a different legal person from its members. It was not possible under this legal doctrine therefore, for the company to be an "agent" of one of its members - Salomon, the previous proprietor of the business. In the words of Lord Halsbury L.C.:

"either the company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be agent at all; and it is impossible to say at the same time that there is a company and there is not".²⁶

Lord MacNaghten in the same case, put his point even more effectively when he said:

"the company is at law a different person, altogether from the subscribers to the memorandum of association, and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are the managers, and the same hands receive the profits, the company is not at law an agent of the subscribers or a trustee for them. Nor as subscribers, are members liable in any shape or form except to the extent and in the manner

provided by the Act"

The separation of the corporate person from its human members (and for our purposes, from the state) is said to be "opaque and impassable". It is only in very few situations indeed, that this corporate veil will be ignored, or as it is put in company law parlance: "the corporate veil lifted and pierced"²⁸ Apart from these instances, the company or corporation should not be linked in any way with its members, except as members, not as owners, trustees, agents or any other legal position which challenges the position of the artificial legal person. This doctrine of separate legal personality has certain legal consequences flowing from it, some of which are not wholly beneficial to the members (and in our case the state).²⁹ To this extent, the decision in Salomon v. Salomon & Co. Ltd.³⁰ has been said to be "calamitous because, corporate personality works like a boomerang and hits at the man who was trying to use it".³¹

The boomerang effect (of this doctrine) notwithstanding, it can be observed that the major effect of the doctrine is to separate the businesses and activities of the corporations from those of its members, be they human beings or institutions, that establish them. This doctrine applied to the public corporation implies that there cannot be any confusion as to the ownership of the enterprises managed by the corporation with those that directly belong to the state. On matters of ownership, the state falls into oblivion immediately after it has finalised the process of incorporation. This too implies that in law, the activities and behaviour of public corporations should not in any way affect the image of the state,

although it is actually the state and the pre-dominant class interests in the country that control the state, that use and stand to benefit from the activities of public corporation, a very ideal institution for serving bourgeois interests and objectives: without ever being linked together. In this way, private enterprise is completely cushioned. More importantly, the doctrine protects bourgeois interests by representing the state as a neutral organ in society, not concerned about economics nor participating in the management of the enterprises being administered by the public corporations, because these businesses or enterprises in law do not belong to the state, but rather to the public corporations themselves, being separate legal persons.³² If the performance of public corporations is poor or unmerited, the state should not take the blame. The public corporations are autonomous!

2. THE RIGHT TO SUE AND SUED IN OWN NAME

The state enjoys certain immunities and privileges under the Government Proceedings Act.³³ Notable among these immunities and privileges is the non-availability of certain remedies against an aggrieved party, suing the state or state department. A Court of law in this country cannot order the remedies of specific performance,³⁴ injunction³⁵ or attachment³⁶ against the state. Also important, is the fact that, government departments can only sue or be sued in the name of the Attorney-General who is the legal advisor to the Government. Public corporations being separate legal persons from the government, do not share in these governmental privileges. Public corporations on formation have a right

to a name and can sue or be sued as separate and fully responsible legal persons in their own names. One other result which flows from this legal attribute is that public corporations are taxable unlike other state or governmental departments.³⁷

Why has it been found appropriate to exempt public corporations from these state privileges and immunities? Here again the true nature and role of public corporations is revealed: public corporations are business organisations like any other and therefore must not be protected under the banner of state privileges and immunities. Because of their business nature (public corporations are expected to operate on "commercial lines"), they are expected to do a substantial amount of business side by side with other private firms and therefore should not hide their shoddy performance under the privileges that the state departments enjoy. This gives an opportunity to the private firms to compare their performance with that of the public sector.

3. THE POWER TO OWN AND DISPOSE OF PROPERTY

As a separate legal person from the government ministry or department under whose portfolio the corporation falls, the public corporation can own its own property. Public corporations are usually empowered under the enabling statutes to acquire and dispose of property in their own names. Like in the case of Salomon v. Salomon & Co. Ltd.,³⁸ it is not possible to say after incorporation, that the property of the corporation is also the property of the state merely

because the state had a hand in establishing the public corporation. The two entities, the public corporation and the state must be seen as separate and the property they hold as different. A change in the composition of the board of directors or indeed in the government leaves the corporation quite unaffected, unless the changes touch on the corporation itself by statutory amendment. Because the property the corporation holds belongs to it and not any other institution or organ, the corporation and not the institution is allowed a relatively free hand to manage and administer it.

4. THE POWER TO BORROW BY PUBLIC CORPORATIONS

Just as public corporations own and dispose of property in their own names, so they have the statutory power to borrow money for the advancement of their corporate functions, in their own names. Like the company, public corporations use the highly beneficial floating charge as the security for their borrowing. Because the business turn-over of public corporations is rather high, it is usually not advisable for the corporation to use its fixed assets as a security for borrowing. The use of the corporations fixed assets as a security for borrowing can inhibit the course of business of the corporation by tying some of the business items down for too long while acting as security. A floating charge therefore, is used by the corporation to secure all its borrowings. The charge functions very simply: it "floats like a cloud over the whole assets of the corporation from time to time, falling within

the generic description, but without preventing the disposal of those assets in the usual course of business until something occurs to cause the charge to become crystallised or fixed." ³⁹ Until something occurs to crystallise the charge, it hovers over the stock-in-trade of the corporation. What acts as the security of the corporations' borrowing therefore is the property of the corporation when the charge has become crystallised and not before. In this way, the floating charge enables the corporation to carry on its normal day-to-day business transactions without any inhibitions. In addition to the public corporation using this device, corporate borrowing is normally guaranteed by the state through the treasury. These two factors, make public corporations such secured borrowers. But we shall see how this power is to some extent limited by the requirement that all corporate borrowings must be approved by the ministers of Commerce and Finance. ⁴⁰

5. PUBLIC CORPORATIONS AND THE ULTRA VIRES RULE

A corporation, owing its incorporation to a statutory instrument cannot do anything beyond the powers expressly or implied conferred upon it by the enabling statute. Any act by the public corporation, whether by the board of directors or servants of the corporation of any calibre, in excess of the statutory provisions is ultra vires the corporation and void to the extent of the excessive exercise of such power. An ultra vires act, being, beyond the powers of the corporation, does not bind the public corporation.

This is so, even if the corporation purports to ratify the ultra vires act, because really the public corporation lacks the legal capacity to act in the way or in the capacity it purports to act. This type of situation should however be distinguished from an entirely different principle, when the board of directors of the corporation exceed the powers delegated to them by the corporation of an intra vires act. When the directors have exceeded their powers, the corporation may not be bound by such an act because, its agents have exceeded the authority, expressly or impliedly granted to them. In this case however, no question of capacity arises and the corporation may ratify what the directors may have done.⁴² This rule is very convenient to the corporation and serves two main purposes:

1. the rule restricts the functions of the public corporation to those statutorily authorised and not any other that either the corporation or the directors in their personal whims feel should be added. If any other functions which were not statutorily anticipated in the enabling statute are performed by the corporation, the corporation will be censored in this exercise by the state. In this way the state ensures that the corporation established to manage a rubby mine in Taveta area, does not find itself doing business in a fried Fish and Chips Kiosk in the city centre in Nairobi.
2. The creditors to the corporation have an interest in the activities of the corporation as a security for their credits to the corporation. The creditors look forward for payment from the funds of the corporation earned after performing its authorised

functions and powers. The ultra vires doctrine, protects the creditors, by ensuring that the corporations' money and time are not dissipated on unauthorised activities, thereby depleting the corporations' available funds to pay its legitimate debts.⁴³

Although the effect of the ultra-vires doctrine has been whittled down by the practice of companies and corporations alike, of drawing their objectives in such general terms by including what has become known as the "incidental business or objects clause", the ultra vires rule still protects sufficiently, the two main interests we have alluded to above: those of the shareholders and the creditors. The effect of this rule was summarised by Lord Cranworth as early as 1855, when he said:

"It must therefore be now considered as a well settled doctrine that a company (and for our purposes, the public corporation) incorporated by an Act of Parliament for a special purpose cannot devote any part of its funds and time to objects unauthorised by the terms of its incorporation, however desirable such an application may appear to be".⁴⁴

It is not difficult to see how the ultra vires doctrine protects the corporate businesses and interests of private enterprises, in which, those who control the state machinery have overriding interests. Public corporations are forced to limit their activities to the "declared" interests and areas only, leaving

all the rest to private entrepreneurship, which public corporations must be seen to supplement. In this way the state is used as a liaison organ between private enterprise and public corporations to ensure that public corporations are restricted to areas of "public interest". We shall see in the next section that these so called areas where the "public interests" should be confined are no more than the unprofitable areas of the economy which are considered inappropriate for private enterprise to undertake.

In conclusion of this section, it may be observed that the legal⁴⁵ fiction espoused by the legal personality principle is not an empty shell or slogan. Some serious consequences flow from it. As we have endeavoured to show, these consequences tally with the aims of private enterprise. Through these corporate legal attributes, most of which were developed for the limited liability company and private enterprise in general, public corporations bolster their interests and functions. In fact the principle of separate legal personality as applied to public corporations is used to alienate these institutions from the so called "public interest", which they were established to properly serve!

III. THE HISTORY AND DEVELOPMENT OF THE PUBLIC CORPORATION

Historically; public corporations are new business organisations compared to the limited liability company, the partnership or even the cooperative society. Public corporations became a common feature of capitalist production to a noticeable extent only in the 1920s and

1930s. In this section, we shall try to grapple with the important questions: What factors led to the evolution of public corporations at this time? Put differently, what economic forces nurtured the public corporation at this particular time in the development of mankind? Or are public corporations creatures of "practical needs" as has been asserted by some bourgeois scholars.⁴⁶ These questions implicitly raise issues which can only be answered by looking at the historical development of the public corporation in the context of the socio-economic forces which nurtured this new but important politico-economic institution. It is only by studying the public corporation within a historical context that we can come to grips with the true nature and roles that this institution plays in our socio-political and economic development.

Professor Friedmann lists a number of factors which he asserts led to the evolution and subsequent development of the public corporation as an institution of socio-politico-economic importance.⁴⁷ These factors are:

1. that, it had become apparent in the 20th century, that the functions of the state had changed to the extent that new institutions with new features had become necessary. Commercial and industrial functions had become proper governmental functions. To perform these new but important functions, the new legal organisations were needed and therefore created by the state. These new legal organisations were mainly comprised of public corporations;

2. that, public corporations were the special legal form at the disposal of governments to fulfil the new governmental functions, because their theory and structure enabled governments to control the enterprises managed and administered by public corporations without underpinning them to the bureaucratic practices and "red tapeism" so rampant in governmental departments, and the same time, the enterprises are managed efficiently through the managerial autonomy of the board of directors;
3. that, socio-politico-economic ideas in the 20th century, had changed to the extent that new demands were made unto the state to exercise responsibility over certain economic and social life which had hitherto been controlled by private enterprise, and lastly,
4. that, the growing technical complexity of socio-political and economic functions made it indispensable for the administrative autonomy of public utilities. This ensured that administrative agencies of public utilities were sufficiently adapted to change.

Whereas these factors point to the increasing use of public corporations by states of whatever ideological background, at the beginning of this century, these factors alone shed little light, if any, on the historical necessity for the mushrooming of public corporations. What socio-politico-economic ideals had "sufficiently changed" to allow governments to play a more leading role in the

economic life of their countries? What "technical complexities" resulted in the use of public corporations as "independent administrative" and "managerial institutions" to keep a breast with developments? And lastly, why was private enterprise at this time in its development, willing to operate side by side with governmental enterprises, which enterprises were unknown hitherto before? Answers to these questions which seek to expose the root causes of the evolution of public corporations, are not normally the pre-occupation of legal writers, and yet it is only by grappling with these issues that we can understand the true nature and uses to which public corporations have been put. Answers to these questions lie in the political economy of monopoly capitalism, the phase of the capitalist mode of production prevalent at the beginning of the 20th century. To this we now turn.

By the 1870s, in the very womb of Laissez Faire economics, was germinating a superior phase in the capitalist mode of production, which became known as monopoly capitalism. ~~Monopoly capitalism~~ was the very anti-thesis of Laissez Faire capitalism. This phase of capitalism production was characterised by the concentration and centralisation of production in fewer and fewer hands. The free market mechanism which had been the moving philosophy in the era of Laissez Faire capitalism also known as classical capitalism, became obsolete and wasteful, in the sense that many uneconomical units of production competed against each other for the same market, thereby raising the costs of production. Laissez Faire capitalism could only perpetuate itself as a mode of production at the risk of over-production and the resultant lowering of prices by the operation of the law of supply and demand. The lowering of commodity prices led to an

150.000
15 000 000
15 million per
month
1,000,000
2,000,000

economic crisis in the 1870s. By the 1880s, firms which had been locked up in cutthroat competition against each other, began to form "associations and combinations" at both the production and marketing levels. These "associations and combinations" aimed at the restoration of commodity prices to the levels they had been before the economic crises of the 1870s. Professor Nabudere has observed on this phenomenon that:

"the small competitive firms and the competition generated by the cheapening of production in major industries, as a result of innovations and inventions of this period, merely made the crisis worse. Thus we observe as early as the 1880s, the emergence of associations and combinations formed by industrialists to counteract this competition... The purpose was to overcome overproduction by selling above the new costs of production in order to restore profitability. A market became available only at the higher monopoly prices. This arrangement became the general feature of a new imperialism, much more aggressive than the free trade imperialism of the early 19th century".⁴⁸

The concentration and centralisation of production in fewer and fewer hands did not only spell danger for the small individual entrepreneurs who were forced out of their professions, trade or businesses, but also posed danger to the very notion of "democracy" as it was known in the western world. The danger of economic anarchy became a real one. Another danger was posed by this new phase of capitalist production, and this

was that: if this economic anarchy was allowed to continue, there was danger of further economic crisis, in that, the monopoly companies in their new leash of economic power could keep production at low levels in order to reap the maximum profits for their products. To ward-off this new economic crisis, the state which had hitherto been content with: "the keeping of law and order", was prepared to play a more active role in the economy, along side other direct interventions. It is in this respect that governments, mindful of the impeding economic crisis established public corporations. Their role was to cushion the whole capitalist system from collapse! To do this, the state also introduced other direct measures which aimed at regulating and standardising production and the pricing mechanism.⁴⁹ These measures, were undertaken by the state with the long term interest of monopoly capitalism in mind.

Most orthodox legal writers,⁵⁰ on the other hand, argue that the state was willing to play a more active role in the economy for two main reasons:

1. that capital was scarce or unwilling to move to particular sectors of the economy. The Economist Magazine, discussing this point observed that: "traditionally, the most likely field for state enterprises in an expanding economy is where the risks are great and the private entrepreneur - in an age of capital scarcity and high taxation of profits - may well hang back".⁵¹ This view of the use of public corporations delimits them for use in the new unprofitable enterprises in the economy. Public corporations are expected

to initiate and develop new areas in the economy and those which cannot yield a return in the form of super-profits for the private entrepreneur. In the case of new industries, this theory stipulates that: once the enterprise has become viable, it be de-nationalised by selling the enterprise to private entrepreneurs. At this stage, the risks and the uncertainties that go with the production and marketing of new products will have been diminished, assuring the in-coming entrepreneurs a steady flow of profits.

2. The state participates in the economy when "political necessity" requires that the state intervenes in the interests of the "general" development of the country concerned. This is what has been called the "sinking sands" theory. When private enterprise is unwilling or unable to move into a particular sector or area of the economy, then the state should intervene by establishing public corporations to initiate development in the sectors or areas concerned in the interests of general development, or else, the sectors or areas of the economy lag behind in terms of the overall development effort in the country. Such corporations as: the Tennessee Valley Authority in the U.S.A. - 1933; The Tana River Authority,⁵² The Lake Basin Development Authority⁵³ and the Kerio Valley Development Authority,⁵⁴ among others, are examples of public corporations established by states on the "sinking sands" theory. Other occasions when "practical necessity" has required the establishment of public corporations so it has been argued, includes: 1. the manufacture of military hardware "which is the undisputed area of production for the

state! The state undertakes this responsibility to live up to its seeming impartiality in the class struggle that consumes society. Because the state is in charge of the war machinery, the oppressed class or classes in that society cannot accuse the dominant class of using and being in charge of this war machinery. If military hardware, were to be produced under the direct control of the private entrepreneurs, this "neutrality" of the state would be immensely diminished; 2. during periods of economic crisis, the state undertakes or plays a more direct and active role in the economy than ever before. A look at periods of economic crises in the history of mankind will confirm this phenomenon. The Tennessee Valley Authority⁵⁵ in the U.S.A.; was incorporated at the peak of the great depression in 1933; the Land and Agricultural Bank was established in 1932 in Kenya to resuscitate the colonial settler economy; the Industrial Development Corporation,⁵⁷ the precursor of the Industrial and Commercial Development Corporation was established in 1944 at the peak of the Second World War and in Britain, a whole host of public corporations,⁵⁸ were incorporated between 1945 and 1948 during the period of economic crisis which resulted from the Second World War.

Whereas the use of public corporations on the occasions mentioned is indisputable, most of these writers furnish no explanation(s) as to why the state should partake a more direct and active role in the economy now than ever before. Why was the state more amenable now to the needs

of the economy and "general" development than ever before? To answer this question properly, we have to look at the nature of the state itself during the period of investigation. One thing which is notable and which will become apparent later on, is that: there had occurred substantial changes at the economic base from the 1850s onwards in the capitalist system, which marked the demise of the Laissez Faire phase of capitalist development. Laissez Faire capitalism could no longer keep abreast with economic factors. Or put in another way, Laissez Faire capitalism could no longer regenerate its own reproduction, and it was rendered with the passing of time, moribund. With the degeneration of Laissez Faire capitalism, there was the progressive development of monopoly capitalism as the next most logical and viable economic system. The development of monopoly capitalism from the ruins of classical economics carried with it new concepts and perceptions about the state, free from the inhibitions of the old phase of capitalism which were no longer relevant for the economic needs and programmes of the new period. A state that was more subtle in its support of the dominant class interest in society, and yet seemingly mindful of the plight of the exploited majority of that society was the creature of this revolution. Karl Marx rightly observed that the liquidation of free competition and its replacement by monopoly capitalism gave the state this new perception. He said:

"free competition which was typical of the classical capitalism of the past will inevitably give way to the production relations based on monopoly domination; and that would inevitably be accompanied by an increase in the economic role being played by the state." 59

Why was it only the state that could save capitalism from its collapse by injecting into the economy direct investments through public corporations? An explanation of this phenomenon is to be found in the nature of the state itself. To this we now turn.

Perhaps more than any other institution, the state is one which is surrounded by controversy and constant debate. The controversy surrounding the nature and role of the state is built around two arguments, diametrically opposed to each other. On the one hand, the state is seen by bourgeois scholars, bearing the Hegelian imprint as the "guardian of the general interest of society and the law as the embodiment of freedom.⁶⁰ This group of scholars see the state as a centralised power which results from a balance the various socio-politico-economic interests in any country. This view stresses that, the state is an embodiment of "justice" and "public interest", encompassing the community as a whole. The bourgeoisie therefore mystify the state as a neutral institution whose main objective is the "public good". Public corporations as creatures of the state, enhance the economic well being of its people and are endowed with this neutrality. Public corporations by this token, are also instruments aimed at the "public good" of the "general public" as a whole. It was in this light that John Maynard Keynes, a leading bourgeois economist of the monopoly capitalist era, viewed public corporations as major instruments of economic development which governments were urged to use more frequently. Keynes unequivocally asserted that:

" progress lies in the growth and recognition of semi-autonomous bodies within the state, bodies whose criterion of action within their own fields is solely the public good as they understand it, and from whose

deliberations, motives of private advantage are excluded, though some place it may still be until, the ambit of mens' altruism grows wider, to the separate advantages of particular groups, classes or faculties, bodies which in the ordinary course of affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of the democracy through parliament".⁶¹

But is the state a neutral embodiment of "justice" and the "public interest"? Does the state rise above the sharp class interests that consume society in a capitalist state? And finally, is it true to say that the creatures of the state: the public corporations, are institutions "whose sole criterion of action is the public good"?

A look at any state in a capitalist society, broken up into classes: in their relationships to the means of production and labour,⁶² and which classes are pitied unto each other in endless class struggles, will reveal that it is not the embodiment of "justice" and the "public interest". As will become apparent in the latter parts of this section, "the conflicting strivings in any society among its members stem from the differences in the position and mode of life of the classes into which the society is divided"⁶³ As Marx observed: "the history of all hitherto existing society is the history of class struggles: freeman and slave, patrician and plebeian, lord and serf, gild-master and journeyman, in a word, oppressor and oppressed".⁶⁴ The state more than any other socio-politico-economic institution in society participates in the "conflicting strivings" of the classes which comprise that society. This is precisely because the state, unlike it is represented

in bourgeois scholarship is one of the very products of the constant antagonisms which have consumed society since eternity. The state is only one of the superstructural features of any society which must necessarily depend on and is a product of its material being. Explaining the importance of the material being of any society as the determinant feature, Marx said that: the mode of production of the material life of any society conditions the social, political and intellectual life processes in that society in general.⁶⁵ The state is merely a product of the economic base and its features in any particular society is determined by the relationships of production which exist in that society. Marx therefore, put economics at the centre of everything else, and every action, institution or even idea in that particular society, be it social or political, can only be fully understood and explained in the totality of its relationships with the economic causes and effects. It is not possible therefore, against the conclusion of Keynes and his contemporary bourgeois scholars that an institution which is itself the creation of particular economic conditions can operate free of the interests of those economic conditions. The state is a "class" creation which is incapable of any impartiality and neutrality in the face of the raging class struggles between antagonistic classes.

The Marxist theory of the state in contradistinction to the bourgeois theory asserts on the other hand that, the state is merely an administrative, executive and legal machinery by which the ruling class(es) in every society ensures its (their) control over the

means of production. The marxist theory asserts that the state is nothing more than an instrument of class oppression which will wither away with the collapse of class society. In the words of Marx, "the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie" ⁶⁶ In the Marxist view therefore, the state does not act as the point where the various contending social forces in a class society meet, but rather as an instrument which expresses the very dicisiveness of society into antagonistic classes. Fredrick Engels expressed this feature with characteristic clarity. We will quote him at length to bring out the full effect of what he said. Engels said:

"the state is by no means a power forced on society from without; just as little is it "the reality of the ethical idea" "the image and reality of reason" as Hegel maintains. Rather it is a product of society at a certain stage of development, it is the admission that society has become entangled in an insoluble contradiction with itself, that it is split into irreconsilable antagonisms which it is powerless to dispel. But in order that these antagonisms, these classes with conflicting class interests might not consume themselves and society in a fruitless struggle, it becomes necessary to have a power, seemingly standing above society, that world alleviate the conflict and keep it within the bounds of 'order', and this power of society but placing itself above it, and alienating itself more and more from it, is the state" ⁶⁷

The economic interests of the class(es) that control the means of production and appropriate labour is the same class(es) which also predominates and control the state and its functionaries. In the long run the state becomes pre-occupied with the defence of the economic interests of the dominant ruling class(es) more or less exclusively. The intervention by the state in the economy through Public corporations is therefore no coincidence! The "class" state aimed at bolstering the interests of monopoly capitalism, the predominant phase of capitalist production at the beginning of this century, after the demise of the Laissez Faire capitalism. Public corporations are not innovations for balancing and bolstering the "public interests" as most bourgeois writers would like them represented, but rather, they are instruments, like their creator, the state, for cushioning the interests of monopoly capitalism. Professor Nabudere came to this conclusion in his study of monopoly capitalism. He writes:

"The intervention of the state in the economy through the various forms of public expenditure and arms of production in particular assisted monopoly capitalism in increasing the productivity of labour. The state engaged in its formal functions of creating the stable conditions of class oppression that are essential to monopoly capital; and financed the so called 'Wasteful production' which is in any case part and parcel of monopoly capitalism. More importantly it thereby made possible a growing profitability for monopoly enterprises. Were

this not so, the system, given its inherent contradictions, and in particular the class contradictions, would have faced irreversible crisis".⁶⁸ (Our emphasis)

Between these two almost diametrically opposed views of the nature and role of state, it would seem to us that the latter, is the more realistic, because it lends credence to the fact that the state as a matter of fact, hardly ever identifies itself with the plight of the majority poor of any society in any serious way, unless of course, it is doing so to avert some crisis. In times of crisis, it is imperative that the state should act more favourably to the majority poor to avert the sharper class contradictions that threaten the very economic basis or foundation on which the society and with it the state are built. This view has also been expressed by the protagonists of the former view - that the state is an instrument of "social cooperation", although this same group recognises the other opposite view, the marxist view as the more primary role of the state. In an article setting out the chronological development by Marx of his views and the theory of the state, Miliband argues, drawing evidence from Marx's writings, that although Marx and Marxism primarily view the state in its "oppressive" role, they also hold a secondary view that "the state is an independent organ free from and superior to the social classes, and that it is the dominant force in society rather than being an instrument of the dominant class"⁷⁰ This argument is based on the observations by Marx that at certain historical periods, particularly in England and France, "it is not the ruling class as a whole, but rather a fraction of it, which controls the state and that those who actually run it may well belong to a class which is not the economically dominant class".⁷¹

As plausible as this argument may sound, it fails to recognise two important points. First, this argument fails to view the ruling group in any country within their class context and the interests they espouse. The ruling class need not be represented within the state functionaries by the same persons or indeed at all levels. Different sections of the ruling or predominant class play different and apparently varied roles within the state set-up. Under the doctrine of separation of powers, a constitutional law principle on which is built the organisation of the modern state, small sections of the dominant class play different roles within the state functionaries. The legislature, mainly performs the role of policy formulation, the executive, that of policy implementors and lastly the judiciary performs the role of arbitrators.⁷² Whereas these "fractions" of the state seemingly perform different roles, each of them plays a primal role in safeguarding the predominant interests of their class as a whole.

Secondly, this argument fails to appreciate the fulness of Marx's theory of the state, because it was only after coming to the conclusion that the state is an instrument of oppression by the minority classes over the majority havenots, that he assigned to this very institution the task of suppressing the "capitalist roaders" after the working class in a socialist revolution do away with social classes and class rule, during the transition period to communism. Marx observed that: "between capitalist and communist societies lies the period of the revolutionary transformation of the one into the other. There corresponds to this also a political transition period in which the state can be nothing but the revolutionary dictatorship of the proletariat",⁷³ Instead of its characteristic

use as an instrument of oppression of the majority by the minority, during the transition period, the "oppressive" state will have been changed qualitatively by the socialist revolution, and will aid the working class in their new won revolution to oppress and suppress the remnants of the class interests and demands of the minority oppressors who will have been overthrown in the socialist revolution.

How does this marxist theory of the state relate to the circumstances of the colonial and neo-colonial territories and peoples, comprising mainly of the third world countries? A debate has been raging on as to the nature and role of the state within the colonial and neo-colonial countries for sometimes now, since about the early 1970s.⁷⁴ The gist of the debate comprising the writings referred to above is that, the state within the colonial and neo-colonial or peripheral societies must be looked at with one consideration in mind. This is the colonial legacy. During the colonial era, monopoly capitalism used the colonial state as the organised central point from whence it could tap the natural and human resources of the colonial territories. This was because, the colonies were basically still backward and non-monetarised; basically subsistence type-economy. To break this subsistence orientation, the colonial state was used to force the inhabitants of these territories into the money economy.⁷⁵ This was the process of incorporating the colonial peoples into the capitalist economic system. It was by this process that the colonies were forced to satisfy the needs of monopoly capital in the metropolitan countries. In performing this role, the colonial state was nothing but an instrument of monopoly capital, which sought to fulfil the demands of monopoly capitalism over the colonies,

namely: the supply of raw materials and foodstuff for the metropole; acting as market for the manufactured goods from metropolitan industries and finally acting as a market for monopoly capital.⁷⁶ It does not arise from the abundance of literature on this matter therefore that the colonial state was an "arbitrator" between the colonial peoples and monopoly capitalism. It is worthy noting that, although the colonies had basically feudal and subsistence economies, where capital was not yet destined to play an important role, the fact of colonialism alone meant the imposition on the colonial peoples some of the social values and relations of capitalist development. It has been observed to this end that: "With the spread of the dominant reproduction dynamics to a world level, the pre-colonial self-centred development of the peripheral societies was blocked, being transformed, in regionally differentiated scope and form depending on the historical and natural conditions, into a complementary and subsidiary system attached to the metropolitan system"⁷⁷ It was due mainly to the fact that capital was imposed on a predominantly inferior peoples of the peripheral societies, that it was possible for the exploitation and pillage of the colonies to the extent undertaken, and thus denying the colonies an opportunity for the internal accumulation of capital,⁷⁸ which is so important for regeneration.

During the colonial period therefore, the state assumed the role of an administrator and organiser of certain important activities in the place of the bourgeois class, which was either too weak or absent. It is because of this fact; the lack of a strong class, that the state became the most centralised power which directly appropriated a large part of the economic surplus and deployed it in bureaucratically directed economic enterprises in the form of public corporation, in the name of promoting economic development.⁷⁹ The most important

thing to note about the "state" appropriation of the economic surplus in the colonies is that, this activity was geared towards the development of capital within the context and limited interests of the metropolitan ruling classes. It is in this light for example, that we should view the conflicts which existed between the colonial state and the local settler community in Kenya. Whereas the settlers increasingly advocated for policies which would eventually make the colony autonomous from the hegemony of the metropole, the state, echoing the policies of the metropolitan bourgeoisie insisted that Kenya was to remain part and parcel of the British empire. The metropolitan bourgeoisie won the day, dispelling the chances of the local settler community in Kenya holding sway in the economic matters of the colony.⁸⁰

In the post-colonial era, the state has continued to suffer from some of the hang-ups of the colonial period. The state in the neo-colonial or peripheral societies has continued to play the role of a central organised authority ensuring the continued underdevelopment of the peripheral states within the capitalist system. This centralisation of the power of the state, ultimately leads to the "overdevelopment" of the state functionaries within the neo-colonies in comparison to the classical capitalist states in the metropole, where the more advanced bourgeoisie can truly claim to be strong and independent. Indeed as Saul observes, the neo-colonial states in East Africa for example, became "overdeveloped" as a "need to subordinate pre-capitalist, generally non-feudal social formations to the imperatives of the capitalist development."⁸¹ It follows therefore as Alavi and Shivji concluded,⁸²

that, those in control of the machinery of the state in the neo-colonies (commonly referred to as an oligarchy), are under the direct thumb of the metropolitan bourgeoisie. The real "socio-economic base" of those who control the states in the peripheral societies lies with the international bourgeoisie, and their role within the state is merely that of intermediaries. This is the historic mission of the indigenious ruling class in the peripheral or neo-colonial states! This must be necessarily so, because independence merely managed to break loose the direct political control, but did nothing by way of restructuring the economic base on which colonialism was constructed. The socio-economic formations of the colonial era are still prevalent in the neo-colonies and with them also are present the socio-economic relations.

The neo-colonial state therefore performs the role of "protector" of the metropolitan economic interests, with minor appeasements to the indigenious population. This theme will form the basis of a more elaborate discussion later, when we discuss a Kenyan public corporation, the I.C.D.C. and its role in national development. It is in this context that we shall attempt an appraisal of the Kenyan state and the public corporations which it creates.

CHAPTER TWO

PUBLIC CORPORATIONS, POLICIES

AND

POLICY FORMULATION IN KENYA

Introduction:

The evolution of public corporations met with varied reactions in different countries. The hostility of the American Congress to the Tennessee Valley Authority and the distrust shown by the British Conservative Party towards Parastatals, after the Second World War, are cases in point. In this Chapter, we intend to examine the reaction of the Kenyan Governments (both colonial and post-colonial) towards public corporations. Our main concern will be an assessment of the official government policy in facilitating or hindering the functions public corporations perform. Our coverage in this chapter is what has been called "the process of tracing the transformation of public corporations from a theoretical principle to the stage when they take their place among other legal forms".⁸³ The importance of this process or exercise is rather obvious considering the close working relations between public corporations and the state. The objectives, whether political, social or economic which make up the functions of public corporations and the state is therefore one of paramount importance in order to understand the true nature of public corporations.

This Chapter will be divided into three main parts: part one will concern itself with the evolution of public corporations and their historical development in Kenya; part two will be about the objectives

for establishing public corporations by the Kenyan state and part three will be concerned with the extent and use of public corporations in Kenya.

II.

PUBLIC CORPORATIONS:

POLICIES AND POLICY FORMULATION IN KENYA.

In this section, we shall look at government policy in two parts. The first part will be concerned about the colonial Government policy towards public corporations. The second part will deal with the post-colonial Government policies as regards public corporations.

(1) POLICY FORMULATION ON PUBLIC CORPORATIONS IN COLONIAL KENYA

By the 1930s, public corporations were being visibly used by the colonial Government in Kenya as instruments for development. This was not because public corporations had spontaneously developed out of the productive relations at the time in the colony of Kenya as contrasted with the development in the metropole. On the contrary, the colonial Government in Kenya established public corporations in response to the development of the productive forces in Britain. These productive forces held sway on the colony. Public corporations in Colonial Kenya were established in disregard of the economic relationships between these institutions and the predominant mode of production in the colony. At this time, most of the colony was still predominantly under subsistence economy, with a small settler community which had been monetarised. Public Corporations established were employed by the Colonial Government to strengthen this small settler farming Community.

The colonial public corporation can therefore be said to have been a colonial importation from Britain, a transfer of a colonial model institution, whose history, aims and objectives could not be justified in the new circumstances they were required to operate. The importation of the public corporation from the "mother" country was not unique to this area of public corporations. Indeed the general body of law operative in the colony was a replica of the law and the attendant socio-cultural values of the metropolitan country. These legal transfers could be explained at two levels however. In the first instance, the Colonial Government was only willing to operate with similar models. There was neither the time nor the initiative for the Colonial Government to try new and unknown models. The most logical thing in the colonial situation was to import a model or models that the "mother" country had already tested! Law passed by the British legislature was thought to be good for the "natives" without any form of modification to suit their peculiar environment. Secondly, the importation of the colonial models embodied the wider philosophy of the "civilising" mission which colonial Britain had arrogated upon itself.⁸⁴ Models developed in the "mother" country were therefore thought applicable to the colonies because the colonies and the colonial peoples were expected to develop in the "image of the metropolitan colonial powers". The colonial peoples were expected to cherish the metropolitan socio-cultural values, because their own values were backward and primitive and that therefore, should be disowned for the more superior ones.

In Kenya as in Britain, public corporations were set up as "rescue operations" in one enterprise or the other. The early public corporations in Kenya mainly comprised of the statutory and marketing boards.⁸⁵ These corporations were set up by the Colonial Government mainly to bail out the minority settler farming community from collapse during the economic depression of the 1930s. In the words of one Kenyan scholar, the main reason for establishing public corporations in colonial Kenya" had been specifically the resuscitation of the settler agriculture, which was solely privately owned".⁸⁶ The resuscitation of settler agriculture in Kenya was not only important to the individual settlers in the colony, but also to the British economy in general. The whole logic of colonial possessions was based on what the colonies could produce for the resuscitation of the metropolitan economy. The colonies were not acquired or attained as an end in themselves. They were important to the metropolitan economies in three important aspects. These aspects were: one, for the supply of raw materials for keeping the wheels of industries moving. In Kenya this role of the colonies was achieved through the establishment of such institutions as the Kenya Co-operative Creameries, the Kenya Farmers Association, the Maize and Produce Board, the Pig Industry Board and the Tea Board of Kenya. And lastly, the colonies were of crucial importance because they provided a ready market for the industrial commodities and capital from the colonial power. The first two roles were directly performed by public corporations. Public corporations established in Colonial Kenya were supported in the performance of these roles by two important public corporations which were established in Britain for the purpose of supervising the production of foodstuffs and raw materials. These corporations were: the colonial (now

Commonwealth) Development Corporation and the Overseas Food Corporation.⁸⁷ These two British Corporations were empowered under statutory authority to: "promote the carrying on of such activities by other bodies or persons, and for that purpose to establish or expand or promote the expansion or establishment of other bodies to carry out such activities, either under the Control or partial control of the public corporations or independently, for the investigation, formulation and carrying out of projects for developing resources of colonial territories with the view to the expansion of production of foodstuffs and raw materials." ⁸⁸

The roles performed by the colonial public corporations reflect the character and nature of the public corporations during the colonial period. Public corporations in Colonial Kenya were mainly deployed in the agricultural sector. It was only in post-independent Kenya that efforts were made to involve public corporations in other sectors of the economy. Another important characteristic of the colonial public corporations in Kenya was that, public corporations were used by the colonial state to prop private enterprises as contrasted to creating a public sector economy. From the onset, public corporations in colonial Kenya were not set up or established as viable business entities for the general public interest, but rather, they were set up to support existing enterprises, dominated by the white minority settler community. In this way, public corporations were reduced to mere pawns of private enterprise within the economic set up.

