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THE PRIVATISATION OF PUBLIC ENTERPRISES IN FRANCE AND GREAT BRITAIN

The State, Constitutions and Public Policy

by

TONY PROSSER

BADIA FIESOLANA, SAN DOMENICO (FI)

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European University Institute
Badia Fiesolana
– 50016 San Domenico (FI) –
Italy

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INTRODUCTION

This paper will be concerned with the effects of differing conceptions of the role of the state and differing constitutional arrangements on the delivery of public policy as revealed through a comparison of the programmes for the privatisation of public enterprises in Britain and France. Both countries have adopted extensive privatisation with the ascent to power of Governments of the Right; in fact, the earlier British privatisation programme has offered a major source of inspiration for France. However, there have been major differences in the nature of the enterprises to be sold and on the mechanisms for sale in each country, and one aim of this paper will be to establish the extent to which these can be attributed to constitutional divergencies.

Recent work within comparative political economy has stressed the importance of political differences, and in particular differences in the role of the state, in the formation and implementation of economic policy (see, in particular, Hall, 1986). Relatively little work has, however, been undertaken on the role of constitutional arrangements in this context. Such arrangements are closely connected with the conception of the state predominant in each country, but the effects on policy making may be paradoxical. In particular, of central importance is the variation between the 'stateless' society of Britain, in which economic policy formation has been traditionally conceived as largely the responsibility of private actors, and the 'state' society of France in which the state itself has traditionally adopted a major role. However, I will defend the hypothesis that the sort of constitutional arrangements associated with a 'state' society may impose greater restraints on policy-making than those of 'stateless' society; in other words, that a strong state may gain its strength from the very absence of a developed concept of the state embodied in

constitutional law. This will be analysed in two ways; the first being an examination of the constitutional constraints on the freedom of manoeuvre of government in implementing privatisation. Secondly, I will examine the relations between government and privatised industries to assess the degree to which the role of the state has been replaced by impersonal markets or whether important tools of state intervention have been retained. This will enable me to assess whether economic liberalism provides an adequate substitute for constitutional controls on government.

One point needs stressing here; this is a working paper and represents the presentation of a set of hypotheses rather than a fully developed work: I hope that it will act as a catalyst for criticism and future recasting of the ideas set out. For reasons of space it has proved necessary to exclude important themes. Firstly, discussion here will concentrate on France, with only brief references to Britain for comparative purposes. Similar themes have in fact been discussed elsewhere in relation to Britain in considerable detail by myself and a colleague [Graham and Prosser, 1987]. Secondly, I will omit discussion of regulation of enterprises after privatisation. This has assumed considerable importance in Britain and in France (in the latter country in the area of broadcasting), but must await future treatment.

THE STATE AND CONSTITUTIONS

It is now something of a truism that in Britain the concept of the state is alien to constitutional analysis [see generally on concepts of the state Dyson, 1980]. Indeed, the difficulty with which English judges handle the concept has been recently illustrated in litigation concerning privatisation, where the suggestion by one of the Law Lords that assets of a bank about to be privatised

belonged to the state served not to clarify ownership but to sow general confusion as to what the concept of the state might refer [Ross v Lord Advocate [1986] 3 All ER 79]. Of course, this denial of the centrality of the concept of the state in Britain is not to deny that Britain has an extended and powerful state apparatus. Rather it is to suggest that concept of the state as the means for 'the rationalist pursuit of order (in its broadest sense) in a society subject to ceaseless change' [Dyson, 1980: 7] has been absent from the British political and legal tradition. There has also been no attempt to systematise relations between the individual and the state; and, in particular, English law has not evolved 'the idea of the state as a formally recognised legal institution, subject to its own distinct norms and procedures and integrating diverse institutions' [Dyson, 1980: 41, and see generally 36-44, 112-6, 199-201, 210-2]. The following quotation from President Pompidou (addressing his ex-colleagues in the Conseil d'Etat in 1970) would be inconceivable in Britain:

> For more than a thousand years... there has been a France only because there was the State, a State to bring it together, to organize it, to make it grow, to defend it not only against external threats, but also against group egotisms and rivalries. Today, more than ever, the State's force is indispensable not only to assure the nation's future and its security, but also to assure the individual his liberty. [quoted in Dyson, 1980: 84].

Paradoxically, however, a developed concept of the state can also lead to important constraints on government. The paradox lies in the fact that a state tradition is associated with ideas of a strong state; it is 'accompanied by a widespread sense of the legitimacy of public action (action that is independent of party ideology) and by a willingness to define 'public power' as distinctive and to exercise it authoritatively.' [Dyson, 1980: 256]. However, a state tradition is also accompanied by a systematic elucidation of public law

lacking in Britain: there has been no development in England of a separate system of administrative courts or a coherent and distinct system of legal principles governing state action. By contrast, in France the Conseil d'Etat has over many years developed distinctive principles of review of administrative action, and many of these have been borrowed by the Conseil Constitutionnel in its role of reviewing legislative proposals. Bearing in mind that 'Government' and 'state' are not synonymous in societies with a developed state tradition, one finds that the application of constitutional and administrative law principles may impose real constraints on government. A further paradox is that, whilst the constitutional arrangements of the Fifth Republic impose major limits on the legislative powers of the French Parliament and increase those of the Executive, the interventions of the Conseil Constitutionnel at the initiative of members of the Assembly and Senate may, as we shall see, provide potentially more effective constraints on the governmental legislative proposals than anything available to MPs during the British privatisation process.

It is certainly clear that the differences in conceptions of the state and in its organisational forms in Britain and France have had a crucially important influence on the political economies of the two countries, in particular in providing an interventionist state with a much more central role in leading economic growth in France [see Hall, 1986; Hayward, 1986, and Shonfield 1965; esp. ch V]. It is now clear that these differences have also had an important role in the implementation of the privatisation programme in the two countries. In Britain constitutional analysis in relation to privatisation has been remarkable by its absence; only two cases of minor importance have reached the courts and virtually no academic ink has been spilled on the subject [but cf Lewis and Harden, 1983]. Nevertheless, in the British privatisation process the

lack of a developed state tradition has had important effects. Thus the British conception of the state as a vaguely threatening monolith has served to give added ideological legitimacy to the privatisation programme; a central theme of the justifications produced by the Thatcher Governments has been that privatisation frees enterprises from the dead hand of the state, and encourages responsibility and independence by enforcing the self-reliance of commercialism and the market.

In France, by contrast, the rhetoric of privatisation included fewer anti-state references, and indeed it has been suggested that the process represents a potential strengthening of the state by concentrating its forces on its natural missions; to quote the Minister for the Economy, for Finance and for Privatisation;

> Le dynamisme de notre société suppose un Etat fort, sûr de ses missions. Il est incompatible avec un Etat tentaculaire se substituant aux acteurs économiques. La privatisation était donc nécessaire. [JO, Assemblée Nationale, 27 oct 1987, p 4893]

It would also appear that nationalisation avoided much of the unpopularity which it had acquired in Britain through its association with the concept of the state [Hayward, 1983: 223]. Indeed, in a manner quite extraordinary to Anglo-American eyes, in France nationalisation has been given a form of constitutional protection through the requirement that enterprises with the character of a national public service or a monopoly of fact are to be public property (this will be discussed more fully below). Other Constitutional provisions have also had a major effect on the privatisation programme, for example as regards pricing. Before examining these matters in more detail, it is necessary to describe briefly general constitutional arrangements in France and Great Britain.

The major difference of principle is that the French Assembly, unlike the British Parliament, is not sovereign in the sense of being in principle able to pass legislation on any matter whatsoever. Article 34 of the 1958 constitution sets out exhaustively the matters on which Parliament may pass legislation in the form of lois. These include such matters as civil rights, nationality, criminal procedure and penalties, and also, most relevantly here, 'les nationalisations d'entreprises et les transferts de propriété du secteur public au secteur privé'; the interpretation of these provisions by the Conseil Constitutionnel and the Conseil d'Etat have been of crucial importance. Matters not listed in Article 34 are, by virtue of Article 37, of 'un caractère réglementaire' and so a matter for the issue of décrets by the executive without the need for Parliamentary approval. The Government may also obtain Parliamentary consent for a limited period under Article 38 to employ ordonnances in the area normally reserved for lois.

In Britain there is, of course, no judicial review of primary legislation; this is limited to delegated legislation made under statutory authority and, in some circumstances, under the Royal Prerogative. In France, two institutions exist for the judicial review of legislation and legislative proposals. The first is the Conseil d'Etat; this is the summit of the system of administrative courts which decides disputes between the public bodies and individuals in France, as well as possessing important consultative functions [see generally Brown and Garner, 1983]. A décret will come within the category of administrative act subject to review by the Conseil, which can ensure that it does not trespass on the area reserved for Parliament and does not infringe the 'general principles of law' [Brown and Garner, 1983: 8 and 134-143]. However, a loi is not subject

to review by the Conseil d'Etat; the nearest thing that exists to a comparative constraint is the role of the Conseil Constitutionnel.

The Conseil Constitutionnel was introduced with the birth of the Fifth Republic in 1958 and was clearly intended by de Gaulle as an attempt to maintain the restrictions imposed on the power of Parliament; its 'main function and early activities marked it down as a watchdog on behalf of executive supremacy' [Hayward, 1983: 139]. It is composed of nine members, three being appointed by each of the President of the Republic, the President of the Senate and the President of the National Assembly for a period of nine years. In addition, any former President of the Republic is a life member of the Conseil. Quantitatively, the bulk of its decisions concern alleged electoral irregularities; however, the most important role envisaged on the establishment of the Conseil was to prevent Parliament legislating outside the domain reserved for it by Article 34. Thus during legislative proceedings a proposal or amendment may be referred to the Conseil for a decision whether it is in the domain provided for lois (Article 41), and under Article 37 the Prime Minister may refer a loi already enacted to the Conseil for it to determine whether it is within Article 34; if not the Government may then amend or repeal it by decrét.

These functions of the Conseil Constitutionnel would then seem to mark it out as a means of preserving Governmental autonomy vis-a-vis Parliament. However, its other functions have marked it out as a protector of basic rights against government and legislature. Most importantly in the context of this study, in certain circumstances the Conseil can be asked to establish the compatibility of a loi with the Constitution, again before it has been finally promulgated. Originally, proposed lois could be referred to the Conseil only by the President

of the Republic, the Prime Minister, the President of the Assembly and the President of the Senate. However, in 1974 an important Constitutional amendment was introduced to the effect that reference might take place by 60 Deputies or 60 Senators, and this has provided an important tool for the strengthening of Parliamentary powers over governmental legislative proposals (Article 61). This procedure has been used in the case of both nationalisation and privatisation, as we shall see.

The procedure has achieved added importance in view of the recognition of the rights referred to indirectly in the Preamble to the 1958 Constitution as enforceable by the Conseil as a basis for deciding that proposed lois are incompatible with the Constitution. These are the rights set out in the Déclaration des Droits de l'Homme of Août 1789, and the 'principes particulièrement nécessaires à notre temps' set out in the constitution of 1946. Doubts as to their enforcability were dispelled by the decision of the Conseil of 16 juillet 1971 holding provisions of a proposed loi to be unconstitutional as infringing the right to freedom of association, and a number of decisions since then have adopted the same approach [see Rivero, 1984: esp. chapters I,1 and II,1]. There is, of course, no equivalent of this in the British Constitution with a sovereign Parliament; the role of the Conseil in assessing the compatibility of proposed legislation with the Constitution has been a major influence in giving the French privatisation process its particular character.

