

## Law and the Political Economy of Privatization in Sub-Saharan Africa

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### Recommended Citation

Maxwell O. Chibundu, *Law and the Political Economy of Privatization in Sub-Saharan Africa*, 21 Md. J. Int'l L. 1 (1997).  
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## ARTICLES

### LAW AND THE POLITICAL ECONOMY OF PRIVATIZATION IN SUB-SAHARAN AFRICA

MAXWELL O. CHIBUNDU\*

#### I. INTRODUCTION AND OVERVIEW

On February 21, 1996, the usual cacophony on the trading floor of the New York Stock Exchange was livened up further by that most stereotypical of spectacles: a troupe of brightly clad African dancers, providing ceremonial amusement as a lead-in to more consequential business.<sup>1</sup> The occasion, however, was not the entertainment of visiting "dignitaries," nor even the opening or closing ceremony of a sporting event. Rather, these performers most of whom probably spoke not much more than rudimentary English, let alone the arcane language of international finance, in response to the sovereign edict of their nation state, Ghana, had presented themselves at the high temple of finance to help celebrate the opening of trading in "global Depository Receipts" of the shares of Ashanti Goldfields Limited, a gold-mining company whose primary extractive operations are conducted in Ghana, whose principal managerial skills are furnished by Australian, South African and British nationals, and the shares of whose stock are traded on the Accra and London stock exchanges.

Ashanti Goldfields is reportedly the first sub-Saharan African "operating" company to have its shares traded on the New York Stock Exchange.<sup>2</sup> Until very recently a money-losing state-owned enterprise,

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1. See e.g. *Out of Africa*, NEWSDAY, Feb. 22, 1996, at A43; *Ghanaians on Big Board*, NEW YORK TIMES, Feb. 22, 1996 at D22; Kenneth Gooding, *Ashanti Becomes an African in New York*, THE FINANCIAL TIMES, Feb. 22, 1996, at 24.

2. See *Ashanti Goldfields Commences Trading on New York Stock Exchange*, BUSINESS WIRE, Feb. 21, 1996 (available in Lexis/Nexis News Library, Wires file); THE FINANCIAL TIMES, *supra* Note 1. ASA Ltd., a South African investment company, has apparently been trading on the New York Stock Exchange since 1958. See NEWSDAY, *supra*

Ashanti Goldfields has become the darling not only of Wall Street, but for somewhat longer, also of the London Stock Exchange. On its face, it appears to epitomize the successful restructuring of one of the basket cases of economic mismanagement in the dark continent.<sup>3</sup> Its journey from neglected and weed-infested properties to a resurgent entrepreneurial undertaking, funded not by governmental subsidies but by private capital, seems paradigmatic of the new economic order, 1990s style, in which the in-flow of portfolio rather than foreign direct investments has become the yardstick of the favorability rating of dependent national economies within the centers of international finance, and, therefore, the arbiter of national economic performance. For the sovereign republic of Ghana, the crown jewel of its economy can now rely on the liquidity of its name recognition in the international marketplace to finance

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Note 1. American Depository Receipts representing interests in fifteen African companies are apparently being traded through the NASDAQ system. See *Today's Briefing*, THE DETROIT NEWS, February 22, 1996. The Company's characterization as "sub-Saharan African" apparently comes from the fact that its primary assets (gold-mines) are located in Ghana, and that it is incorporated in Ghana. The Ghanaian Government currently owns about 20% of the Company; another 40% is owned by the Anglo-Australian and South African multinational, Lonrho, and the bulk of the remainder is owned by investors on the London Stock Exchange. See THE NEW YORK TIMES, *supra* Note 1; Harry Mouzalas, *Ghana To Sell \$ 100 Mln Ashanti Goldfields Stake*, THE REUTER EUROPEAN BUSINESS REPORT, Jan. 31, 1996 (available on Lexis/Nexis News Library, Papers File.)

3. Aside from the initial success of the public offering — the offering price stood up to trading on the opening day — an indicator of the dramatic restructuring of the Company, and indeed of Ghana, may be gleaned from the quadrupling of the production of gold from about 280,000 ounces in 1985 to about a million ounces in 1995. See BUSINESS WIRE, *supra* Note 1. Like Ashanti Goldfields, Ghana has been touted as a success story of the World Bank's "Structural Adjustment Program" in sub-Saharan Africa. See *eg.* Lionell Demery & Lyn Squire, *Macroeconomic Adjustment and Poverty in Africa: An emerging Picture*, WORLD BANK RESEARCH OBSERVER, 1996 ("Cote d'Ivoire's failure to adjust effectively to external shocks during the period of study provides a convenient counterfactual to the success of the Ghana's reform efforts"); *Ghana: A Model of Democracy?* FOREIGN REPORT, Aug. 15, 1996 ("[B]ecause Ghana has in the past few years been proclaimed as a model of successful economic reform in Africa . . . it will be watched to see if it can also be held up as a model of democratization."); Phillip Eade, *Urgent Need for Foreign Investment*, EUROMONEY, June 1995, at 131 ("It has become almost a cliché to say that Ghana is World Bank's African Showcase. In the 12 years since the government began its structural adjustment programme (SAP), its combination of liberalizing reforms and strict fiscal and monetary measures has helped produce an average real growth rate of 5% and bring inflation down from 120% to 30%"). *But cf.* *Biting the Hand that Squeezed Them*, THE ECONOMIST, Oct. 21, 1995 at 48 ("Even Ghana, the donor's favourite pupil, has lost some shine. While its GDP has grown by 5% a year over the past ten years, much of this has been due to a large inflow of foreign aid. Now Ghana's prudent housekeeping is lapsing. Inflation, having dropped to 18% per year, has rebounded to 50%.")

future needs. Governmental policy need no longer be held hostage to the unilateral decision of a single unhappy investor to withdraw from the economy. For the foreign large shareholder such as Lonrho, the availability of a liquid international market creates an exit which does not entail the "for better or for worse till death do us part" credo that previously governed much foreign direct investment in developing societies by multinational companies. And as for the proverbial Belgian dentist or Kansan wheat farmer being asked to risk her retirement nest egg, it simply marks the opening up of another frontier for risk diversification. But how smooth down the Volta will the sailing be? Does the offering of Ashanti Goldfields stock amount to any more than the all-too-frequent historical "first," good only for the parlor game of "Trivial Pursuit," or does it represent, finally, the coming of age of Africa-centered private accumulation of capital and its nonconcessional integration into global capitalism?

This article presents the reflections of an academic lawyer on a decade of the privatization phenomenon across the globe,<sup>4</sup> and explores its implications for the quest for economic growth and stable liberal political order in sub-Saharan Africa. My primary interest is in illuminating the relationship between legal craftsmanship, on the one hand, and the imperatives of socio-political and economic forces on the other. Its writing is grounded on the view that the "privatization" movement is one area in which lawyers and "law" have played demonstrably significant roles in shaping and nurturing clear transformations in international political economy.<sup>5</sup>

Privatization has attained the status of a self-validating orthodox creed, and while there remain some doubters,<sup>6</sup> privatization looks less

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4. According to one recent report, the last decade has witnessed the privatization of over 10,000 enterprises in more than one hundred countries. See Interpress Service, March 1, 1996 (available in Westlaw's Magsplus Library.)

5. The issue of "constitutional" change is another. Unlike the privatization phenomenon, however, legal scholars have extensively debated the practical and normative implications of the role of law in bringing about these changes. See e.g. Robert C. Juelke, Note, *The Economic Causes and Consequences of Economic Reform in Eastern Europe*, 34 WM AND MARY L. REV. 1367 (1993); Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555 (1993); Lloyd Cutler & Herman Schwartz, *Comments: Constitutional Reform in Czechoslovakia: e Duobus Unum?* 58 U. CHI. L. REV. 511 (1991); Carlos Santiago Nino, *The Debate Over Constitutional Reform in Latin America*, 16 FORDHAM INT'L L. J. 635 (1993).

6. Recent political trends in Eastern Europe, notably the successes of heirs to the communist parties of Poland and Hungary, and possibly Russia, political instability in Italy, and the less surefootedness of conservative parties in France, Britain and Germany, when taken with outright protests against privatization in countries like Mexico and South Africa, give pause for any unequivocal assertions about the future of privatization. These,

and less like a "fad."<sup>7</sup> Among other structural reasons, privatization quite comfortably fits the current three-part chime of "free market," "democracy" and "rule of law." Further, its practice has been sufficiently rewarding to definite and identifiable groups in pockets of professional and entrepreneurial activities all over the world, so that it has established constituencies that can only be dislodged by a powerful counterwave that is currently nowhere in sight. Above all, the process has become sufficiently routine and seemingly sufficiently understood so that it is no longer arcane, and as such it can be marketed at minimal intellectual cost across the globe. In other words, we have stopped asking foundational questions about privatization, and to the extent we ask any questions at all, they focus on how particular transactions can be more efficiently accomplished.

In keeping with this transcendent global trend, privatization is being vigorously advocated as a cure for much that ails sub-Saharan Africa. While economists and political scientists have vigorously debated the normative implications for their disciplines and for society of their varied

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however, appear as no more than quite weak cautionary diversions on the road to privatization. See generally EUROMONEY, February 1996 (a special issue on privatization that summarizes the history of and background to privatization as a global commercial phenomenon, and provides prognostications on its future); Compare *Selling the State*, THE ECONOMIST, Dec. 9, 1995 (observing that when history of the 1980s and 1990s is written, privatization would be a hard chapter to write, and that it has been getting "bad press" despite its "historic sweep."); and *Unexpected Record Proceeds in 1995*, PRIVATISATION INTERNATIONAL, Jan. 1, 1996 (stating that the future for privatization is "rosy.")

7. Compare Mary N. Shirley, *Colloquium: The What, Why, and How of Privatization: A World Bank Perspective*, 60 *FORDHAM L. REV.* 23 (1992); DAVID J. DONALDSON & DILEEP M. WAGLE, *PRIVATIZATION: PRINCIPLES AND PRACTICE* (1995); AHMED GALAL AND MARY SHIRLEY, EDs. *DOES PRIVATIZATION DELIVER?* (1994). These works, while recognizing the political components of the decision to privatize, steadfastly attempt to demonstrate empirically that privatization generates significant accretion to national wealth, and by dissemination of such information, they seek to promote its propagation and to forestall any relapse into state ownership and control of productive resources. In this, they may have well succeeded. The volume of privatization in 1995 was reportedly worth 73 billion dollars, up from 64 billion dollars in 1994. This figure was particularly astonishing since the first half of that year witnessed only 18 billion dollars in privatization attributed largely to the peso crisis which resulted in significant outflow of portfolio investment from Mexico. Moreover, investor interest in infrastructural enterprises such as telecommunications, transportation networks, electricity and water, and the apparent willingness of hitherto reluctant governments to surrender control over these resources seem to assure the continuation of the phenomenon. See *Unexpected Proceeds in 1995*, *supra* note 6. This is not to dismiss, however, continuing conflicts over how and what ought to be privatized, especially by labor unions. These conflicts, however, whether in Russia, France, Mexico, or South Africa, do not directly challenge the concept of privatization, merely specific implementations.

prescriptions for dealing with the transforming changes that fall within their bailiwick (price stabilization and money supply, for example, for economists; civil, liberal or democratic societies, for political scientists),<sup>8</sup> the discipline of law, in dealing with privatization, has engaged in very little of such discussion. Because privatization is part of and may be integral to the current fundamental structural shift in international political economy, that is, the organizing norms, rules, and procedures of contemporary international society, such a discussion is called for both as an intellectual and a practical need. Its exploration in the sub-Saharan African context is especially necessary because the peoples of that region of the world exercise much less control over their own destiny than do most others. Additionally, their futures depend at least as much on the proclivities of external donors and lenders who are insulated from the consequences of their decisions as on the decisions of domestic leaders and institutions ostensibly accountable to those whom they rule. Lacking the exemplary effect of direct accountability, the decisions of these foreign mandarins hopefully may be affected — at least at the margins — by intelligible, coherent rational explanations.

This essay is thus a preliminary attempt at getting some of these necessary conversations going. It begins by acknowledging the varied meanings of “privatization,” and the importance of localizing privatization decisions in the quite distinct cultural and political spheres that continue to exist notwithstanding the frequently heard-of “globalization” of international economic practices. With that understanding established, the essay explores the relevance of law and lawyering in the process, and seeks to link these roles with the broader normative shifts in current liberal legal thinking, especially in the arenas of constitution-making and in the transitional societies and the development of a post-Cold War economic order. The essay concludes by concertizing the interplay of legal technocracy with instrumental economic and political forces by examining the privatization phenomenon in sub-Saharan Africa generally and in Nigeria in particular.

## II. THE AMBIGUITIES OF PRIVATIZATION

Like so many concepts that elicit unquestioning adherence by the millions and equally uncritical rejection by a like number of others, “privatization” lacks an easily rendered definition. Its diversity embraces

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8. See e.g. JEFFREY SACHS, *SHOCK THERAPY: POLAND'S JUMP TO THE MARKET ECONOMY* (1993); MARSHALL GOLDMAN, *WHY ECONOMIC REFORMS IN RUSSIA HAVE NOT WORKED* (1994); BEVERLEY CRAWFORD, ED., *LOST OPPORTUNITY: MARKETS, STATES AND DEMOCRACY: THE POLITICAL ECONOMY OF POST-COMMUNIST TRANSFORMATION* (1995).

such practices as the contracting out by a government of the provision of such quintessentially "public" services as military defense<sup>9</sup> and the running of prisons,<sup>10</sup> to the withdrawal of government ownership of or participation in entities engaged directly in industrial or agricultural production. Perched somewhere in between these two is the opening up to private participation of enterprises whose public ownership or control have hitherto been the source of internecine debate: post and telecommunications, airports and airlines, and public utilities including electricity, water and wireless broadcasting. What molds this broad idea of "privatization" into anything approaching coherence appears to be that it relates to mechanisms and arrangements (however loosely structured) that share the goal of reducing or eliminating state and/or governmental ownership or control over entities whose primary *raison d'être* lies in the socio-economic realm.<sup>11</sup>

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9. While the "mercenary" soldier long has exemplified the contracting out of the rendering of military service, the engagement was generally surreptitiously undertaken, the "soldiers of fortune" tended to be employed by anti-government groups, and where they were employed by the recognized government of the state, they were generally integrated within the overall supervision and command of a national military hierarchy. More recently, however, the use of such services as South Africa's "Executive Outcomes," the Dutch registered "International Defense and Security," and the U.S.-based "Military Professional Resources" by such African governments as those of Sierra Leone and Angola, and by the Baltic states of Eastern Europe, suggests a high degree of the ceding of legitimate control over military power (when, where and how to use it) to private entities. *See eg. Angolan Diamonds: On the Rocks*, THE ECONOMIST, Sept. 14, 1996 at 68; Paul Harris, *Privatizing War: Military Advising is Growth Industry*, INSIGHT MAGAZINE, Aug. 26, 1996; Danielle Gordon, *No Peace for South Africa's Wand'ring Warriors; Executive Outcomes Uses Angola As Training Ground For Mercenary Soldiers*, BULLETIN OF THE ATOMIC SCIENTISTS, May 1996 at 5; Phillip Winslow, *The Business of War*, MACLEAN'S, Nov. 6, 1995 at 33; *We're the Good Guys These Days*, THE ECONOMIST, (U.S. Ed.) July 29, 1995 at 32. *See also* Barbara Starr, *US Firm to Train Muslim Federation in Bosnia*, JANE'S DEFENSE WEEKLY, June 5, 1996 (reporting on the contracting out to Military Professional Resources of the undertaking of the U.S. Government to train the "Federation Army" of Bosnia-Herzegovina); Mark Thompson, *Generals For Hire*, TIME, Jan. 15, 1996 (private military training firm may train Muslims.)