(2) THE PUBLIC CORPORATIONS IN POST-COLONIAL KENYA

At independence in 1963, public corporations in Kenya were being used or deployed for the two main purposes which had been designated for them during the colonial era. But with flag independence, it became imperative that changes should be effected at the policy level, to reflect the changed political power shift. To this end, there was a restatement of the general policies and objectives to be pursued or implemented by the new African Government. The changes in policy affected many areas of Kenyan life. Among other areas affected, the new African Government spelt out most explicitly the future role and use of public corporations. In general terms, the new African Government stipulated that the public corporations were to be used as policy instruments for the benefit of the whole economy. This government policy was contained in Sessional Paper No.10 on: African Socialism and its Application to Planning in Kenya.⁸⁹ This paper spelt out unambiguously, the type of economy the new African Government was keen on encouraging. The African Government of post-colonial Kenya set out to build an economy based on the philosophy of "African" Socialism. "African" Socialism in the eyes of the government, meant: "political democracy; mutual responsibility; various forms of ownerships; a range of controls to make sure that property was used in the mutual interest of the whole society and its members and lastly that there would be the diffusion of property ownership to avoid the concentration of wealth and income in few hands".⁹⁰

This policy statement was a prescription for a "mixed economy", which in recent years has become a mere euphemism for a capitalist economy. On the public sector and the nationalisation of private enterprise, the government unequivocally stated:

"Nationalisation of private property is a useful tool that has already been used in Kenya and will be used again when the circumstances require. But it should be recognised that, if the nations' limited domestic capital is to buy existing land, livestock, buildings, machinery and equipment, the nation was no more productive assets than before, only their ownership has changed".⁹¹

The Commitment on the part of the post-colonial African Government to a free enterprise economy as stated in the Sessional Paper, points to two important considerations about the nature of the post-colonial public corporation in Kenya. The first is that, public corporations as a form of property ownership were to be used very sparingly indeed by the government. Private individual ownership of property would be preferred to collective public ownership. This meant in ultimate terms that, the post-colonial African Government preferred private forms of property ownership to a public sector economy. Secondly, in the rare circumstances when public corporations were to be established and used, they would be used by the government to re-allocate property to Africans, who had hitherto been excluded from the property ownership and acquisition during the colonial period. These two characteristics of the post-colonial

public corporation still predominate the Kenyan Government policies as regards public corporations .

In 1974, the Kenyan Government restated its commitment to the philosophy of "African" Socialism. Among other things, emphasis was laid on: "an increasing participation in the process of production by the government as opposed to the mere regulation of the economy in the conventional sense; the expansion of the co-operative form organisation and ownership; the encouragement and active promotion of self-help schemes and lastly the respect for private property coupled with a growing domestic share in ownership".⁹² Following this deliberate policy, it can be observed that the government has used public corporations mainly in the following areas: One, in strategic production, which if left in private hands could threaten the security of the state or undermine the intergnity of the nation; Secondly, when productive resources are being wasted by the private sector, three, in rescue operations" or what are called sinking sands operations or enterprises, when a particular industry or enterprise has a serious detrimental effect on the public interest and lastly, when other less costly means of control are at the disposal of the government.⁹³ We shall at a latter stage show how the establishment of public corporations in Kenya corresponded to one or the other of these general policies - but for now let us turn to an assessment of the popularity and extent of use of public corporations in Kenya.

The expansion of the public corporation sector in Kenya, it would seem, has been sealed off by the recent

Review Committee of Statutory Boards. ⁹⁴ Reiterating the age-old distrust of public corporations by the government of Kenya which was clearly portrayed in the 1965 statements, the Committee recommended that the establishment of new public corporations or the continued use by the government of certain existing corporations posed the danger of politicizing productive and distributive trades. Because of the importance of this view on the future of public corporations in Kenya, we feel we should set out this recommendation in full. The Committee stated unequivocally that:

We feel there is danger of over-politicizing production and distribution through the establishment of too many parastatals. Such politicization could lead to many problems besides being, itself an actual threat to development. Kenya has a "mixed economy", and there are many instruments at the disposal of the government for the pursuance of its main aims of promoting development and ensuring the proper control of the economy. We are of the view that, no parastatal should be established unless the need for it is indisputable. Indeed because of changed circumstances which have made the terms of reference of some boards irrelevant, and because of obvious overlapping of responsibilities in certain cases, we feel that certain existing organisations ought to be abolished". ⁹⁵

It remains to be seen how the government will go about organising and rationalising public corporations in Kenya, but one thing seems clear, and this is that, the use of public corporations will be even more limited. More use will be made of "other forms of ownerships at the disposal of the government". Notable among the other forms of ownerships is of course private enterprise!

III. THE USES AND OBJECTIVES BY THE STATE FOR ESTABLISHING PUBLIC CORPORATIONS IN KENYA

What objectives does the state in Kenya aim to achieve by establishing public corporations? Although part of the answer to this question has already been given in our general discussion on the evolution and general historical development of public corporations, we think that it is important to emphasise and set out again the Kenyan position more clearly. We intend in this section to set out the aims and the objectives of the Kenyan state(s) in establishing and utilising public corporations.

A look at the policy statements will reveal a number of aims, objectives and roles that public corporations are expected to fulfil in Kenya. These aims, objectives and roles are mainly of two types: the first are what we may call the explicit roles. The explicit roles and objectives are those desires and hopes by the government which have been expressly stated in the government policy guidelines. Secondly, there are those aims, objectives and roles which we have called implicit objectives. These are the objectives and desires which the government pursues through the instrumentality of public corporations, without having expressed or stated so in the policy guidelines. The implicit objectives are usually the result of some form or other of pressure(s) on the government to do something by a section of the Community in Kenya, even though the thing urged might not be palatable politically. Let us now turn to a more detailed discussion of these government objectives.

(1) THE EXPLICIT ROLES PERFORMED BY PUBLIC CORPORATIONS

A look at policy statements in Kenya will reveal the explicit objectives and roles performed by the public corporations on behalf of the government as mainly the following: 1. the control of the economy; 2. the Africanisation or indigenisation of the economy and lastly, 3. Capital formation and accumulation for investment. These objectives find expression in many government statements, and public corporations existing in Kenya fulfil them in one way or another. We shall now turn to a detailed discussion of these objectives.

(a) THE CONTROL OF THE ECONOMY

The intensification in the use of public corporations in Kenya can be explained in terms of the desire by the post-colonial government to control and regulate the economy. The philosophy of the free play of the economic factors which had been prevalent during the early period of rule was no longer thought acceptable. The desire by the Government to control the economy was not unique to the Kenyan state. Indeed as we have endeavoured to show in the first chapter, this trend was dictated by the economic factors of the dominant phase of capitalist mode of production and affected every state. This trend was given philosophical justification in the 1930s by Keynes in his book: The End of Laissez Faire.⁹⁶ From then on, the states,

not only in colonial Kenya, but elsewhere, got more and more involved in the planning and management of their economies. By so doing, the Kenyan post-colonial state, purported to ensure that the citizens attained a minimum standard of living as a pre-condition for liberty and human dignity, the two crucial principles which were at the centre of the struggle for independence.

Participation of the state in the economy was achieved at two levels. Firstly, by the state establishing its own business enterprises, side by side with private enterprise. These business entities, mainly took the form of Public Corporations. Through public corporations, the state facilitated a certain amount of planning and management of the Kenyan economy, so that the scarce resources available could be utilised in a more rational manner. Secondly, the state undertook to supervise the private sector so that, private enterprises which participate in the economy through the big monopoly companies could be constrained in using their economic power and position to endanger the economic lives of the many consumers of their goods and services. In this particular role, the state set minimum standards to be observed by the private enterprises in the process of production. It is by performing these two important roles, that the modern state in Kenya discharges the economic responsibilities that have truly become state responsibilities all over the world. These economic responsibilities are undertaken by the states to ensure that the economic policies and programmes formulated by the governments are carried through without

fear or failure or sabotage from the private sector or enterprise. It is only by ensuring that the economic policies and programmes of the government do not fail, that the states' own lease of political life is assured and prolonged.

The post-colonial state in Kenya found it imperative to participate more actively in the planning and management of the economy at the two levels we have already discussed. It was imperative for the post-colonial government to adopt "a more management approach to government affairs because" - this ensured that the colonial legacy of an economy dominated by a minority settler community and international capital was reduced.⁹⁷ Also the participation of the state in the economy ensured that the economic programmes and policies formulated by it were implemented without fail. This increased participation of the state in the economy in post-colonial Kenya was also coupled with the pledge to involve more actively the Kenyan nationals in the economy. This is what we have called the Africanisation programme, and to this we now turn.

(b) AFRICANISATION OF THE ECONOMY

Perhaps, the most popular role public corporations were expected to fulfil in the Kenyan economy is the Africanisation programme. The success of the Africanisation programme was vital to the new African Government because of the effects of colonialism. During the colonial period, the African was discriminated against in every sphere of life, including that of property

ownership. With political independence, new hopes and expectations were raised of economic gain on the part of Africans. Indeed, at the very root of the political struggle in Kenya, was the economic plight of the African community. On this phenomenon, Colin Leys has observed that:

"the Contradiction between economic rationalism and dependence on foreign capital was expressed in the intense pressure put on the government by the small businessmen to assist them break into the more profitable end of non-agricultural private sector and since they were the people on whom the regime most depended for securing popular support, they were helped." ⁹⁸

Racial segregation and discrimination in property ownership which had characterised the colonial economy had to be discarded so that Africans could partake of the ownership of property in independent Kenya. The new African Government admitted from the very onset that it had inherited economic imbalances from the previous political set-up and that it was time something was done about these imbalances. The most direct and effective way of correcting the imbalances in the economy was to use the governments' limited resources to support the economic endeavours of the African population.⁹⁹ The importance of ensuring that the Africanisation programme succeeded as an indication or epitome of independence in the now independent Kenya, was said by Professor Mutungi as to be a crucial one.

Professor Mutungi observed that:

"It is probably superfluous to emphasise that the control of the economic life of a country's citizens is an important aspect of the transfer of power for which independence stands. Political independence has to be marched with economic control of the country's economy by her citizens". ¹⁰⁰

A look at the "native" business history in Kenya will reveal why the African Government was anxious to pursue a policy of Africanisation at independence. During the colonial period, Africans and African interests were subordinate to those of the Europeans and Asians. Africans were said to lack the ability to enter into modern business transactions. Africans were said to have the mental capabilities of infants and that therefore they had to be "protected" by the law from the exploitative designs of the superior racial groups. The Colonial administration therefore, enacted laws whose purported effect was the "protection of natives" from the exploitation of the Europeans and Asians. The best example of this type of laws was the Credit With Natives Ordinance of 1903.¹⁰¹ This ordinance was applied to virtually the whole colony by 1918.¹⁰² The most exacting provision of this law was in S.3, which stipulated that:

"no contract for sale on credit of goods to the value or at a price of more than ten pounds by any trader or other person not being a native of such provinces or districts shall be valid unless it is in

writing and attested by the District Commissioner or Assistant District Commissioner of the district to which the native belongs".

s.5 of the Ordinance was the punishment section for the non-attestation of the credit or sale agreement. An unattested sale was not admissible in evidence as evidencing the credit or sale.

Although provision was made for getting approval or attestation from the local administrative authorities, it is important to note from the very onset that it was not easy for a "native" to get this approval or attestation for his credit or sale. The whole colonial system was geared towards instilling fear and psychological defeat into the "native". To go before a District Commissioner, a man who could find several faults with you (such as the non-payment of taxes) to attest or approve a credit or sale agreement was not an easy undertaking, other inconveniences notwithstanding. In most cases, Africans who sought credit gave up the whole exercise on the mention of an appearance before a District Commissioner.¹⁰³ The effect in practice of this so-called "protection" law was to repulse African initiative in business because of lack of credit facilities. The impact of this law was far reaching on the "natives" efforts to acquire and manage businesses.

Ironically, the colonial administration was of the view that the Credit With Natives Ordinance was for the benefit and well being of Africans. In 1948, this ordinance was repealed and replaced by a far more precise legislation. The new law was the Credit to Africans (Control) Ordinance.¹⁰⁴ As the headnote to

this ordinance revealed, the new law aimed at controlling the granting of credits by non-Africans to Africans. The most important section of this law was s.2, which stated that:

"Subject to the provisions of this ordinance, where a non-African grants to any African, whether in respect of one or more transactions credit in excess, in the aggregate of a sum of two hundred shillings, no suit shall lie in any court in the colony for the recovery of such a sum unless the contract, in respect of which the credit was given, is in writing and approved and attested by an attesting officer".

Where an African entered into a contract with a non-African, whether by way of chattels transfer, mortgage, charge or other contract of sale, in excess of two hundred shillings (K.Shs. 200.00) and the contract or instrument of transfer was not attested to by an attesting officer, and the African failed to pay back or breached the contract so entered into, the non-African would not enforce the contract of sale or transfer, or pray for a remedy which he might have otherwise been entitled to, either at law or in equity had the contract or instrument been attested to.¹⁰⁵ As with the former ordinance, attestation was provided for but the conditions which the "native" was living under had not eliminated the fears and handicaps present in 1903. Africans still found it difficult, if not impossible to face the colonial masters for approvals or attestation of credits or sale agreements.

The total effect of these two legislations was to deny the Africans access to credit facilities, with the result that business became estranged or alien to Africans. Non-Africans took advantage of these legislative provisions to acquire most of the property in the colony. Because of lack of any form of security, Africans were left behind in the process of property ownership. The position of the aspiring African businessman was made worse by the reluctance on the part of the non-Africans and other lending institutions to have any business transactions with Africans. An example of the risks which befell non-Africans who transacted with Africans can be illustrated by the case of Issa and Suleman v. Michael & Co. Ltd. ¹⁰⁶ In this case, the respondents, who had been the defendants, came under the operation of the Credit to Africans (Control) Ordinance. The provisions of this ordinance notwithstanding, the respondents purported to buy a lorry from the appellants on credit terms without the approval or attestation from an attesting officer from their local district. The lorry was to be paid for by instalments. When the respondents failed to pay as agreed, they were sued by the appellants, praying for either the return of the lorry or the payment of the outstanding instalments. The respondents replied by denying that the lorry had in fact been bought on credit terms. They alleged that they had paid one thousand shillings (Shs.1,000,00) on delivery of the lorry by the appellants and expended eight hundred and thirty-two shillings (Shs.832.00) of the remaining one thousand shillings (Shs.1000.00) on repairs of the lorry, so that the outstanding sum due to the appellants was only one hundred and sixty eight shillings (Sh.168.00). The appellant's prayer failed and the court in its judge-

ment said that the prayer of the appellants was tantamount to asking the court to aid them enforce an illegal transaction, contrary to s.2(1) of the Credit to Africans (Control) Ordinance. The Court went on to say:

"A party cannot set up a case in which he must necessarily disclose an illegal transaction as the groundwork of his claim in pari delicto polior est conditio defendants". 107

Africans could not receive any credit, both from individuals and lending institutions in excess of two hundred shillings (Shs. 200.00), without the District Commissioner from the district the African came, assenting to the credit. Ignoring the provisions of this law, risked the same results as suffered in the case of Issa & Suleman v. Michael & Co. Ltd.,¹⁰⁸ for the non-African Creditor. Such credits or sales would be illegal and no Court of Law in the colony could help an aggrieved party to recover the balance of the credit or sale agreement, or even the return of the article of sale on grounds of non-payment. Business transactions between Africans and non-Africans without the approval of the local District Commissioner were not enforceable at law! By the time the Credit to Africans (Control) Ordinance was repealed in 1960, 109 irreparable damage had already been occasioned on Africans. In any case, by the time, non-Africans had captured and controlled the colony's Commerce and Industry far beyond their appropriate ratio to the country's population.

The two ordinances we have discussed above were not the only impediments to the African's business aspirations and property ownership during the colonial

period. Whereas these ordinances blantly barred "natives" from undertaking credits in amounts exceeding two hundred shillings (Shs. 200.00), other measures were brought to bear to limit or bar the borrowing capabilities of Africans. The other most important impediment to African business initiatives was the lack of any security to support their borrowing. The most important asset that the African possessed was land. Since this asset was not registered and titles issued, there was nothing else that Africans could have used to secure their borrowing. The dilemma in which Africans found themselves overland can be illustrated by the case of Isaka Wainaina wa Kamotho & Another v. Murito wa Indangara & Another & the Attorney General. ¹¹⁰

In this way, Africans were denied all avenues of joining other racial groups in Commerce and Industry. This was the "native" business position at independence in 1963. It was not surprising therefore, that the African Government after attaining independence was anxious to remedy or redress this most unsatisfactory situation. The intensity of the anxiety entertained by the new African Government was expressed by the late Tom Mboya, the then Minister of Economic Planning and Development in 1965. Mboya observed that:

"Any visitor to our city must be struck immediately by the absence of Africans in the commercial life of our country. This must appear strange to them, when they know that this is an independent African state". ¹¹¹

This then, is the background to the Africanisation Programme or policy in Kenya.

To remedy or redress the colonial imbalances in business acquisitions and ownership, the new African Government promised among other things to: "provide education, training and the attainment of experience in an effort to ultimately take over the ownership and management of Commerce and industry; make capital available with small down payments and at low interest rates through national institutions such as the Land and Agricultural Bank; the Agricultural Finance Corporation and the marketing boards; follow up the provision of capital with extension services in agriculture, commerce and industry; stimulate large scale investments through the Development Finance Company of Kenya, the Kenya Tourist Development Corporation; promote producer, marketing and Consumer cooperatives and train people to run them, so that large scale opportunities are opened to Africans with limited capital; promote home ownership through tenant purchase schemes, self-help housing projects and mortgage finance institutions and of course the Africanisation of the civil service as rapidly as possible".¹¹²

As will be observed soon enough, public corporations in Kenya were assigned a leading role in the implementation of this policy of Africanisation of the economy. The reasons for making the Africanisation programme a priority one, were manifold, but the most important reason was the political one. If Africanisation was not going to proceed at a fast enough pace, there was great danger of the African masses getting disillusioned about independence and the aims of the African leadership. The

African masses were bound to feel cheated about the economic benefits promised to them by the African leadership during the struggle for political independence. Stressing this point, the government in the 1966-1970 Development Plan observed that:

"So long as consumers depend on retail shops that are overwhelmingly owned and operated by non-Africans, they will conclude that although Africans have gained control over political and administrative machinery of the country, the economic life of the nation is still in the hands of non-Africans." 113

Mr. Maina Wanjigi, while he was the Executive Director of the ICDC, reiterated this stand in an address to the members of the Kenya Association of Manufacturers. Mr. Wanjigi warned the members of the Association that the Africanisation programme had to be encouraged at all costs, even if it meant as mere "window dressing". He said that:

"I am convinced that unless the Africans, who form more than 95 per cent of the Kenyan population feel that they are part and parcel of our industrial and commercial economy, just as they feel they are part of the agricultural sector of our economy, it would be difficult to create a stable economy. It is vital that our industry is identified as truly local by the ordinary man in the street. He must be made to feel that it is truly his industry. I feel sure that, if anybody can do this, it is those of you who are represented in the association. I would go further and say that you have a duty, you have the responsibility, to assist in the Africanisation of Commerce and industry if for

nothing else, at least, in the preservation of the institution and value of what I explained earlier as the free enterprise system. Those who value the free enterprise system have at times had to make great sacrifice for its preservation." ¹¹⁴

The political nature of the Africanisation programme and the nature of the state in post colonial Kenya, make this programme nothing more than a show-piece-"window dressing", to blind-fold the onlookers into believing that Africans now share and participate in property ownership in this country. Although this will form the subject of a latter discussion, it is important for now to note that, while the government pays lip service to the Africanisation programme it continues to encourage foreign firms to invest in both Commercial and industrial concerns without discrimination. These foreign firms, often with world wide operations, compete with the budding African businessmen and industrialists, making it impossible for government to implement its own programme!

(c) CAPITAL FORMATION AND ACCUMULATION FOR INVESTMENT

One of the obstacles the governments efforts to initiate economic development was lack of capital. In this section, we shall look at the governments' efforts at procuring capital for investment. The government has attempted to solve the problem of capital scarcity by first mobilising Africans to participate more actively in economic activities in the country such as

in agriculture, Commerce and industry. By so doing, Africans were involved in a capital generation exercise for investment. By increasing production, the government ensured that the share of investable income was increased. This was not however the only option open to the government. The new African Government also sought to increase the available investable capital by calling on foreign sources for capital, either by way of grants, loans or investments in viable sectors of the economy. In this way, the domestically available capital was supplemented. Now let us turn to a detailed discussion of each of these sources of capital.

(i) DOMESTIC MOBILISATION AND CAPITAL ACCUMULATION

The state through public corporations, took it upon itself the task of encouraging African participation in all sectors of the economy in post-colonial Kenya. The encouragement of African participation in the economy was made by the government through the disbursement of loans and other credit facilities to Africans. These were services which had been unavailable to Africans during the colonial days. This exercise had two main aims. The first aim or objective was to encourage African participation in the economy with a view to increasing production so that the share of the surplus investable income would be increased. Secondly, a low rate of interest was charged on the loans disbursed by the government. The interest rate so charged on the loans, represented the cost of the loans disbursed by the government. The interest collected by the government agencies charged with the responsibi-

lities of distributing the loans was made available to the government as accumulated capital for further investment. In these two ways, the government through the agency of public corporations increased the aggregate amount of capital available for investment. An example of these processes can be furnished by the activities of various public corporations, including: the Industrial and Commercial Development Corporation (the I.C.D.C.), The Development Finance Company of Kenya (D.F.C.K.), the Kenya Tourist Development Corporation (K.T.D.C.), and the Industrial Development Bank (I.D.B.). The I.C.D.C., advances money to small and medium scale traders and industrialists who are expected under the loan agreement to repay the loans plus an additional interest after a specified period of time. On completion of the loan, the loan (principal sum) plus the interest, represents the accumulated capital available to the corporation and the government for the use of the next trader or traders desirous of credit facilities. Meanwhile, the previous trader or industrialist continues to participate in the economic life of the country by producing goods and services which fetch for him an income. This income, may in turn be invested to generate more wealth in the country.

Because of the importance attached to capital formation and accumulation, the state as one of the important criteria of assessing the success of public corporations, the declaration of a profit at the end of each financial year. Public corporations are expected as a matter of policy to attain some profitability in their business undertakings to justify their existence.

Reiterating government policy on this issue, the Review Committee of Statutory Boards commented that:

"If success of investments is to be judged strictly on the basis of a return on investment with regard to equity or debt servicing performance with regard to loans, it is quite obvious that government investments have not measured up to the acceptable standards." 115

In order for public corporations to live up to the expectations of the government, the Review Committee of Statutory Boards, recommended the establishment of an Investment Division to be located in the office of the President, whose role would be the monitoring of all government investments in public corporations to ensure that they are not mismanaged or misused. 116

(11) FOREIGN INVESTMENTS AND CAPITAL ACCUMULATION

Side by side with the domestic efforts to accumulate capital for investments, the African Government also sought to obtain capital for investments through foreign sources. The government explicitly stated in 1965 that: "in order to compensate for our shortage of domestic capital, in order to grow rapidly so that our aspirations can be realised, we must borrow from foreign governments and international institutions and stimulate the inflow of private capital". Indeed foreign capital was considered of crucial importance in the development efforts of the government. The government

elaborating on this point, further stated that:

"It is estimated that for every pound Kenya can raise for development, at least two pounds can be raised from abroad. This will enable us to grow three times as rapidly with foreign aid as we would grow without it". ¹¹⁸

This policy was the inauguration of what has become known as the "hospitable climate" for foreign investments in Kenya.

In the 1970-1974 Development Plan period, although the government proposed to raise 85 per cent of the total expenditure (both recurrent and capital) from internal sources, it is interesting to note that the share of foreign development capital was estimated at about 50 per cent of the total - about K&90 million in numerical terms. ¹¹⁹ The government committed itself to opening up the country even more to foreign investors and their capital. Although this may have been justifiable to a degree, because of the scarcity of development capital, it is interesting to note that the government somehow bypassed "Asian" capital and excluded the Asian Community in general from playing an active role in certain sectors of the economy. Available "Asian" capital was bypassed in preference for foreign capital. The African Government did this in order to give a chance to the Africanisation programme which had just been inaugurated. Leys observes that the exclusion of the Asian community from actively participating in certain sectors of the economy, particularly in industry, was a deliberate policy of the government so that Asians could not use their capital

these sectors of economy against the interests of Africans. Leys says:

"Nearly half of their ("Asian") capital was in urban real estate, thanks to their exclusion from farming in the "white" highlands. But their movement into manufacturing had already begun to accelerate in the 1950s, and it is obvious that their capital resources coupled with their market knowledge and entrepreneurial experience would have enabled them to play a leading role in this field had they been encouraged. ¹²⁰

Foreign capital in Kenya has in fact been used in certain instances to buy out some of the existing "Asian" businesses by the government or government agencies and subsequently transfer them to African entrepreneurs. The Industrial and Commercial Development Corporation (ICDC), the Development Finance Company of Kenya (DFCK), the Housing Finance Company of Kenya, the Kenya National Trading Corporation (KNTC); the Kenya Tourist Development Corporation (KTDC) and the Agricultural Finance Corporation (AFC) are a few of the government agencies that have channelled foreign aid and investment funds in Kenya. By performing these roles, public corporations aid or support the government in its efforts to increase the available funds for investments. Whether or not however, the use of foreign aid and investments by the government has achieved the posited government goals is a different question. This theme will be the subject of discussion in a latter chapter. ¹²¹

(ii) THE IMPLICIT ROLES PERFORMED BY PUBLIC CORPORATIONS

Apart from the roles that public corporations are said to be expressly performing, there are other roles that public corporations perform which can be discerned from the activities of the corporations and the state in general. These roles are what we have called the implicit roles. These roles are mainly the following:

1. the consolidation of private property ownership;
2. the provision of political patronage and rehabilitation to members of the political bureaucracy, and
3. the provision of facilities for the joint ventures with foreign investors.

We now turn to a detailed discussion of these implicit roles and objectives.

(a) THE CONSOLIDATION OF PRIVATE PROPERTY OWNERSHIP

The use of public corporations to entrench the ownership of private property ownership is one of the roles that these institutions have performed ever since they were first established in Kenya. During the colonial period, and indeed the first ever public corporation established in Kenya, the Land and Agricultural Bank, was set up to resuscitate the white settler farming community from collapse in the 1930s.¹²² This use of public

corporations did not come to an end with the collapse of the colonial empire. This role of public corporations was only adapted to changing times and needs after the collapse of the colonial empire. Even in independent Kenya, public corporations have continued to be used and associated with the private property by individual capitalists. This end has been achieved at two levels: 1. Public Corporations have encouraged private entrepreneurship which ultimately takes over the business that belonged to the public sector. In this way, private enterprise, denationalises the public sector. The Review Committee of Statutory Boards attested to this role when it recommend that some of the public corporations operative in Kenya had become irrelevant after developing to the fullest extent, the enterprises assigned to them for the take-over by private enterprise.¹²³ In performing this role, public corporations have nurtured a petty-bourgeois class to supplement the international bourgeoisie in Kenya. The petty-bourgeoisie class has been used as a buffer-zone guarding the international bourgeoisie in their exploitation of the peasants and workers of this country. The collusion of these two classes in Kenya makes it possible for the exploitation of the natural and human resources to the maximum without raising nationalist feelings, because Kenyan Africans are seen also among the people who benefit from the national wealth side by side with international capital.

Secondly, public corporations have been used as catalyst institutions in Kenya. This means that, public corporations have been used as mere agents of bringing together factors of production from other sources without themselves deploying their resources

in a permanent way. In this way, public corporations do as little as possible to get the enterprises conserved to get established on a sound basis (sic!). Once the enterprises being developed are soundly viable, public corporations move to other areas in the economy to re-employ the same capital and management skills which had been tied up in the now de-nationalised enterprise. This is what Nyhart has called the catalyst role of public corporation in their development role.¹²⁴ This role is contrasted with the injector role that some public corporations perform. In the latter case, public corporations usually have no private partners that can take over the enterprises, and thus denationalise or decontrol them by acquiring the public stake in the enterprises concerned. On the contrary, public corporations redeploy their capital and management resources in a more permanent way into the enterprises that they seek to develop the private sector once they can be viably managed, thus assuring a large profit margin for the new private entrepreneur who has taken over.

A look at public corporations in Kenya will also reveal that they are or have been used by the political bureaucracy to provide political patronage or rehabilitation of political supporters or opponents within the economy. To this role we now turn.

(b) PROVISION OF POLITICAL PATRONAGE AND REHABILITATION

Appointments to boards of directors of public corporations have been used by the political bureaucracy as acts of political patronage or to rehabilitate political

opponents within the economy. Professors Bradely and McAuslan in their article: The Public Corporations in East Africa assert that "all governments (in East Africa), but more so Kenya, regard the membership of the board of directors of public corporations as an opportunity to exercise political patronage".¹²⁵ Ex-Ministers, ex-members of parliament, members of parliament and some senior members of the public service, often find themselves appointed as members of boards of directors of public corporations; either as Chairmen or as ordinary members. For example, Mr. Paul Ngei, was appointed Chairman of the Maize and Produce Board in 1964. At that time, Ngei was also the Minister of Cooperatives and Marketing; Mr. Masinde Muliro, was Chairman of the Maize and Produce Board in 1967, combining this post with the position of member of Parliament which he held; Dr. Njoroge Mungai, was until recently (1979) the Chairman of the Kenya Oil pipeline, while at the same time a nominated member of parliament; Mr. Khaoya, a one time Assistant Minister for Agriculture, was appointed Chairman of the Cotton Lint Board after losing his parliamentary seat in the 1974 general election. Appointment to statutory boards of fallen politicians has been an indication on the part of the government that although these politicians have been rejected by the electorate, they have not lost favour with the government. Examples of this phenomenon can be given by the appointment of people like Mr. Maina Wanjigi and Dr. Gikonyo Kiano to parastatal boards.

On the other hand, membership of boards of directors of public corporations has been used by the government in completely contrasting circumstances to the political patronage discussed above. Appointments to boards

of directors of public corporations have also been employed when the government is desirous of rehabilitating a political opponent. Mr. Nowrojee has observed that, in Kenya "appointments to boards of directors of parastatals have been used for rehabilitation purposes for former political opponents".¹²⁶ Examples of this use of public corporations can be furnished by the appointment of Mr. Luke Obok to the Chairmanship of the Kenya Film Corporation after his release from detention in 1972; the appointment of Mr. Bildad Kaggia as the Chairman of the Maize and Produce Board, after KPU, to which he was vice-president was banned in 1969. The appointment of Mr. Oginga Odinga to the Chairmanship of the Cotton and Lint Board, after he had been barred from contesting the 1979 general election is perhaps the best example of the use of public corporation's board appointments as some measure of appeasement of former political opponents. It would seem however that during the last years of the Kenyatta regime, the former role was used more often. Rather than appease political opponents, detention was the more common action.¹²⁷ It would also seem that, the more serious political opponents were not appeased by appointments to boards of directors of public corporations. It was not until President Moi came to power that Mr. Oginga Odinga was appointed for the Chairmanship of the Cotton and Lint Board. It remains to be seen how the Moi regime will handle the question of political opponents. But if the "KANU Clearance" issue of 1979 is anything to go by, it seems as if, like under the Kenyatta, the Moi regime is not prepared to forget the past and make a fresh start! People who have been in one or another associated with K.P.U.

still carry that stigma! This observation is made notwithstanding the recent appointment of Mr. Seroney a well known opponent of Moi, as the Chairman of the Industrial Development Bank. 128

(c) THE FACILITATION OF JOINT VENTURES WITH FOREIGN INVESTORS

Public corporations in Kenya have also been used to provide a form which is conducive for the joint business ventures between the government of Kenya and private foreign investors. Why, one may ask does the public corporation form provide an ideal structure for joint ventures between the government and foreign investors? Capital from multinational companies find a good partner in the public corporations for specifically the same reasons public corporations are preferred as business entities to the government departments. Public corporations are preferred as business organisations to the government department because they are said to be operationally more efficient and at the same time, submit to more public accountability through the controlling minister. Multinational companies are therefore more at home organisationally, with the public corporations than with the government departments as business partners. More importantly however, public corporations are preferred as partners of multinational corporations because of their separate legal nature, separate from the governments which own them. Because public corporations are separate legal persons from the government, with their own management committees, this allows or permits multinational companies to participate in the management of joint venture businesses. Participation in the joint venture businesses would not

in the joint venture businesses would not have been possible if government participation in the businesses was at the departmental level. In this situation, the business ventures would be too exposed to the "politics" of the country. A joint venture agreement between a government department and a multinational company is too vulnerable to political pressures to be economically viable! Multinational companies have therefore shunned involving themselves too directly with governments. Because of this fear of politicizing production in what should be purely economic ventures, public corporations become the ideal forms to do business with the multinational companies. In Kenya, the preference of foreign capital as a source of development capital must have been consciously accompanied by the choice of the form which is known to administer this finance: the public corporation! Professor Ghai discussing the criteria used in choosing one form of business organisation from another observes that:

"the choice of form can also be determined or at least influenced by external factors. We have already noticed the preference of western loan agencies for the public corporation form; equally it has been alleged that the East European countries prefer to deal with public corporations because the communists do not want to deal with capitalist forms such as private companies. Foreign private interests may also prefer this form" ¹²⁹

A study by the International Study Centre (New York) has also come to this conclusion. International lending

institutions prefer to deal with public corporations rather than dealing directly with government departments.¹³⁰ This conclusion is also borne out by the working of the Industrial and Commercial Development Corporation (the ICDC). As of 30th June 1979, the ICDC had entered into fifty nine (59) joint venture agreements, most of them with multinational companies. ¹³¹

It is important to note however that, whereas international lending agencies and private multinational companies prefer dealing with public corporations as business partners, they cannot afford to dispense with the government altogether. The presence of senior government officials on boards of directors of public corporations gives great advantage to the foreign investors. When a joint venture agreement has been finalised, government officials do almost everything in preparation or facilitation of the joint venture. The government officials deal with such matters as the: procurements of exchange control under the Exchange Control Act;¹³² investment approvals, under the Foreign Investment Protection Act; ¹³³ procurement of licences, under the Trade Licensing Act,¹³⁴ procurement of entry permits under the Immigration Act, ¹³⁵ guaranteeing, informally the protection or reservation of the home market for the established industry and the procurement of land on which to build or construct the buildings and plants. A look at the Rivatex Joint Venture Agreement¹³⁶ will clearly reveal in greater detail these matters.

IV. THE EXTENT AND USE OF PUBLIC CORPORATIONS IN KENYA:

In this section we will attempt an assessment of the intensity of use of public corporations in Kenya. Our main aim or concern will be to show the contribution of the public corporations sector to the overall economic development effort by the government. The readiness with which public corporations are used by the state in Kenya can be discerned in two main ways. Firstly, by the number of public corporations established and used in the economy, and secondly, by the contribution of these public corporations to the national economy. Both these methods indicate the attitude of the government towards public corporations as instruments of or agencies for national development.

In 1968, when answering a question in parliament, a government minister said: "there are 403 statutory boards and other bodies in the country, ranging from big state corporations such as the ICDC to small committees such as factory committees".¹³⁴ Nowrojee, writing on public corporations and cooperatives in Kenya and Tanzania in 1972, observed that there were more than fifty (50) public corporations operating in Kenya at that time.¹³⁸ The most recent estimate of the number of public corporations operative in Kenya was given by the recent Review Committee of Statutory Boards. The Committee observed that:

"In terms of numbers, there are about sixty-six parastatals and country-wide co-operatives.