It is now time to examine the privatisation process in France to establish the effect of constitutional constraints and the continuing role of the state. This will be introduced by a brief description of the background of nationalisation, for in general the difficulties of the operation of public enterprises have

formed a powerful attraction for privatisation. There will then follow an account of the implementation of the privatisation programme considering the extent to which the government found itself faced with constitutional constraints limiting its freedom of action. Finally will be described some of the means for continuing governmental intervention in the affairs of privatised concerns to discover whether these suggest a greater degree of state intervention in France than in Britain, and the extent to which this is regulated by law.

NATIONALISATION AND UNRESOLVED PROBLEMS

In Britain, a major factor justifying the pioneering privatisation programme has been the lack of legitimacy enjoyed by the nationalised industries. Reasons for this include the perennial problem of relations with government, and the lack of effective consumer representation [see generally Prosser, 1986]. In France, institutional arrangements for nationalisation have been somewhat different, and major nationalisation took place in the early 1980s, much later than in Britain; a further difference being that it penetrated deeply into the internationally competitive sectors of the economy. Before examining the French privatisation programme, it will be necessary to assess the degree to which the different arrangements there avoided the difficulties of nationalisation in Britain.

Some important background factors must be referred to. The first has been already described as part of the constitutional background; this is the greater legitimacy of the state in France and the history of more extended state economic activity. The second background factor is the very different organisation of capitalism in France: thus family ownership of commercial and industrial concerns has been extensive, and the stock market has not been a major source of finance in a way comparable to Britain. Nor are there pension funds to act as large institutional investors. This has meant that much finance has come from the banks, and in turn nationalisation of the banks has been of much greater importance than in Britain, the vast majority of them having been state-owned due to decisions taken in the 1940s and in 1982.

A further important aspect of business organisation is the existence of large holding companies with interests in a wide range of different areas of production. In Britain, the nationalisation statutes limit diversification, and

examples of this in practice have been limited to such enterprises as the Post Office's National Girobank and the short lived attempt by the British Gas Corporation to enter oil production. By contrast, in France nationalisation has included vast holding companies covering many different areas of the economy; this was considerably increased by the nationalisation of holding companies in 1982, when around 3,500 subsidiaries were transferred to public ownership. As this suggests, there are also major differences in the sectors affected by nationalisation in France and Britain. In France nationalisation of banks has assumed major importance whilst having been virtually non-existent across the channel. In addition, the nationalised industries have a much greater role in the competitive sector of the economy, and indeed in areas of international competition, than in Britain where the major public enterprises have been the transport and energy utilities. Of course, even in Britain some nationalised industries have faced important competitive pressures (notably the British Steel Corporation), but the nationalised sector has never reached the heart of the competitive economy as in France.

The institutional forms adopted for public ownership also differed in Britain and in France. In particular, the idea of representative boards and of tripartism, decisively rejected in the Morrisonian model of public enterprise in Britain, has been a central element in the institutional arrangements for public ownership in France. Thus in the major nationalised enterprises conseils d'administration were established containing representatives of the state, of employees and of consumers. The working out of this principle in practice has involved considerable difficulties. The first point to stress is that this system gave enormous power to government, although its viewpoint was often not a coherent one as the representatives were divided between different ministries

which often lacked any common vision. Until the 'lois Auroux' introduced direct elections for workers' representatives in 1982 these were also selected by the relevant minister after nominations from the trades unions. However, the creation of a means of representing the consumer interest gave rise to the greatest difficulties. In Britain, the attempted resolution of the problem was to set up consumer councils outside the enterprises; however, their powers were extremely limited and effects minimal. Some experimentation took place in the 1970s with the appointment of consumer members to some of the Boards, but this was very much at the margins of public enterprise decision-making and was short-lived and ineffectual. In France, the initial idea of government appointment of consumer representative was replaced in 1953 by the power to appoint persons chosen 'en raison de leur compétence en màtiere industrielle et financière'. Once again, it is clear that such a vague definition gave enormous power to the designating minister and in 1982 new, even broader, provisions were introduced providing for the appointment of representatives of the economic environment of the enterprise, though it seems that these were to play only a limited role in practice. In addition, arrangements for Parliamentary accountability were weak; the powerful Parliamentary Sub-Committees which had scrutinised public enterprise under the IVth Republic did not survive 1958, though ad hoc inquiries have continued. The major form of outside scrutiny remains through the Cour des Comptes which took over scrutiny of the accounts and management of public enterprises in 1976.

If tripartism and Parliamentary accountability did not provide solutions to the problem of accountability of nationalised enterprises to broader economic interests, it will be already apparent that the institutional arrangements permitted extensive powers of intervention by government; and, as in Britain, we

find little success in regularising such intervention and opening it up to public accountability. Recognition of these problems is at the basis of the important Nora Report [Nora, 1967], recommending, *inter alia*, that the relations between government and enterprise be given a degree of continuity and the enterprise be given some guarantee of autonomy of management in specific areas through the drawing up of 'programme contracts'. The essence of these contracts was to provide a framework of mutual commitment for five years ahead; the plans would be linked in with the French national planning process as a means of coordination with broader national objectives [for a general account of the use of contractual techniques in French planning see Bergsten, 1975]. These were not, however, very successful, partly because of the disarray in which the French planning process found itself at that time [Estrin and Holmes, 1983: 169-75].

It thus appears that France had been little more successful than Britain in developing an orderly and legitimate system of relations between government and public enterprises. This is not to deny that some enterprises, particularly Renault, had succeeded in gaining considerable autonomy from government; and that in other areas, such as the nuclear power programme, objectives of government and industry have been substantially in accord. The recession of the late 1970s and 1980s, however, showed the severe strains to which the system had become subject. The Socialist Government and the Mitterand Presidency elected in 1981 nevertheless embarked on a major programme of nationalisation covering a major part of the French economy; thus the public sector in total now represented 24% of industrial employment, 32% of turnover and 60% of investment. The importance of the new public sector was not merely numerical however, for public enterprises were now at the heart of the competitive economy in France.

Did the 1982 nationalisations represent progress in resolving the problem of relations between the industries and government? In order for this to be properly understood, something must be said about the aims of nationalisation so that the degree of governmental involvement necessitated by public ownership can be assessed. The nationalisation proposals had a long gestation period, and in particular were the subject of fraught and lengthy negotiations between the Socialist and Communist Parties. In view of this it is hardly surprising that objectives became somewhat blurred and confused; not all the different objectives were fully worked out and some of them were likely to prove incompatible in practice. In addition, many of them clashed with the stress also placed by the new Government on autonomy of management for the industries as a means of improving their financial performance.

A number of governmental controls over the enterprises were loosened in the case of the 1982 nationalisations. This of course raises the question of how the enterprises were to be made the object to the myriad aspects of government policy for which it was claimed they would be an instrument. The answer was envisaged as through the negotiation of contrats de plan. These would provide a general framework for the establishment, for a number of years, of stable mutual objectives between government and enterprise within which the latter could be permitted autonomy in management. It was through the contrats that the industries were to be incorporated in the broader process of national planning which the Socialist Government proposed to resurrect as a central element of its policies, and the unions were also to be closely involved in the drawing up of the plans so they would be one means of implementing industrial democracy. A relatively high degree of success was obtained in negotiating the contrats and in many ways the contrats were to show themselves as a much more successful means of regularising relations with government than had their predecessors; the concept of such plans attracted general support [see Haut Conseil du Secteur Public, 1984; Vol I p 22; and vol II chs 1-3].

Certainly, the use of the contractual technique was a far more sophisticated means of regularising relations between public enterprises and government than anything attempted in Britain. However, two elements were of particular importance in weakening the effectiveness of the contrats de plan. The first was that they were envisaged as a part of a wider process of national planning. However, the attempt to revive the National Plan had only very limited effect; the planning minister had restricted influence, economic growth was slow and unpredictable and with the abolition of the Ministry of Planning in March 1983 the plan became peripheral to Government policy. Secondly, the recession and

the rapidly worsening financial position of many of the public enterprises made effective long-term planning impossible. In the case of the nationalised enterprises, the increased stress on commercial viability has been at the expense of the wider goals set out in the contrats and has favoured the development of greater commercial autonomy. The results have been summarised as follows:

> The price for requiring financial order as the top priority for nationalised industries was according greater independence to their managers...although the Government continued to meddle intermittently in their affairs, rather than providing them with a clear set of directives, which is what they most constantly requested. Thus, the Left ran into the familiar problem when dealing with the nationalised sector: lack of autonomy could stifle initiative and enterprise while independence involved inadequate control. [Machin and Wright, 1985: 22-3]

By stressing these problems, one could give the false impression that the 1982 nationalisations were ineffectual and did not attain any of the Government's aims. However, they were of extreme importance in two major respects. Firstly, far-reaching measures for restructuring the industries were put into effect, through the supply of state funds (for the enterprises had been starved of investment funds in the years before nationalisation) and through the promotion of mergers and shedding of marginal activities, especially in the chemical, electronics and steel-making industries [see Zinsou, 1985; chs V-VII]. This could not have occurred had the enterprises remained in the private sector, and was largely responsible for substantial improvements in the financial performance of the enterprises by 1984 in marked contrast to the serious problems soon after nationalisation. Secondly, the Government was able to ensure that the industries continued to invest heavily despite the recession and so overcome slow investment due to a lack of business confidence. There was

also some success in the development of industrial democracy, and the Conseils d'administration did provide a forum for increased dialogue between managers and workforce [Zinsou 1985; pp 86-90 and Haut Conseil du Secteur Public, 1984; Vol I, pp 119-28 and Vol II, p260]. The contractualisation of relations with government also held promise for the future, not least in providing opportunities for dialogue and in encouraging the administration to speak with only one voice.

The nationalisations, then, had not provided a major means of government intervention in the economy; rather, their importance lay in industrial restructuring and investment. This raises an essential point; the major acts of restructuring and recapitalisation were essentially one-off; they did not require continuing state ownership once the financial position of the enterprises had been restored. Moreover, the many problems of developing acceptable forms of relationship with government continued, and were reminiscent of the problems which had occurred in Britain; as one writer has put it, referring to the period 1982-3, 'these companies faced the worst of both worlds: they lacked global directions from the state to guide their long-term strategy, yet were subject to sporadic intervention into their daily operations' [Hall, 1985: 90]. One can see, therefore, that when a Government of the Right took power in 1986 the temptation to get rid of the problem through privatisation would be strong, and despite the strong tradition of state intervention in the economy in France, this is precisely what occurred. Ironically, the very success in improving the finances of the enterprises under state ownership made privatisation a much more feasible prospect.

THE PRIVATISATION PROGRAMME: BACKGROUND AND ORIGINS.

Two important point need to be made about the background of the privatisation programme in France. The first is that *limited* privatisation took place in France long before the election of the Chirac Government in March 1986; indeed, the blurring of the public and private sectors and the existence of a large number of subsidiaries owned, in whole or in part, by nationalised holding companies rendered this inevitable. This cession of interests in subsidiaries, or the 'respiration' of the public sector, had given rise to particular legal problems before 1986 due to the existence of Art 34 of the Constitution of 1958 requiring that 'la loi fixe les règles concernant... les transferts de propriété d'entreprises du secteur public au secteur privé [see Rapp, 1987]. In the absence of legislation regulating the process, a large number of such cessions remained unlawful until 1987.