10. Thus, in the United States, the provision of sleeping accommodations for prisoners and their supervision is extensively contracted out to private parties. For the legal implication of the privatization of the prison system in the U.S., *see generally* Ira P. Robbins, *Symposium: Privatization of Prisons; Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813 (1987). *See also* John G. Dipiano, Note, *Private Prisons: Can They Work? Panopticon in the Twenty-First Century*, 21 J. CRIM. & CIV. CON. 171 (1995); Kenneth L. Avio, *Private Prisons: An Economic Analysis of the Model Contract and Model Statute for Private Incarceration*, 38 AM. U. L. REV. 531 (1989); Brian B. Evans, Comment, *Private Prisons*, 36 EMORY L. J. 253 (1987).

11. *Compare Testimony of James A. Waddell Before the Small Business Committee of the U.S. House of Congress*, April 14, 1994 ("Privatization is the process of transfer-

Although routinely justified on the classic economic grounds of productive and allocative efficiencies, it is simultaneously advanced as a necessary component of political liberalization. In the most commonly idealized image of privatization, a state divests itself completely of all interests in a commercial venture, and relegates its involvement in the affairs of that entity solely to that of an impartial regulator, leaving it to the ingenuities of profit-maximizing entrepreneurs to create national wealth. By and large, this form of "privatization" accurately defines the process in a very limited number of societies and cases, notably the United Kingdom since 1984.<sup>12</sup> But even in some of these cases, the practice is muddied up by the government retaining a "golden share" which empowers the government to intervene at its discretion — usually said to be in extraordinary circumstances — and to exercise a veto over otherwise legitimate managerial decisions of the entity.<sup>13</sup> In the vast majority of cases, such complete disinvestment of state ownership and near-complete relinquishment of governmental control constitute the exception rather than the rule.

These definitional ambiguities are borne out in the mechanisms employed to realize the object. They range from "partial privatization," in which the state retains some ownership, exercising only such control as it would be entitled to were it a private shareholder, to "commercialization," in which government ownership and control (nominal and real) re-

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ring productive operations and assets from the public sector to the private sector. Broadly defined in this fashion, privatization is much more than selling an enterprise to the highest bidder, as it included contracting out, leasing, private sector financing of infrastructure projects, liquidation, mass privatization, etc. My testimony will argue that there is no single "best approach" to privatization; the appropriate privatization path depends on the goals that the government is seeking to attain, the individual circumstances facing the enterprise, and political context of the country.")

Although this description of "privatization" suggests its affinity with "economic liberalization," it is worth noting that the two concepts are not necessarily always in coincidence. As explained in the African context, economic liberalization — at least as pushed by such international financial institutions as the World Bank and the International Monetary Fund — may entail greater rather than less state involvement. Nonetheless, privatization is properly viewed as a subset of the now-dominant neoliberal order.

12. See e.g. Steven L Wolfram & Bruce C. Bennett, *Multinational Offerings: A United States Perspective After British Telecom, British Gas, and British Airways*, 1987 COLUM. BUS. L. REV. 339. Similarly, while "privatization" has not been a dominant feature of political economy in the United States, the few examples of privatization of government-controlled commercial entities such as Conrail and some data-gathering agencies in the U.S. Department of Commerce have been of this variety.

13. On the use of the "golden share" in French and British privatizations, see e.g. Alexander Marquardt & Ellen H. Clark, *French Privatizations and International Capital Markets*, 15 N.W.U. J. INT'L. L. & BUS. 408, 417-18 (1994).



main complete, but operators are given a free hand *de jure* (and may be allowed *de facto*) to operate the enterprise as an economic profit-seeking entity that responds directly to market forces,<sup>14</sup> to “denationalization,” in which state ownership is “formally” abolished (or more likely reduced), but *de facto* control remains effectively in the hands of state-directed bureaucrats or employees.<sup>15</sup>

The structure adopted by a particular society doubtless reflects its peculiar political economy. In all cases, however, the lawyer as an artisan of the art of negotiation, draftsmanship or advocacy plays a central role; for whatever the socio-political or economic structure of the society, a continuing vital reality is that concepts of ownership and control are neither self-defining nor self-enforcing, but are directly molded and fashioned by the contingent interactions of influential persons and institutions within the society. Whether in the West or in the East, whether in capitalist or communist societies, neither ownership nor control is ever fully vested or fully denied to an entity. Ownership entails some but by no means absolute control, and attributes of ownership unavoidably inhere in the concept of control.<sup>16</sup> Indeed, much of the work of economic law is dedicated to seeking to arbitrate the shifting margins of the rights attributable to these concepts, and as I shall discuss below, privatization, however embraced, does not remove this regulatory function of the state.

The idea of privatization is not a new one. Although most profoundly actualized only in the last decade, its roots lie quite sometime further back. But contrary to the dominant literature of the 1960s and 1970s, which drew a distinction between “legal” monopolies in which state intervention was thought advisable to effectuate social equity and economic development, and “natural monopolies,” in which state intervention was essential to assure allocative equity and efficiency, the privatization movement of the 1980s and 1990s has not endowed special significance to these distinctions. Privatization has occurred as readily in natural monopolies (necessarily interdependent networks of “essential facilities” such as transmission lines for “public utilities”), as in legal monopolies, such as the generation of electrical power, mail delivery, and ownership of transportation depots; i.e. assets that although readily replicable derive their superior economic value only as long as their economic scarcity is promoted through the legal regime.<sup>17</sup> Nor have the ex-

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14. See *infra* notes 76-80, 112-115 and accompanying text.

15. Much of the privatization in Central and Eastern Europe and the CIS states would appear to fall into this category.

16. See e.g. Note, *Russian Property Law, Privatization, and the Right of “Full Economic Control,”* 107 HARV. L. REV. 1044 (1994).

17. Compare MARGARET THATCHER, *DOWNING STREET YEARS* at 668-87.

tractive industries — the mining of raw materials and the exploitation of natural resources such as forestry products — necessarily been deemed “national patrimonies” beyond the power of a transient government to dispose of.<sup>18</sup> Rather, the central focus of current privatization movements has been the structure of the process, and thus, despite the clear ideological underpinnings of privatization, this focus has effectively channelled attention to matters of practical legal and economic choices: assets sales versus securities underwritings, public offerings versus private placements, limited consortia biddings versus mass vouchers. In these, law has played at least a nominal visible role, and the lawyer, undoubtedly a central role.

### III. LAW AND LAWYERING IN THE PRIVATIZATION PROCESS

Few processes better demonstrate the paradoxical and complementary relationships of political ideology and legal pragmatism than the tackling at the global level of “privatization.”<sup>19</sup> The ascendancy of mixed economies in the industrialized capitalist nations of the world in the post-World War II era assigning to the state not simply a regulatory function, but planning, control and even ownership roles in “key sectors” or “commanding heights” of the economy,<sup>20</sup> generated lively academic discussions among social scientists about the nature of the role of the state in the economy. The obvious relevance of political ideology in the discussion was clear; for at one extreme lay the overthrown 19th century “laissez-faire” industrial capitalism of the poor laws and the robber barons, and at the other the Leninist-Marxist gospel of state ownership and control of all means of economic production.<sup>21</sup> Both ideologies were given formal expression in the network of rules and regulations that defined ownership, use and transfer rights on the part of the individual or the state. It is in the extent to which these so-called “property rights”

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18. Thus, although many Latin American countries, notably Mexico, in response to their historical experiences constitutionalized state ownership of some basic resources such as mineral products, these limitations have proved at most to be weak restraints on the privatization process. In Mexico, for example, this constraint has at best slowed down the privatization of the petro-chemical industry.

19. For a first-hand account at the highest level of the mix of politics and economics in the privatization decision-making process, see MARGARET THATCHER *supra* note 17, at 668-69, 685-87.

20. See e.g. CHARLES E. LINDBLOM, *POLITICS AND MARKETS* (1977); JOHN KENNETH GALBRAITH, *INDUSTRIAL SOCIETY*. Cf. A. Allan Schmid, *State and Market: When Command Goes Capitalist*, *ECONOMIC THOUGHT AND POLITICAL THEORY*, David Reisman, Ed. (1994) at 129 (discussing the interplay of command and exchange in the transitional economies of post-cold war Eastern Europe.)

21. See CHARLES E. LINDBLOM, *supra* note 20.

shape and are shaped by the various privatization schemes that constitute the bulk of the intellectual discussion on "privatization."<sup>22</sup> Meanwhile, much of the practical lawyering skills are devoted to the instrumental packaging and allocation of these "rights" through formal legal documents. The efficacy of the legal structures now being erected over the long run is yet to be proved, but there seems little doubt that it will depend in significant measure on how accurately these structures approximate and assimilate (or are assimilated into) the social structures, political habits and economic propensities of the composite interests whose interactions shape the relevant national communities. It is thus worth observing that while the intellectual discourse on privatization prior to the 1980s focused on defining the range and character of products and services best left to the "market" and those more efficiently and effectively organized under the aegis of governmental power,<sup>23</sup> the emergence of privatization as a global phenomenon in the 1980s was not a thought-through response or product of these discussions. Rather, it was the expedient and in many ways accidental product of thoroughgoing political fisticuffs. Britain, and more specifically her combative former Prime Minister, Margaret Thatcher, blazed the path. As she readily admits in her autobiography, whatever economic sense there was for privatization, the political and ideological considerations were far more important.<sup>24</sup> On the latter point, it was not simply that the state had no business running essentially commercial concerns like British Steel or British Airways, but privatization was an instrument of the Conservative Party's war against Left Trade Unionism.<sup>25</sup>

Although engaging in very little domestic privatization of its own, it was ultimately the political power and economic resources of the United States that assured for privatization a more than passing notoriety. U.S.

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22. See e.g. Note, *Russian Property Law, Privatization, and the Right of "Full Economic Control"*, *supra* note 16; Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. L. 183 (1995). See generally DAVID J. DONALDSON & DILEEP M. WAGLE, *supra* note 7.

23. See generally Charles E. Lindblom, *supra* note 20.

24. MARGARET THATCHER, *supra* note 17 at 668-69.

25. *Id.* at 686. Notably, this posed an ironic difficulty for the privatization of the coal-mines, the hot-bed of British left-wing unionism. An element of privatization intended to diffuse as much as possible Union opposition was to require sizeable worker purchase of shares in the privatized company. The most productive mines in Britain, and those most likely not to be closed down just before or immediately after privatization, also happened to be worked by the most radical members of the Coal Miners' Union. As a consequence, the one industry that the Conservative Party would have most loved to privatize presented the greatest opportunity for windfalls of ownership, control and employment to its most hated adversary.

lawyers, accountants investment bankers, economists and hedge-fund speculators fanned out to all corners of the globe to spread the gospel of the triumph of entrepreneurial private capital over statist control or ownership of the means of production, accumulation or distribution. In all four corners of the globe, they found willing converts, but rarely because privatization made intellectual sense.

Privatization experiences in Eastern Europe<sup>26</sup> as in many Latin American countries<sup>27</sup> were driven as much by internal political factors as by the external economic benefits to be derived from the practice. In both societies, the process was integral to the redefinition of the structure of the society in which the authoritarian or corporatist role of the state has been supposed to take a back-seat to the promotion of a liberal civil order dominated by an ethos of local individual entrepreneurialism, fostered by foreign capital, and cemented by free market exchange. In Eastern Europe, privatization was essential to the new post-communist political order because it directly undermined the central tenet of communism — at least as practiced in those societies — state ownership and control of the means of production, accumulation and distribution. Those who challenged thus found in privatization a graphic (and some have said “revolutionary”)<sup>28</sup> demonstration of their rejection of the past, and a concrete statement of the new future. Acceptance of privatization could thus form a litmus test for distinguishing between the old and the new.

“Mass” or “voucher” privatizations symbolically express the antipathy of the new emerging order to the communist past which touted state ownership of all means of production. Symbolically satisfying though mass privatizations may be, they suffer from significant practical shortcomings. Mass privatizations do not (at least as an initial matter) raise substantial pools of capital. Furthermore, they are highly unlikely to result in changes of managerial control, nor in the infusion of new expertise. Thus, to the extent that the economic underperformance of enterprises under the old communist order was attributable to undercapitalization, the misallocation of capital, and poor managerial supervision and control, mass privatizations are unlikely to provide solutions in the short run. But they nonetheless serve the highly legitimating purpose of presenting an aura of distributive fairness, and of giving a significant

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26. See e.g. JOAN M. NELSON, *INTRICATE LINKS*; BEVERLY CRAWFORD, *supra* note 8; KAZIMIEREZ POZNIANSKY, ED., *THE EVOLUTIONARY TRANSITION TO CAPITALISM* (1995).

27. See e.g. Werner Baer & Melissa Birch, *Privatization and the Changing Role of the State in Latin America*, 25 N.Y. U. J. INT'L L. & POL. 1 (1992); Leslie Elliott Armijo, *Menem's Mania?: The Timing of Privatization in Argentina*, 1 S.W. J. L. & TRADE AM. 1 (1994).

28. See generally CRAWFORD, *supra* note 8.; POZNIANSKI, *supra* note 26.

proportion of the public a vested interest in the success of the new order. Moreover, to the extent that only a fraction of the enterprise economy undergoes mass privatization, the significant remainder can be subjected to other forms of privatization, thereby providing an avenue for reconciling the rhetoric of "democratic capital" with the reality of exclusivity essential to capital accumulation and self-sustaining formation. Here, lawyers and investment bankers can and have been highly influential. They have sought to reconcile the political imperatives of mass participation in the restructured economy with the resource demands for capital, managerial expertise, rationalized inputs, standardized and predictable outputs. Because these latter often require not simply the wholesale dismantling of existing enterprise structures but the infusion of new managerial personnel and lines of control, lawyers have been confronted with elemental issues of devising and refining appropriate conceptual legal norms in the areas of ownership, use and control of privatized assets,<sup>29</sup> and distributing rights between foreign and domestic holders of these rights. The unbundling of property and contractual rights, then, and their repackaging into new institutional arrangements have been the mainstay of the privatization process in Eastern Europe. The extent to which these can be achieved through fiat — legislative edicts and presidential decrees and proclamations — is a source of disagreement among observers.<sup>30</sup> In large measure, the debate raises the question of the extent to which "the law" represents ideological commitments, and the extent to which it reflects practical political and economic compromises.