This number does not include all government companies, nor does it include all subsidiary companies of parastatals." ¹³⁹

The variation in the numbers of public corporations given in Kenya can be explained at two levels: one, the ambiguity in the definition of public corporation used. Because of the lack of a proper and precise definition of a public corporation, there is confusion as to which governmental institutions qualify to be included in the classification of public corporations. In this respect, it is interesting to note that included among the public corporations in Kenya are Companies-Cum-Co-operatives, in no way associated with the government, in terms of equity holding. The government is a mere creditor to some of these companies cum cooperatives. ¹⁴⁰ The reason given for classifying some of these institutions as public corporations was that: "these cooperatives are engaged in activities in which the government has or should have a direct interest" ¹⁴¹ The nature of the interest that the government "has" or "should" have, is not specified and one is left wondering whether the "interests" so loosely talked about are pecuniary, emotional or even political! The classification of public corporations in terms of future interests makes them very fluid indeed! This is made worse in the case of the Review Committee because, the Committee proceeded to discuss matters pertaining to the "parastatal sector" without any definitional guidance as to what they were talking about. The Review Committee discussed the "parastatal sector" as if the sector is free of any controversy definitionally. The lack of a clear definition of the "parastatal sector" which results from this sort of an approach, accounts for the confusion in identifying what public corporations are and what roles they should play in

national development.

Secondly, there has been a preference by the government for the use of the limited liability company to the public corporation proper in Kenya. Government companies abound in many areas of the economy where the government has business interests. These companies include for example: the Kenya National Trading Corporation Ltd.; the Kenya Industrial Estate Ltd; the Kenya Film Corporation Ltd; the Housing Finance Company of Kenya Ltd; the Development Finance Company of Kenya Ltd; and the ICDC Investment Company Ltd. These companies were incorporated under the Companies Act,¹⁴² rather than being established as public corporations proper, with their own constituent statutes. This trend of establishing public corporations and private companies side by side, causes confusion when it comes to classification of which institutions is which. These Government Companies were excluded from the classification of public corporations in Kenya, the government's financial and holding interests notwithstanding.

Overall, it can be said that Kenya utilises a sizeable number of public corporations in the fields of agriculture, commerce, industry, tourism, housing, construction, insurance, banking and the distributive trades. The importance of these institutions to the government lies more in the contribution they make to national development. To this we now turn.

The Contribution of public corporations to the national economy is a crucial one. In the 1974-1978 Development Plan, the Government observed that:

"the real significance of these institutions (public corporations) is as policy instruments. However, even in terms of output, they have significance. Value added in 1964 to the parastatal sector rose from K.£.33.1 million in 1972, an increase of about six times".¹⁴³

The sixfold increase in the net parastatal product, explains the rapid increase in the Gross Capital Formation (G.C.F.) and the Gross Domestic Product (GDP) in recent years. In the years 1964-1972, the Gross Capital Formation rose from K£44.3 million to K£110.2 million.¹⁴⁴ From these figures the share of the parastatal sector contribution to national development was 28 per cent in 1972 as compared to about 10 per cent in 1964. So far as the Gross Domestic Product is concerned, the parastatal sector contributed about 16 per cent of the total monetary value of K£554 million in 1972. Mr. Mbogua estimated that the parastatal sector contributed about 16 per cent to the Gross Domestic Product in 1976, with a value added of about 9 per cent.¹⁴⁵ These figures appear to be underestimates, considering the increase in the activities of the parastatal sector in the 1970s. It would seem, Mr. Mbogua's figures are based on the 1972 statistics set out above and not those of 1976.¹⁴⁶

The Public corporation sector in Kenya is smaller than that of Tanzania. It was estimated that the parastatal sector contribution in Tanzania amounted to about 18 per cent of the Total Monetary value of the Gross Domestic Product in 1970. By 1972, this figure

had increased to about 25 per cent of the total Gross Domestic product.¹⁴⁷ This variation can be explained in terms of the rationalisation of public corporations in policy terms in Tanzania.

Public corporations are not only important in terms of their contribution to the GDP. Public corporations are also important in respect of the employment opportunities they provide. It has been estimated that public corporations in Kenya put together employ as many people as the civil service, if the teachers are excluded.¹⁴⁸ In this way, their contribution to the general welfare of the people of Kenya is a crucial one. The place of public corporations in the national economy is not one to be taken for granted therefore, because of the large number of the people who depend on them for eking a livelihood.

CHAPTER THREE

THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION: A CASE STUDY:

Introduction:

In this and the following Chapter, we shall take a look at the Industrial and Commercial Development Corporation, the ICDC, and how it relates to the principles of the public corporation, which formed the core of our subject matter in the previous chapters of this thesis. The central issue in this section of our thesis, will be, the impact of the form public corporations take on the performance of their corporate duties. In other words, in this and the next chapter, we shall seek to assess the impact of the organisational form of the ICDC on the performance of its functions or duties. To understand the influence of the organisational form on the performance of public corporations, we will need to make a brief study of the performance of the other business organisations at the disposal of the government, particularly the limited liability company and the government department. In this way, we shall facilitate a comparison between the public corporation form and the other organisational forms available or at the disposal of the government. This chapter will mainly concern itself with the internal organisational form or structure of the ICDC. We will seek to establish the internal organisational relationships within the ICDC to test the managerial efficiency thesis, said to be the cornerstone on which the concept of the public corporation is built. In Chapter four, we will deal with the external controls and the autonomy theory as it applies to the ICDC. In Chapter four, we will try

to test the public accountability theory as a function of the organisational or structural form.

II. THE HISTORY OF THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION - THE ICDC.

The Industrial Development Act ¹⁴⁹ established the Industrial Development Corporation - the IDC, the precursor of the Industrial and Commercial Development Corporation, hereinafter called the ICDC, "as a body corporate with perpetual succession and a common seal, with powers to hold land and sue and be sued in its own name". ¹⁵⁰ Although the IDC was only incorporated in 1954, it was not a new Conception. The Corporation in its present form was established to take over the assets of an existing body: the East African Industrial Management Board - the EAIMB, ¹⁵¹ a body corporate which had been established in 1944 but only incorporated eight years later in 1952. The East African Industrial Management Board was set up by the Colonial Government for the purpose of economic and industrial reconstruction in the Colony of Kenya, after the damage caused during the Second World War. The East African Industrial Management Board was established mainly to ensure a steady supply of essential Commodities during and after the War. ¹⁵²

The new name, the Industrial and Commercial Development Corporation was adopted in 1965, during the drafting

of the policy paper: Sessional Paper No.10
on: African Socialism and its Application to Planning
in Kenya. The present statutory form of the corpora-
tion was however provided in 1967 by an amendment
to the provisions of the Industrial Development Act.¹⁵³
The change of name from the Industrial Development
Corporation to the Industrial and Commercial Develop-
ment Corporation showed the concern of the new African
Government to develop Commerce and industry on the
same footing.

The ICDC's predecessors, the East African Industrial
Management Board and the Industrial Development Corpo-
ration were set up by the Colonial Government to perform
functions which were of great importance to the white
settler community in Kenya and the British economy in
general.¹⁵⁴ The Industrial Development Corporation
for instance was set up for:

"the purpose of facilitating the industrial
and economic development of Kenya by the
initiation, assistance or expansion or by
aiding in the initiation, assistance or
expansion of industrial or other under-
takings or enterprises in Kenya or elsewhere".¹⁵⁵

In the exercise of these functions, the ICDC was
required under the statutory provision to have regard
to the desirability of:

- "(a) Acting principally as an auxiliary finance
organisation and not as the sole source of
the provision of finance in respect of any
particular undertaking or enterprise;
- "(b) Exercising its powers of affording financial
assistance, so far as possible and except

where the Minister for Finance otherwise directs, by way of guarantee, loan or investment and not by way of grant or subsidy" 156

What do these functions show about the nature of the Industrial Development Corporation and the government that set it up or established it? The first observation discernible from these statutory functions is that the IDC was incorporated by the Colonial Government to operate beyond the boundaries of the colony of Kenya in facilitating industrial and economic development. This means that, the IDC was not a national corporation as such, to serve national interests, but rather, it was a corporation at the disposal of the whole British Empire in its efforts to harness industrial and economic development. The concern for industrial and economic development for which the IDC was to become the main instrument of implementation, was not limited to the colony of Kenya alone. This concern was espoused throughout the colonial empire. This is why the IDC was expected to work in conjunction with other institutions from "Kenya or elsewhere" in the fulfilment of its functions. The other institutions or undertakings which were intimately associated with the work of the IDC were the Colonial (now the Commonwealth) Development Corporation and the Overseas Food Corporation. 157 The objectives, of these two British Corporations, were basically an extension of the IDC's objectives, or put differently, the IDC drew its inspiration and functions from the functions of these two British Corporations, having been established just ahead of the IDC. The functions for which the Colonial Development Corporation and the Overseas Food Corporation had been established were mainly the:

- "investigation, formulation and carrying out of projects for developing resources of colonial territories with a view to the

expansion of production therein of foodstuffs and raw materials, or for the other agricultural, industrial or trade development therein". 158

The second observation discernible from the functions of this corporation is that, the IDC was conceived as a catalyst - type corporation, whose functions were auxiliary to other sources of finance. It is our submission, that the other sources of finance for joint participation with the IDC were expected to be mainly private in nature or from private sources. Indeed the IDC was expected to be a junior partner, to act "principally as an auxiliary organisation and not as the sole source of the provision of finance in respect of any undertaking or enterprise". The IDC and later the ICDC have played an important role in enhancing and proping the development of private property ownership in Kenya. In the true spirit of catalyst institutions, the IDC and the ICDC allowed themselves to be dominated by private property considerations. During the colonial period, the IDC was used along side other public corporations to bestow financial benefits to the small white-settler community who dominated the state organs in Kenya. In post-colonial Kenya, the ICDC is perhaps the single most important public corporation responsible for the transfer of private property to Africans under the Africanisation programme.

The third and last observation on the nature and character of the IDC discernible from its statutory functions is that, it was a "commercial" corporation as opposed to either service provision or production. The IDC was established as a finance corporation with profit-making as one of its foremost objectives. The finances of the corporation were to be disbursed "by way of guarantee, loan or investment and not by way of

grant or subsidy". This requirement had its origin in the notion that the IDC was operating basically as a limited liability company which had to declare a profit at the end of each trading or financial year. The close link between public corporations and the limited liability companies in their conception and operative criteria was presumed. This was the subject of a previous discussion (in Chapter two) and it suffices here to say that, the introduction of Company law considerations and criteria in the working of public corporations was because, the company law form was thought to be a highly successful form capable of bringing together the factors of production in an efficient manner. In the case of the IDC, the position was even more unique because, the company law form had been very closely associated with its predecessor, the East African Industrial Management Board. Mr. Nowrojee has observed on this public corporation company law connection that:

"The board (EAIMB), was referred to in the ordinance (1954) as the 'former company' and the provisions of the ordinance carry as much public corporation language as that of the companies ordinance. The 'acquiring and taking over as a going concern' of the 'undertaking and business of the former company' are phrases whose more usual habitat is the Memorandum of Association. The objects clauses of such memoranda are again recalled in the examination of the ordinance which sets out the 'powers of the corporation' at the usual length and in the paragraph form of such clauses. Similarly, there was statutory provision for the appointment of alternate directors, not usually found

in public corporation legislation. Again, unusually provision was made for the application of provisions of the companies ordinance to the corporation" 159

The three characteristics of the IDC discussed above, were inherited by the ICDC when the latter was incorporated in 1967. These characteristics directly affected in one way or another the structural organisation that the ICDC assumed. This structural organisation, known to lawyers as the legal form, will form the subject of our discussion in the next section.

III. THE INTERNAL ORGANISATIONAL STRUCTURE OF THE ICDC.

From the foregoing pages, it will have been noticed that the basic organisational structure taken on by the ICDC was that of the limited liability company, first employed by the East African Industrial Management Board - the precursor of the Industrial Development Corporation. As in the Company law form therefore, there are three hierarchies of officials that perform the functions for which the ICDC was established. This hierarchy of officials or corporation organs are: the board of directors; the management Committee and lastly the employees, who comprise various grades and skills. The efficient management of the corporation requires the proper and efficient co-ordination of these three cadres of officials of the corporation. Now let us turn to a detailed discussion

of these levels of corporate management.

(1) THE BOARD OF DIRECTORS

Before we discuss the ICDC Board of Directors, we feel it would be prudent to discuss in general terms the concept of the board of directors. We feel this is an important step because, the general discussion of the Board of directors will give us an opportunity to highlight on the underlying necessity of having a board of directors within the structure and management organisation of public corporations.

In the Company Law form, the invention of the Board of directors was the result of the amorphous nature of the joint stock company, by the late 18th century.¹⁶⁰ Because of the large numbers of shareholders investing in any one particular company, it became impossible for the whole general body of the shareholders to participate directly in the management of their company. It became necessary therefore to elect a few of the shareholders to manage the company on behalf of the rest of the body of the shareholders. A further complication was introduced in company management when it was realised that the management of companies required much more expertise than most ordinary shareholders were capable of furnishing. This realisation necessitated the recruitment of the "expert director" in the business(es) undertaken by the company when the need arose. Companies started electing directors, particularly the managing director under service contracts, "because of

the knowledge he brought with him to the management of the company". This development in corporate management divorced the shareholder-"owner" of the company from its management. This separation of "ownership" of the company from its management was bound to create conflicts between these two organs of the company.

The Conflicts that erupted between the "ownership" of the company and its management resulted in the demarcation of roles and functions between these two organs of the company. But because of the important position occupied by the management, the directors very soon became the more powerful organ of the company. Directors sitting as a board acquired the mandate of the company by law to: "exercise all such powers of the company as are not required to be exercised by the company in the General Meeting".¹⁶¹ Thus, apart from the declaration of dividends; the consideration of the company accounts, balance sheet and reports of directors and auditors; the election of auditors; the election and removal of directors and the alteration of the Memorandum of Association, Articles of Association and the Capital structure of the company, all the other functions and powers of company management were conferred upon the board of directors.¹⁶²

The adoption of the board of directors by the public corporation form from the limited liability company, carried with it the separation of property "ownership" from the management of the public corporation. Whereas the funding of public corporations, at least the majority shareholding, comes from governments, governments are not charged with the day-to-day management of public corporations. The management

of public corporations is left to autonomous boards of directors of the public corporations concerned. In the day-to-day management functions, the board of directors like those of limited liability companies, acquired a wide spectrum of powers. Although in the case of public corporations, there are no individual shareholders as such, most of the shares being held by the government or its agents in partnership with some other corporate businesses, boards of directors are expected to be mindful of the institutional shareholders in the discharge of their powers. Almost invariably, the boards of directors of public corporations must be mindful of the interests of governments, which usually hold the majority of the shares. Higher up on the ladder, boards of directors must not allow the functions of their corporations to run counter to the "public interest", since it is the public who are ultimately the shareholders, being the tax payers. The general public can in a loose sense be called the shareholders of the corporate businesses managed by public corporations. As Professor Hanson has observed by analogy:

"in public corporations, there is a similar (as in the limited liability company) hierarchy up to the board of directors. Immediately above it however, comes the Minister, whose functions are similar to those of a shareholders meeting only to the extent that he appoints, dismisses and criticises the members of the board. The business of the shareholders' meeting, to the extent that there is an analogy for it in public corporations, is discharged by the legislature, whose members have been frequently, if loosely, described as the representatives of the

shareholders. The shareholders themselves are the electorate" ¹⁶³

A Conflict between the public corporation through its board of directors on one hand and the government on the other, could be as fatal to the board of directors of the corporation as a clash of interests between the shareholders of a company and its board of directors. It is interesting to note in this respect, how the common law rules and principles developed for the limited liability company in so far as their functions, powers and liabilities are concerned, are applied or adopted to public corporations with little qualification. In the words of Professor Gower, "the general common law of corporations, will govern them (public corporations) except in so far as this is expressly or impliedly modified, and that many of the judge - made principles of the company law will be equally applicable to this more recent growth". ¹⁶⁴

From the limited liability company experience, there are two types of boards of directors. The first is the policy-oriented type of board of directors. The second type of board of directors is the functional - type board of directors. ¹⁶⁵ In the policy-oriented board of directors the individual directors have no specific duty assignments. In this type of board of directors, responsibilities are collective. The functional division of labour in this type of board organisation begins at the level of the managerial official. The day-to-day administrative decisions within the broad framework of directoral policy are delegated by the board of directors to the management committee, entirely composed of employees of the corporation. ¹⁶⁶ The role of the board of directors in this organisational framework be-

"the important area of sub-policy and decision-making, midway between the overall action of the (line minister) and the point where the administrator takes up. It is in this area that the representative and resourceful board of directors must occupy, if government corporations are to operate with efficiency and accountability" ¹⁶⁷

In this set up, the functions of the board of directors become :

1. the formulation of sub-policies;
2. the checking of internal budgetary programmes;
3. studying and recommending on the organisational questions of the public corporation;
4. making strategic executive appointments to the corporation; controlling financial methods and reporting on them to the minister and lastly, conducting public relations for the corporation.

On the other hand, the functional-type board of directors represents the highest authority of the public corporation and at the same time, the individual directors are assigned duties as heads of the various departments of the corporation. Two important exponents of this structural set-up: the Hoover Commission ¹⁶⁸ and Mr. Appleby ¹⁶⁹ argued that: "since the line minister, his secretary and the managing director of the corporation are an important trio in the management of corporation, the minister and his secretary should be charged with the formulation of policy; the managing director (in so far as his chiefs are diligent in the practice of delegation) will be given a free hand in executing the policy". ¹⁷⁰ In this organisational set-up, the board of directors is purely of an advisory nature, and can

be by-passed by the managing director on certain issues. The board of directors in this organisational set-up is responsible to the managing director and not vice-versa. The board is merely charged with the responsibility of helping the managing director in executing policy which has been formulated by the line minister and his secretary.

As will be seen shortly, the ICDC utilises the policy-oriented type of board of directors. This is also the type of board used in most other public corporations in Kenya. This board structure is said to be the better of the two types, particularly in the conditions of the third world countries. The reasons for preferring the policy oriented board of directors include:

1. the need for a strong supervisory board, apart from the minister and his permanent secretary, two government officials charged with the responsibility of formulating policies for public corporation. The need for a strong supervisory board arises because of the inexperience and lack of diversity on the part of corporate executives in the third world countries;
2. the policy-oriented board of directors is removed from the day-to-day management of the corporation and therefore, the members of the board are in a better position to appraise the performance of the management staff;
3. in the functional-type of board of directors where policy formulation and implementation

are jointly undertaken, inter-personal differences at the level of directors can easily be generated and this often leads to the young and inexperienced directors or managers ignoring one role in favour of the other; or to ignore the implementation of policies originating from their adversaries within the board. 171

4. Lastly, in situations where members of the board of directors are not appointed purely on merit, but rather for political reasons, ¹⁷² the separation of policy formulation and implementation gives the corporation the opportunity to appoint experts at the management level to run efficiently the day-to-day affairs of the corporation.

Under s.4(i) of the ICDC Act, the Minister for the time being responsible for Commerce and Industry (this ministry has been split into two ministries of Commerce and industry respectively and the Act has not been amended yet to reflect this change in the ministers responsible for the corporation), has the power to appoint a chairman and not less than five, nor more than nine other directors to form the board of ICDC. This section stipulates that:

"The Corporation shall consist of a chairman and not less than five nor more than nine other directors, all of whom shall be appointed by the Minister from among persons appearing to him to have had experience and show capability in industry, trade and administration."

A look at the ICDC Annual Reports and Accounts reveals that the board of directors has always operated at full strength since independence. Ideally, the members of the ICDC Board of Directors are supposed to come from persons with wide experience and expertise in either "industry trade or administration". This is not always the case! In any case, the Minister has the discretion to appoint to the board, people "appearing to him to have", and not necessarily people who have the experience and capacity to manage industry, trade or administration. This discretion is in addition to the fact that most appointments to public corporations in Kenya, particularly the position of chairman, are politically motivated.

The 1963 Board of Directors of the ICDC consisted of:

Mr. Kiragori as the Chairman;
the Permanent Secretary to the Ministry of Commerce and Industry; or his appointee as the vice-chairman;
Mr. J.B. Wanjui as the Executive Director. The other members of the board of directors were:

Mr. F.J. Addly;
Mr. Charles Rubia, (now Minister of Urban Development and Housing.... and one time Mayor of the City of Nairobi);

Mr. Sheikh M.A. Almoody; Hon. Kato-Bala, M.P.;
Hon. Gachago, M.P.; Senator G.M. Kalya and
Mr. W. Rodgers. ¹⁷³ By 1976 the Board of Directors of the ICDC consisted of:

Mr. Kiragori as Chairman;
the Permanent Secretary in the Ministry of Commerce and Industry or his nominee as the vice-chairman;

Mr. Matu Wamae as Executive Director;
Mr. F.J. Addly; Mr. Ernest Vasey KBE, C.M.G;
Hon. W.A.D. Ayoki; M.P.
Mr. Godfrey W. Karuri; Dr. J.K.N. Ngeno and
Mr. D.M. Kayanda as members. ¹⁷⁴

In 1979 the board of directors of the corporation was substantially reconstituted to comprise of:

Mr. Kiragori as Chairman;
the Permanent Secretary of the Ministry of Commerce and Industry Mr. Kabetu, as the Vice-Chairman;

Mr. P.M. Waweru as Executive Director;
Mr. S.N. Okova, M.P. (then);
Mr. I.W. Njuguna;
Mr. E.N. Wainaina;
Mr. G.W. Karuri;
Mr. W.A.D. Ayoki and Mr. D.M. Kayanda. ¹⁷⁵

Although the ICDC Act does not exhaustively stipulate the duties of the Board of directors, apart from the duties to: determine the allowances to be paid and to pay the chairman, directors and any other persons employed about the affairs of the corporation; ¹⁷⁶ the appointment of the General Manager and such managers, accountants, secretaries, managing agents and such other servants or agents of the corporation as is necessary for the proper discharge of corporate functions; ¹⁷⁷ cause to be kept proper books of accounts and such other records as are necessary to give a true picture of the state of the corporations' affairs; making the books of accounts and other books of record, available to the Minister and lastly, the preparation of a statement of accounts in such a form that can be submitted to the Minister, who in turn submits it to the National Assembly within

six months of receiving it,¹⁷⁸ public corporation practice sets the board of directors as the most important organ of the corporation in the management of its corporate affairs. This practice is in line with the law developed for the limited liability company.

The Board of Directors of the ICDC is not limited in functions to the financial controls of corporate management as it might be discerned from the Act and enumerated above. ~~On~~ the contrary, the ICDC Board of Directors is the governing Council of the Corporation on all management matters. As a matter of Corporation practice, the board of directors is empowered to do anything within the statutory powers of the corporation which is not the direct responsibility of the Minister or Parliament, so long as the act undertaken is for the bona fide benefit or interest of the corporation.¹⁷⁹ Most of the activities of the Corporation are delimited to the statutory provided powers. These powers include the declaration of profits on an annual basis and the establishment of subsidiaries for the proper management of the specialised functions of the corporation. These powers are drawn from the company law analogy.

But what is the real scope of the directors' duties to public corporations? This question can be answered at two levels. At the first level, this is done by utilising the Company law analogy and the second, by looking at public corporations as public institutions performing public services, and therefore demanding that officers entrusted with the management of these public services must be required to be conscientious of the public needs of the government. We shall now discuss in turn these approaches.

The legal position of the public corporation director has long been influenced by considerations of the private company. This has been in response to the so called Company law analogy which we have alluded to above. As Professor Hanson rightly commented, public corporations utilise the collective management technique - being placed in the board of directors. The choice of the board of directors as the instrument of management was mainly because the Company law form had employed this technique and found it suitable.¹³⁰ With the inheritance of the Company law management technique, public corporations also inherited the uncertainties in the law that apply to the Company law form. The legal position of the Company director is not as clear as it should be, taking the frequency of use into consideration. Some writers view the company director as a trustee of the Company, who must perform the general duties of a trustee along side any functions that may be specifically or statutorily mentioned in the instrument of his appointment.¹⁸¹ On the other hand, certain other legal sources view the company director as an agent of the company, who must observe the statutory duties of an agent.¹⁸² This is the view which is preferred by most legal writers. The dilemma of these legal comparisons notwithstanding, it can be observed that directors of companies and public corporations alike, comprise the top management of their institutions, and are in respect of their management decisions accountable for the activities and other undertakings of these institutions. This is even more true for the public corporation which is essentially a public institution

and the directors are appointed by the politically accountable Minister to manage the corporation for the "public interest". It is for this reason that the public corporation director must be looked at from the "public officer" point of view. To this we now turn.

Although there is overwhelming evidence to regard public corporations formed to carry out public functions as legal persons distinct from the government unless parliament has by express provision given it the character of the servant or agent of the government,¹⁸⁸ and that therefore their employees, servants and agents are government servants - civil servants, we think that it is correct to state that public corporations are public instruments and that their employees, servants and agents are "public officers" of one form or another.¹⁸⁴ This is mainly because of the public nature of the equity shareholding in public corporations which is ultimately held by the general public who constitute the electorate and the taxpayers.¹⁸⁵ Because of the public nature of the public corporation, its duties, functions and relations to the public, it becomes necessary that other criteria, other than the purely private enterprise ones, which regulate the company law form be considered. It is for this reason that the Company law standards and duty expectations from a director are inadequate in the public corporation setting. It is not therefore true to say that in the public corporation duty situation, directors are only expected to carry out the standard of skill and diligence expected from their counterparts in the company law setting.¹⁸⁶

Directors of public corporations are by appointment expected to be diligent members of society, people who have proven capabilities and have the requisite experience in "industry, commerce and administration". This requirement implies an objective assessment of the individual director's performance, knowledge of his duties and experience in contradistinction to the company law position. This in turn suggests that if an individual director does not exhibit the required knowledge, performance or experience in the management of the corporation, he could be vetted out of the management of the corporation without the corporation or the appointing agency incurring any liability. Negligence on the part of the board of directors as a collective unit, or even the individual director, where he has personal responsibilities delegated to him, could be actionable. Under s.17 of the ICDC Act, "no director or officer of the corporation shall be personally liable for any act or thing done, or omitted to be done by him as such in good faith or without negligence in the course of the operations of the Corporation". Although the Act protects the honest and diligent director or officer of the corporation from any personal liability, it is foreseeable from the wording of this provision for a director or any officer of the ICDC to be held liable for acts which are done in bad faith or in situations where there is proven negligence. Although no case of this nature is known to us, nor to the Assistant Corporation Secretary of the ICDC,¹⁸⁷ it is possible for such prosecution to be sustained in law. It is our submission that such cases are rare to find, because the more likely course of action to be taken by the Government against dishonest or negligent directors is to retire them quietly so that the Government is saved a face for having appointed incompetent and dishonest persons to manage important Government businesses.

In the discharge of their functions, public corporations through their boards of directors, like all other public institutions must be guided by principles of a general administrative nature. These principles include such matters as: intra vires transactions; the exercise of good faith in their day-to-day operations; the observation of the natural justice rules: no bias on the part of the decision maker and notice and an opportunity to be heard by any party affected by the corporations' deliberations. ¹⁸⁸

As public institutions, public corporations have capacity only to handle matters which are intra vires the corporation and are expressly or necessarily implied by their constituent statutes. This principle was the subject of discussion in chapter one, on the Legal Attributes of Public Corporations. It suffices here to restate that under English Common Law, a corporate person established by statutory provision must not exceed the powers expressly or impliedly granted to it by the instrument of incorporation. To do this would expose the directors and the corporation to accusations of exercising their powers and functions ultra vires the corporation, and such purported exercise of powers and functions would be null and void. ¹⁸⁹ The requirement that only intra vires powers of the corporation should be exercised, does not only relate to the substantive powers of the corporation. Procedure must also be given its due place in the workings of public corporations. With reference to public corporations, such matters as the realisation of a quorum at board and committee meetings and the conduct of such meetings according to the laid down rules are important.

If the laid down procedure is not followed, any resolutions passed as a result of the improperly constituted meeting can be challenged for being ultra vires the corporation. The legal effect of the ultra vires doctrine is that, an act beyond the powers of a corporate authority is not binding on it and therefore the perpetrator of such an act would be personally liable for any liability arising from it. This doctrine has serious boomerang effects on innocent third parties who may find themselves without a remedy in the event that the corporation is the author of the ultra vires act. Such absurd effect was experienced in the case of Re Jon Beauforte (London) Ltd. 189A

The exercise of corporate powers must also be in good faith. Although the term good faith is a most over used term, there is no definite or hard and fast meaning attached to it. This term is normally used to mean: honestly, not for corrupt or improper purposes and that the powers must be exercised for ends which the powers were designed to attain. The public authority exercising the particular power must act reasonably, without introducing extraneous matters into the issue under consideration. ¹⁹⁰ Public Policy Considerations must normally be given due weight. If public corporations purported to perform their functions in disregard of these principles, their actions would be liable to challenge on grounds of bad faith, on the part of the servants or officers who are charged with the management of these corporations. An illustration of this principle can be furnished by the case of Nairobi City Council v. Wadhwa. 191 In this case, the purported allocation of market stalls in Nairobi City Market was challenged as discriminatory and therefore void, because "race" was not a relevant consideration in the assessment of ones ability to manage

a market stall!

More importantly, public corporations as public institutions must observe the twin principles of natural justice: that no man shall be judge in his own cause and that a person affected individually must have notice of the case against him or affecting his interest, and an opportunity to be heard in his defence or to present his objections. Although the question as to whether or not the public corporation was acting as a "judicial" or "administrative" agency would arise before disposing off the matter, legal thinking tends towards the conclusion that: "a public body acts quasi-judicially when entrusted with the decision of questions in dispute of two parties".¹⁹² This means therefore that public corporations and their directors must always bear in mind the safeguarding of third party interests in their day-to-day operations. These principles should be observed in such day-to-day exercise of corporate power in matters such as, the allocation of credit facilities to different applicants, the allocation of businesses and finally the exercise of corporate power in the event that, a businessman or a business enterprise has failed to meet its financial commitments to the corporation in terms of loan repayments. The non-observation of these principles on which the administration of natural justice is hinged, would expose the corporation to accusations of unconsciounable behaviour and liable to administrative law remedies.¹⁹³

The activities and the attitude of the ICDC Board of Directors bears witness of the public nature of their duties to the Government and the public in general. An official of the corporation told us that the ICDC directors are usually quite interested in the activities and functions of the corporation. She said, it is on very rare

occassions indeed that the individual members of the board miss board meetings without the excuse or apology, which meetings are held once in a month. The official does not remember a single occassion when a board meeting was postponed or cancelled for lack of a quorum, which is set at any five members of the board including the Chairman.¹⁹⁴ From this exposition, we can observe that the directors of the ICDC are more "committed" to their duties as directors than their counterparts in the company law setting. Apart from the "public duty calling", which we have attempted to ascribe to these officials, another explanation could be furnished by the importance these officials, Sue moto, attach to their appointments. As we have had occassion to mention, appointments to boards of directors of public corporations are one of the ways in which the Government expresses its political patronage to supporters or seeks to rehabilitate former political foes. Neglecting corporate duties after such an appointment has been made in your favour could be interpreted as ingratitude to the Government which made the appointment. Another possible reason for the apparent "Commitment" to duty by the directors of public corporations is the important role public corporations perform in national development. The Review Committee of Statutory Boards, citing the economic importance public corporations perform in national development, recommended that corporation directors and their managers should be prepared to accept corporate and individual liability for the conduct of the affairs of our public corporations. The Committee stated:

"It must be made clear to the boards that, they and their members are required to accept corporate and individual responsibility for the conduct of their affairs".¹⁹⁵

The acceptance of Corporate and individual liability

on the part of public corporation directors and managers must necessarily entail the acceptance of wider responsibilities and diligence than hitherto known to their Company law counterparts. We expect therefore that with the Government's acceptance of the Review Committee's recommendations, directors and managers conduct of corporate business in Kenya will be subject to more surveillance than before. Public and Criminal law sanctions should be used more often to reduce the incidences of: prolonged inefficiency; financial mismanagement; waste and malpractices, resisting public accountability; nepotism and the personalisation of office in public corporations" 196 alluded to by the Review Committee.

(2.) THE MANAGEMENT COMMITTEE

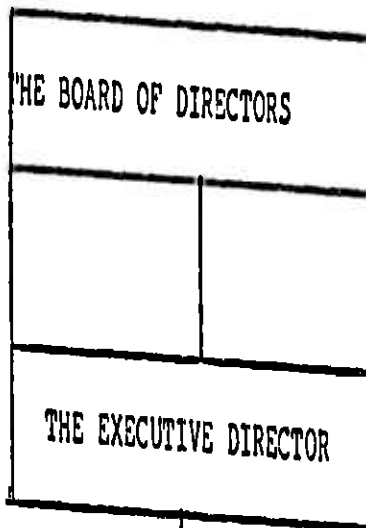
The Board of Directors of the ICDC is of the policy-oriented type, the main task of this board being the interpretation of corporate policy and the implementation of the corporation's programmes. The functions that the board of directors implements include the statutorily provided functions and any other that the Government through the line minister may from time to time bring to the attention of the corporation. The day-to-day administration and management of the corporation is left to the management of the corporation. The management committee of the ICDC is headed by the Executive Director who also sits on the board of directors of the corporation. The Executive Director is the Chief-executive or officer of the corporation and unlike

other members of the board of directors, he is a full time official of the corporation. The Executive Director is accountable to the Board of Directors and the Minister, for both his actions and those of his subordinates in the corporation. The Executive Director in the performance of his duties to the corporation provides the necessary link between the Minister and the Board of Directors on one hand and the management Committee and the employees of the corporation on the other hand.

To facilitate the efficient administration and management of the ICDC, the employees and servants of the corporation are divided into various departments and sections, each specialising in special duties. An official of the corporation told us the ICDC as at January 1978, was made up of five departments, each supervised by a departmental head. ¹⁹⁷ These departments were:

1. The Administration Department;
2. The Loans (Investments) Departments;
3. The Finance Department;
4. The Projects Department and
5. The Management Services Department.

Chart No.1 on the next page shows this organisational structure and the functions each department performs. The official also pointed out that the board of directors of the corporation reviews the functions of each department after every five years to bring it in line with the functions and expectations of the corporation. This is mainly to strengthen the impact of the corporation to public needs. The Management Committee is the repository



THE ADMINISTRATION DEPT. HEAD: COMPANY SECRETARY.	THE LOANS DEPT. HEAD: LOANS MANAGER	THE FINANCE DEPT. HEAD: CHIEF ACCOUNTANT	THE PROJECTS DEPT. HEAD: PROJECTS MANAGER	THE MANAGEMENT SERVICES DEPT. HEAD: GENERAL MANAGER.
Administrative services; Departmental coordination; Personnel recruitment and Training	Screening and the processing of loan applications; appraisal of technical aspects; assembling project details through field work; recommendations to the Board on loan applications.	Keeping accounts Records; Banking functions for loan disbursements and repayments; Registration of security documents; Advise on Accounting problems, methods and other business problems; Loans follow-up; Supervising Loans repayments.	Project analysis; Market surveys; Liaising with foreign investors, local industrial investors and Government Ministries; Preparation of feasibility studies; projects follow-up; Advisory services to prospective local and foreign investors.	Consultancy services; Extension services; valuation of business properties; secretarial work for some subsidiary companies where the corporation has equity holding.

SOURCE: MANUAL, THE INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION, NAIROBI, 1970.

of corporate power within the corporation and a look at the activities of each department will indicate the important role that this sub-stratum of corporate management performs. The importance of the management committee lies in the fact that it comprises the professional cadre of the corporation whose expert knowledge is crucial for the proper interpretation and implementation of the corporate functions assigned to the ICDC.