In addition to respiration there were other examples of French precursors to the privatisation programme. In Britain, plans to allow nationalised industries (notably British Telecom) to raise money on the markets to supplement government finance for investment foundered over difficulties in the role of government as guarantor. In France, by contrast, provision had been made in the loi Delors of 1983 for the issue of *titres participatifs* and *certificats d'investissement*, a form of non-voting share, enabling the public enterprises to raise finance through the stock market, and these became an important source of investment funds.

A further example of moves towards the private at the expense of the public sector, this time also involving liberalisation as well as limited privatisation, can be seen in the audio-visual field. Thus in 1982 the state television

monopoly had been ended and a new High Authority set up to to accomplish a partial distancing of control of audio-visual matters from government. In early 1986 authorisations for two new private television stations, 5 and TV6, were granted; a state radio company was sold also.

It is thus clear that important moves had taken place anticipating privatisation before the election of the conservative coalition in March 1986. However, there had been nothing resembling a full-scale privatisation programme. A second major point should now be made; despite the existence of this limited privatisation in practice, there was virtually no advocacy of a large-scale programme of privatisation even on the Right until the British experience showed that not only was such a programme possible but that it could have considerable political advantages of a short-term nature for governments. There was of course no shortage of revived neo-liberal ideas in France, particularly from the group writers associated with 'la nouvelle économie' [see for example Lepage, 1978; 1980; 1985]. However, the remedy put forward for excessive state involvement in the economy was deregulation and exposing public enterprises to increased competition rather than extensive denationalisation; the fear was that the Bourse would be unable to cope with the sale of large numbers of shares on privatisation, and that, without special constitutional protection for privatisation, purchasers would not buy shares for fear of losing them with a change in political control.

In contrast, the British experience was important in showing that privatisation could be accomplished with considerable political ease; it was no longer part of the politically unthinkable but was likely to prove easier to implement than

many forms of deregulation, and later writers used the experience as the basis for advocacy of a major five-year privatisation programme [Jacquillat 1985]

Thus in a real sense the French programme of privatisation is parasitic on the British experience. It also contains a strongly ideological element similar to that of Britain and differentiating it from more pragmatic efforts in a number of other countries. It is thus not surprising that the justifications for privatisation given by Government spokesmen during the legislative process were also remarkably similar to the justifications provided in Britain. Thus in introducing the first projet de loi on privatisation, the Minister, Balladur, stressed the need for economic efficiency, claiming that the state could not act efficiently in modern economic conditions; that public ownership imposed rigid structures and resulted in the politicisation of state enterprises and unnecessary political intervention in their affairs. Public enterprises had not been economically successful and were accountable neither to the state nor to the market place; there was also a more general need to cut back the state and reduce public spending [JO, Assemblée Nationale 22 avril 1986: 210]. All these arguments were familiar from Britain. A rather different aim should also be mentioned, however. In France the Bourse was of extremely limited importance in raising finance compared to other major capitalist countries. Privatisation through flotations on the Bourse could contribute to the growth of Paris as a financial centre.

When one comes to the *implementation* of privatisation, however, two rather different themes from those in Britain are apparent. The first relates to the theme of the beginning of this paper: care is taken to avoid suggesting an

overall hostility to the state To quote the minister responsible for privatisation;

> C'est là un sujet d'importance, qui reflèt bien notre conception de l'Etat. Elle n'est en rien hostile, par principe, à l'Etat. Elle lui réserve, à l'inverse. un rôle premier parce qu'éminent: celui de garantir aux citoyens un cadre solide et durable d'épanouissement, celui d'être un Etat fort car résolu, respecté car rassemblé sur l'essentiel et se défaisant de l'accessoire. [JO, Senat, 21 mai 1986: 744].

Secondly, there is a strong stress on the intention of the government to act in an open way in implementing privatisation: according to the same minister 'les mesures adaptées seraient prises afin que la plus grande transparence préside à ces opérations' [JO, Assemblée Nationale, 24 avril 1986: 328]. As these themes might suggest, the putting into effect of privatisation has been different in several important ways in France from that in Britain.

IMPLEMENTING PRIVATISATION IN FRANCE.

In Britain the privatisation programme did not form a major part of the Conservative Party Manifestos of 1979 and 1983. In France, however, there was no doubt that success by the Right in the elections of March 1983 would lead to a substantial programme of privatisation, and in the first announcement by Jacket Chirac, the new Prime Minister, it was stated that privatisation would take place through the use of ordonnances. It will be recalled that this involves the passing of an empowering law through parliament, after which the Government may legislate for a limited period in the domain normally reserved for lois passing through Parliament in the normal way. The effect is, of course, to remove Parliamentary scrutiny of the details of the process and to remove the opportunity for the Conseil Constitutionnel to declare the detailed legislation in breach of the Constitution. The only recourse left to deputies is to refer the empowering law to the Conseil, although of course ordonnances may be reviewed by the Conseil d'Etat as with other administrative acts. However, ordonnances require the signature of the President, and given that the Socialist Mitterand remained in place as President, this would be likely to prove the first test of the unusual situation of 'cohabitation' between Government and President of radically different political views. Thus constitutional issues became of importance in the implementation of privatisation from the outset.

The importance of the Presidential role was quickly confirmed when the President announced that he would refuse to sign ordonnances for the privatisation of concerns nationalised before 1981, or where arrangements for financial evaluation transgressed the rules established on nationalisation in 1981 (which were relatively generous), or which put in peril the democratisation of the public sector. Nevertheless, the Government decided to proceed with its plans,

and included in them banks nationalised in 1945 as well as those of 1982, the agency Havas, nationalised by a loi of 1940, and a number of other enterprises pre-dating the 1982 socialist nationalisations. The list did not however include any of the major monopolistic enterprises, for example in the field of electricity, nor did it include Renault. The legislation was passed through Parliament quickly (fuller discussion of the Parliamentary process will follow below), and was then referred to the Conseil Constitutionnel, which concluded [Dec no 86-207 DC of 25-6 juin 1986] that the legislation was not contrary to the Constitution, but this was subject to a number of very important qualifications regulating the way in which the detailed implementation of privatisation was to take place (fuller discussion of the decision will also follow below). Apart from its intrinsic importance, the decision provided an important weapon for the President, who acts a guardian of the Constitution and is able to refuse his signature to ordonnances. The decision of the Conseil giving *conditional* approval gave him an additional justification for exercising this power; the ordonnance would then have to be abandoned or transformed into a loi with the opportunities of Parliamentary scrutiny this gives and the opportunity for a further reference to the Conseil Constitutionnel [see M, 4 Juillet 1986 and Matthieu, 1987: 712-22].

The loi came into effect on the second of July 1986 [loi no 86-793 du 2 juillet 1986], and on the fourth of July the text of an Ordonnance implementing the details was sent to the Conseil d'Etat for its opinion. However, on 14 July in his Bastille Day speech the President announced that he would not sign the Ordonnance as it contained insufficient guarantees of national independence, thereby purporting to implement one of the principles set out by the Conseil

Constitutionnel. The inevitable result was that a draft loi was immediately introduced into Parliament and quickly passed.

This loi came into effect on 6th August [Loi No 86-912 du 6 Aout 1986, JO 7 Aôut 1986], and the two pieces of legislation make provision for the transfer of 65 concerns in five years (compared to 47 concerns nationalised in 1982). Provision is also made for the lawful 'respiration' of the public sector through the establishment of an administrative procedure for the transfer to the private sector of subsidiaries and other interests held through holding companies. Provisions of the legislation will be discussed in more detail later; before doing so, however, it will be necessary to discuss the effect of constitutional arrangements on the scope and content of the legislation. Three aspects will be discussed; the scope and form of the legislation, the role of Parliament, and the role of the Conseil Constitutionnel in relation to pricing.

THE SCOPE AND FORM OF THE PRIVATISATION LEGISLATION

In Britain, by far the greatest controversy surrounding the privatisation process has concerned the sale of monopolies; in particular British Telecom, British Gas and, in the future, the electricity and water utilities. In particular, it has been suggested that the desire to obtain a successful flotation at a good price has prevailed over the desire to increase competition and hence economic efficiency. As a result concerns have not been split up on sale, and limited attempts have been made to encourage competition, thus increasing the attraction of the enterprise to potential investors whilst not doing anything to resolve the more difficult and deep-seated problems of economic efficiency [see eg Kay and Silberstron, 1984]. Limiting competition after privatisation also serves to increase vital management support for the

sale. Similar criticisms have been made of the failure to reallocate routes of British Airways before its sale. In France the situation has been quite different simply because privatisation has been aimed at the *competitive* sector of public ownership and the monopoly utilities, and enterprises in highly regulated markets such as Air France have been untouched.

Why this major difference in the scope of the programme? Part of the reason lies in the distinction between the nationalised sectors in Britain and in France; the latter contained far more competitive enterprises and so these could themselves support a more extensive programme. Secondly, there is less of a temptation to seek high proceeds since the proceeds of privatisation in France cannot be used to fund current government expenditure [Loi no 86-824 du 11 juillet 1986, art 33]. In Britain this has been precisely the role of the proceeds and has resulted in artificially low public spending figures and the opportunity for tax cuts. However, the most important reason for the relatively limited scope of the French programme is the existence of a major constitutional constraint on privatisation in the form of one of 'les principes politiques, économiques et sociaux ... particulièrement nécessaires à notre temps' in the Preamble to the 1946 Constitution, and providing that

> Tout bien, toute entreprise, dont l'exploitation a ou acquiert les caractères d'un service public national ou d'un monopole de fait, doit devenir la propriété de la colléctivité.

This provision is incorporated into the Constitution of the Fifth Republic by its Preamble. Although there was some doubt as to the legal force of such principles, it has become clear for some years that the Conseil Constitutionnel will enforce them and is prepared to declare unconstitutional legislation in

breach [for acknowledgment of this in the in relation to the privatisation programme, see the Minister of State, JO Assemblée Nationale, 22 avril 1986, p 211]. Thus a government wishing to privatise the monopoly utilities would be faced with a choice between its legislation being held unconstitutional, a difficult and potentially unpopular constitutional amendment requiring a referendum or Presidential consent to a special Parliamentary procedure, or the opening up of markets to competition, precisely what has not occurred on a large scale in Britain.

Of course, there is no simple distinction between monopoly and competitive enterprises; rather the distinction is between different markets, and it can be argued that some of the enterprises already ceded come close to a monopoly position in the supply of certain goods. This argument was in fact considered by the Conseil Constitutionnel in examining the privatisation loi; the Conseil concluded that it had not been shown that the Government had made a manifest error in assessing whether the enterprises were in a situation of monopoly or not. The general point remains strong; there is a fundamental difference in the scope of the privatisation programme in France from that in Britain, and constitutional provisions have provided a major constraint in this. Already, than one can begin to perceive the paradox that with a strong concept of the state, a government may be more constrained by the related constitutional provisions than with a 'stateless' tradition.