The state in Latin America has never arrogated to itself sole ownership or control of all means of production, accumulation or distribution. Even in the most corporatist of Latin American states, private ownership, management and control of economic assets were the norm. State ownership and control of productive economic assets, the range of which has vacillated over time,<sup>31</sup> remained concentrated in such predictable spheres

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29. See generally, Note, *Russian Property Law*, *supra* note 16.

30. *Id.* See also Douglas R. Haddock, *Private Property and Russia's Leap of Faith*, 24 ST. MARY'S L.J. 495 (1993); Kim Reisman, Note, *The World Bank and the IMF: At the Forefront of World Transformation*, 60 FORDHAM L. REV. 349 (1992); Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. L. 183 (1995). Cf. Enrico Colombatto & Johnathan R. Macey, *Path-Dependence, Public Choice, and Transition in Russia: A Bargaining Approach*, 4 CORNELL J.L. & PUB. POL'Y 379 (1995) (applying public choice methodology to explain the packaging and distribution of "new rights" in property in the emerging/transition economy of post-Soviet Russia.)

31. Compare Amy Chua, *The Privatization-Naturalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995) (discussing the cyclical history of phases of "privatization" and "nationalization" in Latin America and South East Asia.)

as raw material extraction, capital intensive heavy industries, finance, and armaments production. The sizeable remainder of the economy engaged in import substitution industrialization, agriculture, and the provision of basic services such as health, housing, primary and secondary education has always been in private hands; sometimes effectively regulated, at other times not.<sup>32</sup> Thus, state ownership in much of pre-Brady Plan Latin America could be viewed as a heightened form of state regulation appropriate where traditional administrative regulation was deemed insufficient to protect large scale national economic interest.

It might be thought, therefore, that contemporary privatization in Latin America reflects a belief more in its economic benefits than in its utility as an ideological or political tool. Indeed, much of the justificatory rhetoric of privatization in these countries — especially in the larger economies of Argentina, Brazil, Chile and Mexico — has been framed in economic terms: the debureaucratization of decision-making, the allocative efficiency of resource management and utilization, incentives for the repatriation by nationals of capital secreted in foreign financial institutions, the encouragement of foreign investment, and the like.<sup>33</sup> Although these justifications are not without foundation, and are indeed buttressed by the weak hand these countries had in playing the external debt game of the 1980s,<sup>34</sup> it would be shortsighted to overlook the significance of political forces in shaping the form of privatization in these countries. In Mexico, for example, privatization took an essentially outward looking approach in part because an inward looking one would have directly contested the political legitimacy of the ruling Institutional Revolutionary Party.<sup>35</sup> In Argentina, privatization became a means by which the Peronist

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32. Compare HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989) (discussing the pervasiveness of the “informals” consisting of private actors in such diverse areas as small scale manufacturing or “industry,” trade or commerce, transportation and housing).

33. See e.g. Rafael Porrata-Doria, Jr., *Privatization of Public Enterprises in Latin America*, 87 AM. SOC. INT’L. PROC. 124 (1992); David D. Hale, *Stock Markets in the New World Order: Emerging Capital Markets*, 29 COLUM. J. WORLD BUS. 14 (1994); Survey, *Debtor’s Prison — Third World Finance*, THE ECONOMIST, Sept. 25, 1993 at 15. On the significance of “flight capital” to the privatization process, compare Thomas M. Reiter, *The Feasibility of Debt-Equity Swaps in Russia*, 15 MICH. J. INT’L L. 909 (1994).

34. Specifically, policy-makers in the United States and the International Monetary Fund insisted on structural reforms within these Latin American economies as prerequisites for substantial debt refinancings such as those extended under the “Brady Plan.”

35. See e.g. JORGE G. CASTANEDA, *THE MEXICAN SHOCK: ITS MEANING FOR THE UNITED STATES* (1995); Anne Swardson & Martha M. Hamilton, *Investment Funds Link Economy Series*, WASH. POST, Aug. 21, 1995 at 2. That legitimacy has been further undermined by recent highly publicized disclosures on dealings between members of the Salinas family and the ruling party, on the one hand, and Mexican businessmen who

President has not only maintained but enhanced his grasp on power.<sup>36</sup> Not surprisingly, then, whether in Russia or Poland, Mexico or Argentina, the privatization process has been tainted by stories of massive corruption: the use of entrusted political power to siphon off public assets for private gains on grossly unequal exchange terms.<sup>37</sup>

In all of these cases, law and lawyers have been instrumental in fashioning, advising on, and implementing privatization. Along with investment bankers, they have also been the loudest cheerleaders of the privatization parade.

As a practical matter, legal interventions in contemporary privatizations occur at three levels: legislation drafting, administrative implementation and client counselling and representation. Mired in the technical details evoked by these classic lawyering roles, much of the legal literature on privatizations has concentrated on the assertedly complicated practical puzzles that must be resolved, and the sometimes brilliant troubleshooting solutions that the best trained Western legal minds have divined for them. Without detracting from the value of these functional solutions, a proper appreciation of the role of law in the process requires exploration of the nature of the legal service appropriate to the stage, not simply what is provided. Further, that demand must be viewed in the context of the legal structure of the privatizing economy.

Thus, with regard to the enactment of the governing legislation,<sup>38</sup> the utility of the lawyering function depends less on the clarity and specificity of language than on the effective integration of the process with the administrative structure of the society. The latter is itself a direct product of the long-term experiences of the society. A lawyer cannot rely simply on her draftsmanship or even her prior experiences with other privatization schemes, but must take into account the constitutive political and administrative structures of the privatizing state. The British experience,

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benefitted from privatization programs on the other.

36. See Leslie Elliott Armijo, *supra* note 27.

37. For example, in Mexico, the Salinas family alone reportedly obtained in excess of \$100 million as part of the privatization process, and the pervasiveness of corruption in Russian privatization has become virtually a daily item in news reports of that country. See e.g. Joel Millman, *Mexico Probe Calls a Sell-Off Suspicious, Questions Role of Ex-President's Brother*, WALL ST. J., Sept. 27, 1996 at A15; cf. Laurie Hays, *Friend in the Citi: Private Banker Wooed, Then Sought to Drop Mexico's Raul Salinas*, WALL ST. J., Nov. 1, 1996 at A1 (describing relationship between Citibank and brother of former Mexico President in moving money out of Mexico into anonymous/pseudonymous Swiss banking accounts).

38. See e.g. MARGARET THATCHER, *supra* note 17 at 684-85. See also Douglas Webb, *Privatization in Latin America and the Caribbean: Legal Issues*, 87 AM. SOC. INT'L PROC. 105, 111-19 (1992).

contrasted with the East European and Latin American approaches, illustrates the point.

Given British constitutional structures, each privatization necessitated a specific Act of Parliament which authorized the disposition of specific governmental property, and the mode of that disposition. The text of the legislation was particular to the interest being divested, and the manner of the divestiture. Although these decisions became law by virtue of their adoption by Parliament, they invariably represented the policy objectives of the ruling Conservative Party. Relevant negotiations and compromises were struck prior to the enactment of the legislation, and these were made within a constitutional framework of rigid party discipline, a publicly self-effacing but subterraneously powerful and highly disciplined permanent bureaucracy or civil service, and a political framework whose legitimacy is for all intents and purposes no longer contested. The orderliness of the political process was thus assured, and the compromises that needed to be struck tended to be with managers of the entities to be privatized, rather than with competing social and political forces within society.<sup>39</sup> These compromises generally revolved around specific issues of implementation rather than broad ideological issues. Once struck, however, the agreements were implemented through more or less transparent processes whose viability was assured by the stability of the participating institutions.

A society like Britain with such an insulated tradition of more or less transparent appreciation of the rules of the game can rely on positive legislative enactments to provide a surefooted roadmap for the privatization of the enterprise that it covers. Participants can reliably assume that the legislation will not turn out to be a mirage because the administrative structure responsible for the implementation of the legislation is no less well institutionalized than the enacting body, and the implementing rules can be expected to fall within a reasonably defined field. In such an environment, an open commitment to mass participation can be made with the certainty that past experience is a good predictor of future outcome.

Other privatization schemes have sought to mimic the form of the British practice. However, lacking many of the institutional features that characterized the British polity, it is hardly surprising that the results have been substantially different. For example, although lawyers are frequently called upon to draft a presumptive constitutive document to govern the privatization process, the scope of these documents has been but anything like the particular privatization documents employed by the U.K. government. Thus, the constitutive documents in countries like

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39. MARGARET THATCHER, *supra* note 17, at 686.



Mexico and Russia often have covered several disparate cases of privatization, and left many of the crucial decisions to the post hoc discretion of the executive branch and its administering agencies.<sup>40</sup> Given the absence in these societies of a tradition of strict adherence to well-established administrative rules and practices, one can hardly rely on such legislation for the sort of transparent rules generally associated with the "rule of law." The result has been that the legislative process in these societies have amounted to invitations to bid rather than the ratification of agreements already arrived at. In this setting, to insist on transparency may be tantamount to foreclosing the possibility of transactions. Since legislation is not a blueprint of a consensus already achieved, it is to the administrative process that the lawyer must turn to have the deal done. Formal legislation is not so much a statement of certain outcome as it is a statement of hypothetical objectives. The function of law is not so much to define the process by which such objectives are to be achieved as to invite agility in the reconciliation of the potential methods for achieving those objectives with the institutional constraints within which all large organizations must function.

To say that the administrative processes by which privatization policies in these societies must be implemented is not transparent is thus not to assert that law plays no role here, nor even to suggest that the role played by law and lawyers in this setting is somehow inferior to the formal conception of the "rule of law." It is most certainly not to argue that lawyers are unimportant. To the contrary, law broadly understood as a social phenomenon, and lawyers as its agents, are active participants in the process. The central point worth making here is that administrative processes are born of institutional needs. They embody and reflect bureaucratic responses to the demands of those interests that they are supposed to serve. Thus, as institutional accommodations, administrative processes are built up by accretion and adaptation. They are not shaped by fiat.

Privatization may mark a revolutionary break with tradition, placing new institutional demands on the bureaucracy. It is hardly surprising that in this instance, Western lawyers, used to operating in a market-driven economy, are resorted to for advice and representation by the state and private parties alike. Where such counselling or representation is limited to providing consultation, one can scarcely debate its rectitude. Anecdotal evidence abounds, however, that the role of the Western legal practitioner in these so-called transitional societies extends well beyond consultation

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40. See e.g. Richard C. Schneider, Jr., *Property and Small-Scale Privatization in Russia*, 24 ST. MARY'S L.J. 507, 513, n.23 (1993).

and document drafting to include advising on and implementation of wholesale institutional changes in the administrative state.<sup>41</sup> The undertaking of this task is particularly problematic given the interdependence of economic institutions, on the one hand, and the necessity for staged reform on the other. The remainder of this piece reflects on these points in the context of the privatization process in sub-Saharan Africa, generally, and in Nigeria in particular.

#### IV. PRIVATIZING AFRICA'S ECONOMIES

Sub-Saharan Africa's economic performance during the last two decades has been abysmal.<sup>42</sup> Beginning with the reverberations of the 1973-1974 quadrupling — virtually overnight — of the price of oil, whatever dreams of economic prosperity these societies had entertained at the dawn of their independence a decade and a half earlier were swept away by the global inflationary effects of the oil price rise. For a while, these effects were masked by the nominal increases in the price of other raw commodities which formed the staple of African exports, the extension of concessional credits to hard-pressed African countries by the newly enriched oil exporters and the international financial intermediaries awash with "petro-dollars," and the sense of empowerment engendered by the rhetoric of a "New International Economic Order."<sup>43</sup> With the second oil-price shock of 1979, the ascendancy of conservative governments in Britain and the United States (1979-1981), and the deflationary monetary policies of Western governments in these years, Africa's economic fortunes plunged into the doldrums.

With the arguable exception of the small southern African country of Botswana,<sup>44</sup> every single sub-Saharan African country experienced rel-

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41. See e.g. Douglas Webb, *supra* note 38. (In a presentation attended by this author concerning Eastern Europe, an American lawyer described how his team had participated directly in selecting from among Western bidders those who ought to participate in a joint venture with the East European state.)

42. The term as an economic expression is derived from World Bank usage. See e.g. SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH (1989).

43. See generally Maxwell O. Chibundu, *Law in Development: On Tapping, Gourd- ing and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. (forthcoming in 1997); CHARLES OKOLIE, *THIRD WORLD PERSPECTIVES ON INTERNATIONAL LAW* (1979).

44. See e.g. PIERRE DE TOIT, *STATE BUILDING AND DEMOCRACY IN SOUTHERN AFRICA: BOTSWANA, ZIMBABWE AND SOUTH AFRICA* (1995); Don L. Boroughs & Kevin Whitelaw, *Where U.S. Aid Works*, U.S. NEWS & WORLD REPORT, May 6, 1996, at 52; John D. Holm, *Democratization & Africa. Botswana: an African Success Story*, CURRENT, Oct. 1994, at 36; David L. Peterson, *Debunking Ten Myths About Democracy in Africa*, THE WASHINGTON QUARTERLY, Summer, 1994, at 129. Compare William Easterly & Lant Pritchett, *The Determinants of Economic Success: Luck and Policy*, FINANCE AND DEVEL-

ative and absolute decline in the standard of living of the typical member of its society during the 1980s.<sup>45</sup> While civil war, drought, and internal political instability accounted for some of this underperformance, it was also clear that pervasive economic mismanagement, the existence of poor infrastructure and the organizational incompetence of the state and its civil servants contributed to the continent's woes. Finally, there was the issue of the debt overhang. As was the case with Latin America, many African countries had sought to meet the added burdens to their new economies through extensive borrowings in the international financial markets. Unlike Latin American countries, however, most of that borrowing came in the form of concessional loans and stand-by arrangements with the World Bank, the International Monetary Fund and the various development agencies of the wealthier industrialized countries. When capital dried up in the 1980s, renegotiating these arrangements was a political as well as an economic undertaking.

The role of the world Bank was particularly notable. With a history of active involvement in project financing in Africa,<sup>46</sup> the Bank aroused much less visible hostility from Africa's political leaders and intelligentsia than did the IMF and foreign government's aid agencies such as the U.S. Agency for International Development, or the British Overseas Development Council. Thus, it fell primarily to the World Bank to imple-

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OPMENT, December, 1993, at 38 ("[O]nly four countries [Botswana, Korea, Singapore, and Taiwan, Province of China] were in the top one tenth of the growth rates in both 1960-73 and 1974-88").

The central point of these writings is effectively captured in the following snapshot: "The land-locked African nation of Botswana, is predominantly wilderness and 'bush'. In fact 84% of the country's mass comprises the Kalahari desert and Botswana . . . [Yet] Botswana should not be measured with the same yardstick that applies to some of the other countries of sub-saharan Africa. For it is not the stereotypical poverty-stricken under-developed, one-party state or dictatorship. Rather, Botswana is an affluent, comparatively rich, strong and stable multi-party democracy with a history of sensible government and carefully planned development. As a result, it now has the fastest growing economy in Africa."