Within the policy-oriented type of board of directors, the degree of autonomy exercised by the corporation will normally depend on the quality of the management committee. This is precisely because the management committee unlike the board of directors is a full time organ of the Corporation, and their day-to-day management of corporate affairs, they are expected to make continuous decisions affecting the status and functions of the corporation. Although the management committees of public corporations must always act rationally and in the best interests of their corporations, in other words, they must act free of the influence of the minister or the government in the day-to-day matters affecting the corporation, it is important for the committees to bear in mind that their enterprises act as agents of governments in their desire for national economic development. The overall policies of the government must therefore be given effect in their decisions. The management committees in the exercise of their autonomy and expertise, must therefore bear in mind their public duties to governments and the public in general. ¹⁹⁸ Within the ICDC, the management committee is constrained or influenced in the performance of its management duties by several factors. These factors include: the political orientation of the government or put another way, by the policies which the politically accountable minister and the board of directors may set;

the relevance of the services the corporation renders to the public and the funds put at the disposal of the corporation by the central government. Within the limitations imposed by these constraints, the management committee is expected to create optimum conditions for goal attainment by the corporation. A discussion of the quality of the ICDC Management Committee with an official of the corporation,¹⁹⁹ indicated that the management committee of the corporation has been facilitated to do a good job. The official referred to the almost astronomical expansion of ICDC's activities since 1967 to the present day. This expansion of the activities of ICDC the official said, could only be explained by the hard work and the good management capabilities of the management committee of the corporation. 200

(3.) THE EMPLOYEES

The last in the staff hierarchy of the ICDC are the employees of the corporation. This category of officials is made up of a wide variety of professionals, skilled and unskilled workers. The employees of the corporation range from economists, accountants, lawyers, administrators, agriculturalists, clerical staff, technicians to manual labourers. The role of this group of officials of the corporation is to implement at different levels and stages, the policies and functions of the corporations under the supervision of the management committee. These are the people who do the actual work, or put differently,

these are the people to translate the policies and statutory functions of the corporation into the ultimate goods and services in readiness for consumption and use by the general public. The terms and conditions of service of this cadre of corporate officials, like those of the management committee are formulated by the board of directors of the corporation.

Although the employees of the corporation form the single most important group in the organisation, in terms of numbers and functions, they do not have any direct role in the policy formulation in the corporation, nor in its management. At the policy formulation in the corporation, nor in its management. At the policy formulation level, there is no direct employee - participation or representation on the board of directors of the corporation. The employees of the corporation have no better chance to voice their opinions and views on the policies of the corporation than any other citizen in this country. The ICDC Act does not provide for employee participation in policy formulation; nor is there a director specifically appointed to represent employee interests on the board of directors. When we asked an official of the corporation whether the views and interests of the ordinary employees are sufficiently protected and defended by the board of directors, she said:

"The employees of this corporation are not a special group of people who should be especially represented on the board of directors. The employees of this corporation are just ordinary citizens of this country who happen to be working for the corporation. Like any other ordinary citizen, the employees

of this corporation have the opportunity of questioning the policies of this corporation through parliamentary representation or through the normal channels particularly the public media". 201

On discussing this issue further we were told that there is a suggestion box within the ICDC Building which employees can use to suggest anything they feel would be for the better management of the corporation.

The concept of workers participation in policy formulation is still a far cry, not only for the ICDC but most other worker's organisations in Kenya. Most of the enterprises in Kenya are managed from above and the employees, particularly, those in the lower cadres, are merely expected to respond to the directives given to them by the management staff or the board of directors without question. The question or issue of worker's participation is even more far fetched so far as policy formulation is concerned. In the ICDC, like many other business organisations in Kenya, both public and private, issues of policy formulation are the exclusive preserve of the board of directors in consultation with the government ministry under whose portfolio the corporation falls.

Representation of employee interests at the board level is made even more difficult by the fact that the ICDC utilises the policy-oriented board of directors. The use of this type of board, makes it impossible for the individual members of the board to specialise in specific interests. The reasons for adapting this type of board of directors have already been discussed. Allowing only one director on a policy-based board of

directors to represent the special interests of the employees or workers would be the source of conflict on the board, leave alone, the fact that the law conceives that the duties of a director are owed "to the corporation as a whole" and not to any special group within the corporation. It would therefore be improper within this legal framework for directors of the corporation to act solely in the interests of a particular member or members of the corporation. 202

The ICDC organisational structure as it exists today excludes employees from directly influencing the ICDC policies. Employees of the corporation can only express their views as to the desirability of any particular policy through the suggestion box, Parliamentary representation and the mass media. In its day-to-day deliberations, the board of directors considers among other interests, those of its employees. Directors are by law required to consider the interests of employees where: it would be also for the benefit of the corporation and the general public to do so. An act which seeks to bestow an interest on the employees only in disregard of the general interests of the corporation or the general public, opens the management to accusations of perpetrating an unlawful act. 203

At the management level, employee representation is no better. The employees of the corporation perform their duties in conformity with the directives of the management committee. In any case, since the duty of the management committee is restrictive, that of policy interpretation and implementation, there is very little ground for manoeuvre to allow for employee participation. Either an employee is conversant with his duties to the corporation or he is not. Conflicts between the manage-

ment team and the employees are usually resolved by reference to the established personnel regulations and procedure formulated by the board of directors. The Personnel Regulations and Procedure are akin to the Governments code of Regulations which guides the operations of Civil Servants. An official of the corporation told us that she was not aware of any industrial dispute(s) involving the corporation and any employee(s) that has (have) gone to the Industrial Court. The Corporation was proud of the good industrial relations existing between itself and the employees. The official also alleged that the corporation was one of the best paying public institutions in this country and so its employees would not complain about poor working conditions. ²⁰⁴

IV. THE FORM AND ITS IMPLICATIONS TO CORPORATE PERFORMANCE

What are the implications of the public corporation form on the performance of its corporate duties and functions? Writers on this subject have disagreed as to the actual impact of the organisational form on the performance of public corporations. In 1954, a United Nations Conference on Public corporations unequivocally concluded that:

"the single most critical control point is the law, decree or other basic authority providing

for the creation of public corporations. This is likely to determine in large measure all other organisational relationships." 205

In 1972 Professor James and Ligunya pointed out that some of the structural differences within public corporations in Tanzania were because of the deficiencies in law. 206 They recommended that: "a ministry of Government Enterprises" as the central institution to oversee the performance of public corporations should be established. So far as these two studies of public corporations are concerned, the form public corporations assumed and their immediate control relationships with other Government institutions were crucial for their proper functioning.

On the other hand, there are those who think that the organisational form is not as important to the working of public corporations as the case has been put above. In his study of the Ghanaian public corporations, Pozen came to the conclusion that the adoption by Ghana of the public corporation form posited by the British theory, was not crucial to the way the Ghanaian public corporations performed their corporate duties. 207 Professor Hanson 208 also observed that the organisational form, in so far as its impact can be isolated from the other factors, has little impact if at all, on the performance by public corporations of their corporate functions. Professor Hanson said:

"practically every known type of public enterprise is to be found working well in some circumstances and badly in others, and it is extremely difficult to say to what extent the

performance of a particular enterprise has been affected by the form that the political authorities have given it, as to isolate this factor from all the others is usually impossible. Even if one confines one's attention to the well established public enterprises in the developed countries, it is not easy to judge the relative merits of alternative forms or organisations. It is more difficult, if ones range of vision includes newly established public corporations in under-developed countries." 209

The same conclusion as that set above by Professor Hanson was arrived at in 1965 by the United Nations' sponsored conference on: The Organisation and Administration of Public Enterprises. The delegates agreed that:

"the alleged decisive influence of the law regulating public enterprises has proved illusionary and that there is indeed no discoverable correlation between the legal rights and the obligations of a public corporation and the quality of the performance which it achieves." 120

Writers who insist that the form public corporations take, plays a decisive role in the performance of their corporate functions, seem to make a false start! Public corporations are established by the state to fulfil designated roles in the national economy. It is difficult therefore to see how the form they take can determine the quality of their own corporate performance. What

seems important in the performance of these corporate functions is how the state is able to co-ordinate the efforts of these public corporations within the national context, in the light of the overall objectives of the economy, of which public corporations are but a small part. A Central planning machinery and the formulation of a long term strategy in which public corporations are part is the only way to ensure the successful contribution by public corporations to the development our national economy. And this is a political question! The form the ICDC takes, the internal organisational structure we have discussed above, does not have any direct bearing on the quality of performance of the corporation.

To our mind, it is the political and economic factors prevailing in the country that will determine the output of public corporations in Kenya. It is impossible for an institution, however ingenious its form, to successfully operate in an uncongenial political and economic environment. It is the political arm of the government that sets the goals and criteria for assessing whether the functions for which the corporation was formed are being achieved. The functions of public corporations will therefore necessarily tally with the economic and political goals of the class or classes controlling the state. So long as these political and economic goals are set up by the dominant classes in the particular society or country, it seems to us that it will make very little difference, if any, whether government enterprises are operated as public corporations proper or as limited liability companies or will indeed as mere government departments. It will make little difference in our situation, whether

the enterprises managed by the ICDC were operated under a completely different organisational form: the limited liability company, without the public accountability safeguards or indeed under a government department with the usual bureaucratic red tapeism. It is worthy of note that there is evidence of: "prolonged inefficiency, financial mismanagement, waste and malpractices, personalisation of office, corruption and nepotism and resisting of public accountability in many public corporations in Kenya" ²¹¹ These are the same evils that have been levelled against the country's civil service. ²¹²

In the light of what we have said above, emphasis should be shifted from issues of organisational form to a debate of the political and economic implications of our policies. A central planning and co-ordinating machinery for the implementation of properly formulated long term political and economic strategies should be facilitated, if public corporations have to play a more positive role in our national economy. Because of this finding, we doubt the effect of the proposed reforms or changes suggested by the Review Committee of Statutory Boards on the improvement of the performance of public corporations in Kenya. The establishment of a Parastatal's Advisory Committee; ²¹³ the strengthening of the Inspectorate of Statutory Boards; ²¹⁴ the creation of an Investment Division in the Vice-President's office and Minister of Finance to monitor all Government investments in parastatals, ²¹⁵ and the proposed "State Corporations Act" ²¹⁶ will not solve the problems facing and plaguing public corporations in Kenya today.

CHAPTER FOUR

EXTERNAL CONTROL AND PUBLIC ACCOUNTABILITY IN THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION - THE I.C.D.C.

I. Introduction:

The quid pro quo for the managerial autonomy exercised by management committees of public corporations is public accountability. Management Committees of public Corporations under their executives, administer the day-to-day affairs of public corporations. In their day-to-day management of corporate affairs, the management committees are not given an unlimited hand in the administration and formulation of policies applicable to the public corporations. The management committees are expected to exercise the day-to-day management of public corporations in conformity with the general directives and policies formulated by the mainly politically accountable ministers of the government responsible for the portfolios under which the public corporations concerned fall. In other words, management committees of public corporations must lend themselves accountable to the boards of directors of public corporations and through the board of directors to the minister under whom they fall. Implicitly built into this organisational form or structure of public corporations therefore, is a mechanism which ensures that public corporations lend themselves to public accountability. In this Chapter, we shall attempt to study the principle of public accountability as it relates to the ICDC. This principle of public accountability is the twin principle to the managerial autonomy concept which we studied in chapter three (3). The two principles put together, form the cornerstone on which the public corporation as a concept is modelled.

The principle of public accountability guards against public corporations lending themselves too easily to the flexibility in operations of the limited liability company. The extent of the limited liability company flexibility was described by Professor Hanson when he said:

"In the limited liability Company form, the base of the hierarchy is the management team, consisting of a number of officials with specific responsibilities under the leadership of the Managing Director. This management team has the mandate of doing anything within the constitution of the company which is for the bona fide benefit of the Company". ²¹² (our emphasis)

The almost absolute managerial autonomy which the limited liability company enjoys unguarded, can be detrimental to the "public interest" which public corporations are necessarily a product of. To reduce the dangers of using public corporations for private and individual interests or benefit by management teams, enabling or constituent statutes - and in our case, the ICDC Act, set up some control organs within the organisational structure of public corporations, whose aim is the facilitation of public accountability for all the corporate functions undertaken by the public corporations. Although some of these organs of control have some resemblance to those used by the limited liability company form, the former are far more efficient. Commenting generally on the controls available

against the management teams of public corporations and limited liability companies, Professor Hanson has observed that:

"In a public enterprise, there is a similar hierarchy up to the board level as in the limited liability company form. Immediately above it, however, comes the minister whose functions are similar to those of the shareholders' meeting only to the extent that he appoints, dismisses and criticises the members of the board. Quite apart from the fact that the minister can do these things far more effectively than an amorphous assembly of shareholders, he differs from the latter in that he is more or less continuously concerned with policy formulation, being able to give orders to the board in respect of general and specific policies at any time he thinks fit. The business of the shareholders' meeting to the extent that there is an analogy for it in public enterprise is discharged by the legislature, whose members have been frequently, if loosely, described as the representatives of the shareholders. The 'shareholders' themselves are the electorate. Whereas therefore, the limited liability company has a three level hierarchy in its management control, a public enterprise has a four-or five layer one." 213

We are going to study these external control organs within the ICDC, as the means available to the public corporation to attain public accountability for its corporate functions. It is important to bear

in mind that these organs of control do not aim at subordinating the activities of the management team, who are the specialists or experts in the various functions that the corporation performs, but rather to influence and streamline the management team into giving consideration or due weight to the "public interests". In the ICDC, the external control organs are the following:

1. The Board of Director's of the Corporation;
2. The Ministries of Commerce, Industry and Finance;
3. The Presidents' office (the Inspectorate of Statutory Boards and the Parastatal's Advisory Committee.);
4. The Parliament
5. The Judiciary;
6. The Public (Electorate);
7. Special Agencies (mainly the Controller and Auditor-General and the Development Plan)

We shall now turn to a detailed discussion of these control organs.

II. THE ICDC BOARD OF DIRECTORS

In so far as the ICDC Board of Directors is of the policy-oriented type, it can be said to be an external control organ vis-a-vis the functions of the management Committee. In this sense, the Board of Directors of the Corporation perform purely peripheral management roles by formulating sub-policies and ascertaining that in fact the management Committee which is charged with the day-to-day administration of the corporation performs its functions in conformity with the statutory provisions of the ICDC Act ²¹⁴ and any

other policy directives from the Minister(s) and itself. The ICDC Board of Directors exercise its control activities over the management of the corporation at three levels:

1. by supervising the management team in its execution or implementation of policies issued by the Ministers of Commerce, Industry and Finance;
2. by backing-up ministerial policies and directives with sub-policies formulated by itself for the proper management and co-ordination of the corporate activities of the ICDC and;
3. by the control and supervision of the Board of Directors of the subsidiary and Associated Companies in their discharge of corporate functions.

The first two functions of the ICDC Board of Directors were the subject of discussion in chapter three. It suffices to mention in the present context that, the Executive Director of the ICDC, who leads the management team is responsible to the Board of Directors of the Corporation and the Ministers of Commerce and Industry (and the Minister of Finance when financial matters are involved), for his actions and the actions of his subordinates in the management team. The Board of Directors of the Corporation, influences the performance of the Corporation's functions and duties by setting the levels of salaries and allowances of the staff and agents of the corporation, including the allowances for its own members. ²¹⁵ By so doing, the Board of Directors sets the level of employee initiative and morale within the corporation. If salaries and other allowances, paid to both the employees and the management

staff of the corporation are not competitive with those paid elsewhere - (both in public and private sectors of the economy) the morale in the Corporation may go down and the corporation may suffer in terms of employee initiative.

The Board of Directors has also been given the mandate to employ the staff of the corporation at all levels. ²¹⁶ To ensure the proper coordination of corporate functions or activities within the corporation, the Board of Directors makes strategic appointments of Corporate managers whose duty it is to co-ordinate the employees of the corporation in their day-to-day duties to the corporation. Because the Board of Directors has the powers of hiring, disciplining and firing the employees and managers of the corporation, they perform their duties wary of the Board's exercise of these powers. In the event of a corporate manager or employee of the corporation misusing his powers, the Board is liable to discipline or fire such person. These residual powers of the Board of Directors keep the managers and employees of the corporation on the alert in the discharge of their duties to the corporation.

The other important role that the ICDC Board of Directors performs is the control and supervision of the boards of directors of the subsidiary and Associated Companies of the ICDC. As of June 1979, the ICDC had fifteen (15) subsidiary companies and forty-four (44) Associated Companies. The Subsidiary and Associated Companies of the ICDC have been established under statutory authority and registered under the Companies Act. ²¹⁷ These subsidiary and Associated Companies perform their duties in compliance with the Companies Act. For them therefore, the Company Law setting is not only predominant,

but also comprises the law which regulates their corporate functions. In order that these government companies do not lose their sense of public accountability, the ICDC Board of Directors moderates their activities and powers to keep them in line with the expectations of both the central government and the public in general. Like the parent corporation, the Subsidiary and Associated companies of the ICDC are expected to perform their corporate functions or duties with the "public interest" as their guiding principle. Part of this control on the part of the ICDC is achieved through its right to appoint members of the boards of directors of these Subsidiary and Associated Companies. Through the boards of directors mechanism, the ICDC makes certain that persons who understand and sympathise with government policies, which the corporation itself submits to, are appointed. The ICDC Board of Directors is usually also strongly represented on such boards of directors' through the person of the Executive Director, who is almost invariably appointed as the Chairman of the Associated Companies. It should also be borne in mind that as shareholder (either of Subsidiary or Associated Companies), the ICDC ^{participates} in the appointment of Managing Directors of these companies and by so doing, control the possible use of corporate power within the companies.

The Control of the Associated companies of the ICDC by the Corporation's Board of Directors is not an easy task. This is because, in some companies, the corporation holds a nominal equity shareholding, sometimes as low as 5.6 per cent. ²¹⁸ The corporation's entitlement to appointing members of boards of directors in these circumstances is considerably reduced. Most of the

members of the boards of directors of Associated Companies are appointees of the joint venture partners of the ICDC - the multinational corporations, which hold the majority of the shares in these companies. Harmonising the interests of the ICDC and those of the government on one hand and those of the multinational corporations on the other hand, is a task that the ICDC Board of Directors is required to *perform*. When we talked to the then Executive Director of the ICDC Mr. Matu Wamae, about the balancing of interests between the ICDC and the Multinational Corporations, comprising the majority shareholders in the Associated Companies, he said:

"The aims and expectations of the ICDC and the Government on one hand and those of the Associated Companies on the other hand are the same. The ICDC and the Associated Companies are partners in progress. Both the ICDC and our partners expect a good return on the capital invested and the prosperity of the nation at large. In any case, foreign companies always agree that the Executive Director of the ICDC would become the Chairman of the board of directors of the Associated Companies. Once we are on the board, we always make known our policies, if they are not yet clear to the foreign partner." 219

The (then 1978) Executive Director of ICDC was in effect saying that the ICDC and the government in general have no control problems over the Associated Companies. The two partners in progress (sic!!), were working harmoniously for the development of this country! The control of

the activities of the Associated Companies by the ICDC can be said to be achieved and effected via the assortment of the aims and expectations of each partner at the negotiation stage, before the signing of the joint venture agreement. This type of control, must be minimal, notwithstanding Mr. Wamae's assertion to the contrary. The fact that partners stand to benefit a proprietary interest from a joint venture does not necessarily mean that their aims and expectations for undertaking the venture are the same. It was no wonder that Mr. Wamae was a member of sixty-one boards of directors while he was the Executive Director of the ICDC. Most of the Companies Mr. Wamae directed were Subsidiary and Associated Companies of the ICDC. ²²⁰ Of the sixty-one (61) Companies and Corporations that Mr. Wamae directed, he was Chairman of forty-two of them. ²²¹

Even with the reputable abilities of the previous Executive Director, it is doubtful whether he was not being overworked to the extent of loosing grip of what was in fact happening in the Subsidiary and Associated Companies. Was it possible for one man to effectively direct all these companies - and chair - boards of directors of forty-two (42) of them? Taking into consideration the amount of preparation required to attend and effectively participate in board meetings, the reading and cross-checking of the agenda, scrutinising the minutes of previous board meetings, the answer to the question posed above must be surely ^{be} No.! It is not surprising that as a result of this apparent laxity in management and control of foreign enterprises, the foreign investors have tended to dominate negotiations in most joint venture agreements, technical assistance agreements; trade marks and patents and the licencing of technology. In a recent speech, the then Minister of Commerce and Industry (now responsible for only

the Commerce portfolio) Mr. Mwamunga said:

"Budding Kenyan industries are being dupped by the quick thinking, slick talking foreign investors. High sounding deals are made, but Kenyans are getting a raw deal time after time. Kenyan firms are a victim of a monumental fraud. They are sold dummy machinery; they pay royalties for obsolete technology; management fees far outstrip profits; foreign investors dump sub-standard plants here without backing their machinery with any capital ... and so the list of woes goes on" 222

The views expressed by the Minister Mr. Mwamunga are preferable to those given by Mr. Wamae on the question of the interests at stake in joint venture agreements. We prefer Mr. Mwamunga's views because they represent the present trends in foreign investments. 223 Elsewhere as in Kenya, foreign investments, both public and private, are utilised by the investors, not as sources of capital for the recipient or host countries, which should be ploughed back into local enterprises for the future development of the host countries, but rather use them as sources of income from the host countries where the capital is invested. Returns to investments are in the form of dividends, profits and royalties. In recent years, the amounts of money siphoned out of Kenya in the form of dividends, profits and royalties far exceeds the invested capital over the same period. The flight of capital from Kenya is at times done by under cover means. 224

But does the fact that the Kenyan economy is being dupped by foreign investors necessarily mean that the aims and expectations of the ICDC and the government on the one hand and the foreign investors on the other hand are different? The answer to this question need not

be necessarily in the *affirmative*. The aims and expectations of the two partners in the joint ventures could as well be the same, as Mr. Wamae observed. Indeed as we already observed, the state and its agents in Kenya are not "mindless" institutions. The government and the ICDC in Kenya serve the dominant economic interests of the ruling class or classes, which interests are represented by monopoly capital, which mainly comprises foreign capital.

III. MINISTERIAL CONTROL OF THE ICDC

Ministerial control of ICDC's corporate affairs is exercised through the parent-ministries. The line Ministers who control the Ministries of Commerce and Industry have the mandate under statutory provision to formulate and issue policies to be implemented by the corporation. The Ministers of Commerce and Industry are charged with the responsibility of controlling the activities of the ICDC through or with respect to the formulation of policies. But the matter does not in fact end here. Over financial matters, the Minister for the time being responsible for Finance is charged with the responsibility of controlling and supervising all the financial matters of the corporation. This power by the Finance Ministry, is to be exercised in conjunction with the Ministries of Commerce and Industry.

Although ministerial control is one of the most important means at the disposal of the government in the control of the corporate activities of public corporations, it does not exist in the abstract. Ministerial Control of corporate affairs of public corporations depends on the existence of certain factors. These factors include:

1. the level or stage of economic development that the country has attained;
2. the demands being made on ministerial time;
3. the quality of the management team and the board of directors that the corporation has employed, and
4. the role that the state has assigned the particular corporation in the national economy.

A Combination of one or more of these factors will normally determine the nature and quality of ministerial control available in any one particular corporation. In the ICDC, these factors have something to do with the quality of the ministerial control exercised by the Ministries of Commerce, Industry and Finance. We shall now turn to a discussion of the quality of the ministerial control exercised by each of these ministries over the activities of the ICDC.

(1) THE MINISTRIES OF COMMERCE AND INDUSTRY

The ICDC being concerned with commercial and industrial undertakings has always been associated with the Ministries of Commerce and Industry. Since its incorporation in 1954, the ICDC has always come under the portfolio of Commerce and Industry, a ministry which has always existed in this form until the 1979 ministerial allocations. In November 1979, this ministry was split into the Ministries of Commerce and Industry. These new ministerial allocations have caused some confusion and hardships in the administration of some departments of the government. With respect to the ICDC, the activities of the former ministry have been split down the middle, some of them going to the new Commerce Ministry and the rest to the Ministry of Industry. But for the purpose of our analysis, we shall treat these two ministries as one because, the respective ministers as of now exercise the same powers over the corporation. This position is akin to what existed in the ICDC before the 1979 "Nyayo" General Election.

Before the 1979 "Nyayo" General Election, the ICDC came under the Ministry of Commerce and Industry. The Minister responsible for this ministry exercised direct control over the affairs of the corporation. Ministerial Control over the ICDC was exercised in mainlyⁱⁿ the following ways:

a) by the appointment of the members of the board of directors;

b) by the formulation of general policies which bind the corporation, and

c) by informal methods.

We shall now turn to a detailed discussion of these methods of control.

a) THE APPOINTMENT OF THE MEMBERS OF THE BOARD OF DIRECTORS

Under the ICDC Act, the Minister responsible for the Ministry of Commerce and Industry is empowered to appoint the Chairman and the other members of the Board of Directors of the Corporation. The Act specifically stipulated that:

"The Corporation shall consist of the Chairman and not less than five nor more than nine other directors, all of whom shall be appointed by the Minister" 226

Since the members of the Board of Directors owe their appointment to the Minister, it is expected that they will submit to the policy directives of the minister when and if he issues any. Disobedience or neglect of the government policies as transmitted to the Corporation through the Minister may lead the members of the Board of Directors or the particular director who disobeys or neglects such policy being fired from the services of the corporation. It is also expected, in theory at least, that the Minister in choosing the members of the Board of Directors of the Corporation, will not only look for persons who have the expertise and requisite experience,

but also look for persons who are generally agreeable to government policies so that the instances of Board disobedience of Ministerial directives is reduced. But as we shall see in a short while, when we discuss the informal controls, the practice is not so simplistic! Other considerations are brought to bear when making board appointments. Not only does the Minister or the President consider the knowledge and experience that one is bringing to the corporation, but also his political standpoint in relation to the government. And once the appointment has been made, the practice of political patronage within our political system makes it almost impossible for any board of directors to stand up against the decisions or directives of a Government Minister.

b) THE POLICY FORMULATION ROLE

The Minister is authorised under the Act to issue policy directives, of both a general and specific nature to the corporation. The issuance of these policy directives gives an opportunity to the government which funds the corporation to control what the corporation can do. S.8A of the Act, states that:

"The ICDC shall in the exercise of its powers and in the performance of its duties under this Act or any other written law, act in accordance with any general or special directives that may be given to it by the Minister" 227

Although the ICDC had been performing its corporate functions since 1952, it was not found necessary to set out this control mechanism in the organisational structure of the corporation until 1967. The change of attitude on the part of the government can be explained by the desire to control some dissident corporate managers who had been inherited from the colonial regime. In 1964, a cabinet Minister when answering a question in the National Assembly said that the need for controlling the activities of public corporations *arise*

because: "When we became independent there were certain Chairmen of these organisations with whom we had trouble".²²⁸ During the parliamentary debates leading to this amendment, the then Minister for Commerce and Industry Mr. Mwai Kibaki, said that he sought to introduce this amendment so that there was no doubt as to who was the boss so far as the formulation of corporate policy was concerned between the Minister and the Board of Directors of the ICDC. Mr. Kibaki said:

["The] lack of ministerial control was an oversight which should now be corrected so as to avoid any doubt as to who would be able to give directives, if there was a conflict of opinion between the Board of Directors of the Corporation and the Minister" ²²⁹

Because of the urgent need by the African Government to control the economy, there was the desire to control or at least subordinate the economic power position and interests of the settler community who had hitherto controlled the Kenyan economy. The domination of the economy by the settler community even

after political independence caused anxiety to the African Government, because some of these settlers were not willing to implement the governments' policies, particularly on Africanisation. Mr. Nowrojee has observed that the desire to control the activities of public corporations which had hitherto operated under European and Asian commercial and industrial bourgeoisie, was made even more acute because of lack of "informal" controls or relations between the new African Government and these corporate managers. If "informal" controls had been developed, the government would have found it superfluous to develop other methods of control, particularly the formal legal controls, necessitating the amendment of the constituent Acts. Mr. Nowrojee has stated that:

"No social patterns had as yet been established that gave the informal controls to the newly constituted government. Accordingly, though the state capital was available or the potential capital for the successful public enterprise had become available, the legal structures were still defective to assist the local would be beneficiaries." 230

Using the newly acquired power, the African Government, through its Ministers, sought to control the activities of the officials of public corporations. This gave the government the opportunity to control the economic enterprises that were being managed by public corporations. With the appointment of officials to these public corporations who owed their economic power and political

allegiance to the African Government, the need for these formal legal controls became unnecessary. "Informal" Controls developed between the corporate managers and their counterparts in politics. We shall now turn to a discussion of these "informal" controls, between corporate managers and the political bureaucracy.

c) INFORMAL CONTROLS

Formal legal relationships are not always the best working relationships that intimate institutions, working for the same goals and objectives are bound to have. As Mr. Nowrojee has observed above, informal, non-legal relationships are usually established between the institutions and the persons charged with the responsibilities of administering these institutions. This is true of the relationship that exists between public corporations and the parent ministries in Kenya. During the colonial period, the social patterns created by the government dictated to the public corporations what interests they were established to serve. In this role, public corporations needed very little telling, leave alone control by the Central Government before they could fulfil this role. Immediately after independence, with the change of the political power structure within the country, there was a temporary confusion of the set social patterns, with the colonial goals and objectives for which public corporations were established, being subordinated to those of the new African elite,

who had taken over the reigns of political power. With this change in the political power base, there was an inevitable conflict between the political and commercial wings of the state, now that independence had ushered in a completely new group of politicians.²³¹ After independence the African Government, aware of the dangers of depending on a politically uncongenial commercial bureaucracy, strove to establish one of its own from the young African elites, for whom independence must have represented some economic gains, which had been denied them during the colonial period. With the entrenchment of the Young African elites into the commercial and industrial sectors of the economy, it again became superfluous to enforce the formal legal controls set out in the legal provisions establishing these public corporations.

When we talked to the then Executive Director of the ICDC on the autonomy of his corporation from the control of the Central Government, and how far his corporation operated without interference, in the day-to-day management of its corporate affairs, Mr. Wamae said:

"The ICDC has excellent relations with the Government. Since the 1967 period, which was a crisis period for the corporation, the corporation enjoys government confidence. Most of the policies implemented by the corporation are formulated by the corporation in its board of director's meeting. In any case, both the ICDC and the government officials regard each other as colleagues,

all engaged in national building. At another level, the Ministries of (Commerce and Industry) and Finance with which we work very closely, are represented on the Board of Directors. If there is any policy that the Government wants to introduce, normally the Government introduces such policy through their representatives on the Board of Directors. Very often, the Government views are debated by the Board of Directors of the ICDC and if found sound, are adopted. We only adopt Government policy because it is sensible as a policy and not because it was put to us as a directive from the Government". 232

Throughout the interview, the Executive Director was emphatic of the good relationship existing between the corporation and the Government and how informal this relationship is. The formal legal powers and controls have been put in disuse and replaced by the "informal" relationships which Mr. Nowrojee has discussed so well above. Although the formal legal mechanisms are available on the statute books, they are not called into use, unless there is a breakdown in the "informal" relationships. The corporate managers of public corporations in Kenya in fact consider themselves as colleagues rather than subordinates to the Ministers and other Government officials charged with the responsibilities of supervising the activities of public corporations. This line of development in the management of public corporations is not unique to Kenya. The same phenomenon was observed

in the Ghanaian situation. Professor Pozen stated that: "the conception of the board of directors as a meeting place for the representatives of divergent interests is wholly mistaken." ²³³ The members of the ICDC Board of Directors interse and the officials (both politicians and civil servants) of the controlling ministries form a homogenous group who have no antagonistic class interests. Their interests as one class are the same! In terms of the control of the activities of the parastatal sector, the government can quite easily impose its will on the public corporations informally, by assuring the commercial and industrial bourgeoisie who manage public corporations, of some economic benefits. This is what happened in the 1964-1967 period. The conflict in interests which existed between the politicians and the commercial and industrial bureaucracy, between the corporate managers and their counterparts in the ministries, were ironed out by the appointment of Africans as managers, and who depended on the government for their economic wellbeing, if they supported the political system. These two groups of people, the commercial and industrial bourgeoisie on one hand and the political bureaucracy on the other, form the homogenous comprador class, who in this country, are an appendage of the international bourgeoisie.

(2.) THE MINISTRY OF FINANCE

Because of the special interest that the Ministry of Finance holds in financial matters within government ministries and other public institutions,

it is imperative that this ministry, which is now under the office of the vic-president, should exercise some responsibility in controlling the powers of the ICDC. The reason for the financial interest by the Ministry of Finance in government departments and other public institutions is not far to find. This is that: "the operations of all government departments and public corporations, even when they are not recipients of budgetary funds, have effects on the national finance" ²³⁴ Indeed the Ministry of Finance has a great deal of interest in public corporations in Kenya, which corporations are expected to contribute significantly to the national development effort. The Ministry of Finance is charged with the overall responsibility of allocating finances to all government departments and other governmental agents, of which ICDC is one. Under S.11 of the ICDC Act, "the Minister of Finance, may with the consent of parliament, make advances or grants to the corporation", to enable it to discharge its functions properly and with efficiency.

This is what the government, through the Ministry of Finance has just done. In 1955, the IDC, the predecessor of the ICDC, was established by granting it a loan from the Colonial Government. By 1965, the government through the Ministry of Finance had committed into the ICDC KShs. 9,321,220, of which KShs.4,036,220 was in non-interest bearing loans. By the 1978/1979 financial year, the financial position of the corporation had substantially changed. As at June 30, 1979, the Government of Kenya had sunk Kshs. 469,584,200.00 into the ICDC. This accounts for about 74 per cent ²³⁵ of all the ICDC funds. Obviously this is too substantial a holding in the ICDC for the government and the

Ministry of Finance to merely sit back and watch the money being put to improper use. Under S.8(i) of the ICDC Act, the corporation is authorised to raise "money with or without security". In the exercise of this power, the corporation must seek the approval of the Minister of Finance. The mandate to seek authority before the ICDC exercises these borrowing powers is granted under S.9(i) of the Act. This section provides that:

"The borrowing powers of the corporation shall be exercised only with the approval of the Minister of Finance as to the amount, sources of borrowing and the terms and conditions on which the borrowing may be effected".

In exercising this power under the ICDC Act, the Minister of Finance has considerable control over the activities of the corporation. Since the availability of finance is central to every undertaking of the corporation, it is true to say that the ministry plays a central role in shaping the activities of the corporation by allowing or disallowing it to use certain sources of finance.

The recent Review Committee of Statutory Boards, strengthened this control role by the Ministry of Finance by establishing an Investment Division in this ministry, which division was charged with the responsibilities of monitoring government investments.²³⁶ This division will go along way in controlling the investment policies of public corporations.

The ICDC is one of the public corporations that will be directly affected by the functions and powers of the new department of the ministry of Finance.

The necessity of having more than one ministry controlling the activities, functions and powers of the ICDC is not immediately obvious. The Ministries of Commerce and Industry are charged with the control of the functional aspects of the corporation, whereas the Ministry of Finance is charged with the control of all the financial matters of the Corporation. One would have expected that one ministry would be sufficient, since each ministry of the government is expected to be well informed about governmental policies which bind the ministries of the government together. This assumption underlies the important constitutional law doctrine of collective responsibility.²³⁷ It is even more strange for the ICDC Act to insist on the approvals of three ministers before any financial disbursement is made by the corporation, when it is remembered that all these ministers and their permanent secretaries are nominees of the president and are members of the Board of Directors of the Corporation. This statutory provision can be the source of conflict between these ministries in the management of the corporate affairs of the corporation. When we asked the Executive Director of the ICDC whether there have been any conflicts between the Ministries of Commerce, Industry and Finance, he said: there had been no such conflict.²³⁸ The lack of conflicts notwithstanding, this provision points to the almost complete lack of co-ordination between government ministries on certain important

policy issues regarding public corporations. The normal situation would have been to have one ministry responsible for the affairs of the corporation, and through that ministry, the other interested parties within the government would transmit their interests.