Important differences also exist in the form of the legislation from that in Britain. Thus in examining the provisions of the loi, what is at first striking is the detailed set of instructions as to the method of sale. In this sense the process is more clearly legally structured, although of course the provisions

are to cover a large number of enterprises rather than just the single one dealt with in most examples of British legislation. One might assume that the more detailed legal provisions compared to Britain would result in a more accurate picture of the privatisation process appearing in the legislation and in more effective parliamentary scrutiny. However, in fact a considerable degree of flexibility as to method of sale is preserved for the Minister; thus for example the loi does not lay down when a particular method of disposal is to be chosen, and the Minister is given the important power to dispose of interests in enterprises outside the market by mutual agreement (sale by 'gré à gré') and, as we shall see, this has been used extensively to set up 'hard cores' of investors in the enterprises at the time of disposal. What does create some inflexibility and constraint on the Government is the fact that the enterprises to be sold are listed in the legislation and there is an obligation to dispose of them before the end of the current legislature in 1991 (subject, of course, to a future loi repealing the obligation, now an inevitability with a change of Government). These two elements had not in fact figured in the Government's original projet de loi, but had been introduced after representations from rapporteurs of the Senate committees to the effect that to give the Government a discretion as to overall timing and as to which enterprises would be sold, would breach principles laid down by the Conseil Constitutionnel requiring a greater degree of precision in empowering legislation [see JO Senat, 21 mai 1986: 758-91]. Because of the Presidential veto the method of using ordonnances was not in fact applied. Nevertheless, this offers a further example of constitutional constraints limiting the freedom of manoeuvre of the Government in implementing privatisation.

PARLIAMENTARY SCRUTINY

It has already been suggested that one of the important issues of cohabitation was the refusal of the President to sign ordonnances and his desire to permit Parliamentary debate on the privatisation provisions. However, even when the normal legislative process is used Parliament is in an extremely weak position under the Vth Republic. To avoid the frequent bringing down of governments by shifting majorities as had characterised the IVth Republic, a number of powerful tools have been provided to government to minimise the effect of parliamentary opposition, and these were used to the full.

It was necessary for the Government to act with as much speed as possible to enable the programme to be implemented in a single Parliament. The Left was determined to delay this as much as it could, and so borrowed a tactic used by the Right in opposing nationalisation in 1981; the tabling of a large number of amendments and requesting discussion of them. Thus in the Assemblée Nationale the Left tabled 624 amendments before the Government ended discussion; in 1981 the Right had tabled 1438. It should also be recalled that the legislation provided for the whole of the privatisation programme rather than applying only to individual enterprises as in Britain. In fact, the bulk of the amendments sought to require (unsuccessfully) detailed discussion of the rationale for the privatisation of each individual enterprise.

In the case of the initial projet for the loi of habilitation, unlike for nationalisation in 1981, the Government decided not to set up a special Commission to consider the projet of the loi, and instead 5 of the 6 Parliamentary Commissions were to consider it. However, the Government cut short discussion in the all-important Finance Commission after only 15 hours,

and little progress was made in the other committees, some of them being suspended sine die after accusations of obstruction on the part of the Opposition [M, 19 avril 1986]. This meant that the commission stage was able to contribute little to Parliamentary scrutiny. Discussion in the Assembly itself was highly generalised, concentrating on overall defences of nationalisation and of liberalism and saying little about detailed institutional design. This was heightened by the refusal of the minister to defend the decision to sell each particular enterprise because he should not publicly say bad things about enterprises owned by the state (!) [AN 5 mai 1986: 674]; a rule often broken in particular stages of debate, but which prevented any detailed justification being given for the details of the programme. Instead there was simply an assertion that all competitive enterprises were potentially suitable for privatisation.

The discussion of the Articles of the projet de loi had reached article 5 when the Government decided to engage its responsibility by use of Article 49(3) of the Constitution [AN, 15 mai 1986: 915]. This provides that

> Le Premier Ministre peut, après délibération du Conseil des Ministres, engager la responsabilité du Gouvernement devant l'Assemblée nationale sur le vote d'un texte. Dans ce cas, ce texte est consideré adopté, sauf si une motion de censure, déposée dans les vingt-quatre heures qui suivent, est votée dans les conditions prévues à l'alinéa précédent.

This had been expected for some time; authorisation had been given by the Council of Ministers to the Prime Minister at a very early stage. The reason given was obstruction from the Left, although this mechanism had not been used in relation to the major nationalisation legislation in 1981, only being invoked for the re-drafted legislation after the decision of the Conseil Constitutionnel. The Socialists tabled the Vote of Censure; after a Debate it was unsuccessful,

and so the loi was considered adopted. Thus this Constitutional provision is a tool perfectly suited to a government wishing to limit debate on the contents of its proposals; although there may be good reasons for limiting blocking tactics, so draconian a weapon severely limits the extent of Parliamentary scrutiny. Articles 5-8 covering the implementation of privatisation were not voted by the Assembly, and articles 6-8 were not even debated, though under 49(3) *Government* amendments were considered as incorporated in the text adopted. It is also worth noting that, despite the aggression sometimes shown in debate and the bulk of the amendments tabled, there was an impression that participants were simply going through the motions of opposition; the outcome was pre-ordained, and the battle was fought much less actively than that of 1981 [M, 8 mai 1986].

Article 49(3) is not available for the Government to use in the Senate; however,it has other means of enforcing its will there. The first, in this case is a much larger majority, and negotiations took place at an early stage to agree with the majority representatives that the Senate would approve the same text as the Assembly and so remove the need for a reference back [M, 26 avril 1986]. As a result, the Commission which examined the projet de loi before the debate did not recommend any amendments. The other device available is that of the block vote under Art 44 of the Constitution; this means that amendments may be discussed but no vote takes place on them; only amendments acceptable to the Government are considered in a vote. Nevertheless, the Left deposited over 400 amendments; these usually gained no response from the Government except a recommendation of rejection. At the Government's request, Articles 2 and 3 were taken first and approved after block votes, as were the other articles after brief debate. A final vote on the loi resulted in a government majority of 208

to 102. The use of this block vote procedure had the desired result of producing a text identical with that previously adopted by the Assembly and so no reference back was needed. As we shall see in detail below, the loi was then referred to the Conseil Constitutionnel.

Although the result of these debates was clearly a foregone conclusion, there was at least discussion of issues of principle in both Houses. The same could not be said, however, about the second projet de loi, on the implementation of privatisation; this is particularly ironic in view of its origins as an ordonnance which the President had refused to sign so as to provide an opportunity for Parliamentary debate. After a brief meeting the Finance Commission recommended that no amendments be made to the projet: after 55 minutes of debate, filled by the Commission's Rapporter-General and by two ministers, Article 49(3) was brought into action and debate was suspended for the vote of censure. The censure motion was unsuccessful and the loi was adopted at first reading. The projet then passed to the Senate; the Rapporter-General and the two Ministers were heard and the Senate then voted to reject the projet on a preliminary question, as the Finance Commission had recommended. This was, however, only a procedural device, for the Government had earlier made a declaration of urgency in relation to the projet. This meant that on the rejection Article 45 came into play; in the case of disagreement between the two houses, the Prime Minister can call together a mixed commission of seven deputies and seven senateurs to propose a new text; this is then to be voted by each assembly, with no amendment permitted except with Governmental agreement. The commission made important changes on to the proposals, in particular relaxing the provisions restricting foreign ownership; as a result the loi was more liberal (in the economic sense) than the Ordonnance which the President

had refused to sign. This version of the loi was then adopted after 70 minutes debate in the Assembly and half an hour in the Senate. It should also be added that the Government agreed to a debate on the implementation of privatisation on 27 October 1987, but this took the form of a debate involving only discussion with no vote [see JO, Assemblée Nationale, 27 oct 1987: 4893-4918 and M, 8 and 29 oct 1987]. Nor was the debate of high quality; it was largely a ritual exchange on the merits or demerits of nationalisation with little discussion of the implementation of privatisation.

It is clear that government in France has a battery of techniques available to it to diminish Parliamentary debate, including the resort to ordonnances, the use of Article 49(3), the block vote and the procedure on disagreement between the Houses. This makes the availability of reference to the Conseil Constitutionnel of particular importance as it enables some real form of scrutiny of legislation to take place and provides one technique for legislators which is not so subject to Governmental control. It should, however, be remembered that the British Government also has a wide variety of techniques for use to ensure the passage of legislation in the form it desires. Debate in the British Parliament on privatisation has often been tediously prolonged, but has centred around the principle of privatisation (on which the Government is not likely to change its position), and it has not been possible to discuss in detail such important matters as the method of sale, and relations with government after disposal. One does have the added opportunity for debate offered by the fact that each major privatisation has required its own legislation, rather than there being a general statute as in France, but each Act is very much a skeleton and little provision is made in it for the design of the privatised company, for methods of sale and for future relations with government [see Pickering, 1984]. In

addition, little provision has been made for the gathering of outside views before privatisation; in the case of the British Gas sale, no White Paper or considered consultative paper was issued in advance, and in the case of British Telecom the White Paper [Cmnd 8610] was highly superficial. A White Paper has also recently been issued for the proposed sale of the electricity industry, but this represents very much a statement of a position already taken by the Government after private political lobbying rather than an attempt to gain outside ideas and so improve the quality of debate [for the lobbying process see eg The Sunday Times, 28 Feb 1988]. The Energy Select Committee of the House of Commons held an inquiry on regulation of the gas industry before the legislation came before Parliament in an attempt to improve the quality of debate, but this had limited effect in changing the governmental proposals [see generally Graham and Prosser, 1986: 22-4]. In general, then, the privatisation process in Britain has been accompanied by fuller parliamentary debate but with limited effect in constraining the power of the Government.

There is one major difference in the tools available for members of Parliament in France and in Britain. In France there is the opportunity for them to refer draft legislation to the Conseil Constitutionnel; no equivalent exists over the Channel. This has had a major influence on the privatisation programme, both through the actual decisions of the Conseil and through 'autolimitation', ie the anticipation by government of a successful challenge in the Conseil and so the drafting of the legislation so as to avoid this. We have already seen something of this in restrictions imposed on the scope of the programme and the form of the legislation. I will now discuss an area of great controversy in the British privatisation programme where in France the influence of the Conseil has been considerable; that of the pricing of enterprises sold by the state.

THE CONSEIL CONSTITUTIONNEL, PRICING AND PRIVATISATION.

After the privatisation of monopoly utilities, the major issue of controversy in the British privatisation programme has been that of pricing. There has been considerable criticism from Opposition politicians that enterprises have been disposed of too cheaply; perhaps more importantly, this has been shared by academic commentators and the Public Accounts Committee of the House of Commons. Thus an analysis of the sale of public assets has concluded that '[w]hatever one's views about the desirability of a programme of privatisation considerable concern must be felt about the techniques that have been employed in implementing the programme to date....costs have been high, primarily as a consequence of the underpricing of assets...' [Mayer and Meadowcroft, 1985: 55]. The Public Accounts Committee has expressed strong doubts as to whether the best return for the taxpayer has been received in a number of sales, including those of British Aerospace, Associated British Ports and British Telecom; it has also questioned the necessity for the considerable expense of underwriting such issues [HC 189, 1981-2: HC 443, 1983-4: HC 35, 1985-6]. In relation to the more recent sales, the National Audit Office has also had difficulty in satisfying itself of an adequate financial return from sales [for British Gas see HC 22, 1987-8: British Airways, HC 37, 1987-8: Rolls-Royce, HC 243, 1987-8] The problem is even more acute where the disposal does not take the form of an public offer of shares but a private disposal to a single buyer [see eg on the sale of Royal Ordnance, HC 162, 1987-8].