Martin Warwick, *Out of Africa; Botswana's Botspack X.25 Data Network*, COMMUNICATIONS INTERNATIONAL, Jan. 1994 at 58.

45. This is even true of three other often cited examples of "Africa's few success stories" in the first half of the 1980's: Kenya, Cameroon and Cote D'Ivoire. In the case of Nigeria, despite being an oil exporter generating revenue in-flows in excess of \$200 billion between 1975-1995, the country sustained a real decline in per capita income of over 10%. See e.g. World Bank *Nigeria's Structural Adjustment Program* at 73 (1994).

46. Of particular relevance here is the work of the International Development Agency, an arm of the International Bank for Reconstruction and Development which extends near-interest-free loans with exceptionally long maturities to the poorest countries.

ment (or more correctly, to recommend the implementation of) "structural adjustment policies" in African countries.<sup>47</sup>

While the specifics of the policies varied from country to country, their general tenor was clear. Paradoxically, African countries were asked to use state power to reduce state involvement in the economic life of the national society.<sup>48</sup> These included reduction of the civil service workforce, liberalization or reduction of licensing requirements for and tariffs on imports, devaluation of the domestic currency, removal of price-control regulations, improvement of tax collection mechanisms, and above all, reduction of governmental subsidization of both production and consumption. This last was the harbinger of privatization, for much government subsidization occurred through surplus employment and bulk purchases by parastatals.

One last catalyst propelled the acceptance of privatization in sub-Saharan Africa. In the quest for "modernity" through economic growth, African societies are remarkably nondiscriminatory in their choice of means. More often than not, they have adopted the prevailing doctrine with relatively little regard for the suitability of the policy for the historical, social or structural context of their societies.<sup>49</sup> Thus, in the early 1960s, the newly independent countries, despite their anticolonial political ideology, accepted en masse the then dominant Keynesian "liberal internationalism" that assigned to the government the role of "priming the pump" of economic growth. The government, while abstaining from direct intervention, nonetheless made its influence felt through active fiscal policies such as the creation of tax holidays for the benefit of preferred "pioneer" industries.<sup>50</sup> This approach was borrowed directly from the departing colonial administrators, and was sponsored in large measure by

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47. These policies were not unlike the "conditionality" terms insisted on by the IMF as a prerequisite for access to IMF stabilization facilities. Indeed, in many countries, the IMF, the World Bank, the "Paris Club" (an intergovernmental gathering of "lender agencies), and the "London Club" (a borrower-country-specific gathering of private lenders) often worked in tandem to restructure payments due from indebted countries. See generally THOMAS J. BIERSTECKER, *INTERNATIONAL FINANCIAL NEGOTIATIONS* (1992).

48. See e.g. Thomas J. Bierstecker, *The Triumph of Neoclassical Economics in the Developing World: Policy Convergence and Bases of Governance in the International Economic Order*, GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS, JAMES N. ROSENAU AND CZEMPIEL, EDS. at 108-110, 116-119.

49. For the development of this argument in the Nigerian context, see *infra* note 74 and accompanying text.

50. See e.g. Yitzak Hadari, *The Role of Tax Incentives in Attracting Foreign Investments in Selected Developing Countries and the Desirable Policy*, 24 INT'L LAW 121 (1990); Richard J. Faletti, *Investing in Nigeria — The Law, Good Intentions, Illusion and Substance*, 5 J. INT'L. BUS. 743 (1983).

the new development consultants who were beginning to emerge as recognizable cadres in the international financial institutions and in academic circles in the U.S. and Britain.<sup>51</sup> In a pattern that was to be repeated all too frequently, little attention was devoted to establishing the efficacy of these policies in the specific African environment into which they were being introduced. How responsive to tax policies, for example, was the establishment of basic manufactures? To what extent was the setting up of these "pioneer industries" more likely to be influenced by labor policies, import and export trade regimes, or political stability? These issues were generally not thought to be pertinent because they had not been prefigured in the British or French colonial experiences, in which the latter factors had been taken as given, and not likely to vary.

Barely a decade later, the Keynesian policies were eclipsed by the rhetoric of nationalism in economic development. Relying on theoretical and doctrinal imports from Latin America, African countries sought to pursue economic growth through policies of "import substitution industrialization," and "nationalization" or "indiginization" of sectors of the economy. Invoking the motif of centralized planning of the national economy,<sup>52</sup> African governments deluded themselves with the illusion that the central government could effectively manipulate the economy to yield specified results during identified periods of time. Little attention was paid to the availability of the necessary managerial skills or of sufficient internally generated savings to meet capital demands. Nor did these policies take account of external shocks such as those represented by inflation in the price of oil and of manufactured imports, and of dramatic declines in the terms of trade for the raw products that were the main exports of African economies.

As economic conditions became progressively worse in the 1970s and 1980s, African polities looked more and more to staccatic-speaking but intellectually ill-prepared junior military officers to fill the gaping holes in national leadership. But young army officers fared no better in dealing with Africa's economic problems than had its gerontocratic politicians. Pervasive corruption, persistent hunger and famine, the continuing rationing of basic necessities, high rates of unemployment, and the very visible deterioration of basic educational, health and transportation infrastructures made all too obvious the continent's economic plight.

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51. See generally ANN O. KRUGER, *THE POLITICAL ECONOMY OF POLICY REFORM IN DEVELOPING COUNTRIES* (1993); PETER T. BAUER, *REALITY AND RHETORIC: STUDIES IN THE ECONOMICS OF DEVELOPMENT* (1981).

52. So complete was the importation of the idea that most plans mimicked the five year period then common in Eastern Europe and South America.

It was at this point that privatization appeared to African policymakers as a viable tool of economic growth. Coming as a recommendation from Western consultants or as a dictate of Western political leaders, it might have been ignored. However, comrades in Latin America and in *perestroika* Russia and Eastern Europe were grasping onto privatization as a life-preserver. Moreover, the political environment between 1989-1992 in Africa was remarkably restive. A population long quiescent and seemingly capable of passively accepting the most atrocious misrule was beginning to bestir itself, and to demand a voice in the choice of its leaders.<sup>53</sup> For those seeking power in the emerging new order, privatization offered a distinctive and as yet untried policy proposal. Consonant with emerging trends in other parts of the world, it promised the possibility of unburdening the public fisc from the drain of funds that was the legacy of the many ill-conceived public projects that were acquired in the 1970s. Further, it had the added advantage of offering plausible sources of spoils for the new power elite.

Privatization, in its various incarnations,<sup>54</sup> was thus embraced by the renascent Africa of the 1990s.<sup>55</sup> Not only did it find acceptance among traditionally conservative polities like Cote d'Ivoire, Kenya and Nigeria, but it was adopted by hitherto self-proclaimed socialist societies like Tanzania, Zambia and Zimbabwe. Not surprisingly, some of its strongest adherents were those societies that experienced revolutionary transformation such as Ethiopia and Eritrea. For these countries, privatization genuinely marked a symbolic break with the past, a means of obtaining foreign assistance from the West, and the possibility for a restructured and differently functioning society.

The interactions of two entities most vividly demonstrated the coming of age of this "second revolution" in Africa, and their fortunes raise the question of its survival. In Zambia, in 1992, the twenty-five-year-old one-party rule of Dr. Kenneth Kaunda's United National Independence Party (UNIP) came to an unexpected end when it was defeated in the first multiparty elections in over twenty years by Chiluba's Movement for Multiparty Democracy.<sup>56</sup> Ostensibly a life-long trade unionist, Mr.

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53. See generally JENNIFER WIDENER, ED., *ECONOMIC CHANGE AND POLITICAL LIBERALIZATION IN AFRICA* (1994).

54. See *supra* notes 9-15 and accompanying text. The forms of privatization in Africa are more fully developed in the Nigerian context in Part IV, *infra*.

55. See generally REXFORD A. AHINE & BERNARD KATZ, EDs., *PRIVATIZATION AND INVESTMENT IN SUBSAHARAN AFRICA* (1991).

56. The Washington Post accurately represented the dominant view of Western journalists when it trumpeted that:

Frederick Chiluba's victory in Zambia's first multi-party elections in nearly 20

Chiluba had campaigned for power by denouncing not only President Kaunda's "one-party dictatorship," but more particularly the inherent corruptibility of the system given the concentration of economic power in the "nondemocratic" state. The answer that newly elected President Chiluba prescribed was the "market," and more particularly "privatization," especially of the copper industry, Zambia's primary foreign exchange earner.<sup>57</sup>

In this recommendation, President Chiluba was abetted by Mr. Sardonis, a banker who, through his Meridian-BIAO Bank, headquartered in Zambia, sought to create the first privately-owned Africa-based commercial banking concern. Mr. Sardonis saw his bank as a vehicle for financing privatization programs throughout the continent.

By 1995, however, this alliance of new politics and new capital had foundered. Zambia's democratic experiment was faltering, and Meridian-BIAO had failed. Employing the standard legal formalism of dictatorial rule, Mr. Chiluba was engaged in the task of "amending" the Zambian Constitution to ensure that his control over governmental power could not be effectively challenged by the one person capable of defeating him in a genuinely free and fair election: Mr. Kaunda. To this end, the Zambian Constitution was to be amended to preclude any Zambian both of whose parents were not born in Zambia (or more accurately, the British colonial protectorate of Northern Rhodesia) from holding the office of the President.<sup>58</sup> Meanwhile, the vaunted privatization of Zambia's copper

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years stands as a new high water mark in an extraordinary process of democratization in Africa that began in earnest in Zambia and other nations several years ago. Fed up with corrupt, single-party states and military regimes largely lacking in accountability, Africans have arisen in numerous lands in recent years to fight for greater freedom and better representation in their governments.

Neil Henry, *Kaunda Graciously Bows to "Verdict": Zambian President of 27 Years Leaves as Successor Sworn In*, WASH. POST, Nov. 3, 1991 at 21. See also Michael A. Hiltzick, *Voters Oust Kaunda, Zambia's Leader Since '64*, LOS ANGELES TIMES, Nov. 2, 1991 at 6, ("[T]he election stands as the most important victory so far for multiparty democracy in mainland sub-Saharan Africa, not least because Thursday's voting was conducted peacefully without any of the chaos and rioting that have marred such exercises in Gabon, Senegal, and the Ivory Coast . . . Democracy is a key issue in the region because many development officials and Western diplomats argue that Africa's widespread authoritarianism was contributed heavily to its economic decline and political stagnation."); Jane Perlez, *With Pride and Economic Pain Ahead, Zambia Swears in New Leader*, NEW YORK TIMES, Nov. 3, 1991 at 3.

57. See e.g. Colleen Lowe Morana, *Zambia; Privatization*, INSTITUTIONAL INVESTOR, Sept. 1995 at S10.

58. See e.g. *Zambian Government May Deport Ex-President as Illegal Alien*, N. Y. TIMES, Oct. 19, 1995 at A7; Lynne Duke, *Zambian Faces Difficult Reelection Campaign; Chiluba, Who Ousted Longtime Strongman, Is Now Accused of Backpedaling on Democ-*

industry has stalled.<sup>59</sup>

As for Mr. Sardonis' dream of an Africa-based continent-wide banking entity financing the revolution in privatization, it ended with the liquidation of Meridian-BIAO, and at no small cost to the already-impooverished governments of such countries as Tanzania, Kenya, Swaziland, and Zambia.<sup>60</sup>

Nor can the Chiluba and Meridian-BIAO stories be viewed as isolated failures. Whatever the initial reception of Africa's "Second Revolution," it is clear that by 1995, views had become highly polarized about the value and efficacy of the privatization process. Neither electoral politics nor the market offered the self-evident routes out of Africa's misfortunes that they had promised half a decade earlier. In much of the continent, privatization was being equated with the all-too-familiar prior experience of the politically powerful and economically well-off appropriating national wealth for "personal development." Increasingly, labor unions are demanding reconsideration of privatization programs.<sup>61</sup>

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racy, WASH. POST, July 25, 1996 at A22; *Zambia: Kaunda says In News Conference He Will Fight Chiluba, Government*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 12, 115 (available on Lexis/Nexis BBCSWB File); Judith Matloff, *Zambia's New Democracy Takes Big Step Backward*, CHRISTIAN SCIENCE MONITOR, June 7, 1996, at 6.

For a nonpartisan Zambian's statement on Chiluba's form of "democratic rule", see generally Fred M'membe, *Zambia's New President "Fathers" Orphan Democracy: Freedom of Speech One of Many Rights Ignored by Election Winners*, WORLD PAPER, NOV. 1995 at 6.

59. See e.g. Lynne Duke, *Disaffected In Zambia: Citizens Caught by Economic Ills, Power Struggle*, WASH. POST, Sept. 12, 1995 at A12; Karl Maier, *Zambia Feels Chill of the Free Market*, THE INDEPENDENT, Oct. 9, 1994 at 16.

60. See e.g. Joel Kibazo, *SA Bank Acquires Swaziland Side of Meridian BIAO*, FINANCIAL TIMES, Apr. 12, 1995 at 28; Jowie Mwiinga, *Zambia-Economy: Golden Goose Lays Copper Eggs*, INTER PRESS SERVICE, July 19, 1995 (available on Lexis in Middle East and Africa Library, Allnews File); Buchizya Mseteka, *Kenya Central Bank Shuts Down Meridian Bank Branch*, REUTERS WORLD SERVICE, Mar. 14, 1995.

61. See e.g. Alan Morris, *South Africa: Privatization Plans Test Tripartite Alliance*, INTER PRESS SERVICE, Apr. 15, 1996 (available in Westlaw, Magsplus Database) ("[d]ebates around privatization are going to challenge the strength of the tripartite alliance of the African National Congress, the South African Communist party, and the Congress of South African Trade Unions. The latter two have expressed clear opposition to privatization.") Compare R. Stephen Brent, *Tough Road to Prosperity: Slow Economic Growth Under South Africa's New Government*, FOREIGN AFFAIRS, March 1996 ("Unfortunately, the labor unions, which fear job losses and have recently threatened strikes, have hamstrung all privatization options. In this field, the government cannot afford to bow to an interest group, even one that played an important role in an anti-apartheid struggle. The interests of the unions are at odds with the national interest, and a hard choice has to be made.")



Thus, as Africa marches to the end of the millennium, an issue of central concern is whether Ashanti Goldfields or Meridian-BIAO typifies the future that lies ahead. Is privatization any more likely to survive as a tool of national economic growth than had prior experiments in import substitution, indiginization and export processing zones? Above all, to what extent is the outcome likely to be influenced by law and legal developments?