Perhaps, the most important significance or effect of the tripple ministerial control over the ICDC, is that the doctrine of ultra vires which we discussed in chapter one, as one of the consequences of incorporation, is of no consequence so far as the exercise of the borrowing powers of ICDC are concerned. Creditors to the corporation are not required to ascertain for what purpose or objectives the money the corporation borrows from them will be used, and whether those purposes or objectives are the authorised objects ^{as} ^{per} the enabling statute. The Act stipulates that:

"A person lending money to the corporation shall not be bound to inquire whether the borrowing of the money is within the powers of the corporation or be concerned to see to the application thereof or be answerable for any loss or misapplication thereof". 239

This provision means that the ICDC and its potential creditors are free from the absurd effects of the ultra vires doctrine as construed in the cases of Re Jon Beauforte ²⁰ and Re Lee Behrens and Co. Ltd. ²⁴¹ Although the application of the ultra vires doctrine is of no consequence, so far as the borrowing powers

of the Corporation are concerned, it is *debatable* whether the doctrine does not apply to the corporation where the corporation has no capacity or power to act at all. If the corporation purports to discharge a function, which is not allowed for at all by the enabling statute, such act or acts would be ultra vires the Corporation and therefore so far as the Corporation *is* concerned, void. 242

The non-application of the ultra vires doctrine in so far as the borrowing powers of the Corporation are concerned, may *reflect* some pressure from the financial community and other lending institutions at the time when the ICDC Act was being formulated. Just as there is preference by international lending institutions for the public corporation form, so also, it is possible for private lending agencies to pressurise the government into securing their lending by removing some cumbersome principles applicable to the Company law form. The responsibility for checking that the loan sought by the corporation is for the authorised objectives rests on the government ministries concerned with the supervision of the ICDC activities, rather than the lending institutions. The "pressure" theory is feasible because, most of the institutions which lend to the ICDC are Banks,²⁴³ which are only too aware of the implications of the ultra vires doctrine.

Under S.12 of the ICDC Act, the power of the Board of Directors of the Corporation to declare dividends is curtailed by allowing the Minister of Finance the right to direct the corporation as to the use of its profits from time to time, after consultation with the Minister(s) of Commerce and Industry. The

Minister of Finance has the mandate to direct the Corporation "to pay into the consolidated fund any money held by the corporation and deemed by the Minister to be a surplus to the Corporation's existing or anticipated requirements" ²⁴⁴ This provision ensures that the profits made or realised by the corporation, are not dissipated in non-priority and minor schemes and programmes of the corporation, leaving other more urgent programmes of the government unattended. The profits made by the corporation should be available for re-allocation by the Minister of Finance to needy areas of the economy through the central planning agency. In this way, the Minister of Finance exercises a great deal of influence on the activities of the ICDC.

IV. THE OFFICE OF THE PRESIDENT (THE INSPECTORATE OF STATUTORY BOARDS AND THE PARASTATALS ADVISORY COMMITTEE)

(1.) THE INSPECTORATE OF STATUTORY BOARDS

The Inspectorate of Statutory Boards was established under the Office of President in 1966. Although the idea was a novel one, and one which could go along way in harmonising and co-ordinating the activities of public corporations in Kenya, the Inspectorate was never really developed to a full-

fledged government department. It is for this reason that the Review Committee of Statutory Boards,²⁴⁵ recommended that the Inspectorate should be strengthened so as to play a more effective role as an instrument of government supervision of the activities of the parastatal's sector in Kenya. The Review Committee envisaged a small but closely coordinated and adequately staffed department with properly qualified staff under the office of the president, which should not be a policy implementing agency, but rather, should have capacity to evaluate policy and comment on and monitor the manner in which the policies are being implemented. To enable the Inspectorate to perform its functions properly, the Chief Officer of the Inspectorate was made a member of the Parastatal's Advisory Committee. The main responsibility of the Inspectorate of Statutory Board was designated as the giving of consultancy services to corporations and their parent ministries on matters pertaining to the effective management of public corporations. Such consultancy services included the following areas: accounting, cost control, budgeting and financial reporting. ²⁴⁶

The Inspectorate's terms of reference were envisaged by the Review Committee of Statutory Boards to be: the examination of organisational effectiveness of parastatals in the light of their mandates and the enabling Acts; receiving and advising on the financial position of each public corporation on an on-going basis. This includes the examination of the existing procurement and tendering procedures, supervision of the implementation of general and specific government directives to public corporations on such

matters as allowances and emoluments, terms and conditions of service, use of official transport and the acquisition and disposal of valuable assets, to test-check the management styles and practices to instil a more urgent sense of public accountability, to participate in review exercises with ministries and other outside agencies of parastatals, to attend board meetings in order to come to grips with the internal organisational stresses in the parastatals, to maintain liaison with the controller and Auditor-General and other professional auditors and finally to provide on-going and in-depth management audit services to public corporations. 247

From the wide spectrum of services to be provided by the Inspectorate of Statutory Boards, one can discern a movement, in terms of control and supervision of the corporate affairs of public corporations, from the parent ministry to control by the Inspectorate of Statutory Boards. The Inspectorate is expected to regulate and supervise public corporations in matters of policy implementation which have been matters hitherto performed by parent ministries of Commerce and Industry. This confusion of roles is bound not only to cause conflicts between the Inspectorate and the respective ministries, but it is also bound to reduce the element of political accountability, since the Inspectorate unlike the parent ministries is headed by a (mere) civil servant whose functions do not involve a "political" element.

(2.) THE PARASTATALS ADVISORY COMMITTEE

Another newly created organ for the supervision and control of the activities of public corporations in Kenya is the Parastatals Advisory Committee. 248

The Parastatals Advisory Committee, it was recommended by the Review Committee of Statutory Board, was to be made up of high ranking government officials. The Committee is made up as follows:

The Permanent Secretary, Office of the President (now known as the Chief Secretary), as the Chairman;

the Permanent Secretary, Ministry of Finance;
the Permanent Secretary and Director of Personnel Management;

the Permanent Secretary, Ministry of Economic Planning and Development;

the Inspector of Statutory Boards, and
the Permanent Secretary of the ministry under which the Corporation being considered falls or comes.

The Parastatals Advisory Committee's main term of reference was to be the formulation of policy considerations affecting public corporations, and in particular to advise the government on such matters as the:
"establishment, amalgamation, winding up and any such other matters relating to the proper organisation of public corporations in Kenya" 249

With the establishment of these two organs: the Inspectorate of Statutory Boards and the Parastatals Advisory Committee, the role of parent ministries as policy formulating organs of public corporations will be greatly diminished. Combining the roles performed by these two organs of the government is equivalent to creating a "Ministry of Parastatals" within the Office of the President. Unless the Acts establishing public corporation are amended to incorporate the new structural form within the law, there is a greater danger of

conflict between the parent ministries and the two organs. There is also danger of duplication of work between these different institutions of the government. If remedial steps are not taken to avert the conflicts that are bound to result from this organisational form, the organisation, control and supervision of public corporations in Kenya will even be more confused than hitherto known.

V. LEGISLATIVE OR PARLIAMENTARY CONTROL

Public corporations in Kenya are creatures of parliament or are established under statutory authority, and are therefore ultimately responsible to parliament. Although Parliament does not exercise control and management functions over public corporations, having delegated these responsibilities to the ministries of the government under whose portfolio the public corporations come, it still has residual interests and exercises certain responsibilities for the proper organisation, management and control of the public corporations. As the Select Committee of the British Parliament observed with respect to nationalised enterprises in Britain:

"Members of Parliament represent both the consumers and the tax payers. As representatives of consumers, they are interested in the efficiency of the industries as it affects prices and the quality of services; as representatives of the tax payers, they are

interested in the financial performance of the industries and their contribution to furthering the public interest". 250

In Kenya, Parliament exercises control over public corporations as the representatives of the general public in the twin interests of consumers of their goods and services and as the tax payers who fund the public corporations. Parliament by so doing, seeks to attain public accountability and corporate efficiency in the functions of public corporations. In Kenya, Parliamentary Control of parastatal activity is exercised in four main ways:

1. through legislation: Acts of Parliament, Amendments to parent Acts and delegated legislation;
2. through Annual Appropriations, comprising in loans and grants;
3. through Parliamentary questions and debates on the Annual Reports and Accounts of public corporations;
4. through private members motions, when the members have learned of the performance of the corporation and they seek to question it.

In its general duties of legislation, Parliament has the general mandate of limiting, expanding or even altering the corporate functions of any particular public corporation. In this general duty, Parliament

and its members have the freedom of airing or expressing their views on the performance or the expected performance of any public corporation, be it already established or in the process of being set up. If any particular format set for a public corporation is found inoperative, or defective in any way, parliament can revise the format through amendments to the parent Act. The last such amendment on the ICDC was in 1967, which amendment authorised the Minister to issue directives of a general and specific nature from time to time. ²⁵¹ In this general duty of updating the powers and functions of public corporations, parliament ensures public corporations remain accountable for their corporate acts and duties.

The Annual Appropriation debates are another opportunity for Parliament to exercise its control over public corporations. Under S.11 of the ICDC Act, the Minister of Finance can only "make advances and grants" to the corporation with the approval and sanction of Parliament. Before Parliament has given its consent to the annual appropriations to the corporation by the Minister of Finance, the Minister cannot in his own right grant any money to the corporation, to be disbursed on any activity. Before parliamentary consent is granted, normally parliament seeks an account of the grants of the previous year or years. The Corporation must also give an explanation as to how it proposes to use the funds being requested for. Members of Parliament usually take this opportunity to express their views on the general performance of the corporation. If Members of parliament feel that the corporation has not lived up to expectations, they may reduce or in any way alter the amount of money requested for. In this way

members of parliament have their will over the corporation. The Loans, grants given by the government to the ICDC now stand at KShs. 469,584,200.00.²⁵² This is a large sum of money by any standards. This may be a reflection of the confidence Parliament and the government in general, have in the activities of the corporation.

Parliamentary debates on the Annual Reports and Accounts of the ICDC are another way by which Parliament can influence the activities and functions of the corporation. Under S.14 of the ICDC Act, the books of accounts of the corporation, reflecting the true and fair state of the corporations business must be kept by the Board of Directors of the Corporation and submitted to the Minister, who in turn lays them before Parliament for debate. The submission of the books of accounts to parliament for scrutiny and subsequent debate can be a source of fear and a cause for discipline on the part of the corporate managers. Corporate managers fearing any disclosures in the Annual Reports and Accounts of mismanagement and misappropriation of the corporation's funds, strive to manage the corporation's affairs diligently, so that they may be commended by Parliament as trustworthy and conscientious managers. In this way, Parliament ensures that the corporate managers use the corporation's funds for the purposes authorised by statutory provision.

Although the submission of the books of Accounts of the corporation, in the form of Annual Reports and Accounts is a useful device and used well can go along way in controlling and streamlining the corporate activities of managers of public corporations, it is

interesting to note that this mechanism has not been fully used in the last ten years or so. A perusal of Hanzard Reports indicates that the Minister(s) of Commerce and Industry have not formally laid before Parliament any of the ICDC's Annual Reports and Accounts since 1970. The only references made to the corporation's work has been through the reports of the Controller and Auditor General. The Controller and Auditor-General's report, which is annually tabled in Parliament, consistently refers to some of the activities of the corporation. On the 1978/1979 Annual Report and Accounts of the ICDC, the Controller and Auditor General says:

"The Accounts of the ICDC have been examined ... and as a result of the audit conducted, I certify that the Balance Sheet and the Profit and Loss Account, when read together with the notes thereon, are in agreement with the books of accounts of the corporation which are kept according to the historical cost convention and represent a true and fair view of the state of the Corporation's affairs as at 30th June 1979 ... " 253

This report of the Controller and Auditor-General is the only verification that the Corporation and its corporate managers disburse their annual appropriations on authorised activities of the corporation. An explanation of this sad situation where, Parliament does not review from time to time, the activities of public corporations was said to be the shortage or lack of parliamentary time. 254

Parliamentary questions can also be used by members of Parliament to bring to light the activities

of public corporations. At short notice, the Minister in-charge of the corporation which is the subject of the question, is expected to tell the National Assembly, and through it, the public at large, some aspects of the performance and activities of the corporation. Parliamentary questions are usually used when there are allegations of maladministration or some other misuse of corporate power by the management of the corporation. Well used, parliamentary questions can be serious deterrents to the misuse of corporate power by managers of public corporations. Although the ICDC has not been involved in any controversy that we are aware of, one is reminded of the recent allegations against the National Construction Corporation. A member of Parliament, through a Parliamentary question, requested the Minister of Works to explain allegations of mismanagement and tribalism against the corporation. In the process of answering this question, it was disclosed that the National Construction Corporation is managed by people from one tribe and that the corporation's contracts and businesses are awarded on tribal grounds. 255

The work of Special Committees of the National Assembly, notably the Public Accounts and the Finance Committees, is crucial in the control of the activities of public corporations. These Committees report annually on the use of public funds allocated to Ministries of the government and other public institutions. Misuse of public funds allocated to these public institutions by Parliament is reported to Parliament by these committees for further action. Private members of the National Assembly may also introduce Private Members Bills to try and control the activities of public corporations. Parliament also utilises Commissions of Inquiry as

important controls of not only corporate power but also the misuse of the public mandate by the government. It is not the Commission of Inquiry as such, as the fear of one being appointed to investigate a particular corporation, that forces the management of every corporation to perform its duties and functions with diligence and scandal free. In 1966, Parliament appointed a Commission of Inquiry to investigate the Maize and Produce Board, ²⁵⁶ after allegations of corruption and mismanagement were levelled against the management, particularly the Chairman and the General Manager. In 1978, another Commission of Inquiry was appointed by Parliament to investigate the effects of establishing Halal Meat Products Co. Ltd., a private Company established by Messrs Modha and Adams with a government loan from the Danida - the Danish Foreign Aid Agency, on the Kenya Meat Commission, a public corporation. ²⁵⁷ The exposure and embarrassment, both for the corporation and its officials which follows revelations made to Commissions of Inquiry is the type of publicity that any corporate manager would like to avoid. Although the ICDC has not been the subject of a Commission of Inquiry, the mere possibility of such an inquiry is an apparition which the management of the corporation must guard against.

Overall, the ability of Parliament to control the activities of public corporations, depends on many factors, the most important being the role and place of the legislature in the balance of political power in the country. In recent years, Parliament in Kenya has been relegated to an instrument to rubber-stamp government policies. Although the quality of

Parliamentary debate is still fairly high, and the members of parliament can still make bold criticisms of the government and its policies, the government has become increasingly impatient of any criticism and opposition. Because of this increasing impatience on the part of the government, not many people can risk crossing "swords" with it. We can isolate about three factors which mitigate against the proper and efficient control by Parliament of public corporations in general and the ICDC in particular. These factors are:

1. that parliament has not the continuity of life to enable it to follow-up the day-to-day management of public corporations. Recesses come up too often and they are too long, so that Members of Parliament are not enabled to follow-up what might be going on in these institutions. Sometimes recesses are timed to come in the middle of some important business so that the Members of Parliament lose track of the seriousness of the matter under consideration.²⁵⁸ By the time the recess is over, the Members of Parliament will have lost the enthusiasm and drive in the matter;
2. the quality of parliamentary debate is increasingly becoming low, following the "witch-hunting" by the government of dissidents in Parliament. At least, during the last few years of the Kenyatta regime, opposition to government policies and programmes was taken very seriously. Two instances will suffice to illustrate this phenomenon. The Murder of Mr. J.M. Kariuki, M.P. in early 1975 and the suppression of a

Report of the Commission of Inquiry set up by Parliament to investigate his death is a case in point. Mr. J.M. Kariuki was a re-known critic of the Kenyatta Government on many issues, particularly the policies relating to land and the land tenure system in Kenya. The Report of the Parliamentary Committee appointed to investigate J.M. Kariuki's death, stated that he was taken from a Nairobi hotel under police escort and killed in the Ngong hills area because of his views against the Kenyatta Government. Efforts by Parliament to bring to book the perpetrators of this serious crime failed, because the government did not support the recommendations of the investigating committee. Although Parliament adopted the Report of the Commission of Inquiry into the death of J.M. Kariuki, the government insisted on merely noting the recommendations, which meant that the government was not to implement any of the recommendations made by the investigating Committee. Eventually, no action was taken by the government on the recommendations made by the Commission into the death of J.M. Kariuki. Parliament lost the battle to have the perpetrators of the crime against a fellow Member of Parliament punished. ²⁵⁹ The second instance of government persecution of Parliamentary opposition or criticism of its policies can be illustrated by the detention of Mr. George Anyona, M.P. in 1977. Mr. Anyona, made disclosures in Parliament about the Railways corporation's involvement in some corrupt practices when tendering for some locomotives from Britain and Canada in 1977. Although the allegations made in Parliament were subsequently proved true, and the government was forced to cancel the whole transaction between itself, the Railways Corporation and the British Government, Mr. Anyona was detained in complete disregard of

parliamentary immunities and privileges. 260
Resulting from these actions by the government,
Members of Parliament are scared of what might
happen to them in the event of their criticising
and displeasing the government.

Lastly, the use of Commissions of Inquiry by
Parliament has also been ill-fated. On three occasions
Parliament has set up Commissions of Inquiry which
went through the laborious business before it and made
elaborate and lengthy recommendations only to be
disregarded by the government. 261 In the case of
the J.M. Kariuki Commission of Inquiry, some of the
more vocal and active members of the Commission were
subsequently followed up and forced out of parliament
through legal manouevres. 262

VI. PUBLIC CONTROL

Because of the shortcomings of Parliamentary
control of corporate powers, parliament acting as the
representative of the "public interest", the public
can directly partake or participate in this control
bid in an enlightened society. Public control of
corporate activities can be effected via the mass
media and the press. The press in Kenya has been in
the forefront in exposing instances of maladministration
and other social evils that bedevil public corporations.

The ordinary people who are in constant contact with public corporations, either in the capacity of consumers of the goods or services produced or as interested parties in the corporate business of the corporation, channel their complaints and comments on the performance of public corporations to the daily newspapers with a view to exposing the activities of corporate managers. Most of these complaints and comments on public corporations are in the form of letters to the editor. Also on their own, the newspapers investigate and report on the performance of some of the public corporations. Through these newspaper letters and articles, corporate managers are called upon to explain to the public at large whatever may be going on within their organisations. Some examples will illustrate this phenomenon.

1. Revelations that some officials of the then Maize and Produce Board in Kakamega and Bungoma were corruptly buying maize from farmers and subsequently selling the Maize to the Board at the gazetted prices, and thus making a profit, elicited government action. Because of this report in one of the daily newspapers in the country, the Minister of Agriculture promised the general public that investigations would be instigated to ascertain the truth, after which appropriate remedial action would be taken against the officials concerned. 263

2. Revelations that ICDC's Associate Company, the Nanyuki Textiles Mills Co. Ltd. was facing the danger of collapse, because the government was allowing too many imported textiles of the same quality and fabric,

led to negotiations between the government and the mills, which negotiations ended up in rescuing the mills by the government promising to curb the importation of fabrics in the category produced by the mills. The Government also made some guarantees on the availability of markets for the products of the mills. 264

3. The recent disclosure by the press that the former head of the Asian Film section of the Kenya Film Corporation, had corruptly received K.Shs. 5000.00 from a Mr. Shah of Trivoli Cinema in Kisumu in order for Mr. Shah to be favoured in film supply, necessitated a statement by the General Manager of the Corporation on the state of the management of the Corporation. 265

VII. THE JUDICIAL CONTROLS

The ICDC like all the other public corporations or even other institutions, is subject to the general jurisdiction of Courts of Law. As we have already stated, the ICDC does not enjoy state privileges as if it were a government department. The ICDC can therefore sue and be sued in its own name, without any immunities in tort, Contract and Criminal law. The separate legal personality which the corporation enjoys,

enables the board of directors to conduct the day-to-day management of the corporation in a business-like manner. This principle also enables the corporation to own property and other legal rights, which are the subject to the general jurisdiction of courts of law. Courts of Law will adjudicate over and determine what legal rights are owing or owed by the corporation, depending on how the corporate managers have conducted themselves and interpreted the duties and functions of the corporation. For example, the corporation is subject to the general jurisdiction of courts of law when seeking to recover money lent to some of the many borrowers and users of the Corporation's facilities. In the process of exercising this general jurisdiction, courts of law limit and reinterpret the exercise of Corporate powers performed by the corporation's Board of Directors and the management Committee.

More importantly, courts of law may be used by members of the public or by the Minister under the ICDC Act, to restrain the corporation from engaging in acts or the exercise of powers which are beyond the powers of the corporation. This situation is different from the position provided for under S.9(3) of the ICDC Act. under S.9(3), the ultra vires doctrine as it applies to the borrowing powers of the corporation is of no consequence, because of the participation by the ministries of Commerce, Industry and Finance in the approval of loans disbursed by the corporation. By virtue of this section, all the borrowings by the Corporation are intra vires and an intending creditor to the corporation, need not inquire whether the money borrowed will be used for lawful purposes. This is not the end of the application of the doctrine of

ultra vires to the Corporation's ^{activities} As we have already observed elsewhere in this thesis, the doctrine of ultra vires still applies to the activities of the corporation which are not permitted by law. Acts of the corporation, which are not authorised by the ICDC Act are ultra vires the corporation and courts of law can be used to restrain the corporation from misusing its corporate powers, or using them for the improper purpose. Although we are not aware of any actual cases where the ICDC has been restrained in the exercise of its corporate powers by courts of law, this power is available when need arises. Other public institutions in Kenya have been involved in cases where the "public interest" was threatened.

VIII. SPECIAL AGENCIES

Apart from the institutions of control that are expressly mentioned under the ICDC Act or are necessarily related to the conceptual development of the public corporation, there are some other instruments of control which may at first sight look remote. In relation to the activities of public corporations in Kenya, two special agencies come to mind. These agencies are: the controller and Auditor General and the Development Plan. Under S. 14(3) of the ICDC Act, the accounts of the corporation are supposed to be audited on an annual basis by auditors appointed by the Minister(s). Normally however, the auditor of all public institutions is the Controller and

and Auditor-General, an officer of the Government established under the Kenyan Constitution. ²⁶⁷

The Controller and Auditor-General ensures that all withdrawals from the Consolidated Fund are authorised by law and that the moneys appropriated by Parliament to government ministries and other public institutions are used for the purposes originally planned for. It is in this respect that the Controller and Auditor-General has unearthed several scandals relating to misuse of public funds. Although we are not aware of any case where the Controller and Auditor-General has mentioned the ICDC as being involved in any scandal some other public corporations have featured prominently in the reports of the Controller and Auditor-General. Among the most recently mentioned or named in the Controller and Auditor General's report are: the State Reinsurance Corporation, in a land deal with Cargo Masters a private Company; ²⁶⁸ the Kenya Railways Corporation in a land deal with Cargo Masters and the State Reinsurance Corporation, ²⁶⁸ and the City Council of Nairobi's medical department scandal, where drugs worth KShs.2.21 million could not be accounted for. Being cited by the Controller and Auditor-General as an institution which makes shoddy deals or cannot account for the funds appropriated to you, is a bad reputation and an embarrassment in the eyes of the public. Many public corporations strive to avoid being listed in the Controller and Auditor-General's report of mismanaged public institutions.

The Ministry of Economic Planning and Development is charged with the overall responsibility of planning, co-ordinating development and compiling the National Development Plan. In the discharge

of these responsibilities, the Ministry plays an important role in controlling and co-ordinating the activities of public corporations. The ICDC, like any other public institution, is subject to the planning exercise. The Corporation is normally expected to project its activities to a five-year life span into the future. Once the corporation has committed itself and the government to a particular programme of action, it is expected that the corporation will not deviate from such planned growth. This keeps the activities of the corporation within the government planned limits, and by so doing puts some restraints on the acts or activities of its corporate managers in the exercise of the corporate powers of the corporation.

CHAPTER FIVE

THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND THE IMPLEMENTATION OF ITS OBJECTIVES:

I. Introduction:

In this Chapter, we seek to appraise the work of the ICDC, as an instrument of government policy implementation. The main theme of this chapter will hinge on the question: how far has the ICDC succeeded in performing the functions for which it was established by the government? In answering this question, we shall try and grapple with the efforts the ICDC has made in trying to fulfil the aims and objectives for which it was established by the government and which formed the subject of our study in chapter two of this thesis. 270

The main objectives^{set} by the post-independence government for re-shaping the functions of the ICDC were that, the Corporation should perform functions which were considered as crucial for national development. These functions were:

1. Control of the economy through the Africanisation programme;
2. National mobilisation and accumulation of capital for investment;
3. Industrialisation as a strategy for development.

These three themes or objectives have predominated the work of both the government and the ICDC, in their efforts to develop the country economically. Although these

objectives represent the ambition of these two institutions, how far can it be said that the government through the ICDC has in fact attained these objectives? Or put differently, has the ICDC fulfilled its functions as planned by the government? The theme raised by these questions will now be analysed in greater depth, with regard to each of the objectives set above.

II. THE ICDC, THE CONTROL OF THE ECONOMY AND THE AFRICANIZATION PROGRAMME:

The anxiety by the African Government at independence to control the economy was a real one. The colonial economy in Kenya had hitherto been dominated by the minority settler community with the help of international finance capital. The racial discrimination and segregation which had permeated the whole colonial economy and life had to be controlled in independent Kenya, by the inclusion of Africans in the economy, from whence they had been deliberately excluded. 271 Luckily for the African Government, the policy of Africanisation was not completely new. This was pursued by the colonial administration in what was called the process of co-optation of Africans into the economy. With the "winds of change", blowing in the 1950s and the early 1960s, the "progressive" wing of settler community anticipated that the only way for the settler gains in Kenya to be preserved, was by co-opting a few, mainly elitist Africans into the "property owning class", as an insurance against reverse discrimination,

when these Africans ultimately gained the reigns of political power with independence. The Manifesto of the New Kenya Party, a party comprising of the white settlers in Kenya, advocated for a limited amount of Africanisation of the economy. The manifesto stated:

"We advocate for the allocation of considerable financial resources to enable such people (Africans) to be trained and where deserving financed for entry into the fields of Commerce and industry and improved farming as well as into the profession is." 272

With help and blessings of international finance capital,²⁷³ the new African Government embarked on the Africanisation programme, early in its tenure of office. The Africanisation of Commerce, industry and land ownership was noted as urgent on the priority list, and as a measure of containing nationalist pressure. 274

With respect to the Africanisation of Commerce and industry, the ICDC emerged as the single most important government implementing agency. The ICDC has acted as the main implementing agency of government policy by: making capital available to Africans with small down payments and at low interest rates; advancing capital through the Small Loans Scheme to African traders and businessmen and lastly, by following-up the provision of capital with extension services. 275

The ICDC has been fully pre-occupied with these functions. As of June 30 1975, the ICDC had disbursed through the Small Loans Scheme Kshs. 258,062,180.00 to 6304 projects and traders. This figure does not actually

represent the amount of money and number of projects the ICDC had aided up to June 30, 1975, but rather the projects and finances outstanding as at the time. In the financial year 1974/75 alone, 333 projects had fully repaid their loans to the ICDC, the repayment sum totalling KShs. 33400,840.00.²⁷⁶ By 1978/1979, the outstanding total of the Small Loans Scheme was K.Shs. 293,761,780.00., With 6186 projects and traders. In 1978/1979 alone, 532 Loanees fully repaid their loans contributing KShs. 77,836,920 to the finances of the ICDC.²⁷⁷ Between the years 1974/1975 and 1978/1979, the ICDC has aided about 8,000 projects and traders with a financial turnover of K.Shs. 376,320, 385.00. The Medium and Large Scale Loan Schemes were also administered by the Development Finance Company of Kenya, the Kenya Industrial Estates Ltd. and the Industrial Development Bank Ltd., all associated companies of the ICDC.

What is the nature of this so-called Africanisation programme? Writers steeped in their ideological biases have given different interpretations of this phenomenon. There are those who believe that the Africanisation programme was a programme of action to give an opportunity to Africans to own property, which opportunity had been denied them during the colonial period.²⁷⁸ On the other hand, there are those who believe that the Africanisation policy was nothing more than an expression of economic nationalism on the part of the new African Government.²⁷⁹ We think that, it is important to understand the true nature of the Africanisation programme by looking at its link with international finance capital. This is because, we think that, whereas the Africanisation programme had a lot to do with nationalism in this country, there is the element of its being used as a camouflage policy to hide the extent of domination of international finance capital

in our country.

A substantial share of the ICDC funds come from external sources both public and private sectors. The most important of these sources are: the United States of America, KShs. 1,000,000,00; the Swedish Government (SIDA) , KShs. 7,004,400.00; the West German Government KShs. 7,111,540. and the World Bank through IDA, 10,000,000.00. The private investors include: A Bank Consortium, KShs. 1,880,000; Barclays Bank International, KShs. 5,555,560.00; McKenzie Dalgety (Kenya) Ltd, KShs. 333,320; the Standard Bank Ltd, KShs. 7,777,800 and the Exibank of the USA, KShs. 6,865,660.00. The external finance accounts for about 15 per centum in 1979, as compared to about 22 per centum in 1977. 280

The infiltration of foreign capital into the ICDC, a government institution, in this magnitude is evidence of the fact that the African Government is far from being in control of the economy. Finance capital uses the government structure to rally a small percentage of the population in the economy to play some auxiliary role in the economy, without allowing them any control of it. Loans of varying magnitudes are given out to a small number of African traders and petty businessmen in the name of Africanising the economy, when in real fact, the economy is under the hegemonic control of finance capital. Jorgensen records in an interview with a British director of a manufacturing company in Kenya, as having been told that:

"Let us be frank. Kenya's economy is run by 6,000 Europeans, and we are fortunate to have an African government content to leave it that way". 281

In this way, the Africanisation programme "whitewashes" the role and effort of the African government in transferring businesses from the non-Africans who dominated the economy during the Colonial period to Africans. In the estimation of the ordinary "Wananchi", the Africanisation programme is living evidence that the government is making efforts to transfer businesses, giving an opportunity to international capital to dominate the economy without raising any nationalist feelings. In so far as the ICDC is the main agency for the Africanisation programme therefore, it performs the role of a camouflage institution: hiding the full extent of foreign capital exploitation of our economy. The ICDC encourages under the Africanisation programme, the elites to engage in petty-trading and what we shall later call "pin" manufacture, as a measure of containing African nationalism. The government uses these petty-traders as exhibits of its efforts to distribute the "fruits" of "uhuru" to "Wananchi", when the big businesses and industries are under the control of multinational corporations. Writing on this point Mr. Nowrojee has observed that:

"Here the parastatals have been used to establish and entrench the new national bourgeoisie and secondly, that they have been used to safeguard its (finance capital) position, by the advancement of a parastic buffer "sub-class" by the satisfaction of some of the aspirations of the latter". 282

The failure of the Africanisation programme can also be explained at another level. This is the lack of capital, expertise and business experience on the part of the aspiring African businessmen. Even when the "European" and "Asian" businesses are bought by the ICDC or any of its various subsidiary companies and transferred to Africans, there is still the danger that the African(s) might resell these businesses back to non-Africans. If an outright resell is not considered, non-Africans are invited to participate in the business as senior sleeping partners. This is mainly due to the fact that the African businessmen lack sufficient capital and at times the experience to manage these businesses as a result of the colonial system. This is what has been called the problem of "window dressing". Most African businessmen, claim that most of the lending institutions in the country are unwilling to avail to them sufficient capital to efficiently manage their businesses. This claim is borne out by some statistical facts. As late as 1967, loans to Kenya Africans and Kenyan "African" businesses accounted for only 2.6 per centum of the total loans and advances of all the Commercial banks operating in Kenya. ²⁸³ Apart from the historical reasons already given, ²⁸⁴ lack of capital on the part of African businessmen is as a result of two main factors.

1. Most banks still view Africans as merely potential depositors rather than borrowers. This is because of the high rate of interest, standing at 14 per centum on all bank loans. Also because

of the colonial legacy, the lending officers in most of the commercial banks, many of them still Whites and Asians, ²⁸⁵ regard lending to Africans as a bad risk. Jorgensen records that, in an interview with a former lending officer and branch manager of a Commercial bank, he was told that: "Africans have a different mentality about repaying loans. They dont see it as an obligation". ²⁸⁶

This attitude on the part of bank managers has denied Africans and "African" firms easy access to credit facilities, the only way of boosting participation of Africans in business.

2. Since banking practice relies heavily on social interaction between the bank officials and their customers, Africans were cut off from these banks, because of their social status. Bank officials assert that you need to know a man a bit more socially, before you can trust him with a loan from the bank. ²⁸⁷
By 1971, eight years after independence, the proportion of Commercial bank loans going to African borrowers was only 14.1 per centum, compared to about 78 per centum going to finance new European investments in Kenya. ²⁸⁸

The government set up two training institutions: the Management Training and Advisory Centre in Nairobi, with the help of the International Labour Organisation, to offer accounting and managerial course to African businessmen and industrialists and the Kenya Industrial Training Institute (KITI), in Nakuru, with the help of

Japanese Government, to teach small scale industrial skills. It was hoped by the government that the provision of these skills would produce better businessmen and industrialists. This hope, apparently, is not borne out by the fact that, most businessmen are still helpless in terms stable sources of capital. In 1972, the Mombasa District Commissioner, lamented that only 35 per centum of all the wholesale and retail trades in Mombasa, the second largest town in Kenya, was in the hands of Africans.²⁸⁹ This does not positively show the effects of the so-called Africanisation programme.

The problem of "window dressing", brought about by the Africanisation programme, results directly from the government's lack of goodwill in transferring or rather having Africans controlling their economy. Only the small businesses are "Africanised", thus opening them to incidences of economic sabotage by the big foreign firms.²⁹⁰ It was estimated that by 1967, foreign firms in Kenya contributed about 71.4 per centum of the value added in the manufacturing sector.²⁹¹ In the commercial sector, we often hear African businessmen complain that the manufacturing and wholesale distributors, mainly comprised of multinational firms, do not grant them industrial credit, by advancing to them goods, without the requirement of *immediate* payment. An attempt to break the strength of these foreign manufactures and distributors was made in 1974 by the then Minister of Commerce and Industry, Dr. Kiano, without success. Dr. Kiano announced at the Chamber of Commerce and Industry Annual Meeting, that foreign owned manufacturing firms would no longer distribute their own products and that the distribution of the products would be handed over to African citizens by the end of that year. The deadline set by the Minister silently passed without any sign of implementing the announcement.²⁹² Before

long, the announcement was forgotten and things proceeded as before! No serious follow-up was made by the government. Even some of the foreign companies which would be affected had the announcement been implemented, dismissed the minister's announcement as mere election rhetoric. 293

The Africanisation programme has only worked in the isolated instances when the African businessmen and industrialists concerned have good political connections or are themselves former senior civil servants who tap their connections with multi-national corporations. On this point, Jorgensen observes that:

"In General, all viable African businesses are managed by African businessmen who have good political connections (as the multinational corporations) or are themselves former civil servants of high rank, and in general, they longed to work in cooperation with multinational corporations rather than on their own paths towards a more autonomous, more self-reliant pattern of development. In other words, the African businessmen can be said to have a "comprador class" mentality" 294

The government seems to have resigned its efforts to develop an indigenous and self-reliant economy. Most of the development efforts of the government are channelled through the intermediary of foreign capital. This practice, neutralises the would have been efforts of the ICDC to Africanise the Kenyan economy. The government policy of encouraging foreign investment in the more lucrative areas of the economy in this

country, thus by-passing Africans, is the root cause and source of the failure of the Africanisation programme. Africanisation as an economic policy of the government has become a paper-tiger - remaining on the official books, with very little being done to achieve it on the ground or in practice. But the government and the petty-bourgeoisie, who control the machinery of the state will always over dramatise the achievements they have made in their daily political rhetoric, to hide the extent of the international finance capital in this country. This is for their benefit! And so is the Africanisation programme, as an economic programme. With the Africanisation of the small retail traders, Africans are cheated into believing that they are now at last partaking in the economic gains of the country, leaving most of lucrative businesses and industries under the control of international capital in collaboration with their lackeys in the government.

III. NATIONAL MOBILISATION AND CAPITAL ACCUMULATION FOR INVESTMENT

Apart from the necessity of controlling the economy through the Africanisation programme, there was the urgent need at independence to extend the involvement of the African population in the Capitalist economy and mode of production. This need arose with the increased demands on the government to secure sufficient funds for capital investment and development. One of the anticipated sources of capital was savings

from internal sources. Because of this need to generate internal revenue for investment, it became imperative that the African Government encourages the participation of Africans in the income generating activities, before they could be expected to contribute to this savings effort. The mobilisation of Africans into the income generating economic activities started forthwith with independence. This programme or activity was conducted at two levels:

1. at the quantitative level, when the government sought to increase the business activities in which African traders and businessmen were involved, and
2. at the qualitative level, by increasing and encouraging African participation in the business activities in the more lucrative areas of the economy.