Why, it could be asked, would a Government wish to underprice a cession when a major aim of the privatisation programme is to raise funds? After all, other criticism has alleged that insufficient steps were made to introduce competition which would decrease the potential value of the enterprise on sale. It could

also be suggested that pricing is simply a matter for the market, and that this will automatically produce the most rational outcome. However the market here does not represent some sort of extra-political rationality but is a creation of government through its dealings with other actors; as an examination of the flotation of British Telecom has suggested;

> a strictly rational-actor view of the flotation would be quite wrong....Many decisions were reached by a process of interaction - not negotiation exactly, but accommodation - amongst the interested parties, and often represented the outcome of political (in the loosest sense) processes - relations between brokers and institutions, favours owed to clients, relations between banks, the views of Ministers, etc. In addition, of course, more or less all of the parties involved had a financial stake in the outcome... [Hawkings, 1987; 3].

In this context two reasons can be identified which might lead to underpricing. The first is simply to ensure the success of the disposal and so to gain political capital from this. It was clear that with the first of the large British flotations, that of British Telecom, a major determinant was the need to convince the sceptical financial institutions that the shares would be taken up by investors; as a result the institutions had a major influence in the setting of a cautiously low price [see Hawkings, 1987]. Secondly, by disposing of interests cheaply, a government can attempt to maximise the number of shareholders in privatised concerns. This in turn may provide an incentive for political support for that government by shareholders anxious to avoid any threat to their gains. In a country where privatisation has increased the number of shareholders 4-5 times to almost a quarter of the adult population, this can clearly be a central political consideration, and Government consciousness of it was confirmed when, before the 1987 general election, the Chairman of the Conservative Party sent a letter to British Telecom shareholders

in Labour constituencies warning them of the consequences of the latter Party's policy on renationalisation.

How, then, does pricing take place in British sales? The important point to stress is that the process is premised on the assumption that the sale of state assets is no different from a private transaction: there is no special protection for any form of public interest here. Thus for example, in the cases of British Gas and British Airways, merchant banks were employed to act as financial advisers and this included giving advice on the price to be set; the Secretary of State also appointed an independent adviser to act as a means of cross-checking. However, the only public scrutiny of the process occurs afterwards through examination by the National Audit Office and the Public Accounts Committee; moreover, the financial advisers will also be underwriters for the issue, thereby creating a potential conflict of interests, for they will have an incentive to price the issue low enough to ensure that there is no requirement for underwriters to take up unsold shares. In France, apart from the fact that underwriting has been deemed unnecessary, constitutional constraints have resulted in the creation of a more formally independent element in the decision as to pricing itself. This will now be described and an attempt made to compare the results of pricing in Britain and France.

The constitutional constraints on pricing are related to those laid down when the draft law on nationalisation was referred to the Conseil Constitutionnel by a group of deputies and senators, and was held to be contrary to the Constitution (decision of 16 January 1982). The Conseil decided that the provisions of the Declaration of the Rights of Man applied to nationalisation and that the method of assessing compensation proposed was in breach of Article

17 of the Declaration requiring just indemnity. One of the innovations was to establish an administrative commission to undertake the difficult task of evaluating the non-quoted banks, a model which was to influence the privatisation arrangements. In a second decision of 11 February 1982 the new law was declared in conformity with the Constitution.

As we have seen, the empowering loi on privatisation was also referred to the Conseil by Deputies and Senators [Dec no 86-207 DC of 25-6 juin 1986]. The overall conclusion was that the legislation was not contrary to the Constitution, but this was subject to a number of very important qualifications regulating the way in which the detailed implementation of privatisation was to take place. A central issue was the pricing of the enterprises to be privatised. The deputies had argued that it would be unconstitutional to sell enterprises below their true value as this would breach constitutional principles of equality and would give vendors an unfair advantage; indeed it was argued that the obligation to sell by 1991 could have precisely this effect, and could also lead to transfers to foreigners threatening national independence. The Conseil accepted that both the Constitutional principle of equality and the protection for rights of property in the Declaration of the Rights of Man prohibited the sale of public goods to private parties at a price below their value; these principles applied to the property of the state as well as to that of private individuals. However, the Government had indicated that valuation would take place by independent experts who would ensure that sale was not below the value of the enterprise, and that it intended to include guarantees to preserve national independence in the ordonnances implementing the process. Moreover, the obligation to sell by 1991 was to be interpreted as an obligation to sell in a way which respected these conditions, and if this proved impossible

new legislation would have to be introduced. Thus the Government was to be obliged to proceed by way of ordonnances which included provisions

> selon lesquelles l'évaluation de la valeur des entreprises à transférer sera faite par des experts compétents totalement indépendants des acquéreurs éventuels; qu'elle sera conduite selon les méthodes objectives couramment pratiquées en matière de cession totale ou partielle d'actifs de sociétés en tenant compte, selon une pondération appropriée à chaque cas, de la valeur boursière des titres, de la valeur des actifs, des bénéfices réalisés, de l'existence des filiales et des perspectives d'avenir; que, de même, l'ordonnance devra interdire le transfert dans le cas où le prix proposé par les acquéreurs ne serait pas supérieur ou au moins égal à cette évaluation; que le choix des acquéreurs ne dévra procéder d'aucun privilège; que l'indépendance nationale devra être préservée; que toute autre interprétation serait contraire à la Constitution...

Here than we have a major constitutional constraint on pricing. It is clear, in fact, that the Government had anticipated this response by the Conseil through proposing such an independent body of experts; this forms an example of 'autolimitation', the phenomenon by which governments shape legislative proposals to avoid constitutional challenge [see Keeler and Stone, pp 175-6]. The basic rules of evaluation are governed by the lois of 2 Juillet and of 6 Aout. The former simply empowers the government to fix the rules for evaluation; the details are contained in the latter implementing the requirements set out by the Conseil Constitutionnel. Evaluation is to be carried out by a Privatisation Commission of 7 members, nominated by decree from those with experience of matters economic, financial and legal. They are prohibited from having interests in bodies buying capital in privatised concerns, and from acquiring an interest in such a firm for five years after the ending of their functions. The Commission values the capital to be ceded and must render its evaluation public; this must be conducted according to the objective methods currently employed

and take account, depending on the circumstances of each case, of the Bourse value, the value of assets, subsidiaries, the profits achieved and future prospects. The price is then set by the minister and must not be below the recommendation of the Commission, which must also be consulted at this stage; the Commission is also to give its opinion on the procedures for bringing the sale to market [loi 86-912 du 6 août 1986, art 3]. In the case of transfers of assets by the larger enterprises under the provisions on respiration, evaluation takes place on similar conditions by independent experts nominated by the enterprise, though there is no requirement of publication of the valuation in this case [ibid, art 20, and décret 86-1140 du 24 octobre 1986, arts 5-6]. The Commission is also to be consulted and is to value the capital in the case of cessions outside the market to create a hard core of shareholders [loi 86-912, art 4, Decret 86-1140, arts 2-3], and this has led to a further constraint imposed by the Conseil Constitutionnel. In its decision on the legislation for the reform of the audio-visual field [case no 86-217 DC of 18 septembre 1986] it held that where a core of shares giving control of a company was ceded, the price must be at a sufficient premium to reflect this.

The role of the Privatisation Commission has also been considered by the Conseil d'Etat in a challenge to the cession of 11% of Elf-Acquitaine [Decision of 2 février 1987: 3(2) RFDA, mars-avril 1987, pp 176-90]. This established the important point that the opinion of the Commission need not be motivé (ie accompanied by reasons). In this connection, it should be noted that the minister has refused, on grounds of industrial and commercial secrecy, to make public the reports of the Commission or its minutes; however the latter have been made available to the rapporteur special of the commission of finances of the National Assembly [JO, Assemblée Nationale, 27 oct 1987: 4895]. The Conseil

did however confirm that the Commission has to be consulted twice; firstly to set the value of the holding to be ceded and secondly to give its opinion on the price set by the minister. The decision of the Conseil also appeared to give the Commission considerable discretion in weighing the different factors against each other, though it should be noted that this was affected by the peculiarity of shares already being quoted on the Bourse and thus this factor playing an especially important role in valuation. The Commissaire du Gouvernment of the Conseil took pains to stress that, despite the technicality of the subject-matter, the Conseil should not be deterred from exercising full reviewing powers, and in future cases of the cession of whole concerns not already quoted on the Bourse closer control should be exercised. Nor did the fact that shares traded at an immediate premium of 14% suggest illegality in pricing; the Commissaire noted that in Britain premia had often been considerably greater.

The rejection of a requirement for motivation is unfortunate and has been criticised by academic writers; it does not maintain symmetry with the valuation body established for nationalisation, which *was* required to give reasons [see Bazex, 1987]. Nevertheless, there is in France in principle greater transparency in the means of evaluation of enterprises than in Britain because of the existence of the Commission. Has this made a difference in practice in the implementation of the privatisation process itself? This will now be assessed by examination of the results of the major sales carried out in Britain and France: comparison of discounts received at the end of the first day of trading will enable a simple analysis to be made.

Sales in Britain.

Company	Gross Proceeds(£m)	Discount end first day (%)
Offers for sale		
British Petroleum (1979)	290.4	3
British Aerospace (1981)	148.6	14
Cable and Wireless (1981)	223.9	17
Amersham International (1982)	71.0	32
Assoc. British Ports (1983)	22.0	23
Jaguar (1984)	293.5	8
British Telecom (1984)	3915.6	92
British Aerospace (1985)	550.7	22
Britoil (1985)	448.8	22
Cable and Wireless (1985)	932.9	1
British Gas (1986)	5434.4	36
British Airways (1987)	900.3	70
Rolls Royce (1987)	1362.5	73
British Airports Authority (1987)	918.8	46
British Petroleum (1987)	*	*

**Comparable information on the 1987 BP sale cannot be given because of the peculiar circumstances of the sale (see below). The Trustee Savings Bank sale has been omitted as a special case where proceeds went to the Company itself rather than to the Government.*

Tender Offers		
Britoil (1982)	548.8	-18
British Petroleum (1983)	565.5	3
Cable and Wireless (1983)	275.0	-2
Assoc. British Ports (1984)	52.4	2
Enterprise Oil (1984)	392.2	0
British Airports Authority (1987)	362.5	0

Sales in France

Company	Value (FFrbn)	Discount end first day (%)
Elf-Acquitaine (Sept 1986)	3.3	30.5
Saint Gobain (Nov 1986)	13.5	19.0
Paribas (Jan 1987)	17.5	24.2
SOGENAL (March 1987)	1.5	36.0
BTP (April 1987)	0.4	23.1
BIMP (April 1987)	0.4	21.4
TF-1 (April/June 1987)	3.5	7.9
Crédit Commercial (April 1987)	4.4	16.8
CGE (May 1987)	20.6	11.4
Agence Havas (May 1987)	6.4	8.0
Société Générale (June 1987)	22.3	6.1
Suez (October 1987)	19.6	-18.0
Matra (Jan 1988)	2.0	14.0

Source; Jenkinson and Meyer, 1987, and Regards sur l'actualité, 136, p 9 (updated). Note that the value is not identical to proceeds as there was already private participation in some enterprises in France.

It is thus clear that discounts have been large in both Britain and France, and similar results can be obtained by taking a longer period for analysis than simply the result at the end of the first day. However, French experience lacks the spectacular discounts associated with certain large offers for sale in Britain; the maximum French discount is 36% for SOGENAL; the maximum in Britain 92% for British Telecom. In France two discounts out of 13 sales were over 25%; in Britain 6 out of 21. Moreover, the discounts in France for the largest sales have been relatively modest, whilst the excessively high discounts are especially characteristic of the large-scale offers in Britain; the three sales of over £1000m (excluding the final BP offer) having produced discounts of 92%, 36% and 73%. It also appears that there has been more effective learning from experience in France with relatively low discounts for recent issues. In Britain, by contrast, high discounts have characterised the more recent sales.