I propose to explore these issues and to offer some tentative answers by looking at the privatization process in Nigeria. While the Nigerian example may not be archetypal, it has the merit of being based on a fully constructed legal regime. To this extent, it epitomizes the strengths and weaknesses of a law-based privatization process within the constraints of a sub-Saharan African polity. Exploring the Nigerian privatization scheme thus exposes to scrutiny the relevance of law — formal and practical — in the institutionalization of a process of economic growth.

#### V. NIGERIA'S PRIVATIZATION EXPERIENCE

With a population in excess of 100 million, Nigeria is easily Africa's most populous country, being at least twice as large as any of the other countries, and comprising almost one-fifth of the continent's entire population. This potential wealth of human resources, together with its significant capacity to produce crude oil, has made it a bellwether of developments in sub-Saharan Africa. Always self-conscious of this position, Nigeria's leaders have sought to tailor their policies not only to meet internal demands, but also to accord with their perception of external expectations. The consequence is that in many ways, Nigeria's economic policies and political missteps have foreshadowed or magnified trends in other sub-Saharan African countries.<sup>62</sup> This has been the case with

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62. The seeming paradox of Nigeria's uniqueness among sub-Saharan countries in terms of access to resources, and yet its representativeness as a mirror of the plights of those countries, is only superficial. Reliance on crude oil, while different in degree, is in kind not much different from reliance on other primary extractive products. Such reliance is subject to the booms and busts that are brought on by the cyclical buffeting winds of international commodity prices and over which these nations have no control. Moreover, the administrative regimes in these countries appear totally unequipped to implement policies that would smooth out some of the effects of these peaks and troughs. Thus, although Nigeria's experience with crude oil certainly differed in its particulars from those of non-oil producing sub-Saharan African countries, it paralleled in its essential contours the experiences of Ghana and Cote D'Ivoire with cocoa, or of Zaire and Zambia with copper. Substantial primary export-generated revenue windfalls to the central government resulted in the atrophying of internal tax-collection mechanisms, the strengthening of central governmental power, and the depletion of any reserves of internal revenue-raising capacity to pick up the slack when commodity prices fell. The result was that external debts

privatization.

The privatization process in Nigeria was commenced officially with the adoption of a formal legal instrument, Decree No. 25 of July 16, 1986, which (1) stated the objectives of the program; (2) created a highly structured implementing regime; (3) purported to identify with specificity the enterprises to be privatized; and (4) outlined the rights and obligations of the privatized entities. These provisions, however, and their subsequent enforcement, must be construed against the background of the country's internal politics and economic difficulties in the second half of the 1980s.

#### A. *Prelude to Privatization*

Like virtually all sub-Saharan African countries, Nigeria's post-independence history has been beset by two core problems: how to create a nation state whose government is stable and accountable to the people; and how to promote economic growth and social well-being. In an attempt to provide answers to both, the country has fared extremely poorly as its leaders and its intelligentsia have veered from one policy to another in an effort to ride whatever wave seemed to be cresting. For the first half-dozen years following independence, electoral politics and a noninterventionist liberal economic order appeared to provide optimal solutions. A federal constitutional democratic regime tightly balanced by competing regional and ethnic loyalties encouraged private economic activities and used fiscal policies as a lure for both domestic and foreign investments. Regional governments vied with one another in creating "industrial estates," and the central government granted "tax holidays" to "pioneer" industries.

Civil political competition broke down in 1966 when young army officers, disenchanted with the results of the democratic experiment, seized power and abolished multiparty politics. In the ensuing four years of political instability — including a civil war — no dominant economic ideology emerged.

By the early 1970s, a new political structure had become rooted in Nigeria. This "diarchy" consisted of a nominally military-led government that was for most practical purposes run by a highly self-confident technocratic elite. Insulated from public pressure by the facade of military rule, and fortified by the accelerating increase of revenues from crude oil production, these "civilian commissioners" and "Super Perma-

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contracted on the basis of income flow during good times became major bottlenecks to national expenditure and political independence when international commodity prices dropped.

ment Secretaries” who had met each other in the handful of boarding “government colleges” and “missionary secondary schools,” or in the burgeoning “Nigerianized Civil Service” of the late ‘50s and ‘60s went about restructuring the economy with little interference from the remainder of the polity. Two aspects of the restructuring are particularly noteworthy. First, the central government assumed a dominant role in directing the economic life of the country.<sup>63</sup> Abandoning the previous principle of governance by which regions taxed economic activities within their geographical sphere, the new technocratic intelligentsia centralized revenue collection, and doled it out to the newly created states (itself a means of enhancing central power at the expense of the regions) on the criteria of “need” and “derivation,” the determinations of which were made on ad hoc bases and were subject to virtually no external control. Retaining the bulk of the revenues for itself, the central government moved away from a regulatory stance and began to invest directly in the economy. National five year plans, crafted by the central government, rather than being limited to indicative statements of the society’s economic objectives and means, outlined in quite comprehensive terms projected industrial and agricultural expenditures as well as social consumption and savings, much of which were to be financed by the central government.<sup>64</sup>

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63. One measure of this shift in the role of the central government is reflected by the increase in the proportion of capital expenditure in federal government expenditures net of transfers to the states from 44% in 1973 to 82% in 1977. See TOM FORREST, *POLITICS AND ECONOMIC DEVELOPMENT IN NIGERIA* at 134 (updated ed. 1996). Strikingly, according to Forrest, the overall share of federal expenditures as a percentage of gross domestic product rose from 19% in 1973 to 54% in 1978. *Id.* at 147. Although much of this increase is accounted for by the rise in current expenditures including the tripling of the federal services (excluding military) payroll from \$0.5 million in 1973 to over \$1.5 million in 1983, the period is particularly noteworthy for the sizeable direct federal capital investments. Not only did the government invest in such strategic sectors as oil and steel, but also in the mundane mercantile industries of cargo handling and freight forwarding. *Id.* at 149. In addition, it invested as well in such manufacturing industries as cement, car and truck assembling, pulp and paper production, fertilizer plants, wood and furniture production, sugar and salt refining, machine tools, production of electric meters and transformers, and the distilling of yeast and alcohol. *Id.* at 140. Yet, as Mr. Forrest observes, while such investments gave the state monopoly ownership in some areas — notably the production of fertilizer, salt, pulp and paper — “[o]verall, the state never came near to constituting a dominant force in manufacturing.” *Id.*

64. See e.g. FEDERAL MINISTRY OF FINANCE, LAGOS, NIGERIA; *GUIDELINES FOR THE SECOND NATIONAL DEVELOPMENT PLAN, 1971-1975* (1971); FEDERAL MINISTRY OF ECONOMIC PLANNING *GUIDELINES FOR THE THIRD NATIONAL DEVELOPMENT PLAN: 1976-1980* (1976); FEDERAL MINISTRY OF NATIONAL PLANNING *GUIDELINES FOR THE FOURTH DEVELOPMENT PLAN, 1981-1985* (1981).

Second, in keeping with the evolving trend in the international arena, the Nigerian intelligentsia sought to “indiginize” or “Nigerianize” the economy. The economy was divided into sectors that were segmented in terms of level of ownership by Nigerian nationals. Thus, for example, enterprises engaged in the retail of basic household consumables with relatively small capitalization had to be wholly owned by Nigerians, while substantial foreign ownership was acceptable only in those sectors involving large capital investments and superior technological know-how.<sup>65</sup>

Direct governmental ownership of industrial assets — especially by the central government — satisfied both policy objectives. The control implicit in such ownership strengthened the role of the central government vis-a-vis other institutions within the society; and such ownership was explained away as necessarily in trust for the Nigerian people who, individually, lacked the resources for direct personal ownership.<sup>66</sup>

A military “palace coup” in 1975 began the gradual disempowering of the narrow technocratic elite that had dominated policy-making in Nigeria since the end of the civil war in 1970.<sup>67</sup> This process was accelerated with the return to civil rule in 1979. Coincident with that return to civil rule was the second boom in oil prices, which generated substantial revenue for Nigeria. However, this wealth was speedily dissipated by the new political leaders, who employed it haphazardly to maintain personal power through a remarkably corrupt patronage system.<sup>68</sup> This led to the

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65. See generally THOMAS J. BIERSTECKER, *MULTATIONALS: THE STATE AND CONTROL OF THE NIGERIAN ECONOMY* (1987) (reviewing the 1972 and 1977 indiginization programs).

66. As will be developed below in *supra* note 124 and accompanying text, direct governmental ownership of assets has been favored by many members of the ruling elite in the northern part of the country as a means of counterbalancing perceived northern disadvantage in individualized competition for the accumulation of social capital. Thus, the *New Nigerian*, a newspaper that explicitly articulates the preferences of many members of that elite, in 1977 editorialized that state governments should be allocated 50% of all shares transferred under the Second Indiginization program. *THE NEW NIGERIAN*, Mar. 1, 1977, cited in FORREST, *supra* note 63 at 156.

67. One illustration of the consequence of the military's effort to chart a new direction for Nigeria is the series of cases brought in courts in Western Europe and the United States against the Nigerian government for its refusal to honor contracts entered into by the previous government. See e.g. *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (1980).

68. See e.g. CHINUA ACHEBE, *THE TROUBLE WITH NIGERIA* (1983). Accurately characterizing this period, Tom Forrest has suggested that the name of the ruling party (the “National Party of Nigeria”) was a misnomer, and that it should have been called “the Party of National Patronage.” See FORREST, *supra* note 63 at 134. See generally *id.* Chapter 8. Compare *Nigeria Under Shagari Called Garden of Graft*, *N.Y. TIMES*, Jan. 20,

misuse of national funds in the purchase and construction of uneconomic projects such as steel mills, petrochemical plants and irrigation dams that were then mismanaged.<sup>69</sup> Although the central government became increasingly involved in the economic life of the country through direct ownership of assets, its purpose and uses of these assets were devoid of economic rationality or political ideology; other than possibly self-perpetuation.

The country was thus ineffectual in dealing with the pressures placed on it by the deflationary responses of the West to the second oil crisis, and with the dramatic decline in the price of oil that ensued. The drain on the national treasury of the cost of running the new national acquisitions became severe, and access to foreign capital markets dried up as the country's external debt ballooned. Meanwhile, the same political considerations that had fueled extensive governmental acquisitions made it politically inopportune for the government to adopt conservative fiscal policies, or to allow a devaluation of the currency to reflect the country's worsening trade imbalances.

In the ensuing inflationary environment, there was yet another seizure of power by the military hierarchy, which asserted as its purpose, the restoration of "discipline" and the removal of "corruption" from the society.<sup>70</sup> The military attempted to meet these objectives through draconian measures with significant impingements on civil liberties. In a country which, notwithstanding years of military rule, had never been tolerant of nor exposed to harsh dictatorial measures, it was hardly surprising that there was yet another palace coup in August 1985.<sup>71</sup> The timing of the

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1984, at 1 (attempting to link the broad African patronage practice that "someone who becomes rich and powerful uses-and is expected to use-his position to benefit not only himself but also his family, his clan, his village, his tribe and, if he has the means, even his region" with widespread incidents of unchecked misappropriation of public property in Nigeria.)

69. See generally DAVID GIVHAN, PAUL COLLIER & JAN W. GUNNING, *NIGERIA: POLICY RESPONSES TO SHOCKS, 1970-1990* (International Center for Economic Growth Country Studies, Nov. 11, 1992).

70. See e.g. Blaine Harden, *Military Ousts Government Out of Nigeria*, WASH. POST, Aug. 28, 1985 at A1; Charles Mohr, *Nigeria Coup Tied to Lack of Power Sharing*, N.Y. TIMES, Sept. 3, 1985, at 10; Gregory Copley, *Nigeria's New Bid for Political and Economic Recovery*, DEFENSE AND FOREIGN AFFAIRS, Oct. 1985 at 36.

71. See e.g. Michael Holman, *Army Seeks to Match Expectations to Means*, FINANCIAL TIMES, Feb. 25, 1985, §3, at 2; Charles T. Powers, *Nigeria's Optimism Sinks With Oil Price*, L.A. TIMES, Feb. 23, 1986, at 2; Blaine Harden, note 70.

According to one observer, "[t]he need for a highly authoritarian form of rule [in Nigeria] was obviated both by the weak fragmented nature of the opposition [to military rule] and the control over the top-down distribution of resources." See TOM FORREST, *POLITICS AND DEVELOPMENT IN SOUTH AFRICA* 254 (1996).

coup, however, could hardly have been worse; for it coincided with the free fall of crude oil prices which followed the Group of 7's "Plaza Accord" with concomitant dramatic effects on the crude oil export-dependent Nigerian economy.

The IMF offered Nigeria access to its stabilization facilities conditioned, of course, on satisfactory negotiation of significant structural adjustment policies. The new military government, promising transparency in government decision-making, "submitted" the issue to "popular debate." In the ensuing national debate, which was generally unmoderated, freewheeling and most certainly open, it became evident that the outspoken sentiment in the nation was against IMF compelled "structural adjustment."<sup>72</sup> Faced with this apparent rejection of its policies, the government declined formally to enter into a stand-by arrangement with the IMF, but nonetheless instituted a "made-in-Nigeria" structural adjustment policy, on the basis of which Nigeria was able to obtain substantial lending from the World Bank.<sup>73</sup> Nigeria's privatization program was an integral component of this "made-in-Nigeria" structural adjustment policy.

### *B. Nigeria's Privatization Program*

As an introduction to Nigeria's privatization program, it is important to emphasize that participation in the national economy through direct asset ownership was not the product of a commitment to any of the standard ideologies of "socialism" or "Marxism," but rather reflected haphazard decisions driven by the availability of funds and the political exigencies of a very divided society for which the proper distribution of

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72. For a succinct summary of the line-up of the national debate, see TOM FORREST, *supra* note 71 at 209-10. Compare Jonathan Friedland, *Inching Back into the IMF Line: The New Babangida Government Targets Nigerian Economic Growth*, THE AMERICAN BANKER, Oct. 2, 1985 at 17 (prematurely concluding that Nigeria's year long, often acrimonious impasse with the IMF may soon be over, apparently on the ground that some people viewed the August 1985 palace coup as an "IMF Banker's coup"). See also Blaine Harden, *Nigerian Coup's Leader Held Eager for Economic Arrogance*, WASH. POST, Aug. 29, 1985 at A27 ("[a]ccording to Western diplomats and international bankers . . . Bagangida . . . is known to be more willing than Buhari to negotiate a much-delayed agreement with the IMF").

73. The World Bank offered \$4.2 billion over three years to fund Nigeria's Structural Adjustment Program, financing that was conditioned on progress in the country's policy reform. See FORREST, *supra* note 71 at 212. The failure formally to reach a standby arrangement with the IMF was not, however, without substantial cost. Aside from the fact that direct access to IMF financing was thereby precluded, it also contributed significantly to the failure of the scheduling of the country's substantial international indebtedness. *Id.*

economic assets was conceived as centrally related to nation-building. There were thus four features of the government's direct acquisition of ownership in assets.