At the quantitative level, the African Government encouraged and partially undertook to finance African businessmen and traders entry into the various types of businesses and trade s as: sole proprietors, partners and members of joint stock companies. Laws were passed to enable the government to achieve this end. Notable among the new legislations, were the Trade Licencing Act ²⁹⁵ and the Immigration Act. ²⁹⁶ The effects of these two legislations, it was hoped would be to reduce the influx of foreign participation in the economy. "African" partnerships and limited liability companies as a result of government encouragement were more than doubled in the first decade of

independence. In 1954, the number of partnerships belonging to Africans constituted only 11 per centum of the total number registered which stood at 12,487. In 1964, shortly after independence, African partnerships constituted 54 per centum of the total on the register. In 1973, the total number of partnerships in Kenya stood at 55,589. Of this number, African partnerships constituted 80 per centum.²⁹⁷ From 1954 to 1973, the overall increase in the number of partnerships was 43,102, an increase of about 400 per centum. On the other hand, the increase in the African partnerships went up by about 750 per centum, during the same period. Although it is not possible to determine, the business turn-over of these partnerships, because of the secretive nature of their businesses,²⁹⁸ we think that the mere increase in their numbers in the proportions mentioned above, justify the observation that, more business was being handled by the partnerships in 1973 than in 1964 and 1954. Many of the partnerships that were established between 1964 and 1973, benefited from ICDC funding. It is worthy of note, that by June 30 1973, there were about 4,155 loanees of the ICDC falling under the Small Loans Scheme category.²⁹⁹ The ICDC Small Loans Scheme, is used to fund or finance, the small scale traders and businessmen of the description of sole traders and partnerships.

Swainson also finds that, there was a corresponding increase in the number of limited liability incorporated in Kenya during the same period.³⁰⁰ In her investigation, Swainson finds that, by 1965, there were only 35 "African"³⁰¹ Companies in every sample of 485,³⁰² she studied. By 1973, the "African" Limited Companies had increased to about 121 this, representing an increase from 7 per centum to about 24 per centum of all the registered companies. The most interesting aspect of this

increase was not in the mere numbers. There was also an increase, although a small one, in the capital committed by Africans into these companies. This shows that African businessmen, were now generating more money for savings and subsequent investment than ever before. By 1973, most of the "African" Companies were categorised within the medium sized group of companies, as opposed to the position in 1965, when most of the "African" companies were small sized. Table A below, shows the increase in numbers and sizes of these "African" companies in comparison to companies belonging to other racial groups, notably the Asians and Europeans.

Although Table A clearly shows an increased participation of the "African" limited liability companies in the Kenyan economy in 1973 more than 1965, and therefore by the same token, more savings generating activities within the economy in 1973 than 1965, an important fact revealed about "African" companies is that they still operate at lower levels than those belonging to the other racial groups. Out of 485 companies doing business in Kenya, an independent African country, only 121 companies are "African". The rest of the companies belong to "Asians" and "Europeans". The figure represents only 24 per centum of company ownership in Kenya. Further analysis reveals that "African" companies fall within the small and medium categories, with the registered capital ranging from £1 to £10,000.00. This is contrasted with the "Asian" and "European" companies which mainly fall within the medium and large scale categories with registered capital upwards of

THE SIZES OF PRIVATE REGISTERED COMPANIES IN KENYA IN 1965 AND 1973 BY RACE1965

REGISTERED CAPITAL	£K.1-4999	% of firms	£K5000 10000	% of firms	£K.10000+	% of firms	TOTAL
African Companies:	33	94	2	6	0	-	35
Asian Companies:	45	56	12	15	24	29	81
European Companies:	42	75	4	7	10	18	56
Mixed Companies:	17	81	2	9.5	2	9.5	21
TOTAL:	<u>137</u>		<u>20</u>		<u>36</u>		<u>193</u>

1973

African Companies:	34	28	70	58	17	14	121
Asian Companies :	25	12	97	49	76	38	198
European Companies:	23	23	34	34	42	42	99
Mixed Companies:	10	15	31	46	26	39	67
TOTAL:	<u>92</u>		<u>232</u>		<u>161</u>		<u>485</u>

SOURCE: Nicola Swainson, "The Rise of the National Bourgeoisie in Kenya". Review of the Political Economy of Africa no. 8, p. 45.

£10.000,00. This means inter alia, that African participation in the economy has not yet countered the dominating role played by foreign capital. Suffice it to say, that the big "Asian" and "European" Companies doing businesses in Kenya are subsidiary companies of multinational corporations, having global connections. Their effect on the Kenyan economy is phenomenal, bearing in mind the global transactions and experiences. One thing is very clear from the business transactions of these companies. This is that, multinational companies investing in this country do so, not because of their love for this country, but rather because of the great opportunity they have to maximise profits.³⁰³ The huge profits made by these companies are usually siphoned to the metropole under statutory guarantees of the host country,³⁰⁴ thus, defeating the very purpose for which foreign investors were invited to come and invest in the country.³⁰⁵

At the qualitative level, African participation in the economy was diversified into business activities which had ~~not been~~ hitherto before undertaken by Africans. Among other things, some form of manufacturing, which had been exclusively undertaken by the Asians and Europeans became also an African economic activity. Swainson has some invaluable data in this regard. By 1973, the "African" companies were engaged in the business activities as shown in Table B.

The activity sector of "African" companies represented above, corresponds with what Kaplinsky found in his study,³⁰⁶ as the areas of activity of firms on which the ICDC committed the greatest part of its funds, under the Small Loans Scheme.

TABLE B:

THE ACTIVITY SECTOR OF A SAMPLE OF "AFRICAN" COMPANIES - 1973

Agricultural (production and distribution)	:	55
Manufacture (food and clothing)	:	4
Basic Materials (Chemicals and metals)	:	1
General Engineering	:	1
Transport and Tourism	:	8
Building, Finance and Property	:	11
Import, Export Agencies	:	8
Wholesale Merchants	:	17
Retail Services	:	12
Others	:	5

SOURCE: Nicola Swainson op.cit., p.45

Kaplinsky enumerates the following as the areas in our economy which are funded by the ICDC's Small Loans Scheme: Maize Milling and flour; bakery; jaggery; woodworking; car repairs and sales; sisal brushes and machine building; quarry and cement manufacture; blocks; tailoring; leather and shoes manufacture; saw mills and miscellaneous manufacture which involves, tyre retreading, manufacture of agricultural implements and battery assembly. If our comparison of these two studies is correct, it is right to observe that, the ICDC has been instrumental in promoting and financing the diversification of African participation in business in Kenya. But one may ask, what is the nature of this African participation in the economy as represented by these studies?

This question can be answered briefly. African businessmen can mainly be found in small businesses as contrasted to the other racial groups living in Kenya, whose companies operate the large scale businesses, most of them with international connections. In the industrial sector, African participation is mainly in what may be termed service industries as opposed to production industries. Food processing for export, tourism, transport, import and export agencies, wholesale and retail trades account for about 92 per cent of all the African business time.³⁰⁷ Coupled with the fact that African businesses account for only about 24 per cent (this being the percentage of African companies doing business in Kenya), it seems to us that it is still a long way before Africans can be said to be playing a leading role in the capital accumulation process. There is still plenty of room at both the quantitative and qualitative levels for African participation in the economy. The ICDC and the other public corporations charged with the responsibility of mobilising African participation in the economy should feel challenged by the present state of affairs whereby Africans in their own country are playing an almost peripheral role in the economy.

IV. THE INDUSTRIALISATION PROCESS AND THE ICDC

At the risk of repetition, we feel we should recount the story of the industrialisation process in Kenya. This is because, the ICDC was specifically established in 1954 to initiate industrial development.³⁰⁸ The desire to initiate industrial develop-

ment became an even more urgent priority at independence. The new African Government in a policy statement immediately after independence, promised that it would encourage industrial development with the government participating in the ownership and management of the industries it regarded as fundamental to the economy. ³⁰⁹ The urgent need to industrialise by the African Government was also imperative because of the loop-sided colonial economy, which concentrated on the agricultural sector, at the expense of industries. ³¹⁰

By the 1957/1958 period, the ICDC in response to the government's desire to create an industrial sector, was interested in a number of industrial companies. These companies were: the East African Industries, the Kenya Cannery Ltd., and Pitt Moore Glassworks Ltd., The ICDC also received applications for aid from other industrial companies including the: New Stanley Hotel, Kenya Coast Fisheries Project and a Steel Works project. At the time, there was one handicap to the full participation by the ICDC in industrial projects in the country. This was the lack of sufficient funds. The Board of Directors of the ICDC complained in that year about the inadequate funds at its disposal. The Board of Directors of the ICDC said that: "unless additional moneys are placed at the disposal of the corporation, the time is not distant, if not already arrived, when the corporation will no longer be able to deal with the applications, no matter how desirable, from the point of view of the country's economy their projects may be". ³¹¹ By 1963/1964 period, the financial position of the corporation had markedly changed. A lot of enthusiasm was

being shown by the Government into the activities of the corporation. Funds were availed to the corporation for its activities. Several additions were made to the ICDC's list of industrial projects. These included: the Kenya Cannery Ltd; the Kenya Cashewnuts Ltd; the East African Packaging Industries Ltd and the Pulp and Paper Company of East Africa Ltd. The ICDC planned to invest in several other industrial projects including: the Diatomite Company Ltd. near Gilgil and the now famous Kenya Industrial Estates.

By the 1970s, ICDC's industrial investments had been increased tremendously. The Corporation established subsidiary companies and entered into several joint venture agreements with many industrial multinational corporations, culminating into Associated Companies of the ICDC. As of June 30, 1979, the ICDC had established fifteen (15) subsidiary companies and entered into forty-four joint venture agreements which formed the basis of the Associated Companies.³¹² Although some of ICDC's subsidiary and Associated Companies are not industrial Companies as such, it is worthy noting the new lease of activity and life within the ICDC. Of the ICDC's subsidiary companies, the following can be said to undertake some form of industrial activity: the African Diatomite Ltd; the Ceramic Industries of East Africa Ltd., the East African Fine Spinners Ltd; the General Motors (Kenya) Ltd., the Mining Industries Ltd., the Somerset Africa Ltd., and the Fluospar Company of Kenya Ltd., a company under liquidation.³¹³ Most of the Associated Companies on the other hand undertake some form or other of industrial activity. By June 30, 1979, the government through the ICDC had spent about KShs. 290,000.000.00 on industrial projects.³¹⁴

A discussion of the ICDC's efforts to create an industrial sector in Kenya cannot be complete without mentioning two important institutions which specifically aid the ICDC in its industrialisation efforts. These two institutions are: the Industrial Development Bank Ltd. and the Kenya Industrial Estates Ltd. We shall now turn to a detailed discussion of these two institutions.

(1) THE INDUSTRIAL DEVELOPMENT BANK LTD. (IDB)

As a measure of the increasing importance with which the industrialisation process was being viewed, both by the ICDC and the government, the Industrial Development Bank was set up in 1970. The Industrial Development Bank was set up to specialise in financing large scale industrial projects as opposed to the small and medium scale projects which were being handled by the Kenya Industrial Estates Ltd. The Industrial Development Bank was set up with the help and funding of the World Bank - through the International Bank of Reconstruction and Development (IBRD); Morgan Grenfell, a U.K. Company; a West German Company; the Government of Kenya; the Kenya National Assurance Co. Ltd, and the ICDC holding 20.8 per cent of the shares. Among the industrial projects financed by the Bank, are factories manufacturing the following items:

CHAPTER SIXCONCLUSIONS AND POLICY RECOMMENDATIONS

This study started with a general survey of the evolution of the public corporation as a concept. The progressive disintegration of Laissez Faire economics, which had started by the middle of the 18th century reached its peak in the 1920s and early 1930s. Free Competition which had appeared to the majority of the economists of the time, as the natural law, gave way to the concentration and centralisation of production, leading to monopoly capitalism. The spirit of the small cottage and guild producer, which was epitomised by the adage: "leave us alone", died away with free competition. Wealth was concentrated in fewer and fewer hands. The concentration and centralisation of wealth into fewer hands inevitably led to the state, which had hitherto contented itself with the "Keeping of Law and Order", into the economic arena, as one of the active participants. This movement of the productive forces from Laissez Faire capitalism to monopoly capitalism, had been predicted by Karl Marx, as an inevitable fact resulting from the free competition of the 18th century. ³²³ Marx had observed that the concentration and centralisation of property and wealth into fewer and fewer hands by the monopolies would in turn lead to a greater and more active role being played by the state in the economy, as one of the economic actors, than hitherto known. For different reasons, Karl Renner ³²⁴ and John Keynes, ³²⁵ also believed that the state was bound to play an important role in the economies of their nations during the monopoly phase of capitalist production.

Renner advanced the theory that the establishment of public corporations, institutions enjoying a separate legal personality from the government to carry out activities on behalf of the state, was the only opportunity available for "countering the dominance of the monopoly capitalist owner." ³²⁶ On the other hand, Keynes asserted that, economic development in the monopoly capitalist era depended on the growth and recognition of semi-autonomous institutions: public corporations, within the state organisation, whose criterion of action within their fields would be solely the "public interest" and whose deliberations would be free from private advantage. ³²⁷ In this way, public corporations, became the identified agents of governments to perform the important role of economic actors, along side existing institutions of private property. Public corporations were distinguished from the other business organisations of the time, by their concern for the "public interest", as contrasted to the private, profit motivated limited liability company and partnership. Historically therefore, public corporations can be traced to the revolution at the end of the 19th century, which gave birth to monopoly capitalism.

But are public corporations as creatures of the state, free from the issues or interests of private motive? A theory of the State which represents it as a mindless arbitor of heterogenous interests in society is inadequate, and does not give due consideration to the evolution of the state within its historical and class contexts. ³²⁸ From the roles it performs in any society, the state is not a neutral institution, but on the contrary, it is an instrument

of oppression or coercion at the disposal of the dominant class or classes in any society. The roles that the state and its institutions (notably the public corporations) play, are assigned to them by the dominant class interests in that society. The state and its institutions are found most active in those areas of the economy which perpetuate the economic interests of the ruling class or classes. The use of public corporations in Kenya by the state should therefore be seen in this context. Public corporations are creatures of monopoly capitalism, which they have faithfully served, in financing what has been called "wasteful production".³²⁹ This fact, explains the reason why public corporations lend themselves to a variety of uses in different political set-ups. Because public corporations take their inspirations from the politico-economic set-up and the nature of the state in any country, changes at the politico-economic level have far reaching ramifications on the type of goals and objectives that the public corporations will be called upon to fulfil. Depending therefore, on the nature of the politico-economic set-up in any particular country, and the political ideology that the ruling clique espouses, the nature, goals and objectives of public corporations will vary.

In Kenya, public corporations conceptually, drew their theoretical basis from the British theory of the 1930s.³³⁰ The British theory of public corporations posits a balance between managerial autonomy and public accountability for the efficient and effective management of the enterprise being run by the public corporation. This organisational form is said to be a "unique combination", which allows public corporations to operate on commercial lines,

developed for the limited liability company, and at the same time, the enterprise remains accountable to the general public, who constitute the shareholders, via the government department or ministry, under whose portfolio the public corporation falls.

How far can it be said that the goals and objectives of public corporations as corporate and economic entities, are to be found in the organisational form, that is: balancing managerial autonomy and public accountability? Put another way, how true can it be said that, the organisational form constitutes the goal and objective of an institution, whose evolution is to be traced to the economic interests at stake at a particular historical epoch? This study asserts that, the goals and objectives by the state for establishing public corporations was not so that the corporations could manage efficiently the enterprises under them, but rather, the attainment of specific economic interests that accrued to the dominant interest groups or classes, which controlled the state machinery and for whom public corporations had become important policy instruments. The goals and objectives of the modern public corporations are to be found in the aims and objectives of monopoly capitalism. It was ultimately monopoly capitalism which benefited from the evolution and establishment of public corporations by governments. The aspirations of monopoly capitalism, as a phase of capitalist production, became the goals and objectives that public corporations sought to achieve, since monopoly capitalism represented the dominant mode of production at the time when public corporations became a popular feature of capitalist production. Examples of the way monopoly capitalism employed the use of public corporations can be furnished by two important British public corporations: The Colonial (now

Commonwealth) Development Corporation (CDC) and The Overseas Food Corporation (OFC), Corporations which pursued the same objectives as monopoly capitalism. These two public corporations were established by British monopoly capital for the search of raw materials for British industries and the provision of food for the starved industrial population in Britain and Europe generally. The organisational form had little, if anything, to do with the realisation of these goals or objectives.

Although the theoretical basis of the Kenyan public corporation is drawn from the British theory, the Kenyan public corporation does not correspond to the model posited by this theory. There have been changes in this British model to take account of the differences in the political systems in these two countries. An analysis of the ICDC reveals that the Corporate managers of public corporations in Kenya do not regard themselves as having antagonistic interests from those held by the politicians. Corporate managers and the political wing of the Kenyan "comprador" class perform their respective functions in an atmosphere of mutuality and goodwill. The entrepreneur-manager, managing public corporations and the politicians managing the state apparatus merely control different aspects of the state machinery. They both belong to the same class, the petty-bourgeoisie, and they have nothing to fear from each other. Indeed they complement each other in the control of the state machinery. The petty-bourgeoisie as a class is in turn in the service of international capital, and use public corporations as the instrument of this service. Public

Corporations in Kenya, and the ICDC in particular are used to channel foreign capital into the most lucrative areas of the economy, under-cutting any local initiatives from entering into these areas. In doing so, the Kenyan petty-bourgeoisie class and international capital, share out the benefits that are generated by this partnership, through the agency of public corporations. Political patronage by way of appointments to the boards of directors of public corporations is one other use to which public corporations are put in Kenya, either to resolve conflicts that arise within the ranks of the petty-bourgeoisie or to maintain those people or persons who have been temporarily axed off from the comprador-political wing by the electorate. By these manouevres, public corporations are used by the "comprador" class for its own benefits and ends and those of international capital. "Public interests" to which politicians and the commercial bureaucracy running or managing public corporations so often refer, become mere slogans for the appeasement and blind-folding the public.

It is precisely because of the unity of interests between the entrepreneur-manager of public corporations and the comprador-politician that the legal mechanisms provided for by the law have been rendered otiose. This is the second time in the history of public corporations in this country for this to happen. During the colonial period, the colonial state did not find it necessary to control the settler community who comprised the entrepreneurial - managers of the colonial Public corporations, via the set legal controls. Informal controls, which comprised mainly in the sharing of the same ideals about the role of the colonial economy, were enough to direct and synchronise the activities

of the colonial entrepreneurial - managers to supplement the efforts of the Colonial Government in its policies of exploiting the human and natural resources in the Colony of Kenya. Also in post-colonial Kenya, the development of an African entrepreneurial - manager cadre after the attainment of independence, side by side with the comprador - politician, has rendered the formal legalistic controls provided by the law to be unnecessary in controlling the functions and activities of public corporations in Kenya. Whereas these legal controls were of some use immediately after independence, when nascent nationalism on the part of the African politicians tended to conflict with the entrenched monopoly interests, these conflicts are now a thing of the past. In 1967 formal legal controls in the ICDC were requested for by the then Minister of Commerce and Industry Mr. Mwai Kibaki, to control the settler attitudes to the economic policies of the African Government. ³³¹ Mr. Mwai Kibaki explained the necessity of this addition to the ICDC Act, as an "oversight which had to be corrected so as to avoid any doubt as to who would be able to give directions, if there was a conflict of opinion between the corporate managers of the ICDC and the politically accountable minister". ³³² It is our contention that, contrary to the view held by the minister, there had been no oversight on the part of the Colonial Government, when it was debating the IDC Act in 1954. There was no necessity for the inclusion in the Act formal legal controls, since these controls could be achieved informally. And so is the position today! Even with this formal power on the statute books, the corporate managers and the comprador - politicians regard each other as "colleagues, engaged in nation building and as such need no real legalistic controls". ³³³

The emphasis on the organisational form and the law pertaining to public corporations as the most important inputs in the management and performance of corporate functions have important implications in Kenya. Because public corporations are separate legal entities from the government which creates them, it is possible for the government to side-step its political accountability when there is a crisis in their management. The corporate managers who run the day-to-day affairs of the corporation will in the period of crisis be left out in the cold to explain the crisis and the losses that their public corporations have incurred to the general public who constitute their shareholders. This is what happened to the management committee of the Kenya Meat Commission.³³⁴ Whereas the Kenya Meat Commission was making huge losses, among other reasons because, the government had encouraged and even financed another privately owned slaughter house under the name of Halal Meat Products Co. Ltd., the immediate explanation given by the government for the losses made by the Kenya Meat Commission, was the corporate inefficiency and mismanagement by the management committee of the corporation. Because of the alleged inefficiency and mismanagement of the corporation, the chief executive of the corporation lost his job,³³⁵ the reasoning going: with his removal a more competent and able manager would be employed. Although another chief executive was appointed, the corporation has continued to make losses because of the uncongenial economic surroundings in which the corporation has continued to operate.³³⁶

This organisational form has also important ramification with regard to foreign investment in this country. Officials of international lending institutions insist on doing businesses with public corporations rather than government departments, in the

belief that the corporate form which the public corporations take, is free from the vagaries of local politics. Also public corporations are preferred because their management pattern or structure allows for the participation of officers from the donor or lending institutions, without their appointment raising political sentiments or political pressure from the public. Private investors prefer to enter into joint venture agreements with public corporations because, they are politics-free and the private investors are invited to participate in the management of these joint enterprises by providing the technical staff. ³³⁷ On the other hand, it has been said that the socialist countries which also provide a limited amount of aid, prefer to deal or do business with public corporations because, they are "socialistic" institutions as compared to the limited liability companies with all their capitalistic connotations. ³³⁸ Because of this preference by external lending agencies, the government uses public corporations in Kenya to attract foreign aid and investments from all possible willing corners of the world: the international lending agencies, the Western Capitalist countries and the eastern socialist countries. ³³⁹

But is this organisational form or structure all this important for the fulfilment of the posited goals for public corporations? Put another way, could it make any difference if the ICDC and other public corporations in Kenya, existed under a different organisational form: the limited liability company or even the government department? This study argues that the particular form in which public corporations exist, indeed the form in which the ICDC exists is not

crucial for the performance by the ICDC of its corporate functions. In view of this study's finding, it is irrelevant whether the ICDC or indeed any other public corporation in Kenya existed in the other two alternative forms government enterprises take. In any case, all the Subsidiary and Associated Companies of the ICDC take the form of limited liability companies, registered under the Companies Act. It would seem therefore that the organisational form or structure alone does not bestow upon any public corporation any serious advantage. This conclusion finds support in Professor Hanson's observation that:

"practically every known type of public enterprise is to be found working well in some circumstances and badly in others, and it is extremely difficult to say to what extent the performance of a particular enterprise has been influenced by the form that the political authorities have given it." 340

So long as the activities, goals and objectives set for public corporations by the political authorities remain the same, mere changes in the form public corporations take cannot have a decisive impact on the way these goals and objectives are implemented or even achieved. The emphasis on the legal form and organisational structures set out in the enabling Acts of public corporations, are therefore one-way.

This is not the same as saying that the emphasis on the organisational form or structure by the government is a waste of time as a political objective. The emphasis

on organisational form is important to the political authorities at two levels:

1. it can be used to buy time for the politicians, while they are still grappling around with the possibility of formulating proper policies and strategies for the public corporation sector to "deliver goods" to the public. This is what happened in Tanzania. While the political bureaucracy was making some genuine efforts to formulate policies at the political and economic levels for the proper and systematic operation of the public corporation sector, organisational and structural changes were undertaken to buy time. Changes have been effected on the working relationships of public corporations in Tanzania at the political and economic levels which render some of the principles on which the theory of public corporations are based otiose. 342

2. organisational reform is rich in promises and promises are much cheaper to make than performance. Professor Friedmann made this point succinctly and we shall quote him at length to show the full implications of this phenomenon. He said:

"the rationality of law reform, is in a way spurious, abstract, conceptual and unreal. It is not instrumental in achieving the proclaimed objectives. The major interest it serves, is that of the legal profession itself. In a rather odd way and precisely because of its deficiencies, it can be very valuable to the state.

Again this is not because law reform really brings reform. It is because law reform is rich in promises. Sometimes promises are much preferable to performance and usually they are far cheaper too!" 343

POLICY IMPLICATIONS

Public Corporations as creatures of governments, take their guidelines from the political system and the ideology of the country in which they operate. The roles and objectives that public corporations perform are therefore the objectives of the political bureaucracy that constitute the state in any particular society. In Kenya, the roles and objectives that have been assigned to public corporations by the political bureaucracy reflect the neo-colonial status of the Kenyan state and the economy in general. These roles are the traditional expectations of monopoly capital, coupled with an intensified export of capital for the further exploitation of the Kenyan economy. Attempted organisational reforms that seeks only to alter the form of public corporations without the accompanying changes at the political and economic levels, changes aimed at restructuring the whole economy, including: the political motives, roles and objectives, merely tamper with the superstructural features, including the law, and will not produce

the desired results. Most of the shortcomings that public corporations suffer from in Kenya result from the contradictory policies pursued by the state, which in turn result from the government's link with international capital. Only when this dependence on international capital is destroyed at the political and economic levels, can public corporations be reformed or re-shaped to serve the needs of economic development for the greater majority of the people of Kenya.

Efforts to reshape public corporations in Kenya, should take cognisance of the fact of their historical development. Public corporations cannot operate out of their own politico-economic set-up. The present or existing politico-economic climate in Kenya does not allow or permit public corporations to perform any other role, than that of supportive instruments for the exploitation of this country by international capital, in collaboration with the local petty-bourgeoisie. The recommendations of the Review Committee of Statutory Boards,³⁴⁴ which merely stop at the organisational level: "Financial management, organisational deficiencies, poor management and ineffective supervision by the government",³⁴⁵ will not to our mind, alter the objective purpose of public corporations in Kenya. Evidence of prolonged inefficiency, financial mismanagement, waste, maladministration, personalisation of office and resisting public accountability will persist, not only in public corporations, but also in government departments and ministries. Nepotism, corruption and the personalisation of office by Corporate managers

will continue to plague the management of public corporations in Kenya, notwithstanding the recommendations of the review committee, because they merely sought to tamper with the organisational aspects of corporate management, without addressing themselves to the politico-economic environment in which these corporations work. Perhaps more importantly, the class benefits by the political and commercial bureaucracies who comprise the comprador class in Kenya, will not be significantly changed by these recommendations.

Critical criteria for evaluating the performance and relevancy of public corporations should be set at the political and economic levels. Harsh choices should be made at the politico-economic policy formulation levels. In this regard, such issues as: are public corporations in Kenya, service or commercially oriented organisations, expected to declare profits at the end of every financial year?; are public corporations in Kenya to be used to develop a public sector ownership or a private individualist ownership system? and finally, are public corporations to initiate local based or foreign based development? , have to be faced and answered before any effort is made to alter the structure of the existing corporations. Without making some of these choices, attempted reform at the purely organisational levels: the organisational structure, management techniques, control procedures, appointment criteria and the terms and conditions of service of the employees, are mere promises. And perhaps these promises are much more preferable and cheaper too, than actual or substantive reform or change, in the present circumstances in Kenya.

APPENDIX

LAWS OF KENYA

THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT
CORPORATION ACT

CHAPTER 517

Revised Edition 1962

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CHAPTER 517

THE INDUSTRIAL DEVELOPMENT ACT

ARRANGEMENT OF SECTIONS

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CHAPTER 517

THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION

Commencement: 15th February, 1955

An Act to establish a corporation to be known as the Industrial and Commercial Development Corporation for facilitating the industrial and economic development of Kenya

1. This Act may be cited as the Industrial Development Act.
2. In this Act, except where the context otherwise requires -

"Corporation" means the Industrial and Commercial Development Corporation established by section 3 of this Act;

"Minister" means the Minister for the time being responsible for commerce and industry;

"Minister for Finance" means the Minister for the time being responsible for finance.

3. (1) There is hereby established a corporation to be known as the the Industrial and Commercial Development Corporation, for the purposes of facilitating the industrial and economic development of Kenya by the initiation, assistance or expansion or by aiding in the initiation, assistance or expansion of industrial, commercial or other undertakings or enterprises in Kenya or elsewhere.

(2) In the exercise of its functions under this Act the Corporation shall have regard generally to the desirability of-

- (a) acting principally as an auxilliary finance organisation and not as the sole source of the provision of finance in respect of any particular undertaking or enterprise as aforesaid;
- (b) exercising its powers of affording financial assistance, so far as possible and except where the Minister for Finance otherwise directs, by way of guarantee, loan or investment and not by way of grant or subsidy;
- (c) requiring early liquidation or repayment of any guarantee, loan or investment made by the Corporation, in order to ensure so far as possible that the liquid resources of the Corporation may be available for

other purposes within the scope of the functions of the Corporation under this Act,

and, in particular, to the desirability of ensuring that any such undertaking or enterprise as aforesaid will be of long-term value in relation to the proved self-supporting or to furnish direct profits either immediately or in the future.

(3) The Corporation shall be a body corporate with perpetual succession and a common seal, with power to hold land and to sue and be sued in its corporate name.

(4) The application of the seal of the Corporation shall be authenticated by the signatures of the chairman of the Corporation (or some other director authorised by the Corporation to authenticate the application of the seal thereof) and of another director.

(5) Every document purporting to be an instrument issued by the Corporation and to be sealed as aforesaid or to be signed on behalf of the Corporation shall be received in evidence and be deemed to be such an instrument without further proof unless the contrary is shown.

4. (1) The Corporation shall consist of a chairman and not less than five or more than nine other directors, all of whom shall be appointed by

the Minister from among persons appearing to him to have had experience and shown capacity in industry, trade or administration.

(2) Every director of the Corporation shall hold and vacate his office in accordance with the terms of his appointment and shall, on ceasing to be a director, be eligible for reappointment:

Provided that any director may at any time by notice in writing to the Minister resign his office.

(3) All appointments under this section shall be made by the Minister after consultation with the Corporation.

(4) The validity of any proceedings of the Corporation shall not be affected by any vacancy amongst the directors or by any defect in the appointment of a director.

(5) If the chairman of the Corporation ceases to be a director he shall also cease to be a chairman.

(6) If the Minister is satisfied that any director -

(a) has become bankrupt or has made an arrangement with his creditors; or

(b) is incapacitated by physical or mental illness; or

(c) has been absent from meetings of the Corporation for a period longer than three consecutive months without the permission of the Corporation; or

(d) is otherwise unable or unfit to discharge the functions of a director, or is unsuitable to continue as a director,

the Minister may remove him from his office as a director.

5. (1) Subject to the approval of the Minister, each director shall have power to appoint either another director or any person approved by the other directors, or by a majority of them, to act as an alternate director in his place during his absence or his inability to attend any meeting, and may at his discretion remove such alternate director:

Provided that no director or person shall at one and the same time act as alternate director in place of more than one director.

(2) An alternate director shall, whilst so acting (except as regards remuneration and the power to appoint an alternate), be subject in all respects to the provisions of this Act relating to

directors, and each alternate director shall, whilst so acting, exercise and discharge all the functions, powers and duties of his appointor in his appointor's absence.

(3) A director acting as alternate director shall have an additional vote for the director for whom he so acts.

(4) An alternate director shall cease to be an alternate director whenever his appointor ceases for any reason to be a director.

6. (1) The Corporation shall pay to the chairman and each director such remuneration and allowances as may from time to time be determined by the Corporation with the approval of the Minister.

(2) If any director or person is employed about the affairs of the Corporation otherwise than as director, the Corporation may pay him such remuneration and allowances (in addition to the remuneration or allowances, if any, to which he may be entitled as a director), as the Corporation, with the approval of the Minister, may determine.

7. The Corporation may appoint a general manager, and such managers, accountants, secretaries, managing agents and such other servants or agents as the Corporation may consider necessary for the proper discharge of its functions, on such terms and conditions as the Corporation may determine.

8. Without prejudice to the generality of the provisions of section 3 of this Act the Corporation shall, subject to the approval, generally or specially, of the Minister and subject to such terms and conditions as he may impose in giving any such approval, have power -

- (a) to provide credit and finance by means of loans or the subscription of loan or share capital or otherwise for industrial, commercial or other undertakings or enterprises in Kenya or elsewhere;

- (b) to subscribe for, conditionally or unconditionally, to underwrite, issue on commission or otherwise, take, hold deal in and convert shares, stocks, obligations and securities of all kinds, and to enter into partnership, or into any arrangement for participating in undertakings, sharing profits, union of interest, reciprocal concession or co-operation with any person, partnership or company, and to take or otherwise acquire and hold shares or stocks in or obligations or securities of, and to subsidize, any person, partnership or company, and to sell, hold, reissue, with

or without guarantee, or otherwise deal with any such shares, stocks, obligations or securities, and to promote and aid in promoting, constitute, form or organize companies, syndicates, or partnerships of all kinds to exercise and enforce all rights and powers conferred by or incident to its ownership of any shares, stocks, obligations or securities for the time being held or owned by the Corporation;

- (c) to advance, deposit or lend money, securities and property to or with such persons, partnerships or companies and on such terms as may seem expedient; to create, make, draw, accept, endorse, execute, issue, discount, buy, sell, negotiate and deal in bills, notes, bills of lading, warrants, coupons, debentures and other negotiable or transferable instruments;
- (d) subject to the provisions of section 10 of this Act, to guarantee or become liable by way of suretyship or indemnity for the payment of money, or for the performance of any contracts or obligations, and generally to transact all kinds of guarantee, trust or agency business;
- (e) to purchase, take or lease, hire or otherwise acquire, and to sell, exchange, surrender, lease, mortgage, charge, convert, turn to account, dispose of and deal with,

any movable or immovable property and rights of all kinds;

- (f) to purchase or otherwise acquire and carry on the whole or part of the business, property, goodwill and assets of any person, partnership or company carrying on, or proposing to carry on, any business which the Corporation is authorized to carry on, or which can be conveniently carried on in connexion with such business or may seem calculated, directly or indirectly, to benefit the Corporation, or possessed of property suitable for the purposes of the Corporation, and, as part of the consideration for any of the acts or things aforesaid or property acquired, to undertake all or any of the liabilities of such a person, partnership or company, or to acquire an interest in, amalgamate with or enter into any arrangement for sharing profits or for co-operation or for limiting competition or for mutual assistance with any such person, partnership or company, and to give, issue or accept cash or any shares, stocks, obligations or securities that may be agreed upon, and to hold and retain or sell, mortgage and deal with any shares, stocks, obligations or securities so received;

- (g) to sell, exchange, mortgage (with or without power of sale), assign, lease sublet, improve, manage, develop, dispose of, turn to account, grant rights and privileges in respect of and generally otherwise deal with the whole or any part of the business, estates, property, rights or undertakings of the Corporation, upon any terms, either together or in portions, and as a going concern or otherwise, for such consideration, whether of cash, shares, stocks, obligations or securities, as the Corporation may think fit;

- (h) to invest and deal with money upon such securities and in such manner as may from time to time be determined, and to place money on deposit or current account with any bank or building society;

- (i) subject to the provisions of section 9 of this Act to raise or borrow money, with or without security, and also to secure the payment of money by the issue of or upon debentures or debenture stock, perpetual, terminable or otherwise, or bonds, other obligations charged or not charged upon, or by mortgage, charge hypothecation, alien or pledge of the whole

- or any part of the undertaking, property, assets and rights of the Corporation, both present and future, and generally in such other manner and on such terms as may seem expedient, and to issue any of the Corporation's obligations or securities for such consideration and on such terms as may be thought fit; and also, by similar mortgage, charge, hypothecation, lien or pledge, to secure and guarantee the performance by the Corporation of any obligation or liability it may undertake, and to redeem or pay off any such securities;
- (j) to act as the manager, agent or secretary of any undertaking and to nominate or appoint any person to act as director of, or in any other capacity in relation to, any undertaking, and to act as the agent or representative of any undertaking, whether carrying on business in Kenya or elsewhere;
- (k) to do all or any of the above things as principles, managers, agents, contractors, trustees or otherwise, and either alone or in partnership or in conjunction with any other person, partnership or company, and to contract for the carrying on of any operation connected with the Corporation's business by any other person, partnership or company;

(1) to do all such other things whether of an industrial, commercial or other nature as may be deemed to be incidental or conducive to the attainment of the above objects or any of them and to the exercise of the rights, powers and authorities given by this Act.

8A. The Industrial and Commercial Development Corporation shall, in the exercise of its powers and in the performance of its duties under this Act or any other written law, act in accordance with any general or special directions that may be given to it by the Minister.