Of course, a variety of factors are likely to be at work here, including French learning from the experience across the Channel; however, it is possible to suggest tentatively that the arrangements for valuation in France have prevented extreme underpricing of the sort that has occurred with the largest British examples of privatisation. It should also be noted that the arrangements for independent valuation will apply to small-scale disposals not involving a public offer of shares. In Britain this process has been highly secretive and has also resulted in accusations of underpricing [see Graham and Prosser, 1987: 24-30, and more recently on Royal Ordnance, HC 162, 1987-8]. If the valuation of enterprises being sold has indeed been affected in this way, this represents a further fundamental effect of constitutional constraints in France which has not existed in Britain.

In addition to the general effect of the valuation provisions on pricing, they were also important in shaping the reaction of the French Government to the stock market collapse in Autumn 1987. In Britain, the collapse meant that the largest privatisation of all, the final disposal of shares in BP, would have resulted in shares commencing trading well below the offer price, thus casting doubt on the future prospects for the privatisation programme. In the event, the Bank of England offered a 'safety net' to investors involving the re-purchase of the shares for a figure below the offer price but expected to be well above the market price. In the event little use was made of this because purchasing by the Kuwait Investment Office raised share prices, but what it arrangement amounted to was in effect a retrospective reduction in the price of BP shares to protect the future of the privatisation programme. In France the collapse had a similar effect, with shares in Suez commencing trading well below the offer price. However, a substantial reduction in the price would have taken it below the valuation of the Privatisation Commission which, it should be remembered, has to consider factors other than share price in its valuation, and such a reduction was ruled out and instead provision for deferred payment made [see FT 4 November 1987]. The problems of the Suez sale were among the reasons for the suspension of the privatisation programme immediately afterwards, and in particular the delaying of the sale of Union des Assurances de Paris. This would have been one of the most important examples of privatisation as it formed France's largest institutional investor with stakes throughout the French economy; it was also headed by a close associate of the Prime Minister. In fact, its sale proved impossible before the Presidential election and is of course now firmly off the political agenda.

LINKS WITH GOVERNMENT

Further examples could be given of other constraints imposed by constitutional provisions in France, for example from privatisation of broadcasting and of the Crédit Agricole. However, the central point is clear: the most controversial aspects of the privatisation process have assumed a quite different character in France from that in Britain, and an important influence in this has been the extra constraint imposed by constitutional arrangements associated with the centrality given to the concept of the state. In Britain, government has been effectively untrammelled in implementing privatisation; Parliament has had minimal effect in causing modifications to legislative proposals and the courts have played no real role. It could perhaps be argued, however, that such constitutional constraints are unnecessary in Britain because France is by nature and history a statist, highly interventionist society, whilst Britain is associated with economic liberalism and the market [for comparative accounts of political economy stressing the more central role of the state in France see Shonfield, 1965; esp ch V: Hall, 1986: Hayward, 1986]. Thus the free play of market forces provides the necessary legitimation without the necessity for special constitutional constraints. The privatisation programme would on this analysis represent an extension of economic liberalism, and there would be no need for constraints on state action simply because the state would have no role. In this section I will examine this theme in relation to the role of government in the affairs of privatised companies.

One of the main justifications offered for privatisation in both Britain and France is that it will free the enterprises from the political pressures of the state and leave them subject only to the impersonal disciplines of the market-place. Thus:

> Soyons bien clairs: faut-il que la vie des entreprises soit complètement déconnectée de la politique et des influences politiques? Notre réponse est oui! Complètement et définitivement! [The Minister of State for the Economy, of Finances and of Privatisation, JO, Assemblée Nationale, 27 oct 1987, p 4916].

However, in both countries a number of devices have been retained linking government and privatised concerns; these take the form of powers over shareholdings, contractual links and governmental influence in the regulatory process. Only the first two will be discussed here as the latter in France would take us into the world of broadcasting reform and so outside the scope of this paper.

It should of course be remembered that many privatised concerns are inevitably surrounded by a pattern of strategic decisions to be determined by government. British examples are particularly strong in the field of energy policy, and include the licensing of oil and gas extraction in the North Sea, authorisation of gas imports and exports, and, most strikingly of all, the proposed obligation on the privatised electricity generating concerns to generate a proportion of their energy by means other than fossil fuels (in practice, through nuclear power). Government also retains an important role in the regulatory apparatus established on privatisation. Once more, the difference in scope between the French and British privatisation programmes is important here, for the monopoly utilities which require the largest remaining regulatory role for government have simply not been privatised in France. However, in addition to these general powers a number of special devices have been created on privatisation to retain governmental influence; the most important of these in Britain is the golden share.

GOLDEN SHARES.

'Golden shares' have been adopted in the majority of examples of privatisation of a major enterprise in Britain, the major exceptions being BP, Associated British Ports and Royal Ordnance. The central aim is to prevent takeovers and changes in control not desired by the Government [for further details of 'golden shares' see Graham and Prosser, 1987: 36-8]. In the case of Britoil and Enterprise Oil, a special share retained by government is given a majority of votes and power to call an extraordinary general meeting if any person acting alone or in a 'concert party' makes an offer for 50% of the voting rights, or is entitled to control over 50% of such rights. In the other examples, there is a limit of 15% on shareholdings, and this is entrenched against variation without the consent of the special shareholder, ie the government. In some cases disposal of more than 25% of the company's assets also requires the special shareholder's consent.

One particular objective is clearly to prevent foreign takeover of important companies. However, to express this directly would lead to problems of community law [see especially arts 221 and 52 of the EEC Treaty], and so the provisions have usually made no reference to nationality and cover any proposed takeover. However, in the case of British Aerospace, Rolls-Royce and British Airways there are explicit limitations on foreign shareholdings. In the former two cases this takes advantage of art 223 of the Treaty of Rome giving exemption for military production; the latter is more questionable. Indeed, at the time of writing the EEC Commission is investigating whether the Rolls-Royce provision does in fact fall within the exemption provided by art 223.

The effect of these provisions is to replace a fundamental spur to management efficiency, the 'market for corporate control', with the need to negotiate a takeover with government, even though government will retain no ordinary shareholding in the company. The provision has already assumed great importance in the case of the takeover by BP of Britoil. Use of the golden share was here hindered by its bad drafting; this particular model did not provide government with powers to prevent the takeover, but only to outvote the new owners on the Board of the Company, and so, for example, to appoint its own directors. In practice, the existence of the share was used as the basis for negotiations with BP which eventually extracted assurances on the future rate of exploration in the North Sea, the location of the Britoil headquarters and research, and the composition of the new Britoil board; having extracted these assurances the Minister then agreed not to use the golden share powers [see 128 HC Debs cols 149-60, 23 Feb 1988]. The importance of this example lies in the fact that even the most limited golden share provision has provided government with an important mode of policy intervention after privatisation, and that even a publicly non-interventionist Government is prepared to use it.

In France, it will be recalled that the Conseil Constitutionnel stressed the constitutional status of the need to preserve national independence. Moreover, given the greater tradition of state intervention in France one would assume that stronger provisions would exist retaining residual powers in governmental hands than in Britain. The empowering loi for privatisation enabled the government to fix rules for the protection of national interests, and the relevant provisions are contained in Arts 9 and 10 of the loi on the implementation of privatisation [loi 86-912 du 6 août 1986]. Article 9 provides a discretionary power for the minister to decide that *at the time of the*

cession of sales through the financial markets, no individual or institution may acquire more than 5% of the shares. Article 10 similarly provides that, *at the time of any cession of interests*, no more than 20% of capital may come under foreign control, and that figure may be lowered by the minister when national interests require it.

In the case of the golden share proper, the minister, after consulting the Privatisation Commission, is to determine whether the protection of national interests requires his taking a special share, which would require his consent for any person (or several persons acting in concert), to hold more than 10% of capital. This special share can at any time be transformed by the minister into an ordinary share; it ceases to have effect anyway after five years. For enterprises the principal activity of which falls under arts 55, 56 and 223 of the EEC Treaty foreign holdings in excess of 5% require ministerial consent. These articles refer to activities connected with the exercise of official authority, special treatment of foreign nationals on grounds of public policy, public security or public health, and the production or trade in arms, munitions and war materials. In the case of breach of the provisions on shareholding, the right to vote is lost and the shares must be sold within three months (for provisions as to forced disposal see décret no 86-1141 du 25 Octobre 1986). Further provisions exist in the audio-visual field, including a permanent 20% limit on foreign ownership of television or radio companies, which is however, stated to be subject to France's international obligations [loi 86-1067 du 30 sept 1986, arts 40, 63]

The provisions are, in fact, somewhat weaker than those in the original Ordonnance which the President refused to sign because it did not sufficiently

protect national independence. It should also be stressed that the provisions on shareholding give fewer powers to government than do their British equivalents. For example, the special share must expire after 5 years and nor are disposals of assets subject to special consent. It would not be incorrect to conclude from this that the special share provision was likely to be operated in France in a somewhat half-hearted fashion, and this was in fact prefigured by disputes within government as to whether a special share was desirable at all. In fact, a special share has been taken by the minister infrequently. It was taken in the case of Elf-Acquitaine, unsurprisingly in view of the highly internationalised nature of the petroleum and chemicals business and the great importance of Elf in the national economy. Special shares were also taken in the cases of Matra with its strong military links and in the case of Bull when a capital augmentation took place. In the case of Havas the introduction of a special share was welcomed by the directors on the grounds that the group's capitalisation was relatively weak and and it would have difficulty resisting a foreign takeover bid. However, the special share was not taken in the other privatisations, including the cases of Saint Gobain, Paribas, Société Génerale, Compagnie Générale d'Electricité, Compagnie Générale de Constructions Téléphoniques, Suez and the banks. Its purpose seems temporarily to protect concerns especially vulnerable to foreign takeover, rather than to provide a more general form of governmental intervention.

There is also a body of general law limiting the participation of foreign investors in French companies. This remains in place despite loosenings of foreign exchange controls, and the junior minister for privatisation stressed that it would be used to protect privatised companies [JO, Senat 31 mai 1986 p 1169]. However, it is by definition limited to foreign takeovers, and cannot

restrict investment from within the EEC [see now the circular of 21 mai 1987, JO 23 mai 1987, p 5656].

In conclusion, then, we find that, contrary to stereotypes as to the comparative roles of the state in the two countries, the golden share provisions provide a much weaker form of intervention after privatisation in France than in Britain. The society with a stronger concept of the state and a greater history of governmental intervention does not find this reflected in wider powers of intervention. However, to assess this effectively we need to consider another means of state influence over privatised concerns in France.

HARD CORES

The provision for the creation of hard cores ('noyaux durs') of investors to whom a proportion of the capital on privatisation is allocated by the Government is contained in art 4 of the aout law on the modes of application of privatisation [loi 86-912 du 6 août 1986]. This empowers the minister to choose outside the financial markets the acquirer of an interest after receiving the opinion of the Privatisation Commission. Further provision is made in décret no 86-1140 of 24 October 1986. This confirms that such sale may only take place after consulting the Commission, and provides for preliminary publicity. The disposal can then only take place after the Commission has fixed the value of the interests to be ceded. It should be noted that there is no provision requiring the minister's decision to be motivé. Much stronger provision has been made in the field of broadcasting, where, under art 58 of loi 86-1067 du 30 sept, 1986, 50% of the capital of TF-1, the premier television chain, was to be ceded to group of acquirers chosen by the new regulatory authority. In this case the decision of the Commission is to be motivé [art 64],

although the actual decisions have been lacking in detailed reasoning as to why a particular result was preferred [JO 8 avril 1987, pp 4008-9, and 29 avril, pp 4792-3].