First, the availability of funds dictated the timing and nature of the acquisitions. Significant government acquisitions did not begin until after the surpluses generated by the first oil price rise of the early to mid-1970s, and these were generally of medium-capitalized enterprises such as flour mills, beer breweries, and the like. With the second oil price increases of the late 1970s, government ownership expanded to heavy industries such as steel mills, petrochemicals, and the like.

Second, given that the predominant source of income for these acquisitions was oil revenues which flow to the central government, it was this, rather than state or local governments that made the most significant acquisitions.

Third, for political reasons, many of the central government's acquisitions were presented as being made "in trust" either for the state or local governments, or for specific Nigerians. Thus, for example, under both the 1972 and 1977 indiginization programs,<sup>74</sup> there was usually insufficient private capital to meet the politically determined percentage of Nigerian ownership. In these instances, the federal government made the purchases ostensibly with a view to selling the acquired assets to individual Nigerians when they had saved up enough to pay for the property.

The relevance of these factors is that although Nigeria's privatization program was a forced one, its form reflected the impulses embedded in the foregoing factors.

Nigeria's privatization program was ushered in by a formal legal document: Decree No. 25 of July, 1988.<sup>75</sup> The decree provided for "full or partial privatization" of 110 entities,<sup>76</sup> and for the "full or partial commercialization" of 35 additional entities.<sup>77</sup> The enterprises to be privatized or commercialized were specifically identified, as was the level of government ownership to be retained following privatization.<sup>78</sup>

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74. See THOMAS J. BIERSTECKER, *MULTINATIONAL CORPORATIONS AND THE NIGERIAN STATE* (1987).

75. See SUPPLEMENT TO OFFICIAL GAZETTE EXTRAORDINARY, no. 42, vol. 75, 6th of July, 1988, Part A. "Privatization and Commercialization Decree No. 25, 1988" (Hereafter, "Privatization and Commercialization Decree").

76. See Schedule I accompanying the Privatization Decree. Section 1.3 of the Decree further provided that "[t]he President, Commander-in-Chief of the armed forces, may by order published in the Gazette at any time, alter, modify, delete from or amend any of the enterprises listed in schedule I to this decree so as to alter the category to which any enterprise belongs."

77. *Id.*

78. *Id.*

Other than the assertion that defense-related enterprises were excluded, it is difficult to divine the guiding principles behind the selection of the 146-odd entities out of the 600 possible candidates<sup>79</sup> for privatization or commercialization.<sup>80</sup> On the other hand, there seems little doubt that one of the intended functions of "partial" privatization was to rationalize the level of government ownership within sectors. Thus, in specialized banking (e.g. mortgage, industrial development and longterm credit banking), federal government ownership was to be limited to 70% ownership of relevant enterprises across the board.<sup>81</sup> With regard to oil-marketing (as distinguished from prospecting, transportation or refining), the government ownership, which had varied depending on the expediency of joint venture arrangements, was to be uniformly reduced to 40%.<sup>82</sup> A limit of 40% ownership was also projected in such diverse industries as steel rolling mills,<sup>83</sup> air and shipping lines,<sup>84</sup> fertilizer companies,<sup>85</sup> paper mills,<sup>86</sup> and sugar companies.<sup>87</sup> Such rationalization of ownership does not, however, explain the projected ownership of cement companies, which ranged from 30% to 10% following privatization.<sup>88</sup>

Among the entities to be fully privatized was a haphazard assortment of entities notable more for the fact that the government had ever

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79. See also *Encouraging Private Sector Initiative: Excerpts from the Paper Presented by Shasudeen Usman*, WEST AFRICA MAGAZINE, 1929, 1930 (Dec. 11, 1995) ("[a]ccording to a 1993 TCPC survey of public enterprises in Nigeria, there were some 574 public enterprises owned by the Federal Government wholly or partly . . . But only 145 were covered by the ongoing privatization and the commercialization exercise under Decree No. 25 of 1988.") Moreover, these figures do not include the over 250 parastatals owned or controlled by individual state governments which are not covered by the federally sponsored privatization scheme. Compare Paul M. Lubeck and Michael J. Watts, *An Alliance of Oil and Maize: The Response of Indigenous and State Capital to Structural Adjustment in Nigeria*, AFRICAN CAPITALISTS IN AFRICAN DEVELOPMENT (1994), at 216.

80. As explained below, the government did not adhere strictly to the schedule. The precise number of entities privatized, commercialized or liquidated outright remains the focus of some disagreement. Some entities, notably the country's four major commercial banks, which were not originally scheduled for privatization, did subsequently become privatized, although the wisdom of this decision is now being questioned, and there are indications that they may revert to direct governmental ownership or control.

81. See GUIDELINES ON PRIVATIZATION AND COMMERCIALIZATION OF GOVERNMENT ENTERPRISES, (REPORT OF THE TECHNICAL COMMITTEE ON PRIVATIZATION AND COMMERCIALIZATION, July, 1993) Schedule I, items 1-4.

82. *Id.* Items 6-8.

83. *Id.* Items 9-11.

84. *Id.* Items 12-13.

85. *Id.* Items 14-15.

86. *Id.* Items 16-18.

87. *Id.* Items 19-21.

88. See *id.* Items 22-26.



deemed it important to acquire any interest in them rather than for the fact of their divestiture.<sup>89</sup> These included a tourist promotion service and several hotels,<sup>90</sup> two textile mills,<sup>91</sup> an inland water transportation company,<sup>92</sup> a cargo handling company,<sup>93</sup> a variety of food producing, processing or marketing companies,<sup>94</sup> oil-palm plantations,<sup>95</sup> wood and pulp companies,<sup>96</sup> yeast and alcohol fermentation,<sup>97</sup> a film processing company,<sup>98</sup> a boatyard,<sup>99</sup> beer brewing companies and distilleries,<sup>100</sup> construction and engineering companies,<sup>101</sup> life and casualty insurance companies,<sup>102</sup> and a flour mill.<sup>103</sup>

While it is possible to draw a rough distinction between entities to be privatized from those to be commercialized along the conventional axis of openly competitive enterprises versus public utilities,<sup>104</sup> the rationale behind the choice among the latter as to what was to be "fully" or only "partially" commercialized was less evident. Among those entities that were to be fully commercialized were the Nigerian National Petroleum Company (with responsibility for crude oil exploration, production sharing arrangements and distribution), coal and other ore-based mining companies, Nigerian Telecommunications, Ltd. (which handles international telephone calls), the Nigerian seaport authority, federal real estate (including buildings and parks) management authorities, and employee pension-related insurance companies.<sup>105</sup>

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89. As explained previously, the acquisition of these entities reflected the flow of oil-money into governmental coffers, and the technocratic impulse to view economic development in terms of the acquisition or development of physical assets. See *supra* notes 73-74 and accompanying text.

90. GUIDELINES ON PRIVATIZATION AND COMMERCIALIZATION, *supra* note 81, Items 27, 54.

91. *Id.* Items 28, 76.

92. *Id.* Item 29.

93. *Id.* Item 30.

94. See *id.* Items 32-40, 70, 73.

95. *Id.* Items 47-48, 71-72.

96. *Id.* Items 41-43.

97. *Id.* Item 44.

98. *Id.* Item 44.

99. *Id.* Item 46.

100. *Id.* Items 51-52.

101. *Id.* Items 49-50, 53.

102. *Id.* Items 56-69.

103. *Id.* Item 75.

104. See *supra* notes 16-17 and accompanying text.

105. See GUIDELINES ON PRIVATIZATION AND COMMERCIALIZATION, *supra* note 81, Schedule III.

The entities to be only "partially" commercialized included the Nigerian Airport authority, Nigerian Railways Corporation, the National Electric Power Authority, the Nigerian Security Printing and Minting Co., the federal government controlled radio and television services, the national news agency, and several "river basin development authorities" that had been created to act as catalysts and to channel funds for economic growth in surrounding areas.<sup>106</sup> But this list also included two steel plants,<sup>107</sup> the Federal Housing Authority,<sup>108</sup> a national park,<sup>109</sup> and a machine-tools company.<sup>110</sup>

For the Nigerian government, privatization amounted simply to the "disinvestment by the federal government of . . . its ordinary shareholding in a designated enterprise," with the distinction between "full" and "partial" privatization depending on whether the divestiture of common share ownership is complete.<sup>111</sup> Notably, this definition meant that the government could retain some form of ownership or control in a fully privatized entity. Indeed, the government made it clear at the time of privatization that it would reserve to itself the right to have the so-called "golden share" in a fully privatized entity.<sup>112</sup>

The decree defined "commercialization" as "the reorganization of enterprises wholly or partly owned by the federal military government in which such commercialized enterprises shall operate as profit-making commercial ventures and without subventions from the federal military government".<sup>113</sup> The implementing regulations distinguished between "full" and "partial" commercialization on the ground that

Full commercialization means that enterprises so designated will be expected to operate profitably on a commercial basis, and be able to raise funds from the capital market without government guarantee. Such enterprises are expected to use private sector procedures in running their businesses, and may, subject to the

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106. *Id.* Schedule IV.

107. Ajaokuta Steel Co., Ltd., and Delta Steel Co., Ltd. *Id.*

108. *Id.*

109. Kainji Lake National Park. *Id.*

110. *Id.*

111. See GUIDELINES ON PRIVATIZATION AND COMMERCIALIZATION, *supra* note 81, definitions (a) and (b). Compare PRIVATIZATION AND COMMERCIALIZATION DECREE, *supra* note 75, Art. 14.

112. See *e.g.* TECHNICAL COMMITTEE ON PRIVATIZATION AND COMMERCIALIZATION, SECOND PROGRESS REPORT (1990). See also *Nigeria: Appraising Privatisation*, REUTER TEXTLINE, Jan. 8, 1991 (available on Lexis/Nexis Middle East and Africa Library, Nigeria File).

113. PRIVATIZATION AND COMMERCIALIZATION DECREE, *supra* note 75, Art. 14.

general regulatory powers of the federal government, (1) fix rates, prices and charges for goods rendered; (2) capitalize assets; (3) sue and be sued in their corporate names.<sup>114</sup>

Partially commercialized entities, on the other hand, "will be expected to generate enough revenues to cover their operating expenditures. The Government may consider giving them capital grants to finance their capital intensive projects."<sup>115</sup>

The decree sets out a formally transparent mode for both privatization and commercialization. For this purpose, it created an "independent commission" (the "Technical Committee on Privatization and Commercialization," or "TCPC"), a technocratic body statutorily answerable only to the President of the country rather than to any member of the cabinet or to the civil service.<sup>116</sup> While the TCPC was given broad latitude in determining the best method for privatizing or commercializing each enterprise (whether by sale of stock, sale of assets, private placement, divestiture to management or to employees, and so on),<sup>117</sup> that discretion was sought to be checked in part by the requirement that another ostensibly independent agency, the Securities and Exchange Commission, determine the valuation and pricing of publicly-made stock offerings,<sup>118</sup> and asset prices were to be determined by independent professional accountants and appraisers.<sup>119</sup>

Yet, political considerations were not entirely absent even from the face of the formal legislation. All final decisions of the TCPC with regard to any enterprise had to be submitted for approval to the Federal Military Government,<sup>120</sup> which apparently retained the authority not only to give or withhold consent, but to modify the transaction.<sup>121</sup> Furthermore, the decree expressly instructed the TCPC to ensure regional (i.e. ethnic) balance in the distribution of privatized assets.<sup>122</sup> Where necessary to assure such balance, sales of shares or assets in "privatizing" enterprises could be made to state or local governments (presumably as *parens patriae*) who would purchase such assets in trust for subsequent resale to

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114. *Id.* Art. 13.

115. *Id.*

116. *Id.* Arts. 3 and 4.

117. *See e.g. id.* Art. 4.

118. *Id.* Art 4.1(d). *See also* Decree No. 29 of 1988.

119. TECHNICAL COMMITTEE ON PRIVATIZATION AND COMMERCIALIZATION, SECOND PROGRESS REPORT, *supra* note 112.

120. PRIVATIZATION AND COMMERCIALIZATION DECREE, *supra* note 75, Art. 4.4.

121. *Id.* Art. 4.5.

122. *Id.* Art. 7. *See also supra* note 66 and accompanying text.

citizens.<sup>123</sup> This provision is especially significant because since the civil war, Nigerian social and economic expenditures have been substantially influenced by the explicit use of ethnic and regionally-based quotas in all aspects of government-sponsored programs, from admissions to educational institutions to the financing of development projects.<sup>124</sup>

Notable for its omission from the decree was any provision relating to foreign participation in the privatization process. Although the decree does not exclude such participation, the lack of any explicit endorsement or encouragement of such mechanisms as debt for equity swaps, foreign partner joint ventures, export processing zones, and the like is striking given the backdrop against which it was promulgated — a foreign debt whose servicing demanded close to one-third of all export earnings.<sup>125</sup> Similarly, although the unavailability of lending on commercial terms from international banks, and hence the need for access to World Bank and/or IMF lending with their imposed structural adjustment conditionali-

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123. *Id.* Art 7.2. See also GUIDELINES ON PRIVATIZATION AND COMMERCIALIZATION, *supra* note 81. Tom Forrest has asserted that “concern that particular ethnic groups or sectional interests in the country might be favored by the [privatization] exercise” was a key factor in shaping the thrust and speed of privatization. See FORREST, *supra* note 63 at 224.

124. A TCPC employee explained the operating philosophy in the following manner:

Because of the political nature of the [privatization and commercialization] program itself, because it is not essentially an economic program. Nigeria is a complex polity, and you have to take into consideration the general needs of the polity, itself, and be able to satisfy sections that make up the polity, such that the government would not be accused of (1) what you might call a ‘partiality’ in the disbursement of these shares. Secondly, to be able to create wider share ownership, geographically speaking, taking into cognizance the need to create a feeling of belonging in the general exercise. We did not want to create a situation whereby like it happened in the former indiginization process wide sections of Nigerians felt cheated out of the program . . . If shares were on offer, we ensured that certain percentage went to each state of the federation. It was left then to the states, especially under the banking directives to either take up the shares on offer allotted to them, or they left it for future off loadment on the floor of the stock exchange.

(Interview with TCPC official by author, July 30, 1993) (recording available from author). See also FORREST, *supra* note 63 at 224 and N. 37 (documenting the position of the Kano Section of the Manufacturers’ Association of Nigeria, which called for the use of “quotas and controls” to assure “regional equity” in the privatization process).

125. *But see* PRIVATIZATION AND COMMERCIALIZATION DECREE, *supra* note 75, Art. 4.2 (g) (obligating the TCPC to “[e]nsure the success of the privatization and commercialization exercise, taking into account the need for balance and meaningful participation by Nigerians and foreign interests in accordance with relevant laws of Nigeria.”) On the cost of servicing Nigeria’s foreign debt in the late 1980’s, see generally BIVAN, COLLIER AND GUNNING, *supra* note 69.

ties,<sup>126</sup> and the emerging global climate of hospitality towards foreign capital were instrumental considerations for the policy makers, they are not accounted for by the design of the privatization policies.<sup>127</sup> Further, there was no effort in the decree to harmonize the privatization process to other laws with which it clearly had resonance. Thus, the indiginization decrees and foreign exchange laws remained on the books, seemingly unaltered by these trade and investment liberalizing policies, even if they were hardly enforced.<sup>128</sup>

### C. Implementation

There were three distinct phases to the implementation of the privatization program, and it is in this aspect, more than in the text, that one finds the close interrelationship between economic objectives and political means.