9. The borrowing powers of the Corporation shall be exercisable only with the approval of the Minister for Finance as to amount, the sources of the borrowing and the terms and conditions on which the borrowing may be affected.

(2) Any approval given for the purposes of this section may be either general or limited to a particular borrowing or otherwise, and may be either conditional or unconditional.

(3) A person lending money to the Corporation

shall not be bound to inquire whether the borrowing of money is within the power of the Corporation or be concerned to see to the application or be answerable for any loss or misapplication thereof.

10. The power of the Corporation to guarantee, or become liable by way of suretyship or indemnity for, the payment of money, or the performance of any contracts or obligations, shall be limited to the extent that the aggregate amount remaining undischarged under all liabilities by way of guarantee, suretyship or indemnity assumed by the Corporation shall not at any time exceed the value, as determined by the Minister for Finance from time to time, of the assets of the Corporation available for meeting such aggregate amount as aforesaid.

11. To enable the Corporation to exercise its powers or to fulfil any of its obligations, the Minister for Finance may, with the consent of the National Assembly, make advances or grants to the Corporation.

12. The Minister for Finance may, from time to time, after consultation with the Minister, direct the Corporation to pay into the consolidated fund any money held by the Corporation and deemed by the Minister for Finance to be surplus to its existing or anticipated requirements.

13. (1) The quorum necessary for the transaction of business of the Corporation shall, except where regulations made under this Act otherwise provide, be four.

(2) The chairman of a meeting shall in the case of equality of votes have a second or casting vote.

(3) The directors shall cause minutes of all proceedings at their meetings, and of all proceedings at meetings of every committee that may be appointed by them, to be entered in books kept for the purpose.

(4) The books containing the minute if such proceedings shall remain the property of the Corporation and shall be kept at such place as the directors think fit, and shall at all times be made available to the Minister and to all persons authorised by him in that behalf.

(5) Subject to the provisions of this Act and of any regulations made thereunder, the Corporation shall regulate its own procedure.

14. (1) The directors shall cause to be kept proper books of account and such other records as are necessary to give a true and fair view of the state of the Corporation's affairs and

to explain its transactions, and such books of account and other records shall be kept at such place as the directors think fit, and shall at all times be made available to the Minister and to all persons authorised by him in that behalf.

(2) The directors shall as soon as practicable after the end of each financial year of the Corporation cause to be prepared a statement of accounts in such form as the Minister may, with the approval of the Minister for Finance, direct.

(3) The accounts of the Corporation shall be audited annually by an auditor or auditors appointed by the Minister.

(4) The directors shall as soon as practicable after the end of each financial year of the Corporation make an annual report to the Minister dealing generally with the operation of the Corporation be laid before the National Assembly by the Minister.

15. The Corporation shall not be wound up except by or under the authority of an Act.

16. The Minister may from time to time, by order published in the Gazette, apply to the Corporation any provision of this Act, and where any such order is made such provision shall

apply to the Corporation as it applies to a company within the meaning of the Companies Act.

17. No director or officer of the Corporation shall be personally liable for any act or thing done or omitted to be done by him as such in good faith and without negligence in the course of the operations of the Corporation.

18. The Minister may, after consultation with the directors, make such regulations as he may consider necessary or desirable for the proper conduct of the business of the Corporation including, without prejudice to the generality of the foregoing, regulations with regard to any of the following matters -

(a) the convening of the meeting of the Corporation, directors and committees, and the procedure to be followed thereat;

(b) the appointment or establishment of committees of the directors, and the co-opting of persons other than directors to such committees; and

(c) the provision of a common seal and the custody and use thereof.

FOOTNOTES

INTRODUCTION

- 1 W. Friedmann, "Government Enterprise: A Comparative Analysis". In W. Friedmann and J.F. Garner (eds), Government Enterprise, Stevenson, (London) 1970, p.303.
- 2 Fredrick Engels "The Origin of the Family, Private Property and the State". In Marx and Engels, Selected Works vol.III, progress publishers (Moscow), p.456.
- 3 D. Wadada Nabudere, The Political Economy of Imperialism. Tanzania Publishing House (Dar-es-Salaam) 1978, p. 170.
- 4 R.C. Pozen, Legal Choices for State Enterprises in the Third World, New York University Press, (New York), 1976, Chapter II.
- 5 A.H. Hanson, (ed) Nationalisation: A Book of Readings, George Allen & Unwin (London) 1963, pp. 11-15.
- 6 11 & 12 Geog.6. Chapter 15; Statutes, 1948, 11, 12 & 13 Geog. 6 vol.1. p.3.
- 7 Pheroze Nowrojee, "Public Enterprise in Kenya" In Yash Ghai (ed), Law in the Political Economy of Public Enterprises, International Legal Centre (New York) 1977, p.169.
- 8 Woodruff, The Impact of the Western Man, p. 50. Also quoted by D. Wadada Nabudere, op. cit. p. 144.

- 9 Quoted by D. Wadada Nabudere, op. cit. p.146.
- 10 A look at the ICDC Annual Report and Accounts will reveal that the ICDC has entered into about 44 joint venture agreements with multinational corporations with a total capital outlay of about 1090 million shillings. See the ICDC Annual Report and Accounts, 1978/1979, pp.8 -18.
- 11 The ICDC Annual Report and Accounts, 1978/1979, pp. 8-18.
- 12 Jan Jelmert Jorgensen, "Multinational Corporations and the Indigenisation of the Kenyan Economy". In Carl Widstrand (ed), Multinational Firms in Africa, Scandinavian Institute of African Studies (Uppsala) 1975, pp. 157-167.
- 13 Compare the statistics of the 1972 and 1978 for the manufacturing sector of the Kenyan economy. See the Kenya Statistical Abstracts, 1972 and 1978, pages 37 and 146 respectively.
- 14 This is the solution suggested by the Government review committee, appointed by the President Mr. Daniel Arap Moi, on the 8th February, 1979, to review the financial administrative, appointment and control procedures within public corporations in Kenya. See for greater detail the: Republic of Kenya: Review of Statutory Boards, Government Printer, (Nairobi) 1979.
- 15 The Foreign Investment (Protection) Act, Cap 518 of the Laws of Kenya.

16 The ICDC (Amendment) Act, No.7 of 1967.
Now S.8A of the ICDC Act.

CHAPTER ONE

Footnotes

1. Lord Lloyd of Hampstead, Introduction to Jurisprudence, Stevens (London) 1972, p.43
2. W. Friedmann, "Government Enterprise: A Comparative Analysis". In W. Friedmann & J.F. Garner (eds), Government Enterprise, Stevens & Sons (London) 1970, p. 312.
3. C.D. Drake, "the Public Corporation As An Organ of Government Policy" in W. Friedmann & J.F. Garner (eds), op.cit., p.27.
4. This point has been elaborately discussed by among others authors: L.C.B. Gower, The Principles of the Modern Company Law, Stevens (London) 1969 p.235. Professor Gower observes that: In most nationalisation schemes of which he gives: the Bank of England 1946 and the Cable and Wireless Ltd, existing private companies, chartered or registered, were kept intact, but nationalisation by the acquisition of the whole of their share capital. This phenomenon is also discussed by A.H. Hanson (ed), Nationalisation, Simon Shand Ltd. (London) 1963, pp. 12-15.
5. See. Re Smith & Fawcett Ltd. (1942) Ch.304; Re W & M Roith Ltd. (1967) 1 W.L.R. 432.
6. C.D. Drake, "The Public corporation as an organ of Public Policy". In W. Friedmann & J.F. Garner, (eds) op.cit. p. 28.
7. W. Friedmann, "Government Enterprise: A Comparative Analysis". In W. Friedmann & J.F. Garner (eds) op.cit. p. 307. Also see A.H. Hanson, Public Enterprises and Economic Development, & Kegan Paul (London) 1972, p. 385.

- 8 Quoted in W. Friedmann, The State and the Rule of Law in a mixed Economy, Stevens (London) 1971, p. 56.
- 9 J.F. Garner, "Public Corporations in the United Kingdom". In W. Friedmann & J.F. Garner (eds) op. cit. p. 4.
- 10 W.A. Robson, Nationalised Industries and Public Ownership, Stevens (London) 1965, p.76.
- 11 Since the 2nd World War, public corporations have acquired something of an amorphous use in the fields of Agriculture, Manufacturing, Commerce, Marketing and Finance to name only a few areas. Another interesting aspect of the public corporation is that its use may seem to transcend purely political or ideological considerations. Countries so diverse in political outlooks find themselves using the public corporation. The USSR, USA, Britain, Tanzania, and Kenya use substantial numbers of public corporations notwithstanding their political differences.
- 12 Tanzania utilises this option, under the Public Corporations Act, No. 17 of 1969. This option was also suggested for Kenya by the Review Committee on Statutory Boards, Government Printer (Nairobi) May 1979, pp. 18-20.
- 13 The Companies' Act, cap 486 of the Laws of Kenya. Many public corporations have been established in this way. For example, the ICDC has established a wide variety of subsidiary corporations, operating under the companies' Act as their operative Law. See the ICDC Annual Report and Accounts 1977/1978

- 14 An example of this state of affairs can be found in the Panafrican Paper Mills Ltd, Webuye. The ICDC holds only 5.6 per centum of the total equity share holding.
- 15 As we shall observe in more detail in the next section, in the eyes of the law, a public corporation is its own master and it is fully answerable as any other person (human or artificial). In the cases of Tamlin v. Hannaford (1950) 1 K.B. 18 and Smith v. London Transport Executive (1951) AC 555, it was expressly held that Commercial Corporations are not emanations of the crown and are therefore subject to the control of private law normally exercised over corporate bodies, notably the company, organised on commercial lines. In an obiter in the case of Glasgow Corporation v. Central Land Board 1965 S.C. (HL) 1, the House of Lords attempted to distinguish between the Commercial and social service corporations, suggesting that probably the latter may be classified as emanations of the crown. This argument would seem however to be in opposition to the full thrust of the holding in the better known case of Salomon v. Salomon & Co. Ltd. (1897) AC 22, in so far as it asserts that, an incorporated body (by statute) is in essence part and parcel of the agency which formed it. Also see Peter Bayne, "The Definitions of the Republic in Public Law and Criminal Law Concepts", 1970 Denning Law Journal vol.2 No.3 (University of Dar es Salaam), 29.
- 16 In the words of Lord Denning in the case of Tamlin v. Hannaford (1950) 1 K.B. 18 at p.23.: "The significant difference between the public corporations and other business organisations is there are no shareholders to subscribe the capital that

or to have any voice in its affairs. The money which the corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not secured by debentures but guaranteed by the Treasury. If it cannot be repaid, the loss falls on the consolidated fund, that is to the taxpayer. There are no shareholders to elect the directors or to fix their remuneration. If it (the corporation) should make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to wind up at the suit of any creditor. The taxpayers would no doubt, be expected to come to its rescue before the creditors stepped in".

- 17 Charles de Houghton, The Company: Law, Structure and Reform in Eleven Countries, George Allen & Unwin Ltd, (London) 1970, p. 234.
- 18 For an elaborate discussion of this phenomenon see the following authors: Lenin, "The State and Revolution" in Lenin, Selected Works Vol.II. Progress Publishers, (Moscow) 1970, p.238; Lenin, "The State" in Lenin, Selected Works. vol.III, Progress Publishers (Moscow), 1975, p.200; John S. Saul, The State in Post-colonial Societies: Tanzania" in Ralph Miliband (ed), Socialist Register 1974, p. 349 and W. Ziemann & M. Lanzendorfer, "The State in peripheral societies" in Ralph Miliband, Socialist Register 1977, p.143.
- 19 See generally Tom Hadden, Company Law and Capitalism. Stevens (London) 1972, Chapter I; L.C.B. Gower The Principles of the Modern Company Law, Stevens (London) 1969, pp.234-242.
- 20 Charles de Houghton, The Company: Law, Structure and Reform in Eleven Countries, George Allen & Unwin Ltd. (London) 1970, pp.233-237.

- 21 In Tamlin v. Hannaford (1950) 1 K.B. 18, after attempting to distinguish between the public corporation and other business organisations, Lord Denning went on to say that: "the public corporation is subject to the common law concepts and controls normally exercised over corporate bodies on commercial lines".
- 22 See generally L.C.B. Gower, op. cit. chapters II & III; Tom Hadden, op. cit. chapters I & II; Robert R. Pennington, Company Law, Butterworths (London) 1967, Chapter 1.
- 23 The Companies Law Act - Cap, 486 of the Laws of Kenya, in use in Kenya today is basically the 1948 English Companies Act, of course with a few amendments from time to time.
- 24 Under the Judicature Act, Cap 8 of the Laws of Kenya, English Common Law in force in England on the 12th August 1897, applies in Kenya as good law. For a further discussion of this point see A. Allott, New Essays in African Law, Butterworths (London) 1970, pp. 28-69.
- 25 (1897) A.C. 22.
- 26 Op.cit., p. 31.
- 27 Op. cit., p. 51
- 28 L.C.B. Gower, op. cit., pp. 189-217
- 29 L.C.B. Gower, op.cit. p. 71
30. op. cit.

- 31 Kahn-Freund, "Some Reflections on Company Law Reform" in (1944)7 Modern Law Review, p. 54.
- 32 Tom Hadden, op. cit. p.18
- 33 Cap 40 of the Laws of Kenya.
- 34 S.6 (i) of the Government Proceedings Act, Cap 40 of the Laws of Kenya.
- 35 S.6 (ii) op. cit.
- 36 S. 21 (4) Op. cit.
- 37 Tamlin v. Hannaford, (1950) 1 K.B. 18. Also see the Profit and Loss Account of The Industrial and Commercial Development Corporation, Year ending 1978; I.C.D.C. Annual Report and Accounts, 1977/1978. p. 28.
- 38 Op. cit.
- 39 L.C.B. Gower, Op. cit., p.78
- 40 Under the I.C.D.C. Act, Cap 517 of the Laws of Kenya, the Corporations' borrowing powers cannot be exercised without the approval of the Ministers of Commerce and Finance, as to amount, source and the terms and conditions on which the borrowing is being affected.
- 41 Re Jon Beauforte (London) Ltd, (1953) Ch. 131; Bell Houses Ltd. v. City Wall Properties Ltd, (1966) 2 QB 656.
- 42 Royal British Bank v. Turquand, (1856) 6 E & B, 327. See also the discussion of R.W. James and

S. Ligunya "Organisational Relationships and Control of Parastatals in Tanzania", on this point with particular reference to the Tanzanian Public Corporations, in Eastern Africa Law Review (1972) vol.5, Nos. 182, pp. 57-60.

43 Under the ICDC Act, S.8, the powers and functions of the corporation are phrased in such wide terms that it is difficult to pin down the corporation on an ultra vires act, whatever power the corporation may have exercised.

44 Eastern Countries Railway v. Hawkes, (1855)5 H.L.C., 331 at 346.

45 H.A.L. Hart, "Definition and Legal Theory in Jurisprudence", in 1954 Law Quarterly Review, vol. 70, p. 37.

46 See W. Friedmann, "Government Enterprise: A Comparative Analysis" and A.W. Bradley & J.P.W.B. McAuslan "Public Corporations in East Africa" in W. Friedmann & J.F. Garner (eds) op. cit. pp.303 and 264 respectively.

47 W. Friedmann, "Government Enterprise: A Comparative Analysis" in W. Friedmann & J.F. Garner (eds) Op. cit. pp. 333-336; W. Friedmann, The State and and the Rule of Law in a Mixed Economy, Stevens, (London) 1971, pp. 1-70.

48 Dan Nabudere, The Political Economy of Imperialism, T.P.H. (Dar es Salaam) 1978, p.96.

49 Karl Renner, The Institutions of Private Law and their Social Functions, London 1948, Also Quoted by W. Friedmann op. cit. p.12

- 50 See generally W. Friedmann & J.F. Garner (eds) op. cit.; A.H. Hanson, Public Enterprise and Economic Development, Routledge & Kegan Paul Ltd (London) 1965; LCB Gower, op. cit.
- 51 The Economist, June 20 1953. Also Quoted in W. Friedmann "Government Enterprise: A Comparative Analysis". In W. Friedmann & J.F. Garner (eds), op. cit. p. 303.
- 52 Cap 493A of the Laws of Kenya.
- 53 Act No. 8 of 1979.
- 54 Act No. 9 of 1979.
- 55 W. Friedmann, "Government Enterprise: A Comparative Analysis" in W. Friedmann & J.F. Garner (eds) op. cit., p.56.
- 56 A.W. Bradely & J.P.W.B. McAuslan, "Public Corporations in East Africa" in W. Friedmann & J.F. Garner (eds). op. cit. p. 266.
- 57 ICDC Act, Cap 517 of the Laws of Kenya. Also see N.O. Jorgensen, The ICDC, Its Purpose and Performance, IDS Discussion Paper No. 47, University of Nairobi.
- 58 British Corporations incorporated during this period include: The Bank of England - 1946; (now Commonwealth) The Civil Aviation Board - 1946; The National wealth)

Coal Board - 1946; The National Electricity Board 1947; The National Gas Board 1948; The Iron & Steel Corporation; The Colonial (now Commonwealth Development Corporation 1948 and The Overseas Food Corporation 1948. For an elaborate discussion of these corporations see A.H. Hanson, Nationalisation, George Allen & Unwin Ltd, (London) 1963 pp. 35-64.

- 59 Karl Marx "The General Law of Capitalist Accumulation" In Capital Vol.1, Progress Publishers (Moscow) p. 587.
- 60 Ralph Miliband, "Marx and the State" in Tom Bottomore (ed), Karl Marx, Prentice-Hall Inc., (New Jersey) 1973, p. 129. Also see W. Friedmann & J.F. Garner op. cit.; A.H. Hanson, Public Enterprise and Economic Development, Routledge & Kegan Paul Ltd, (London) 1972; L.C.B. Gower, op. cit.
- 61 John Maynard Keynes, The End of Laissez Faire, Woolfe (London) 1926 Also quoted in W. Friedmann, The State and the Rule of Law in a Mixed Economy, Stevens (London) 1971, p. 13.
- 62 Social classes are defined in terms of their relationships to the means of production and the ability to appropriate the products of labour. See K. Marx, "Manifesto of the Communist Party", In K. Marx and F. Engels, Selected Works, vol.I, Progress Publishers (Moscow) 1977, pp. 108-127; Kwame Nkrumah, Class Struggle in Africa, Panaf (London) 1973, p.17.

- 63 Lenin, Selected Works, vol.I, Progress Publishers (Moscow) 1975 p. 25.
- 64 Karl Marx, "The Manifesto of the Communist Party" in K. Marx and Fredrick Engels, op. cit. p. 108.
- 65 Karl Marx, "A Preface to a Contribution of the Critique of Political Economy", in Marx Engels and Lenin, On Historical Materialism, Progress Publishers (Moscow) 1974, p. 137.
- 66 Karl Marx, "The Manifesto of the Communist Party". In Karl Marx and F. Engels, Selected Works vol.I, Progress Publishers (Moscow) 1977, p.110.
- 67 Fredrick Engels, "The Origin of the Family, Private Property and the State". In Marx and Engels, Selected Works Vol.III, Progress Publishers (Moscow) 1977, p. 268; Also quoted by Lenin, "The State and Revolution" in Lenin, Selected Works vol.II, Progress Publishers (Moscow) 1975, p. 241.
- 68 Dan Wadada Nabudere, op. cit. p. 170.
- 69 For instance see the discussion of Professor W. Friedmann The State and the Rule of Law in a Mixed Economy, Stevens (London) 1971, pp. 52-70. Professor Friedmann sets out clearly the occasions on which the state in the Western Capitalist Countries is willing to undertake direct economic development through public corporations.
- 70 Ralph Miliband, "Marx and the State". In Tom Bottomore, op. cit. p. 135. This argument is also put by Nicos Poulantzas, Political Power and Social Classes, Paris 1973.

- 71 Ralph Miliband, "Marx and the State". In Tom Bottomore op. cit., p. 135.
- 72, See for a further discussion of this point, A. Dicey, Introduction to the Study of the Law of the Constitution, Macmillan & Co. Ltd. (London) 1968, pp. 183-328.
- 73 This passage is quoted in Ralph Miliband, "Marx and the State". In Tom Bottomore op.cit. p.135
- 74 Among other articles on this point see the following: Hanza Alavi, "The State in Post-Colonial Societies: Pakistan and Bangladesh". In New Left Review 74 (July/August 1972) pp. 59-81; John S. Saul, "The State in Post-Colonial Societies: Tanzania". In Ralph Miliband (ed), Socialist Register 1974, pp. 349-372; W. Ziemann & M. Lauzendorfer, "The State In Peripheral Societies", in Ralph Miliband (ed) Socialist Register 1977, pp. 143-176; Issa Shivji, Class Struggle Continues. T.P.H. (Dar.) 1975.
- 75 See J.J. Jorgensen, "Multinational Corporations and the Indigenisation of the Kenyan Economy". In Carl Widstrand (ed) Multinational Firms in Africa, Uppsala offset centre AB (Uppsala) 1975, pp. 143-177.
- 76 For a more detailed discussion of the role of the colonies during the colonial period, see Lenin, "Imperialism, the Highest Stage of Capitalism". In Lenin, Selected Works vol.I, Progress Publishers (Moscow) 1975, pp. 634-731.

- 77 W. Ziemann and M. Lauzendorfer, "The State in Peripheral Societies". In Ralph Miliband (ed), The Socialist Register 1977, p. 155.
- 78 For a further discussion of this phenomenon see generally the debate on the centre-periphery by: James D. Cockcroft, Andre' Gunder Frank and Dale L. Johnson, Dependence and Underdevelopment, A Doubleday Anchor Original (New York) 1972; Kwameh Nkrumah, Class Struggle in Africa, Panaf (London) 1973; Dan Nabudere, Political Economy of Imperialism, T.P.H. (Dar es Salaam) 1978.
- 79 John S. Saul, "The State In Post-Colonial Societies: Tanzania". In Ralph Miliband (ed), The Socialist Register 1974, p. 351.
- 80 See Nicola Swainson, Foreign Corporations and Economic Growth in Kenya, a Ph.D. Thesis, Sussex University (unpublished), part I pp. 23-76; Colin Leys, Underdevelopment in Kenya, Heinemann (London) 1975, Chapter I, pp. 28-62,
- 81 John S. Saul, "The State in Post-Colonial Societies: Tanzania", Op. cit., p. 353.
- 82 H. Alavi and Issa Shivji, Op. cit.

Footnotes

CHAPTER TWO

- 83 Contantin Kofzaroa, The Theory of Nationalisation, Stevens, (London), p.1.
- 84 Y.Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya, Oxford University Press (Nairobi) 1970, pp.3-34.
- 85 The Marketing Statutory Boards were set up to deal in the regulation, distribution and export of raw material products and foodstuffs such as: Cotton, Coffee, tea, wheat and Maize. Because of the post-World War II economic crisis, the settler Community found it increasingly burdensome to meet the expectations of the home economy in the supply of raw materials and food. Many settler farmers were forced or threatened with the possibility of having to quit farming. This was because, farming had become an unprofitable and expensive business. It was due to this reason that the Colonial Government in Kenya abandoned the Laissez Faire philosophy to intervene economically by setting up the Land and Agricultural Bank, and other service regulatory boards, to bail out the unprofitably run and unviable farmers. This ensured the continuity of the production and supply of raw materials and food to the metropole, and at the same time maintained the individual farmers into business - farming.
- 86 Pheroze Nowrojee, "Public Corporations in Kenya". In Y. Ghai (ed), Law in the Political Economy of Public Corporations, (Uppsala) 1977, p.168.

- 87 The Colonial (Commonwealth) Development Corporation and the Overseas Food Corporation were established by the Overseas Resources Development Act, (ORDA) 1948.
- 88 S.1(2) of the ORDA, 1948.
- 89 Government Printer, (Nairobi) 1965.
- 90 Sessional Paper No.10 on: African Socialism and its Application to Planning in Kenya, Government Printer, (Nairobi) 1965, pp. 2-5.
- 91 Op.cit., paragraph 73, p. 26.
- 92 The Development Plan - 1974 - 1978, Government Printer (Nairobi) 1974, paragraphs 2-8, p.34.
- 93 Sessional Paper No.10 Op. cit., paragraph 75, p.27
- 94 Republic of Kenya: Review of Statutory Boards, Government Printer (Nairobi) 1979, paragraphs 6.1 - 6.5, p.18.
- 95 Op. cit., paragraph 6.2, p. 18
- 96 Op. cit.
- 97 Sessional Paper No.10: Op. cit., pp. 27-30; paragraphs 73-84.
- 98 Colin Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism, Heinemann, (London) 1975, p. 149.

- 99 Sessional Paper No.10; op.cit., p.28, paragraph 80.
- 100 O.K. Mutungi, Company and Partnership Laws and their Propriety in the Implementation of Africanisation of Commerce and Industry in Kenya. An unpublished JSD thesis - Yale University, 1974, p.1.
- 101 Cap 130 of the Laws of Kenya (Repealed)
- 102 The Governor of Kenya in exercise of the powers given to him under s.2 of the Credit with Natives Ordinance proclaimed to ordinance applicable to all parts of the colony, vol.II Laws of Kenya, 1926, p. 1189.
- 103 Jan Jelmert Jorgensen, "Multinational Corporations and Indigenisation of the Economy in Kenya". In Carl Widstrand (ed) op. cit. p. 147.
- 104 Cap 104 of the laws of Kenya.
- 105 Op. cit., s.2 (2)
- 106 (1948) 23(II) K.L.R. 12.
- 107 Op.cit. p. 14.
- 108 Op. cit.
- 109 Credit to Africans (Control) (Repeal) Ordinance, no. 11 of 1960.
- 110 9 E.A.L.R., 102.
- 111 T.J. Mboya, "An Address to the Central Chamber of Commerce". In the East African Trade and Industry - vol.10 no. 131, January 1965, p.29.

- 112 Sessional Paper No.10; Op.cit., p.29,
paragraph 83.
- 113 The Development Plan 1966-1970, Government
Printer (Nairobi), p. 267.
- 114 Records of the Kenya Association of Manufacturers
Annual General Meeting, 30 March 1966, cited
in Colin Leys, op. cit. p. 45.
- 115 Republic of Kenya: Review of Statutory Boards,
Government Printer (Nairobi), 1979, p.13,
paragraph 3.8.
- 116 Op. cit. pp. 12-14, paragraph 3.6 - 3.9.
- 117 Sessional Paper No.10, Op.cit. p.19, paragraph 56.
- 118 Op. cit. p. 20, paragraph 58.
- 119 The Development Plan 1970-1974, Government Printer
(Nairobi) 1970, p.2.
- 120 Colin Leys, Underdevelopment in Kenya: The Politi-
cal Economy of Neo-Colonialism, Heinemann (London)
1975, p. 119.
- 121 See Chapter five (5), infra.
- 122 Pheroze Nowrojee, "Public Corporations and Co-
operatives in Kenya and Tanzania: Some Comparative
Illustrations". In East African Law Review, vol.5
Nos. 1 & 2 1972, p. 168.
- 123 Op. cit. p. 18, paragraph 6.2.

- 124 J.D. Nyhart, "The Ugandan Development Corporation and Agriculture". In the East African Economic Review, vol. 6, No.2, p. 104.
- 125 A.N. Bradely & J.P.W.B. McAuslan, "Public corporations in East Africa". In W. Friedmann & J.F. Garner (eds) Op.cit., p.265.
- 126 Pheroze Nowrojee, "Public Corporations in Kenya". In Yash Ghai (ed) Op.cit., p. 176.
- 127 The detention J.M. Seroney, J.M. Shikuku and George Anyona are cases in point.
- 128 The appointment of J.M. Seroney was announced on 24th December, 1980, Daily Nation, 24th December, 1980.
- 129 Yash Ghai, "Control and Management of the Economy". In Y. Ghai (ed) Op.cit., p. 36.
- 130 The International Centre for Law in Development - A proposal: The Impact of Development Programmes in the Human Rights of the Disadvantaged: A study of Public Controls and Government Enterprises, p. 10.
- 131 Multinational companies with joint venture businesses in Kenya include: General Motors; Firestone International Ltd., Unilever Brothers Ltd; Union Carbide International Ltd; Pan African Oriental Paper Mills Ltd. For a detailed list see the ICDC Annual Report and Accounts 1978-1979, pp. 8-18.
- 132 Cap 113 of the Laws of Kenya.
- 133 Cap 518 of the Laws of Kenya.

134 Act No. 25 of 1967

135 Act No. 33 of 1967

136 A look at the Rivatex Joint venture Agreement will show the roles government officials play in facilitating joint venture agreements. This agreement was signed between: the Kenya government; a German Multinational Company, Deutsche Gessellschaft Fur Wirtschaftliche Zusammenarbeit; the ICDC; the International Finance Corporation; Seditex Engineering Co.Ltd. and Rift Valley Textiles Co. Ltd.

137 A government answer to parliamentary question No.12-Official Hansard Report, National Assembly, 4 March 1968, vol.14, col. 298.

138 Pheroze Nowrojee, "Public Corporations and Cooperatives in Kenya and Tanzania: Some Comparative Illustrations". In EALR, vol.5, nos. 1 & 2 of 1972, p. 141.

139 Republic of Kenya: Review of Statutory Boards, Government Printer (Nairobi), p.2, paragraph 15.

140 These Companies are: the Kenya Farmers Association, the Kenya Cooperative Creameries and the Kenya Planters Cooperative Union. These Companies/ Cooperatives are registered both under the Companies Act and the Cooperatives Act - Caps 486 and 490 of the Laws of Kenya.

141 Republic of Kenya: Review of Statutory Boards, Government Printer (Nairobi), p.18, paragraph 5.1.

- 142 Cap 486 of the Laws of Kenya
- 143 The 1974-1978 Development Plan, Government Printer (Nairobi) 1974, p.37.
- 144 Op. cit. p. 43.
- 145 S.K. Mbugua, Secretary to the Inspectorate of Statutory Board, Office of the President. An Address to a Seminar on: Management of Public Enterprises Finance, at the Kenya Institute of Administration Kabete, on the 29th October 1979.
- 146 Op. cit. p.1
- 147 John Loxley & John S. Saul, "The Political Economy of Parastatals". In EALR, vol.5, Nos. 1 & 2 of 1972, p.9.
- 148 Republic of Kenya: Review of Statutory Boards, Government Printer (Nairobi), 1979 p.2.

Chapter Three

- 149 Act no. 55 of 1951, now cap 517 of the Laws of Kenya.
- 150 S.3(3) of the IDC Act, Cap 517 of the Laws of Kenya.
- 151 Pheroze Nowrojee, "Public Enterprises in Kenya" In Yash Ghai (ed) Op. cit., p. 169. The EAIMB was set up under the East African Industrial Management Regulations of 1944 and incorporated as a legal entity under the Defence Industrial Management Corporation Regulations of 1952.
- 152 N.O. Jorgensen, The ICDC, its purpose and Performance An IDS Discussion Paper, No.47, University of Nairobi.
- 153 Act No. 7 of 1967.
- 154 See Chapter two of this study.
- 155 S.3 (i) of the IDC Act, cap 517 of the Laws of Kenya.
- 156 S.3 (3)(a) and (b), op. cit.
- 157 These two British Corporations were set up under the Overseas Development Act, 1948 of Britain - 11 & 12 Geo. 6; chap. 15 Statutes, 1948.
- 158 The Overseas Development Act, 1948, s.1 (i)

- 159 Pheroze Nowrojee, "Public Enterprises in Kenya". In Y. Ghai (ed) op. cit., pp. 169 - 170.
- 160 Tom Hadden, op. cit. p. 19
- 161 Article 8 of Table A of the Companies Act, cap. 486 of the Laws of Kenya.
- 162 Charles de Houghton, The Company, George Allen & Unwin Ltd., (London) 1970, p. 145.
- 163 A.H. Hanson, Public Enterprises and Economic Development, Routledge & Kegan Paul Ltd, (London) 1965, p.400.
- 164 L.C.B. Gower, Principles of Modern Company Law, Stevens (London) 1969, p. 236. On the adaption of the Company Law form of the board of directors, Hanson says: "in most public corporations, top management is collective, being placed in the hands of a board. We rarely ask why this should be so, for we tend to assume that what is good for private enterprise is also good for public. A private joint stock company is run by a board of directors; therefore a state owned concern with analogous functions must be similarly run". A.H. Hanson, Public Enterprises and Economic Development, Routledge & Kegan Paul Ltd., (London) 1965, p. 396.
- 165 A.H. Hanson, Op. cit. p. 395.
- 166 A.H. Hanson, Op. cit. p. 397.
- 167 A.H. Hanson, Op. cit. p. 398.

- 168 The Hoover Commission Report, McGraw Hill,
(New York) 1949.
- 169 Paul Appleby, A Re-examination of Indias
Administrative System with Special Reference
to Administration of Government industrial and
Commercial Enterprises, Government Secretariat
(New Delhi-India), 1965.
- 170 A.H. Hanson, Op. cit., p. 402.
- 171 A.H. Hanson, Op. cit., p. 407.
- 172 Pheroze Nowrojee, "Public corporations in Kenya"
In Yash Ghai, Op. cit., p. 176. This theme was
also the subject of discussion in chapter two,
supra. We discussed this role of public corpo-
rations, as one of the implicit functions of
public corporations in Kenya.
- 173 1963/1964 ICDC Annual Reports and Accounts, p.5.
- 174 1975/1976 ICDC Annual Report and Accounts, p.6.
- 175 1978/1979 ICDC Annual Report and Accounts, pp .
2-3. Mr. Kiragori was replaced.
- 176 The ICDC Act, Cap. 517 of the Laws of Kenya, s.6.
- 177 Op. cit. s.6.
- 178 Op. cit., s. 14.
179. L.C.B. Gower, Op.cit., pp. 515-560. As a matter
of practice, public corporations do not only
have to comply with the statutory provisions
of their constituent Acts. Often, public corpo-
rations are required to comply with the provisions

of certain other laws, particularly the provisions of the Companies' Act. This is usually as a result of some reference by the constituent Act to these general provisions of the Companies' Act. Under s. 16 of the ICDC Act, for example, the Minister is empowered to apply to the ICDC any provision of the Companies' Act, not being inconsistent with the provisions of the Act; and where any such order is made, such provision should apply to the corporation as it usually applies to companies within the meaning of the Companies' Act.

180 A.H. Hanson, Op.cit. p. 396.

181 For a general overview of this point see L.C.B. Gower, Op. cit., p. 515-545. As trustees, directors of Companies are necessarily required to observe some duties whose usual burden falls on trustees. The Jenkins Committee recommended, inter alia that, directors must observe the following duties as a necessary corollary of their directoral duties to the company: 1. a director should observe the utmost good faith towards the Company in any transaction with it or on its behalf and should act honestly in the exercise of his powers and the duties of his office; 2. a director should not make use of any money or property of the company or any information acquired by virtue of his position as a director or officer of the company to gain directly or indirectly any improper advantage for himself at the expense of the company; 3. a director who breaches these provisions should be liable to the company for any profits made by him and for the damage suffered by the company as a result of the breach. The Jenkins Committee on

the Amendment of Company Law - Command.
1749 of 1962, paragraph 99(a).

- 182 Re City Equitable Fire Insurance Co. Ltd. (1925)
Ch. 507. Romer J. observed in this case that:
"It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the Company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what duties are, it appears to me to be wholly misleading. I can see, but little resemblance between the duties of a director and the duties of a trustee of a will or a marriage settlement .." Professor Gower has agreed with this observation by Romer J. in his commentary on the case. See. L.C.B. Gower Op. cit. , p.516.
- 183 This is the view that Peter Bayne holds in his Article: "The Definition of the Republic in Public Law and Criminal Law Contexts". In Denning Law Journal (1970) vol.2. no.3. 29. Also several cases have come to this conclusion. See for example: Tamlin v. Harraford (1950) 1KB 18; Launceston Corporation v. The Hydro-Electric Commission (1959) 100 C.L.R. 654; Victorian Railways Commissioners v. Herbert (1949) V.L.R. 211; Peter Luqayala V.R. (1969) HCD Case No. 69, and Rashid s/o Ramadhani v. R. (1963) HCD no. 323.
- 184 See Hubble v. Commissioner for Transport (1952) 19 EACA 97 and Patel v. Commissioner of Income Tax (1961) EA 698.