What is the purpose of the hard cores? Their presence is a reflection of the lack of large institutional shareholders in France in comparison with the United Kingdom. If all shares were disposed of on the financial markets it would be likely that control would be divided amongst a large number of small shareholders, and the company would be at the mercy of raiders. Thus conditions have been attached to the shares sold to the hard cores; in enterprises covered by the privatisation loi the members of the hard core have been prohibited from disposing of their shares for a period of two years, and for the following three years could only sell to the Company itself or acquirers approved by it. As regards TF-1, a change in the composition of capital is a ground for the withdrawal of the authorisation to broadcast. In return for the clear advantages of control offered by membership of the hard core, the Conseil Constitutionnel has decided in its judgement on the broadcasting law that shares must be offered at a premium above those sold on the financial markets [decision no 86-217 DC, AJDA 20 fév 1987, pp 102-11]. This premium has varied considerably from case to case; in the case of Paribas it was 2.5%, in the case of TF-1 33%, for BIMP 45%, for CCF 4%, for Havas 8% and for Suez 5%.

In contrast to the case of the golden share, the system of hard cores has been used extensively in the privatisation programme, being employed in all the full privatisations apart from Saint-gobain and Compagnie Générale d'Electricité, in both of which natural hard cores existed in the form of bank holdings created earlier. Thus, for example, in the case of Paribas a core of 18.2% was created,

divided between 17 investors; for Crédit Commercial de France 30% between 9; for Havas 20% between 6; for Société-Géneral of 25.6% between 19 and for Suez a core of 28% of capital was created, divided between 23 investors.

The use of the hard core has been the most heavily criticised aspect of the implementation of the privatisation programme in France. The criticisms have taken two major forms. The first, made more credible because of the lack of any requirement of reasons for the allocation of the hard core, is that it has been used to reward political supporters of the Government. According to Government sources, the criteria for choosing an investor are its likely stability, level of participation before nationalisation, the justifications offered by the investor for taking a participation and the future development of the privatised company [M supp 13 june 1987, and see the Minister, JO, Assemblee Nationale, 27 oct 1987: pp 4894-5]. After criticism of allocations, however, new criteria (now breached) were added to the effect that no investor would be favoured in more than two privatisations. However, allegations of political favouritism have been made more credible by the intense personal involvement of the minister in the allocations of hard cores [see eg JO, Assemblée Nationale, 27 oct 1987: p 4895].

The second criticism is of the intense concentration of interests caused by the highly incestuous nature of the allocation of the hard cores. Although no investor was initially awarded an interest in more than two hard cores, a dozen groups were given two participations and with the privatisation of Suez a third participation was permitted. Moreover, a large number of complex links have been built up between the investors involved. A detailed analysis of the hard cores found that the major actors were other privatised companies, companies

about to be privatised and a smaller number of private concerns; between them they had a highly concentrated and complex pattern of holdings in each other; 'Tout se passe en circuit fermé: les 'deux cent familles' de naguère sont-elles devenues les 'cinquante-deux amis'?' Moreover, within these links there was concentration around three particular poles; CGE/Société-General, Paribas and Saint Gobain [M, 17 sept 1987]. This was reinforced by the Suez hard core later; the largest elements in the core were awarded to Saint-Gobain and Elf-Acquitaine, whilst the three insurance groups UAP, AGF and GAN were able to make this their third hard core participation, breaking the rule laid down previously by the minister that two would be the maximum. Moreover, since privatisation the hard cores have been reinforced through their participants purchasing shares sold by small investors with the collapse in share prices; thus for example the hard core of Suez now represents over 50% of its capital [for details of the augmentations see M supp 28 mai 1988]. Indeed, some serious degree of concentration would seem hard to avoid because in France there are only 70-100 groups with the means to participate in the system of hard cores.

It is clear, then, that the creation of hard cores represents a major form of governmental influence which has occurred through a highly closed process involving a major exercise of public power, and this would appear to confirm the conventional view of French capitalism as involving a strong étatist element. However, other factors need to be borne in mind which rather reduce the force of this view. Though the allegations of political placemanship may be well founded, the importance of the hard core holdings in practice can be exaggerated. As has been noted above, they are divided between a large number of investors with the result that an individual holding will be too small to

create any real engagement in the enterprise for the investor. In addition, the new Government is pledged to break up the hard cores. At the time of writing, the Minister has suggested that this will be done simply by removing the obligation to hold shares for a period of time, thus letting the market take its course, probably resulting in fewer but larger shareholdings not determined by political favouritism and with investors more committed to the enterprise [see M 17 mai 1988 and M supp 28 mai 1988]. It should however be recalled that a number of participants in the hard cores will remain under public ownership with the change of government, thus providing a potential means of state influence. We must wait until we have a clearer idea of the intentions of the new Government before reaching a conclusion on this.

It should also be recalled that the idyllic view of the British privatisation programme as operating solely through the competitive financial markets and public offers for sale is seriously misleading. Though the disposals of large enterprises have largely taken this form, there has also been extensive disposals through highly secretive negotiations with private bidders. At the time of writing, the planned sale of the Rover group to the (privatised) British Aerospace is under investigation by the European Commission because of the financial arrangements involved; BAe is paying £150 million whilst the Government is writing off £1.1 billion of losses and injecting £800 million of new capital into the business to enable the sale to take place. This is, however, merely the most recent example of such private sales, earlier cases having included British Rail Hotels and its ferry and hovercraft operations, British Gas' onshore oil operation, the warship yards of British Shipbuilders, the National Bus Company (split into a number of smaller concerns), and a number of parts of the businesses of British Steel and the Rover Group [for further

information see Graham and Prosser, 1987: 24-30]. These operations have generally been shrouded in secrecy; for example, in the case of the British Shipbuilders warship yards the British Shipbuilders Act 1983 had given the minister power to direct the Corporation to discontinue particular activities and dispose of assets, and it was told to sell its profitable warship yards only a matter of hours before the Secretary of State made a public announcement to this effect. No flotation took place; instead private bidding was adopted thus making unnecessary public disclosure of information through a full prospectus.

It should be noted also that in France sale outside the financial markets can only take place after the Privatisation Commission has fixed the value of the interests to be ceded [loi 86-912 du 6 août 1986 art 4 and décret 86-1140 du 24 oct 1986]. In Britain there is no requirement of such independent valuation, and the Public Accounts Committee has criticised sale by private treaty as resulting in a price which may not reflect true market values where there is not strong competition in the tendering process, as failing to provide information about the whole market's view of the selling price, and as loading the dice in favour of the purchaser in those cases where tax losses were a factor in agreeing the price [HC 34, 1985-6]. The Committee has also criticised the disposal of parts of the British Steel Corporation as having favoured the private sector [HC 307, 1984-5], and the National Audit Office has noted that the proceeds from the sale of Royal Ordnance 'were significantly less than the public investment in the Company, as measured by its net asset value' [HC 162, 1987-8]. Examination by the Office is made significantly more difficult in these cases because it will not have access to the books and records of the enterprise involved, and so must work only from the information held by government departments.

A final point need also be made in relation to the comparison between hard cores and British arrangements for sale. Even in the large sales such as British Gas, it is not true that all shares are placed competitively through the financial markets, for as part of the underwriting arrangements a number of shares are firmly placed in advance in the hands of British and overseas investors. Others are provisionally placed subject to oversubscription in the public offer. Far from a premium being payable as required in France, commission is paid to the institutions for agreeing to take up shares. In the case of the British Gas sale, after clawback due to oversubscription, 23% of shares were sold in this way to British institutions, and 11% overseas; for British Airways the figures were 36% and 16%. No accusations of political favoritism on the French pattern have been made here, nevertheless the arrangements are far from the liberal model of a large number of shareholders operating through competitive financial markets.

The creation of hard cores, then, has provided a controversial means of government intervention in privatised companies after their sale. However, they do not represent a fully-fledged means of interventionism, and are likely soon to be broken up by a return to the market. Moreover, similar operations outside the financial markets do exist in British privatisation, and are not subject to the protection of independent valuation. Again we find that the view of the French state as interventionist in a way which the British state is not to be misleading, and indeed there is a degree of outside scrutiny available in France which does not exist in Britain. This will also become evident in the final area of state influence after privatisation to be briefly examined, that of contractual links.

PRIVATISATION, GOVERNMENT AND CONTRACTING

In Britain it is inevitable that a number of important privatised concerns will retain close links with government through contract. Examples are the defence-oriented British Aerospace, Rolls-Royce, the warship yards of British Shipbuilders, the Royal Dockyards and Royal Ordnance. Contractual relations can in principle result in a considerable degree of governmental intervention; for example, after a major Anglo-American conference on public and private interdependence it was reported that there was 'general agreement that the US Government has achieved a greater degree of *de facto* management control over the aerospace industry through the contract device than the British Government has achieved by nationalising certain industries' [Smith, 1971: 19]. In addition, the contractual links may be manipulated to influence the finances of a concern on privatisation through giving a guarantee of firm orders to potential purchasers. There have already been allegations that this has taken place in relation to the sale of shipyards in Britain [see Graham and Prosser, 1987: 43-5], and in the case of Royal Ordnance special agreements were reached committing the Ministry of Defence to purchase at least 80% of its requirement for explosives and propellant for five years and the bulk of small arms ammunition for three years from the privatised company [see HC 162, 1987-8].

English law is remarkably lacking in legal controls over the process of government contracting, both in relation to the selection of contractors and deciding terms:

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

Parliament [Daintith, 1979: 59].

Moreover, recent extensions of the scope of judicial review seem to have left pre-contractual decisions of government largely untouched. There are a number of Directives and Decisions in Community Law which govern the award of public works and public supplies contracts, but many of the key areas of privatisation are excluded from their application, including defence contracting. The central institutional means of scrutiny of government contracting in Britain is the Public Accounts Committee in association with the National Audit Office, but this scrutiny is inherently *ad hoc* and *ex post facto*; moreover, the Office will not have access to the books and records of contractors but only to information in departmental files.

In France, by contrast, recognition of the techniques of government by contract is much more fully developed, as is the special regime of legal supervision, though major areas of controversy remain. Only a very brief outline of the relevant law can be given here. By way of introduction, it should be stressed that in France there are two different legal regimes which are relevant to contracts. There is the normal system of law dealing with civil law contracts between private parties and certain government contracts, but there is also the special regime dealing with the contrat administratif. This will be under the jurisdiction of the system of administrative law courts, in particular the Conseil d'Etat; the latter has developed a sophisticated body of special rules in relation to the enforcement and execution of the contract [for a summary see Brown and Garner pp 125-31]. More importantly for our purposes, there may also be a complex set of procedures and standard terms governing the making of administrative contracts, incorporating requirements of open competition, publicity and some standard terms. The extent of such obligations will vary

considerably depending on the nature and terms of the contract and cannot be summarised here; however, they are enforceable in the administrative courts [for such provisions see generally A de Laubadère et al, 1983, Tome 1, Livre II, Titres III-IV].