Phase I ran roughly from promulgation of the decree in 1986 to the end of 1989. This phase was characterized primarily by inaction. Between 1986 and 1988, there was no indication that the privatization was any more than a moribund governmental pronouncement. In 1988, following the constitution of the TCPC, the program appeared to be not much more than a talking-point. The TCPC spent much of its first two years sponsoring regional and international conferences on privatization, rather than on actually engaging in the process.<sup>129</sup>

This period of inactivity mirrored events in the political sphere. The period between 1986-1990 in Nigeria was characterized by relatively open debate on the political development of the country. None of that debate, however, actually determined the course of that development. Rather, the military government, while encouraging debate, ruled through the promulgation of decrees embodying its own vision of the future direction of the country. In one of the more bizarre instances of political creativity, it decreed a national constitution characterized by a two-party

126. See *supra* notes 47-48 and accompanying text.

127. Compare THOMAS J. BIERSTECKER. By the mid-1980s, virtually no African country was enforcing the restrictive policies on foreign investments that many had adopted in the prior decade.

128. See e.g. Chudi Ubezonu, *Doing Business in Nigeria: Some Aspects of Law, Policy and Practice*, 28 INT'L LAW 345 (1994). The indiginization and foreign exchange control regulations were formally done away with in 1994 and 1995.

129. See e.g. H.R. Zayyad, MANAGEMENT OF PUBLIC ENTERPRISES, (paper presented by the Executive director of TCPC at the National Conference on Structural Transformation of Self-Reliance and Social Justice) (Oct. 12, 1989) (unpublished mimeograph copy on file with author). The new phase was heralded by a three-day conference in Lagos from November 6-8, 1990.

structure "one slightly to the left, the other slightly to the right."<sup>130</sup> Aspirants to political office were required to model their beliefs and statements to conform to these bureaucratically-crafted "political" parties.

There then followed between 1990 and 1993 a staged production of a highly engineered return to civil rule. While the first few acts — notably elections to local government bodies, state legislatures and state governorships — went off as scripted, the mechanism began to break down with regard to elections to national bodies, and of course collapsed with the refusal of the military government to have counted and released the results of the election to the office of the President of the country.<sup>131</sup>

The implementation of the privatization process paralleled these developments in the political arena. Between 1990 and 1993, TCPC privatized either 73<sup>132</sup> or 88<sup>133</sup> of the 111 enterprises scheduled for privatization, and commercialized 30 of the 35<sup>134</sup> entities so designated.<sup>135</sup> Yet, this was considered a complete and successful discharge of the requirements of the law because in 23 instances, it was found that entities designated for privatization or commercialization had already been disposed of administratively, and apparently without the knowledge of policy-makers.<sup>136</sup> Moreover, during the privatization process, entities not previously designated for privatization, notably the country's four largest commercial

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130. See generally FORREST, *supra* note 63.

131. *Id.* at Chapter 11.

132. See Shasudeen Usman in WEST AFRICA at 1929.

133. In an interview with this author on July 30, 1993, a TCPC employee, Mr. Al-Hassan U. Usman, Deputy Director, Corporate Affairs, represented that 83 entities had been privatized and that nine were on the cue for privatization. A TCPC document furnished to this author contemporaneously with the interview however indicated that 88 entities had been privatized, and that 23 needed no additional privatization. See *Economic Democratization — The Nigerian Privatization and Commercialization Programme* at 13 (mimeograph report available from author).

134. Although 35 entities were formally designated for commercialization, the Nigerian government apparently lacked the power to commercialize one such entity, The African Reinsurance Company, which was a multilateral intergovernmental entity. Interview with author, *supra* note 121. See also Shasudeen Usman, WEST AFRICA, *supra* note 79 (stating that only the steel mills have not been commercialized.)

135. Shasudeen Usman, *supra* note 79. *But cf.* FORREST, *supra* note 63 at 224 (stating that "in 1988, privatization program involving 135 enterprises was announced by the Federal Government". Of these, 67 were to be fully privatized, 21 to be partially privatized, 11 to fully commercialized, and 14 to be partially commercialized.)

136. TCPC interview with author, *supra* note 124. According to the employee, the Ministry of Agriculture had "divested" the assets of these enterprises without the knowledge of the remainder of the federal government. *Cf.* Shasudeen Usman, *supra* Note 79, giving the number of pre-privatization divestitures at 26, and attributing only 18 of those to the Federal Ministry of Agriculture.

banks were included and were fully privatized.<sup>137</sup>

Decree 25 provided "public offering" as the standard mode of privatization,<sup>138</sup> but also permitted the use of "private placements" in exceptional circumstances.<sup>139</sup> In practice, the private placement was resorted to as frequently as the "public offering,"<sup>140</sup> and the use of "asset sales" or "outright liquidation" was widespread, notwithstanding the lack of specific statutory authorization for its use.<sup>141</sup>

The Western-trained practitioner of the financial arts — investment banking, accounting, financial economics and transaction lawyering — would have been perfectly at home in the wheeling and dealing environ-

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137. *For Sale Signs Coup in Lagos*, FINANCIAL TIMES, Oct. 16, 1992 ("[i]n an abrupt volte-face the military government of President Ibrahim Babangida last month announced plans to privatise the Federal holdings in 12 of Nigeria's banks. In the process, he wrong-footed Hamza Zayyad, chairman of the Technical Committee on Privatization and Commercialization (TCPC), who only a few weeks previously had described speculation that the government might divest its holdings as baseless . . . The unexpected decision was a typical example of the rule by decree which Nigeria has experienced under military government.").

138. PRIVATIZATION AND COMMERCIALIZATION DECREE, *supra* note 75, Art 6.2. *Compare* Art. 4.3, (authorizing TCPC to recommend some other form of disposition "whenever the technical committee is of the view that any enterprise is not suitable for disposal by public issue of shares.").

139. *Id.* Art. 6.2 (all offers for sale "shall be by public issues except when the Federal Military Government, on the advice of the Technical Committee, decides that the shares of any enterprises should be sold by private placements.").

140. Thus, of the 88-odd enterprises that had been "privatized" as of July, 1993, 35 were by public offering, another four through the so-called "deferred privatization process" in which a significant portion of the stock is sold in bulk to a state or other institution in trust for a defined group of beneficiaries (e.g. state citizens), 8 through the "sale of assets by public tender," 7 through private placements, 1 through a management buyout. The method employed in privatizing the 18/23 entities prior to the work of the TCPC is unexplained. *See* mimeograph report, *supra* note 121 at p. 14. Somewhat different figures are offered by Shasudeen Usman, *supra* note 79; notably the figure given for "sale of assets by public tender" is 26, a number which is said to include the 18 pre-TCPC privatizations. If this representation is correct, it raises the question of why the remainder of the federal government was unaware of the disposition of assets done through a "public tender".

141. One may distinguish between four variants of the "public offer:" (i) the conventional use of an exchange for an underwritten "initial public offering"; (ii) the "sale of assets through a public tender" in which the assets of an entity are auctioned; (iii) a management/employee/deferred "sale" or "buyout," in which a publicly advertized offer is made to a limited class of persons; and (iv) a generalized voucher system or the a public offering that is not underwritten. Nigeria's privatization scheme employed all but the last of these. Private offerings typically are made to a limited class of persons usually without any public advertisement. They may take the form of stock or asset sales, and they may be auctioned or negotiated. Nigeria appears to have employed all of these variations in its privatization program.

ment that characterized the functioning of the TCPC between 1990 and 1993.<sup>142</sup> A handful of government-paid lawyers and accountants put together offering documents and made telephone calls to solicit bids for a variety of parcels of hitherto publicly owned assets; other lawyers, accountants and investment bankers responded with bids and counter-offers. Advised by other investment bankers and economists, competing positions were resolved over beers at "old schoolboy clubs" or after-hours visits to the homes of tennis partners in "government residential areas." These agreements were then delivered to the Federal Military Government for what appears to have been pro forma ratification.

Conspicuous by their absence from public discourse were any stories of direct extralegal governmental interference, or the proverbial Nigerian villains of administrative bribery and corruption.<sup>143</sup> Also noteworthy was the infrequent use of litigation to influence the outcome.<sup>144</sup> Rather, once the technocratic machinery of the TCPC achieved a cruising speed some time in 1990, it maintained it at a more or less monotonous whine until the jarring political events of June 12, 1993 rearranged all aspects of Nigerian life.<sup>145</sup> In the process, landmark establishments that had symbolized "national patrimony" were transferred from public to private ownership;<sup>146</sup> the number of shares traded on the Nigerian stock exchange (which, prior to 1988, had been in existence for a quarter of a century)

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142. In its Report on the Privatization Process, the TCPC asserted that "to date some 600 highly qualified Nigerians and over 200 professional advisers (Chartered Accountants, Solicitors, Estate Valuers, Engineers, Stock Brokers and Issuing Houses) were involved in the Implementation of the Programme in one way or other. Indeed, no other programme in this Nigeria has ever enjoyed broad based participation of highly qualified Nigerians like this programme. [sic] But what is more interesting is that all the professional advisers and individuals are Nigerians, because as a deliberate policy, the TCPC had decided [sic] that the programme should be used for the training of local consultants." Mimeograph report, *supra* note 133 at 7.

143. This of course is not to assert that the privatization process was not influenced by these factors; merely that the factors did not generate the sort of press and public attention that ordinarily one might have expected.

144. *But see infra* notes 169-172 and accompanying text.

145. For the events of June, 1994, in which the military government declined to release the full results of a national presidential election nor to cede power to the civilian winners of that election, see e.g. Kenneth B. Noble, *Nigerian Military Rulers Annul Election*, N.Y. TIMES, June 24, 1993, at A1; *Ibrahim G. Babangida Address to the Nation*, BBC SUMMARY OF WORLD BROADCASTS, June 26, 1993; *President Babangida on Reasons for Annuling Election*, June 28, 1993, available in Lexis/Nexis Library, BBCSWB file.

146. Two such landmarks were the Federal Palace Hotel which was privatized, and Tafawa Balewa Square, whose management was commercialized. See GUIDELINES TO PRIVATIZATION AND COMMERCIALIZATION, *supra* note 81. These institutions were integrally associated with the annual public celebration of the country's "Independence Day".



more than doubled in under five years.<sup>147</sup> The use of limited public resources to finance money-losing commercial ventures for predominantly jingoistic or like ideological reasons became rare; and perhaps most significantly, there was indeed some rationalization of the accounts of some enterprises. Yet, no Nigerian, not even employees of the TCPC, look back to the privatization process with unalloyed praise, and virtually no Nigerian today posits it as a solution to any of the country's numerous socio-political or economic difficulties. Indeed, the privatization process, which was already being wound down by mid-1993,<sup>148</sup> came to a standstill following the June 12 political debacle,<sup>149</sup> and has not been revived. Rather, the subsequent governments have vacillated between a return to the generally discredited pre-1986 statist regime,<sup>150</sup> and modified variations on the theme of the SAP-inspired liberal economic order by positing alternatives that while creating incentives for greater private participation in the economy assured continuing state ownership and control of productive assets.<sup>151</sup> Thus, concepts such as the leasing of state assets to

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147. Interview with author, *supra* note 121. See also Shasudeen Usman, *supra* note 79 at 2930 (“[t]he market capitalization of publicly quoted companies grew from 8 billion Naira in 1989 to over 30 billion Naira by September 1992, mainly as the result of privatization.”) This effect appears, however, to have been temporary. The volume of trading on the Nigerian Stock Exchange in 1994 has been stated as a “derisory” \$19 million. See Tony Hawkins, *Survey of Nigeria: Volumes Stay Low — Stock Exchange*, FINANCIAL TIMES, May 26, 1995.

148. The termination of the active phase of the privatization/commercialization program was symbolized by the renaming of the TCPC as the “Bureau of Public Enterprises” with the assigned task of monitoring and advising on the performance of the “commercialized” state entities. See generally, Shasudeen Usman, *supra* note 79.

149. See *supra* note 145.

150. For example, the 1994 budget presented by the military government of General Sani Abacha returned the country temporarily to a fixed over-valued exchange regime, significant price-control reduction of export incentives, imposition of substantial import controls and renewed government-sponsor of industrial production. See e.g. Paul Adams, *Nigeria's New Leader Turns Back the Clock on Market Reforms*, THE CHRISTIAN SCIENCE MONITOR, Jan. 12, 1994 at 8; James Jukwey, *Nigeria Returns to New Era of Economic Controls*, THE REUTER LIBRARY REPORT, Jan. 11, 1994 (available in Lexis/Nexis Library, Papers File); FORREST, *supra* note 63 at 244.

151. Compare the 1995 Budget address made by Gen. Sania Abacha on January 14, 1995. After acknowledging the “disappointment” and failures of the strategies embarked on in the 1994 budget — government revenues fell, manufacturing declined by over 5% and inflation worsened, even under official estimates — he announced a “budget of incentives and liberalization . . . to free the economy of the statutory constraints to which it has been held hostage”. Taxes and tariffs were to be lowered; the foreign exchange market was to be subjected to “guided deregulation” including the adoption of a fixed but flexible autonomous exchange rate system; the Foreign Exchange Control Act (first enacted in 1962), and the [indigenous] Enterprises agreements for the protection of investments by foreign nationals; some flexibility was to be introduced into the essentially gov-

private entrepreneurs, joint ventures between government-owned, indigenous private and foreign capital, and longterm management contracts have been floated as economic devices of the future.<sup>152</sup> Moreover, increasing demands for renationalization of some entities, notably the large commercial banks,<sup>153</sup> have been made alongside the scrapping of the highly nationalistic "Nigerian Enterprises Promotion Decree of 1989" in order to encourage foreign investment.<sup>154</sup>

What explains this lukewarm response to privatization in Nigeria?

#### D. *The Limits of Privatization*

As a response both to external economic concerns and domestic political pressures, the privatization process in Nigeria was bound to be unsatisfactory to determinists of either school, and to disappoint many proponents within both schools. On the one hand, those who laud privatization as a market-based response to Africa's economic woes have criticized the process in Nigeria as not being sufficiently thoroughgo-

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ernment-imposed interest rate charges by banks; parastatals were to be "rationalized" by cutting down their numbers, although the method for such pruning (e.g. through privatization, sale of assets or outright liquidation) was not specified. To the contrary, "owing to some identified inadequacy and the huge losses incurred by government in realizing its investment, the sale of shares in public owned enterprises is hereby suspended." See generally *Abacha Announces Measures to Liberalize the Economy*, BBC SUMMARY OF WORLD BROADCASTS, Jan 24, 1995 (being the full text of the speech as broadcast on Nigerian Radio, Jan. 14, 1995) (available in Lexis/Nexis BBCSWB File). See also FORREST, *supra* note 63, at 245. But see *Little Nigeria*, THE ECONOMIST, Mar. 25, 1995 at 20 ("[a] deal with the IMF, which looked more likely after a deregulatory budget in January, now seems farther away again.")