- 185 See Lord Denning's evaluation of the equity shareholding in public corporation in the case of Tamlin v. Hannaford, op. cit. at 23; A.H. Hanson Op. cit. p. 400.
- 186 In Re City Equitable Fire Insurance Co. Ltd., (1925) Ch. 407 at 426, Romer J. reduced the law pertaining to the duties of directors to the company to the following basic principles:
1. that a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; 2. that a director is not duty bound to give continuous attention to the affairs of his corporation. His duties are of an intermittent nature to be performed at periodic board meetings, and the meetings of any committees of the board of directors upon which the particular director happens to be placed. He is not, however bound to attend all board meetings and committee meetings, although he ought to attend whenever in the circumstances, he is reasonably able to do so; 3. that in respect of all duties, having regard to the exigencies of business and the provisions of the Articles of Association or the provisions of the enabling Act, may properly be left to some other officer of the company, a director is, in the absence of grounds for suspicion, justified in trusting that officer to perform such duties honestly."
- 187 An interview with the ICDC Assistant Corporation Secretary, 18 January 1981.
- 188 David Brownwood, "Limitations on the Exercise of Power by Statutory Public Authorities". In East African Law Journal (1968) vol.4, p.21.

- 189 Eastern Countries Railway v. Hawkes (1855)5
H.L.C. 331 at 346.
- 189A (1953) Ch. 131.
- 190 David Brownwood, Op. cit. p. 22.
- 191 (1968) E.A. 406.
- 192 Patel v. Plateau Licensing Court (1954) 27 K.L. R.,
147.
- 193 Some of the Common Law administrative remedies
available to an agrieved third party include among
others: Certionari, prohibition, mandamus and
injuction.
- 194 An interview with the Assistant corporation
secretary, 16th April 1980.
- 195 Republic of Kenya: Review of Statutory Boards,
Government Printer (Nairobi), 1979. p.5.
- 196 Op. cit. p.3.
- 197 An interview with the Assistant Corporation Secretary
of the ICDC on 28th January, 1978.
- 198 Hans G. Klaus, Organisation of the Division
Process in Public Enterprises in Kenya: An Approach
to Improve Their Internal Performance: A Working
Paper No. 372, Institute of Development Studies,
University of Nairobi. p.5.
- 199 An interview with the Assistant Corporation
Secretary of the ICDC, on 18th January 1981.

- 200 See ICDC Annual Reports, 1967/1968 and 1978/1979 for a comparison of these activities.
- 201 An interview with the Assistant Corporation Secretary, 16th April 1980.
- 202 Scottish Cooperative Wholesale Society Co. Ltd., v. Meyers (1959), A.C. 324 and Selangor United Rubber Estates Co. Ltd., V. Craddock (1968), 2 All E.R. 1073.
- 203 Parker v. The Daily News Ltd. (1962), Ch. 927.
- 204 An Interview with the Assistant Corporation Secretary on the 16th April 1980.
- 205 A Report on the United Nations Seminar on: Some Problems in the Organisation and Administration of Public Corporations in the Industrial Field, 1954. p. 18. Also quoted by Y. Ghai, "Control and Management of the Economy". In Y. Ghai (ed) Op.cit. p. 33.
- 206 J.W. James & S. Ligunya, "Organisational Relationships and the Control of Parastatals in Tanzania". In E.A.L.R. (1972), vol.5. Nos. 1 &2. p. 39.
- 207 R.C. Pozen, The Legal Choices of State Enterprises in the Third World, (New York) .1976.....
- 208 A.H. Hanson, Op. cit.
- 209 A.H. Hanson, Op. cit. p. 337.
- 210 A Report of the United Nations Seminar on: The Organisation and Administration of Public Enterprises, 1967, p. 9. Also cited in Y. Ghai

"Control and Management of the Economy".
In Y. Ghai (ed) Op. cit., p. 33.

- 211 Republic of Kenya: Review of Statutory Boards,
Government Printer (Nairobi) 1979, p.3.
- 212 Habel Nyamu, The State of the Civil Service in
Kenya, Government Printer (Nairobi), 1976.
- 213 Republic of Kenya: Review of Statutory Boards,
Government Printer (Nairobi), 1979, p.16.
- 214 Op. cit. p.10.
- 215 Op. cit. p. 13.
- 216 Op. cit. p. 14

CHAPTER FOUR

- 212 A.H. Hanson, Public Enterprise and Economic Development, Routledge & Kegan Paul Ltd. (London), p. 400.
- 213 A.H. Hanson, op. cit., pp. 400-401.
- 214 Cap 517 of the Laws of Kenya.
- 215 S.6 of the ICDC Act, Cap. 517 of the Laws of Kenya.
- 216 S.7 of the ICDC Act, Cap 517 of the Laws of Kenya.
- 217 The Companies Act, Cap 486 of the Laws of Kenya.
- 218 The ICDC equity shareholding in Pan African Paper Mills Ltd, Webuye, the largest Industrial undertaking in Kenya is only 5.6 per cent. See the ICDC Annual Report and Accounts 1978/1979.
- 219 Personal interview with the then Executive Director, Mr. Eliud Matu Wamae, on the 16th April 1978.
- 220 Apart from the Directorships held in the ICDC, the Subsidiary and Associated Companies, Mr. Wamae held directorships in: the National Bank of Kenya; Ngong Hills Hotel; Warume Traders; Sagana Sawmills Co. Ltd; Umoja Enterprises Co. Ltd., Marment Holdings Co. Ltd; Somerset (A) Co. Ltd. and Peck and Barber Co. Ltd. From a personal interview with Mr. Wamae on the 16th April 1978.
- 221 This is the number which represents the Associated companies of the ICDC at the time - April 1978. See the ICDC Annual Report and Accounts 1977/1978.

- 222 The Minister Mr. Mwamunga attributed the exploitation perpetrated by Multinational foreign companies to "the lack of skilled manpower to negotiate with the financial and industrial wizards of the developed countries at par". Daily Nation, Tuesday 22, August 1978. p.1.
- 223 Studies abound now on the nature and course of the exploitation by multinational companies in third world countries. It has now become clear that foreign investments to third world countries are one of the methods used by the developed capitalist world countries to maintain hegemonic control over the third world countries - perpetrating what has now become known as Neo-Colonialism. For better details see: Widstrand, Multinational Firms in Africa, Uppsala Offset Centre AB (Uppsala) Issa Shivji, The Silent Class Struggle, T.P.H. (Dar es Salaam), Class Struggles in Tanzania, T.P.H. (Dar es Salaam); D.W. Nabudere, The Political Economy of Imperialism TPH (Dar es Salaam); Y. Ghai (ed), Law in the political Economy of Public Corporations, International Legal Centre, (New York).
- 224 Colin Leys, Underdevelopment in Kenya: The Political Economy of Neo-colonialism. HEP (London) 1975, p. 137. Also see Ann Siedmann, Planning for Development in Sub-Saharan Africa. TPH (Dar es Salaam) 1974, p. 266.
- 225 In a personal interview with the Assistant Corporation Secretary of the ICDC, we were told that the Corporation deals with both the Ministries of Commerce and Industry, because their activities cover the functions of these two ministries. In fact the Permanent Secretaries of these two ministries attend and re-

present their ministries' interests on the Board of Directors of the Corporation. The official, further told us that preparation are under way to bring an amendment to the ICDC Act, to reflect the present position. Interview on the 18th January 1981.

226 S.4(1) of the ICDC Act, Cap 517 of the Laws of Kenya.

227 This provision was introduced into the ICDC Act in 1967, by Act No.7 of 1967.

228 Official Report: Kenya National Assembly vol.2, March 4, 1964.

229 The Memorandum of Objects and Reasons to the ICDC Amendment Act, Act No. 7 of 1967.

230 Pheroze Nowrojee, "Public Enterprises in Kenya" In Y. Ghai (ed) op. cit. p. 174.

231 Official Report, Kenya National Assembly, vol.2, March 4, 1964.

232 An Interview with the then Executive Director of the ICDC, Mr. Matu Wamae on March 18, 1978.

233 R.C. Pozen, op. cit. p. 54.

234 A.H. Hanson, op. cit. p. 367.

235 The ICDC Annual Report and Accounts, 1978/1979. p. 29.

- 236 Republic of Kenya: Review of Statutory Boards, Government Printer (Nairobi) 1979, p. 12.
- 237 The doctrine of collective responsibility was defined by the then Speaker of the National Assembly Mr. H. Slade as: "the government must stand or fall together in the event of its being challenged. Any minister who speaks as a minister of the government is believed and assumed to speak with the authority of the government, and any minister who comes to the speaker for any parliamentary business is accepted by the speaker on the face of it as speaking for the government." Official Report, House of Representatives, vol. VIII, February 15 1966 Cols. 901 - 902.
- 238 A personal interview with the Executive Director of ICDC, Mr. Matu Wamae, 16th April 1978.
- 239 S. 9(3) of the ICDC Act, Cap. 517 of the Laws of Kenya.
- 240 (1953) 1 All E.R. 634; (1953) Ch. 131.
- 241 (1932) 2 Ch.46.
- 242 This was the holding in the case of Ashbury Railway Carriage Co. Ltd. v. Riche, (1875) L.R. 7. HL, 667.
- 243 The following Banks have lent money to the ICDC: The East African Development Bank; Kenya Commercial Bank; Barclays Bank (now) Kenya Ltd; The National Bank of Kenya; the Standard Bank and the Exibank of the U.S.A. Report & Accounts 1978/1979, p.27.

- 244 S. 12 of the ICDC Act, Cap. 517 of the Laws of Kenya.
- 245 Republic of Kenya: Review of Statutory Boards, Government Printer (Nairobi) 1979, p.10.
- 246 Op. cit. pp. 10-11.
- 247 Op. cit., pp. 11-12
- 248 Op. cit., p.16.
- 249 Op. cit., p.16.
- 250 The Select Committee on Nationalised Industries in the U.K. vol.1, p. 183.
- 251 The ICDC Amendment Bill, No.7 of 1967.
- 252 The ICDC Annual Report and Accounts, 1978/1979, p. 29.
- 253 Republic of Kenya: The Appropriation Accounts, Other Public Accounts and the Accounts of the Funds for the year 1978/1979 (Together with the Report thereon by the Controller and Auditor-General), Government Printer (Nairobi), 1979, p. xxxi.
- 254 In a personal interview with the Assistant Corporation Secretary of the ICDC, she pointed out that one explanation for not laying the corporations Annual Report and Accounts is lack of time on the part of parliament. She also added that unless there is something suspicious in the activities of Corporations, debating the Annual Report and

of time for a busy National Assembly - 16th April 1981. Our efforts to confirm this view from officials of the Ministry of Commerce and some selected Members of Parliament failed when the officials failed to keep our appointment.

- 255 An Answer to Mr. Sifuna's question in Parliament on the 15th May 1980. See the Daily Nation, 16 May 1980.
- 256 Report of the Commission of Inquiry on the Maize and Produce Board, Government Printer (Nairobi) 1966.
- 257 The Weekly Review, June 30, 1978, pp. 17-21.
- 258 Parliament was forced to go on recess in the middle of the Kenya Railways Corporation Corruption debate in 1977, which was followed by the detention of Mr. George Anyona, the man who had tabled the motion. See The Weekly Review, May 16 1977, pps. 3 - 7.
- 259 The Weekly Review, March 24, 1975
- 260 The Weekly Review, May 16 1977
- 261 Report of the Maize and Produce Board Commission of Inquiry, Government Printer (Nairobi) 1966; The J.M. Kariuki Commission of Inquiry, Government Printer (Nairobi) 1975; The Commission into the Activities of Halal Meat Products co. Ltd. Government Printer (Nairobi) 1978.

- 262 The Vice-Chairman of the Commission Mr. Mark Mwithaga was charged with a petty-criminal offence which had taken place about two years earlier, 1973, and put in prison for it. Messrs. J.M. Jukuku and J.M. Seroney, members of the Commission were detained for saying that KANU, the ruling Party was dead, shortly after the Commission had submitted its report.
- 263 The Daily Nation, Wednesday, April 12, 1978
- 264 The Weekly Review, March 10, 1979
- 265 The Sunday Nation, December 9 1979
- 266 Nairobi City Council v. Wadhwa (1968) E.A. 406.
- 267 S. 105 of the Kenya Constitution (1969)
- 268 The Appropriation Accounts, other Public Accounts of the Funds for the Year 1979/1980 (together with the report thereon by the controller and Auditor-General), Government Printer (Nairobi) 1980, pp. xxiv - xxvii.
- 269 Op. cit. p. xvi - xviii.

CHAPTER FIVE

- 270 Supra.
- 271 Through legal manouevres, Africans were denied any significant participation in the colonial economy. Land was alienated from them, cashcropping was denied them and loan facilities were outlawed for them. In this way, Africans were forced to sell their labour cheaply to the settler community. For better details see Jan Jelment Jorgensen, "Multinational Corporations and the Indeginiousation of the Kenya Economy". In Carl Widstrand, op. cit. pp. 144-156.
- 272 The Manifesto of the New Kenya Party, Nairobi, 1959. Also See Colin Leys, Op. cit., p. 43.
- 273 The Kenya Government negotiated with the British Government after independence for £11½ million to finance the purchase of land from the European settler farmers who were willing to vacate their farms in the "white highlands" to initiate what became known as the "one million acre settlement scheme". The former Colonial Government also agreed to shoulder the costs of the technical and administrative organisation of the settlement schemes, pre-settlement development and advisory services. A further loan of £8 million was obtained from the British Government, the International Bank for Reconstruction and Development (IBRD), the Commonwealth Development Corporation (CDC) and the Federal German Republic for the development of the Settlement Schemes. See Cherry Gertzel, Maure Goldschmidt and Donald Rothchild, Government and Politics in Kenya, EAPH (Nairobi)

- 274 Session Paper No. 10: African Socialism and its Application to Planning in Kenya Government Printer, (Nairobi) pp. 26-35.
- 275 Op. cit., p. 29
- 276 The ICDC Annual Report and Accounts, 1974/1975, p. 25.
- 277 The ICDC Annual Report and Accounts, 1978/1979, p. 20.
- 278 O.K. Mutungi, Op. cit., pp. 46-98.
- 279 See Colin Leys Op. cit., pp. 148-169; Pheroze Nowrojee, "Public Enterprises in Kenya" In Y. Ghai (ed) op. cit., p. 161.
- 280 The ICDC Annual Report and Accounts, 1978/1971, pp. 27-28. This figure was 35 per centum for the financial year 1975/1976.
- 281 Jan Jelmert Jorgensen, "Multinational Corporations and the Indigenisation of the Economy In Kenya". In Carl Widstrand op. cit., p. 155.
- 282 Pheroze Nowrojee, "Public Enterprises and Cooperatives in Kenya and Tanzania: A Comparative Analysis". In EALR (1972) Vol.5, Nos. 1 & 2, p. 167.
- 283 Speech by D.N. Ndegwa, Governor of the Central Bank of Kenya on the 1st December 1972. Published in the Central Bank of Kenya Seventh Annual Report, June 30 1973, p.63.
- 284 Supra, Chapter II.

- 285 Jan Jelmert Jorgensen, "Multinational Corporations and the Indigenisation of the Economy in Kenya". Carl Widstrand, Op.cit. p. 154.
- 286 Op. cit. p. 159.
- 287 Op. cit., p. 159.
- 288 Op. cit., p. 161
- 289 The Daily News (of Tanzania) January 11 1973, p.4.
- 290 Jan Jelmert Jorgensen, "Multinational Corporations and the Indigenisation of the Economy in Kenya". In Carl Widstrand (ed), op. cit. pp. 157-176.
- 291 Op. cit. p. 163.
- 292 Op. cit., p. 166
- 293 op. cit., p. 166
- 294 op. cit. p. 167
- 295 The Trade Licensing Act, No.25 of 1967, was passed for the purpose of regulating and allocating wholesale and retail businesses. The Act gave effect to two important principles:
1. that all persons carrying on business must be licenced, and
 2. that so far as possible, only Kenyan citizens should be allowed to carry on these businesses outside urban areas. See the Memorandum of Objects and Reasons to the Act. Under S.3 of the Act, the Minister of Commerce and (or) Industry was given authority to classify areas of business into general

business areas and the non-general business areas. Under S.4, goods of trade were also classified into specified goods and non-specified goods. The reason for these classifications was enacted in S.5 of the Act, which was stated as: "After the appointed day, no person who is not a citizen of Kenya shall conduct business (a) in any place which is not a general business area, or (b) in any specified goods unless his licence specifically authorises him to do so".

This section was branded during the parliamentary debates leading to the Act, as the most devastating, so far as foreign enterprises were concerned.

296 The Immigration Act, No.33 of 1967, was passed to restrict the entry into Kenya of certain classes of persons. Under S.5 of the Act, thirteen categories of non-citizens were created, each with its own entry requirements. The Act aimed at restricting the entry into Kenya of the unwanted aliens and bar their subsequent participation into economic activities. The Memorandum of objects and Reasons stated: "the employment of a non-citizen, without the appropriate entry permit is made an offence, and engaging into employment or business by an immigrant without that permit is an offence".

297 Nicola Swainson "The Rise of a National Bourgeoisie in Kenya". In The Review of African Political Economy, No.8, p.44.

- 298 Partnerships are by law not required to disclose the nature of their businesses, via the Annual Report and Accounts like the limited liability Companies. See the Partnership Act, Cap. 29 of the Laws of Kenya, S.16.
- 299 The ICDC Annual Report and Accounts, 1972/1973, p. 25.
- 300 Nicola Swainson, op. cit., p.46.
- 301 Although it is legally inaccurate to describe or attribute race to an artificial legal person - the company, we use the notion of "African" company to indicate the extent of shareholding in companies by Africans. An African Company will mean therefore for our purposes, a company where Africans of Kenyan origin are the majority shareholders, control the management and appropriate the dividends. This definition of "African" company derogates from the principle laid down in Salomon v. Salomon & Co. Ltd. (1897) A.C. 30, and more specifically in the case of Katete v. Nyakutukura (1956) 7 U.L.R. 47. In the latter case, it was held that. "A limited liability company is a corporation and as such, it has an existence which is distinct from the shareholders who own it. Being a distinct entity and abstract in nature, it is not capable of having racial attributes".
- 302 Nicola Swainson, op. cit., p. 47.

303

Siedman observes that the returns on Capital investments in Africa are quite high, estimated at between 20 -30 per cent of the investment, compared to only 16.5 per cent on similar investments in the UK and elsewhere in the developed world, See Ann Siedman, Planning for Development in Sub-Saharan Africa, T.P.H. Dar es Salaam, 1974, p.111

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The Siphoning of profits to the metropole by multinational companies has proved to be a very expensive affair for the developing countries. A look at capital investments and the payouts in the form of profits from the developing countries clearly shows that the developing countries are having a raw deal from foreign investments. The third world countries tend to subsidise the developed countries by injecting money into the economies of the developed countries in the form of profits made by the multinational companies. An example of this phenomenon will illustrate this point. In 1967, the USA investments in Africa earned profits worth \$418m. In the same year, \$367m. was siphoned from Africa in the form of profits to the USA. Additional investments in the same year totalled only \$220m. This means that, Africa injected into the USA economy \$147m. more than the USA invested in Africa. It is also worthy noting that 87 per cent of the profits made by USA firms in Africa were siphoned back to USA. See Ostrader, The USA, Private Investments in Africa. So far as the Kenyan experience is concerned, the

International Monetary Fund estimates that the average cash-out flow in the form of profits is \$30m. annually. This brings the total outflow between 1963 and 1968 to \$188.3m. See the International Statistics xxii No.12, December 1969. Colin Leys reports the same phenomenon in his book, op. cit., p. 137.

305

The Kenyan Government has guaranteed the repatriation of profits by foreign investment firms. See The Kenya Constitution (1969) S.75 and The Foreign Investments (Protection) Act. Cap. 518 of the Laws of Kenya. S7 of the Act stipulates that: "Notwithstanding the provision of any other law for the time being in force, the holder of a certificate, may in respect of the approved enterprise to which such certificate relates, transfer out of Kenya in the approved foreign currency and at the prevailing official rate of exchange:

- (a) the profits after taxation of his investment assets;
- (b) the approved proportion of the proceeds of sale of all or any part of the approved enterprise, either in liquidation or as a going concern, and
- (c) the principle and interest of any loan specified in the certificate".

306

Ralph Kaplinsky, An Analysis of ICDC's Small Industrial Loans Commitments from 1961-1975. IDS Working Paper No.251 (Mimeo), University of Nairobi.

307

This figure is derived from Swainson's statistics given above in Table B.

- 308 The ICDC Act, Cap. 517 of the Laws of Kenya, S.3(1).
- 309 Sessional Paper No.10: African Socialism and its Application to Planning in Kenya. Government Printer (Nairobi), 1965, p.42.
- 310 The Colonial Policy was understandable because, Kenya was relied upon for the supply of raw materials and food for the metropole, and they in turn supplied the colony with the necessary manufactured goods, produced in the metropole and merely exported to the colony.
- 311 The ICDC Annual Report and Accounts, 1958/1959, pp. 1-2.
- 312 The ICDC Annual Report and Accounts, 1978/1979, pp. 8 -18.
- 313 See the Sunday Nation, Sunday May 25, 1980; ICDC Annual Report and Accounts, 1978/1979.
- 314 This figure represents ICDC's equity share-holding in industrial companies (both Subsidiary and Associated), funds comprising the Small Industrial Revolving Fund and the Machinery Loans Fund and moneys expended by the ICDC on the Kenya Industrial Estates.
- 315 The ICDC Annual Report and Accounts, 1974/1975, p. 14.

- 316 The ICDC Annual Report and Accounts,
1978/1979, p.8.
- 317 A Manual on the Nairobi Industrial Estates
(1970), p.3.
- 318 I am grateful to Mr. Matu Wamae for arranging
for my personal visit to the Nairobi Industrial
Estates, on February 16 1978, where I visited
some of these common facilities.
- 319 The ICDC Annual Report and Accounts, 1977/1978,
p.7.
- 320 The ICDC Annual Report and Accounts, 1977/1978,
p. 19.
- 321 The ICDC Annual Report and Accounts, 1975/1976,
p. 31.
- 322 The ICDC Annual Report and Accounts, 1978/1979,
pp. 8 - 18.

CHAPTER SIX

- 323 Karl Marx, "The General Law of Capitalist Accumulation". In Capital Vol.I. Progress Publishers (Moscow), p. 587.
- 324 Karl Renner, Institutions of Private Law and their Social Functions Routledge & Kegan Paul (London).
- 325 John Maynard Keynes, The End of Laissez Faire Woolf (1926) (London).
- 326 Karl Renner, Op. cit., Also found in W. Friedmann, The State and the Rule of Law in a Mixed Economy, Stevens (London), p.12.
- 327 John Keynes, Op. cit. Also found in W. Friedmann, Op. cit. p. 13.
- 328 Fredrick Engels, "The Origin of the Family, Private Property and the State". In Karl Marx and Fredrick Engels, Selected Works Vol.III, Progress Publishers, (Moscow), p. 256.
- 329 D.W. Nabudere, The Political Economy of Imperialism, Tanzania Publishing House, (Dar es Salaam) 1978, p. 170.
- 330 This is what has been known as the Morrisonian Concept of public corporations. The underlying principle is that nationally owned industrial and commercial enterprises are vested in purpose - built corporate bodies with a large measure of autonomy from the government in their day-to-day operations, although remaining accountable to the

government through the line minister on major policy issues.

- 331 The ICDC (Amendment) Act, No.7 of 1967. Now S.8A of the ICDC Act.
- 332 The National Assembly Official Reports, on the ICDC Amendment Bill, 1967.
- 333 An interview with the Former Executive Director Mr. Matu Wamae, on March 18 1978. See Chapter Four - herein above.
- 334 See the Weekly Review, June 30, 1978, pp. 17-21.
- 335 Weekly Review, June 30, 1978, p.19.
- 336 Mr. Odera replaced Mr. Mutura as the Managing Commissioner in 1978. This change in the management of the commission notwithstanding the Kenya Meat Commission has continued to make losses because of the many rivals that the Commission must out-compete and because of the inadequate funding and support from the Ministry of Agriculture. For further details see the Kenya Meat Commission Annual Reports and Accounts, 1978/1979, and the Appropriation Accounts, other Public Accounts and the Accounts of the Funds for the Year 1977/1978, Government Printer (Nairobi) 1979, pp.xx - xxi.

- 337 See the Rivatex Joint Venture Agreement, for the typical clauses regarding the employment of technical staff in joint venture enterprises.
- 338 Yash Ghai, "Control and Management of the Economy". In Yash Ghai (ed) op. cit., p. 33.
- 339 As of June 30 1979, there were forty-four (44) joint venture agreements between the ICDC and private foreign investors in Kenya. The Joint partners with the ICDC come from all parts of the world: both from the west and the East. See the ICDC Annual Report and Accounts, 1978/1979, pp. 8-18.
- 340 A.H. Hanson, Op. cit., p.337.
- 341 The Public Corporations Act, No.17 of 1969. Also the split of the State Trading Corporation was a move in this direction. The Minister of Commerce and Industry in Tanzania explained the move as "aimed at making trading company, which had been previously under the S.T.C., more manageable in size, so that they would generally have a limited area of operation and enabled to compare their performance with other local companies. The management of the companies would be close to the problem areas and hence able to take speedy decisions, adequate action to resolve their problems". Daily News, July 19, 1972.

342 Yash Ghai, "Law and Public Enterprises in Tanzania". In Yash Ghai (ed) Op. cit. pp. 226 - 236.

343 W. Friedmann, The Law in a Changing Society, Stevens & Sons (London) 1972, p.515; Also in R.C. Pozen, Op. cit., p.163.

344 Republic of Kenya: Review of Statutory Boards, Government Printer, (Nairobi), 1979.

345 The President, in setting out the terms of reference for the Committee to review Statutory boards in Kenya said: "From the available evidence, it is clear that while many boards are on the whole doing a good job, there are a number which are in great financial difficulties. Many of the financial difficulties are a result of misappropriate organisational structures, poor management and ineffective supervision by the government itself. The Review Committee is therefore appointed to specifically look at:

1. the urgent financial, administrative and operational problems facing important boards and
2. the appointment and control procedures". See op.cit., p.29. The second stage of this review committee was appointed on the 19th December 1979. Its terms of reference were: "to co-ordinate a detailed review and investigation of each parastatal with the assistance of experts; to advise the government on the appointment of the Chief-executives of parastatals and the transfer of such officers between parastatals and from parastatals to a government ministry and vice-versa;

345

to advise the office of the president on the terms and conditions of service for the employees of parastatals; to examine the existing management agreements with other parties; to advise the government on the proposals to establish new parastatals, amalgamations or winding up some of the public corporations and to advise on the need for parastatals to establish subsidiaries under the Companies Act". See the Daily Nation, December 19, 1979, p.4.

BIBLIOGRAPHY

ARTICLES:

1. BAYNE, P. "Definition of the Republic in Public Law and Criminal Law Contexts," (1970) Denning Law Journal, University of Dar-es-Salaam, Vol.2 No.3, p. 29.
2. BROWNWOOD, D.O. "Limitation on the Exercise of power by Statutory Public Authorities." (1968) East African Law Journal, Vol.4, p. 21.
3. FREUND, K. "Some Reflections on Company Law Reform". (1944)7 Modern Law Review, p. 54.
4. FREYHOLD, M. "The Post-Colonial State and its Tanzanian Version". The Review African Political Economy, No.8, p. 75.
5. GODFREY, M and LANGDON, S. "Partners in Underdevelopment? The Transnationalisation Thesis in the Kenyan Context". Journal of Commonwealth Comparative Politics, Vol.XVI, (1976), p.42.
6. HART, H.L.D. "Definition and Legal Theory in Jurisprudence". (1954), 70 Law Quarterly Review, p. 37.

7. KEMENES, S. "The Enterprise and the National Economy". The New Hungarian Quarterly, No.36, p.61.
8. KITCHING, G. "Modes of Production and Kenyan Dependence". The Review of African Political Economy, No.8, p.56.
9. ALAVI, H. "The State in Post-Colonial Societies: Pakistan and Bangladesh", New Left Review, 74, (1972).
10. LENIN, V.I. "Imperialism the Highest Stage of Capitalism". Selected Works, Vol.1, progress Publishers - (Moscow) 1975, p.634.
11. LENIN, V.I. "The State and Revolution". Selected Works, Vol.2, Progress Publishers - (Moscow) 1975, p. 238.
12. LENIN, V.I. "The State". Selected Works, Vol.3, Progress Publishers - (Moscow) 1975, p.200.
13. MILIBAND, R. "Marx and the State" The Socialist Register, 1965, p.61. Also in Tom Bottomore's, Karl Marx, Prentice-Hall Inc, New Jersey, 1973, p.128.

14. PAMBANTZAS, N. "Political Power and Social Classes". The Socialist Register, 1973, p. 33.
15. SAUL, J.S. "The State in Post Colonial Societies: Tanzania". The Socialist Register, 1974, p. 349.
16. SWAINSON, N. "The Rise of the National Bourgeoisie in Kenya". The Review of African Political Economy, No.8, p.39
17. ZIEMANN, W. and LAUZENDORFER "The State in Peri-pherical Societies". The Socialist Register, 1977, p. 143.

BOOKS:

1. ALLOT, A. New Essays in African Law.
Butterworths (London) 1970.
2. BOTTOMORE, T. Karl Marx. Prentice-Hall Inc.
(New Jersey), 1973.
3. BRETT, E.A. Colonialism and Underdevelopment
in East Africa - The Politics of
Economic Change 1919 - 1939.
Heinemann (London) 1974.
4. DICEY, A. Introduction to the Study of the
Law of the Constitution. Macmillan
& Co.Ltd. (London), 1968.
5. CLIFFE, L. and SAUL, J.S.
(eds.) Socialism in Tanzania, vols. 1 and
2. East African Publishing House -
Dar es Salaam, 1972.
6. COCKCROFT, J.D., FRANK, A.G. and
JOHNSON, D. Development and Underdevelopment -
Latin America's Political Econo-
my. Anchor 1972.
7. COLIN, L. Underdevelopment in Kenya, The
Political Economy of Neo-Colonialism.
Heinemann (London), 1975.

8. FRIEDMANN, W. The State and the Rule of Law in a Mixed Economy. Stevens & Sons (London), 1971.
9. FRIEDMANN, W. and GARNER, J.P. (eds) Government Intervention. Stevens and Sons (London), 1970.
10. FRIEDMANN, W. Law in a Changing Society. Stevens & Sons (London), 1972.
11. FRIEDLAND, W. and ROSEBURG Jr. C.G. (eds) African Socialism. Stanford University Press - California, 1964.
12. GHAI, Y.P. (ed) Law in the Political Economy of Public Enterprise. Scandinavian Institute of African Studies - Uppsala International Legal Centre, New York, 1977.
13. GHAI, Y.P. and MCAUSLAN, Public Law and Political Change In Kenya: A Study of the Legal Framework of Government From Colonial Times to the Present. Oxford University Press, (London) 1970.
14. GOWER, L.C.B. The Principles of Modern Company Law. Stevens & Sons (London), 1969.

15. HADDEN, T. Company Law and Capitalism.
Stevens & Sons (London) 1972.
16. HANSON, A.H. Public Enterprise and Economic
Development. Routledge and Kegan
Paul Ltd (London) 1985.
17. HANSON, A.H. Nationalisation - George Allen and
Unwin Ltd (London), 1963.
18. HOGHTON De
CHARLES (ed) The Company Law, Structure, and
Reform in Eleven Countries -
George Allen and Unwin Ltd.
(London), 1970.
19. INTERNATIONAL
LEGAL CENTRE Law and Public Enterprise in Asia.
Paegeo Publishers (Uppsala), 1976.
20. LLOYD, LORD OF
HAMPSTEAD Introduction to Jurisprudence -
Stevens and Sons (London), 1972.
21. INOZEMTSEIN, N.- Contemporary Capitalism: New
Developments and Contradictions.
Progress Publishers (Moscow),
1978.
22. NABUDERE, D.W. The Political Economy of Imperial-
ism. Tanzania Publishing House
(Dar es Salaam), 1978.

23. NKRUMAH KWAME, Class Struggle in Africa.
Panaf (London) 1973.
24. MARX, K. Capital, Vols. 1,2 &3. Progress
Publishers (Moscow), 1975.
25. PENNINGTON, R. Company Law. Butterworths
(London), 1967.
26. POZEN, R.C. Legal Choices for State Enter-
prises in the Third World.
New York University Press
(New York), 1976.
27. RUHUMBIKA, G. (ed) Towards Ujamaa: Twenty Years of
Tanu Leadership - East African
Literature Bureau. (Dar es
Salaam), 1974.
28. SHIVJI, I.G. (ed) Public Enterprise and Law in
Tanzania: A Special Issue of
the East African Law Review,
Vol.5 Nos. 1 & 2, East African
Literature Bureau (Dar-es-
Salaam), 1972.
29. SHIVJI, I.G. The Silent Class Struggle.
Tanzania Publishing House
(Dar-es-Salaam), 1973.

30. SHIVJI, I.G. Class Struggles in Tanzania - Tanzania Publishing House (Dar-es-Salaam) 1975.
31. SIEDMANN, A. Planning for Development in Sub-Saharan Africa. Tanzania Publishing House (Dar-es-Salaam) 1974.
32. WIDSTRAND, C. (ed) Multinational Firms in Africa Scandinavian Institute of African Studies, (Uppsala), 1975.

UNPUBLISHED MATERIALS:

THESES:

1. MUTUNGI, O.K. The Propriety of the Company and Partnership Laws in the Implementation of the Africanization of Commerce and Industry In Kenya (An Unpublished JSD Thesis - Yale University - 1974.)

2. SWAINSON, N.

Foreign Corporations and
Economic Growth in Kenya.
(An Unpublished Ph.D. Thesis,
University of Sussex, 1977)

ARTICLES:

1. GSAENGER HANS, G.
and GUENTER
SCHMIDT

De-Control in the Maize
Marketing System In Kenya.
Discussion Paper no. 254,
Institute of Development Studies,
University of Nairobi.

2. JORGENSEN, N.O.

The ICDC: Its Purpose and
Performance Discussion Paper
no. 147, Institute of Develop-
ment Studies, University of
Nairobi.

3. KAPLINSKY, R.M.
and HOFFMAN, K.

Technical Change and Some
British Multinationals in Kenya:
Some Global Considerations.
Working Paper no. 250, Institute
of Development Studies, Univer-
sity of Nairobi.

4. KAPLINSKY, R.M.

An Analysis of the ICDC Small
Industrial Loans Commitments
1961-1975. Working Paper no. 251,
Institute of Development Studies,
University of Nairobi,

5. KLAUS, HANS. G.

Organisation of the Decision Process in Public Enterprises in Kenya: An Approach to Improve Their Internal Efficiency. Working Paper no.372, Institute of Development Studies, University of Nairobi.

6. MUTUNGA, W.

On the so-called Indigenous Bourgeoisie Accumulation of Capital and Imperialist Domination in Kenya: The Case Study of the ICDC of Kenya. Faculty of Law, University of Nairobi, 1977.

7. TURKSON, R.B.

Ministerial Control of Public Corporations in Ghana, 1957-1972. Faculty of Law, University of Ghana.

8. O'CRAN, T.

Zambia's Food Crop Marketing Boards Since Independence: A Study of the Structure and Institutional Problems of Public Corporations in Africa. Faculty of Law, University of Zambia.

OFFICIAL PUBLICATIONS

1. Sessional Paper No. 10: African Socialism and its Application to Planning in Kenya. Government Printer (Nairobi), 1965.
2. The Development Plan 1966 - 1969. Government Printer (Nairobi), 1966.
3. The Development Plan 1970 - 1974. Government Printer (Nairobi), 1970.
4. The Development Plan 1974 - 1978. Government Printer (Nairobi), 1974.
5. Review of Statutory Boards. (Chaired by Phillip Ndegwa) Government Printer (Nairobi) 1979.

ICDC PUBLICATIONS:

The ICDC Annual Reports and Accounts for the following years were used: 1957/1958; 1963/1964; 1967/1968; 1968/1969; 1970/1971; 1971/1972; 1972/1973; 1973/1974; 1974/1975; 1975/1976; 1976/1977; 1977/1978; 1978/1979;