One example of such special rules applies where the supply of goods to government falls within the category of 'les marchés publics industriels'. This will occur where, because of the technological complexity of the subject-matter, the state needs to supervise the construction of the product in a way which does not take place in the ordinary case of supplies to government. Examples are in defence and especially armaments, but also in the areas of aeronautics and telecommunications. In such cases the normal requirements of publicity and competitive tendering may not apply because only one contractor will have made the necessary investment for construction of the required goods, but nevertheless a special set of detailed standard clauses exists for such purchases and is published. The extended powers of state supervision will bring such contracts within the powers of the administrative courts [see on this area Laubadère et al, 1983: 274-6]. A number of firms privatised in the current programme do perform work of precisely this nature; obvious examples are Matra with its important defence and aerospace role, and Compagnie générale d'électricité and Compagnie génerale de Constructions téléphoniques, which share the domestic market in the supply of telephone switch equipment.

Also of potential importance for the future of privatised industries is the area not of supplies but of 'government by contract' proper. The use of contractual techniques as a means of regulation in France has a long history, for example on the subject of price control, and it has involved an important network of

contractual linkages both between different governmental institutions and between government and private actors including private companies and representatives of particular sectors or areas of business [for a summary, see Bergsten, 1975]. Moreover, the use of contractual techniques grew rapidly from the nineteen-seventies onwards, and the loi on the reform of planning of 1982 makes provision for the conclusion of contrats de plan with private firms as well as public enterprises. The future role of planning in France is currently a matter of some controversy, and the policies of the new Government are not yet clear, but it would appear that an important role for planning is likely to continue with the use of revised institutional machinery. Even if the formal contractual technique linked to the process of planification is not to be used extensively in relation to privatised concerns, however, less formal arrangements in contractual form have in the past been used extensively with private companies. The degree to which these will be used to link privatised concerns with government must await greater experience of the future of these concerns and the resolution of the current debate on the future of planification, but given the importance of privatised concerns as economic actors it would appear likely that this could well be an important form of relationship.

The legal regime for contracts of this nature also shows considerable sophistication compared to the relevant law in Britain. In particular, challenge of the contractual terms or of an apparent breach of the contract, on the basis of excès de pouvoir, has developed considerably in scope in recent years. This challenge may come from the parties themselves or from third parties; the latter is of particular importance as such third parties will not be able to use the normal contractual remedies. The position of third parties is also crucial because they are likely to be excluded from the process of negotiation of the

contract. Though in principle such review is not within the powers of the administrative courts, this doctrine has been considerably weakened by the willingness of the courts to allow challenge (including that by third parties) of *actes détachables* from the contract itself; these are administrative acts gaining their authority from outside the contract itself, and may included such things as the decision to enter into the contract, the failure to obtain required consents, and a decision by a public authority to confirm or ratify a contract through an administrative act. Thus, for example, Friends of the Earth was able to challenge successfully a contract entered into by a minister with a private steel company for the regulation of pollution, the Conseil d'Etat holding the decision of the minister to enter into the contract was unlawful when he had been given a number of statutory powers to police pollution which should have been used instead [Les amis de terre, CE 8 Mars 1985 RFDA 1985 363-6]. Similarly, third parties have been allowed to challenge the terms of decisions allocating television and radio franchises by contractual means, both in relation to the award of contracts and their premature termination [Compagnie Luxembourgoise de télévision, CE 16 avril 1986; Syndicat de l'armagnac et al, CE 17 décembre 1986, Société TV6 et al, CE 2 février 1987; and Société France 5, CE 2 février 1987; see RFDA (1987), pp 1-43]. Such challenge would not be possible on the basis of existing law in the somewhat similar system for the award of television franchises in Britain [see R v Independent Broadcasting Authority ex parte the Rank Organistion PLC, Court of Appeal, March 26, 1986].

Although contractual techniques represent a tool of government in Britain, they are more fully developed in France in the field of planning, and this does give some support to the idea of France as the more étatist of the two countries. However, it will be now be apparent that their are important opportunities for

the legal challenge of the use of contractual techniques as a means of regulation in France, far more so than exist in Britain. Once more we find that the strong concept of the state is accompanied by a more sophisticated system of legal constraint and regulation on government, a system which may give significantly greater powers of challenge to private parties and permit much fuller public scrutiny. It is now time to draw together the threads of this work and suggest some broader implications.

CONCLUSIONS

Two central arguments have thus emerged from our examination of privatisation in France and Britain. The retention of links between government and privatised concerns suggests that Britain maintains powers of economic intervention no less than does France, whilst in the privatisation process there are greater constitutional restraints on government in France, supposedly the land of a strong state.

Before saying more about the implications of these findings, I need to deal with a couple of potential objections to this analysis. The first is that privatisation is intrinsically an exceptional case. Rather than its implementation representing an extension of state power, it is a means of destatisation, of the state limiting its own powers. Thus we could expect this to be subject to greater constraints where there is a tradition of strong state intervention. The powers described in the latter part of this paper, however, suggest that privatisation cannot be seen simply as destatisation, and indeed in France both the minister responsible for the programme and the Prime Minister have been at pains to suggest that the two are not the same. It is also important to note that the French constitutional constraints described, in particular the power to refer to the Conseil Constitutionnel and the reviewing powers of the Conseil d'Etat, are certainly not peculiar to the privatisation process but apply across the range of government policies. Indeed, the Conseil Constitutionnel had a major influence on the nationalisation process in 1982.

Secondly, it could be objected that the French privatisation programme is an unrepresentative example of policy-making because it occurred in the period of cohabitation between a Socialist President and Right-Wing Government. However,

the refusal of the President to sign ordonnances in this case achieved very little, for the Parliamentary scrutiny of the resulting loi was at best cursory and in fact the provisions in the loi were weaker in protecting national interests than in the original ordonnance. What was important was the role of Conseil Constitutionnel in shaping the contents of the ordonnance and loi, and this was in no way contingent on the circumstances of cohabitation, for the reference came from deputies and senators, not from the President. The role of the President also made the constitutional amendment more difficult, but this was never really a possibility for other reasons. It thus seems that there is scope for drawing general lessons on public policy formation from the privatisation process.

The general conclusion must be that any simple conception of France as a country of the strong state and of Britain as a country of liberalism needs serious reconsideration. This is not to deny that there is a greater degree of identification of the state with national economic goals in France, and that the French state has in the past more actively intervened to assist economic growth. However, it is illegitimate draw from this the theme that the French state is strong and the British weak. In the context of the privatisation programme it is clear that the British Government has been able to implement this far-reaching change in political direction with relative ease; moreover, after privatisation important tools have been retained for continuing governmental intervention. In view of the nature of the major examples of privatisation in Britain, there will be little effective competition in the product market for their services, and this will be replaced by regulation, in which the government retains a major role. The other classic area of market competition, the market

for corporate control, remains under governmental influence through the use of the golden share.

That leads to the view that, under modern conditions, the idea of the liberal, non-interventionist state is mythical. Even what would appear as the fullest expression of government quitting the economic sphere, the privatisation programme, is itself an expression of a public policy preference, and government retains important powers of intervention. In other words, governmental intervention is endemic in the modern economy, and appeal to market forces for legitimation is simply inadequate. Moreover, though the current British Government talks of the disciplines of free markets, markets are themselves institutional creations: 'the market setting in which entrepreneurs and workers operate is a complex of interrelated institutions whose character is historically determined and whose configuration fundamentally affects the incentives the market actors face' [Hall, 1986: 35]. The post-privatisation economic environment is a direct creation of government decision-making. Indeed, this is even more strongly the case in Britain than in France where (partly for constitutional reasons) large monopoly utilities requiring extended regulation have not been disposed of.

The real concern, then, should not be to label governments as interventionist or non-interventionist, but to create the constitutional means for the legitimation of the inevitable governmental policy interventions [for an earlier statement of the same point, see Shonfield, 1965: Part 4]. In Britain this is remarkable by its absence; the central forum for such legitimation is Parliament, yet its effect has been minimal in shaping proposals for privatisation. The role of the courts has been effectively non-existent. In France, by contrast, important

steps have been taken in this direction. The major means for constitutional legitimation has been the Conseil Constitutionnel, and the Conseil d'Etat has been of importance in shaping such areas as government contracting. The answers reached in particular cases by these bodies may or may not have been the correct ones, but at least their existence has forced some degree of debate to take place at the constitutional level [for suggestions of constitutional reforms in Britain with similar aims see Harden and Lewis, 1986].

Generally, discussion of constitutional reform in Britain has centred around the idea of an entrenched Bill of Rights. Of course, this is an important issue, but the discussion here has wider implications. In particular, certain objections to such constitutional reform are shown to be largely groundless. Thus a common objection is that entrenched constitutional provisions prevent elected governments from an untrammelled achievement of their goals, and, by implication, that the sole criterion for legitimacy is the electoral process. Setting aside the arbitrariness of the British electoral system, it should be noted that the existence of substantial constitutional constraints in France did *not* prevent implementation of the major change of direction represented by the privatisation programme. Indeed, had the Government been prepared to use the procedure for constitutional amendment, it could have privatised monopoly enterprises. What has happened is that the French Government was forced to engage in a degree of openness in implementing privatisation, in strong contrast to the private dealings in Britain; this was especially so as regards pricing. If openness represents a prerequisite of any democratic accountability, the French experience is the more impressive on straightforward democratic criteria.

A further criticism of constitutional reform is that it diminishes the role of the elected representative in Parliament. However, the influence over privatisation legislation by the British legislature is not impressive; this also applies to France, save for the opportunity provided for reference to the Conseil constitutionnel which, as we have seen, has had profound effects on the whole privatisation programme. In fact, then, constitutional reform can increase the effective power of parliamentarians through giving the chance of appeal to an outside scrutineer.

Finally, Bills of Rights have normally been conceived as protecting a rather narrowly-defined group of individual rights; thus they have been seen as negative restraints on reforming governments with a more collective vision of social life [see eg Keeler and Stone, 1987]. However, the constitutional constraints implemented here cannot be fitted into the traditional liberal model of individual rights, in particular the requirement that monopolies be publicly owned and the prohibition on underpricing public assets. In turn, the latter represents an application of a broader principle of equality. In the past it may be correct that the concept of equality employed by the Conseil was a highly formal one based on equality of legal treatment and paying scant regard to equality of outcome or of resources [see Bell, 1987]. However, the version of equality presented in the privatisation decision seems to represent a tentative move towards a more egalitarian concept. Thus the referring parliamentarians had argued that sale below the real value of enterprises 'méconnaîtrait fondamentalement le principe d'égalité en procurant aux acquéreurs de ces entreprises un advantage injustifié au détriment de l'ensemble des citoyens', and the Conseil accepted that the prohibition of sale below value derived from this principle of equality. The Conseil also accepted that the

constitutional protection for the right of property applied not only to private property but to property held by the state and other public authorities [see AJDA 1986, 579]. This illustrates the possibility of constitutional protections being developed around *collective* goals, as well as the protection of individual rights, the latter being itself, of course, also of crucial importance.

The detailed working out of these ideas would take us far outside the scope of this working paper. Nevertheless, the central theme is clear; Britain does not lack a strong state; what it lacks is the set of ideas and institutions associated with the requirement of legitimate policy-making where the concept of the state is recognised as central to politics. As a result, government is extraordinarily free from the inconvenience of any democratic scrutiny or accountability.

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