152. 1995 Budget Address, *supra* note 151 ("There are certain enterprises which require high managerial and technical expertise if they are to operate profitably. Government has therefore decided that it is in the best interest of the country that these enterprises are not sold off, at least for now. As from January 1995, a new policy of contract leasing will be introduced by government. This arrangement will involve contract leasing of the enterprises to both local and foreign entrepreneurs. Additionally, in 1995 the government will pursue full commercialization policy for some key parastatals. Consequently, the funding of the affected parastatals by government will cease by the end of 1995, as they would then be expected to be self-financing.") See also Shasudeen Usman, *supra* note 69 at 1930. Cf. *Nigeria to Privatize 5,950 MW Utility, Then Seek 5,340 MW of Private Power*, INDEPENDENT POWER REPORT, Dec. 15, 1995 (available on Westlaw, Magsplus database) (summarizing a program under which the National Electric Power Authority would be "commercialized" in 1996, then leased to private operator(s) for a period of 10 years renewable at expiration. As of the time of this writing, NEPA remains very much a poorly run parastatal.)

153. See Tony Hawkins, *Survey of Nigeria: Policy U-Turn — Banking*, THE FINANCIAL TIMES, May 26, 1995.

154. See *id.* *Volumes Stay Low — Stock Exchange*. See also FORREST at 245.

ing.<sup>155</sup> The 111 entities scheduled for privatization represented a fraction of the over 600 that were potentially eligible.<sup>156</sup> Moreover, excluded from privatization were such highly capitalized and resource draining entities as the Nigerian Railways Corporation, Nigeria Airways, the electric power authority, the international telecommunications system, steel mills, and of course the far-flung Nigerian National Petroleum Company. The rather amorphous concept of “commercialization” with its vague distinction between “full” and “partial”<sup>157</sup> commercialization, and its even more abstruse formulation of the nature of governmental involvement assured continuing political interference with what should be essentially economic decision-making. And the failure of the privatization rules to modify other existing economic bottlenecks such as the limitations on foreign investment imposed by the Nigerian Enterprise Promotion Decrees undercut its efficacy as a means of efficiently harnessing all available capital resources for the economic benefit of the country.<sup>158</sup>

Not surprisingly, others have found fault with the Nigerian privatization process for its failure to take sufficient account of the resulting distributive and political consequences.<sup>159</sup> At a basic level, the country’s choice of the public offering and private auctioning approaches (rather than, for example, a general voucher system) limited participation to only the affluent. That these offerings and auctions fetched only a minuscule percentage of what had been invested in these entities<sup>160</sup> — and perhaps

155. See e.g. *A Flicker of Light*, THE ECONOMIST, March 5, 1994, p. 21.

156. In an interview with this author, a TCPC representative stated that the government’s investments in 55 privatized companies in the amount of 652 million Naira represented 2 percent of a total government investment of over 36 billion Naira in companies that could be privatized. See interview with author, *supra* note 124.

157. See *supra* notes 14, 76-80, 112-115 and accompanying text.

158. Although the Nigerian Enterprises Promotion Decrees of the 1970s were modified in 1989 in an effort to render them less hostile to foreign investment (see e.g. Chudi Ubezonu, *supra* note 128; Shasudeen Usman, *supra* note 79), no effort was apparently made to coordinate the encouragement of foreign investment and the economic liberalization policies exemplified by privatization. Compare Gen. Sani Abacha’s 1995 Budget Address, *supra* note 151.

159. See e.g. Maxwell O. Chibundu, *The Shift to Markets: New Movements in International Law: Responding to Privatization (Remarks)*, 87 AM. SOC. INT’L L. PROC. 105, 119, 123-24 (1993). See also Francis Okafor, *The Socio-Political Dimension of Privatization and Commercialization* (paper presented at the International Conference on the Implementation of the Privatisation and Commercialisation Program — An African Experience,” Nov. 6-8, 1990) (copy with author); Joe U. Umo, *Privatisation in Nigeria: Some Missing Links* (paper presented at the Nigerian Economic Society Seminar, Feb. 4, 1988) (copy with author).

160. The TCPC in July 1993 stated that the privatization of 55 entities with an aggregate public investment of 652 million Naira had grossed total receipts of 3.37 billion

their intrinsic value — amounted not only to a giveaway of public assets, but further aggravated Nigeria's already notorious disparity of wealth distribution.<sup>161</sup> Perhaps most crucially, in a country with no regulatory or institutionalized unemployment compensation, retirement or other economic welfare system, these basic safety nets are often provided on an ad hoc basis by the employer. Privatization removes the use of public agitation as a means of securing these benefits, a not insignificant consideration in a society such as contemporary Nigeria, characterized by high unemployment and substantial underutilization of available human capital, with the consequent ineffectiveness of such conventional tools of self-help as industrial action and other forms of economic boycotts.<sup>162</sup>

Descriptively, these explanations are factually supportable. They are, however, incomplete. Whatever were the economic pressures for privatization, the decision to undertake it, and particularly its implementation, is predominantly political. The decision is the unilateral act of the state and it is controlled in all of its aspects by the class that dominates state power. In a society like Nigeria where there exists profound religious and ethnic cleavage between the dominant state elite and the commercial elite,<sup>163</sup> privatization necessarily implicated a reduction in the resources

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Naira, seemingly on its face a profitable transaction for the government. See TCPC interview, *supra* note 124. But these figures manifest the potential loss involved in Nigeria's privatization. The 652 million Naira were, of course, generally speaking, pre-1980 investments, while the 3.37 billion Naira reflected post-1990 currency values. Using the nair-dollar exchange rate as mirroring real values (an assumption that the purchasing power parity theory validates), we find that the actual value of the 3.37 billion naira at the post-1990s prevailing exchange rate of 3 or fewer cents to the Naira amounted to under \$199 Nukkuib dikkars for an investment of over \$400 million dollars (using the pre-1980s exchange rate of about 67 cents to the Naira). In other words, Nigerians recovered less than 25 cents from privatization for each dollar its government had invested in the assets being privatized.

161. Compare Clifford D. May, *Nigeria's Search for Recovery*, NEW YORK TIMES, Jan. 30, 1984 at D1, Col. 3 (“[a]s in other oil-rich nations, however, Nigeria's wealth was not evenly distributed. A few Nigerians became billionaires, while many lived in squalor.”)

162. It is worth noting that strikes, while common in Nigeria, are resorted to as readily for political as for economic objectives. Indeed, strikes are often employed not by the underprivileged or relatively poorly paid, but by the professional classes, white-collar workers and the well-remunerated employees of the “modern” sectors of the economy such as banks, universities, and the petroleum and natural gas industries.

163. See generally PAUL M. LUBECK AND MICHAEL J. WATTS, *supra* note 79, at 210-213 (detailing the interaction between political appointments to crucial economic ministries during the period of structural adjustment (1986-1992, i.e. the period of privatization), and internal power struggles among the ruling military groups, and relating these conflicts to the relative power relationships between indigenous private and state power structures — political and economic — on the one hand, and the disciplining external

available to the ruling political elite, and relatively increased of the power of the commercial elite. Where the two elites represented distinct ethnic and religious groups, the consequence was a direct shift in the balance of power between these groups. It is therefore hardly surprising that, as previously explained, the central government sought to retain much of the power predominantly exercised by its ruling members through the mechanism of reserving certain interests for state governments,<sup>164</sup> and the so-called "golden share," which the central government has apparently used quite extensively with regard to commercial banks.<sup>165</sup>

## VI. WHITHER PRIVATIZATION?

In a real sense, the important issues that face students of the contemporary privatization phenomenon relate neither to its success nor to its continuing viability. Because privatization reflects the varied political and economic forces at work both within and without a given polity, the influence of scholarship on its trajectory will be, at best, marginal. The external forces that have made privatization a global phenomenon of the "post-Cold War world order" reflect a specific moment in history whose essential underpinning is the confluence of ascendant Western (and more specifically U.S.) neoliberal economic and neoconservative political hegemony. As much as many commentators would like to suggest that there is something unique or permanent about the current world order,<sup>166</sup> history has witnessed too many of these transitory confluences to permit any such sense of a permanent transformation of the structure of property ownership, control and regulation. The one constancy of the exercise of international hegemonic power has been its temporal limitations, and to the extent that the survivability of privatization depends on such hegemonic power as exercised by the U.S. and the West, its viability can be predicted with confidence to be temporary.<sup>167</sup>

Of course, as illustrated by the Nigerian example, it would be a gross oversimplification to view the attraction to privatization primarily in terms of external pressures exerted by Western institutions on the

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technocratic and economic resources of the World Bank on the other.)

164. See *supra* note 123 and accompanying text.

165. See e.g. Paul Adams, *Nigerians Seek Donor's Support on Bank Control*, FINANCIAL TIMES, Aug. 16, 1995 at 3; *Nigeria: Appraising Privatisation*, AFRICAN ECONOMIC DIGEST, Jan. 8, 1991 (available on Lexis/Nexis, Nexis library, Papers file.)

166. See generally FRANCIS FUKUYAMA, THE END OF HISTORY.

167. Compare *supra* notes 6-8, and accompanying text. See generally EUROMONEY, Feb. 1996 (special issue on privatization highlighting its successes and the significant pitfalls that lie ahead; pitfalls that flow as much from political as from economic uncertainties.)

“disadvantaged peoples” of Eastern Europe and the “Third World.” Domestic political considerations and internal pressures for economic rationalization within these societies played critical roles in the willingness (and indeed eagerness) of many of their elites to adopt and implement privatization schemes. Yet, because privatization was almost never internally generated from core domestic ideological commitments,<sup>168</sup> it is reasonable to assume that its capacity to take root in these societies will depend largely on how widely it is perceived to meet effectively the demands of these societies. The important consideration here would not be so much whether privatization does indeed lead to better or more efficient utilization and management of limited economic resources, but rather, whether the economic and political wellbeing of these societies are perceived to be on the mend, and if so, whether the beneficiaries attribute their fortunes to the process.

Considered in this light, the continuing interest for the legal scholar of the privatization program is in the ways and means by which it can be integrated and made a part of the routine life — at least in the economic sphere — of the inhabitants of the so-called “emerging” or “transitional” economies. The privatization program in Nigeria again furnishes an exemplification of this theme.

As previously observed, Nigeria’s privatization scheme, while involving a fair number of domestic transaction lawyers, spawned remarkably little litigation.<sup>169</sup> The exception to this generalization is, however, noteworthy.

One of the entities scheduled for full privatization was the Ayip-Eku Oil Palm Co., Ltd., in which the Federal Government had a 60% ownership.<sup>170</sup> The Federal Government’s effort to divest its interest through a public share offering was stalled for about a year by the institution of a lawsuit by the Obong of Calabar, a traditional ruler. The Obong sought an injunction against the offering on the ground that the federal government lacked title to the assets it was seeking to dispose.<sup>171</sup> The Obong’s claim was apparently as follows:

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168. See e.g. Leslie Elliott Armijo, *Menem’s Mania?: The Timing of Privatization in Argentina*, 1 S.W. J. OF L. & TRADE IN AM. 1 (1994); JOAN M. NELSON, ED., *INTRICATE LINKS: DEMOCRATIZATION AND MARKET REFORMS IN LATIN AMERICA AND EASTERN EUROPE* (1994). See also *supra* notes 53-55, 74 and accompanying text.

169. See *supra* note 144 and accompanying text.

170. See Privatization and Commercialization Decree, *supra* note 75, Item 71.

171. For the account recounted here, I am indebted to Chief (Mrs.) I. Chigbue, Deputy Director and Head of the Legal and Secretarial Department of the TCPC. The interpretation given to the events is mine, not hers.

The major asset of the Ayip-Eku Oil palm co. consisted of communal land (and the oil palm trees on them) that had been given to the federal government by the people of Calabar in exchange for the federal government investing money in, and developing the land for, the benefit of the Calabar people. The cession of the land was solely for this use by the Federal Government and was not intended to divest the Calabar people of their right in the ownership of the land. The Federal Government was thus without power to alienate the land, and it could not do so indirectly by selling stock in a corporation formed for the sole purpose of exploiting the land.

The Federal Government responded that it had obtained the land from the state government, not the traditional ruler, and that the state government had given to the Federal Government full right in the land. Any claim that the Obong had should be stated not against the federal government, but against the state government.<sup>172</sup>

What is interesting about this debate is the forum in which it occurred, and its potentiality to have the privatization scheme fully woven into the ordinary politics and economics of the life of the affected people, rendering privatization not simply the abstractions of income redistribution among the powerful and wealthy, but the source of genuine debate among employees, employers, traditional rulers, and the Western-trained elites who exercise preponderant economic and political power in developing societies. Despite the opportunities offered by the Ayip-Eku Oil Palm Co. dispute, that debate did not occur in Nigeria; and why it did not, probably says as much about the limitations of the role of law in the privatization process as does the highly specialized legal skills western lawyers have brought to bear on the privatization process in even the remotest corners of the world.

The Obong not only failed to persuade a Western-trained judge of the merits of his claims, but his highly sophisticated arguments necessarily crafted in the language of Western legalism rallied few of the laypersons outside his immediate entourage to his cause. What explains this latter (and by far the more important) failure? Solving this riddle would go a long way in establishing the role and future of privatization in the economic and political life of developing societies.

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172. Interestingly, the Federal government does not appear to have relied strongly on any claim of sovereign immunity, nor on the country's "land use decree" of 1978, by which the Federal Government purported to vest in itself title to all land in the country, while granting an indefinite right of use to all persons who would otherwise have had title to such land. (This observation is based on the author's conversation with Mrs. Chigbue, *supra* note 170.)

In some ways, the willingness of the Obong to resort to the judicial system to challenge the actions of the Federal Government represents a triumph for proponents of a transcendent global relationship between economic modernity and the "rule of law."<sup>173</sup> For most such proponents, that triumph is evidenced in the seeming test of the willingness of the ruling military government to subject its authority to control by a civilian judiciary on a matter of substantial national policy. However, it also suggested the possible continuing relevance of traditional institutional structures and practices to such national policy-making. The vitality of this latter point is undercut by the lukewarm interest this potentially significant conflict generated among the Nigerian intelligentsia, especially the privatization lawyers and economic journalists. Among the local communities of the Calabar area, the Obong's insistence that the rights previously granted to the Federal Government reverted to the traditional community when that government relinquished it, seemed all too obvious, lawyers were content to frame issues in the arcane procedural language of standing, "real party-in-interest," "sovereign immunity," and the like.<sup>174</sup> For the privatization expert fixated on the establishment of the "rule of law" as a core ingredient of the process,<sup>175</sup> this emphasis on formal legal argumentation would of course be a welcome one. But these experts who find the route to economic growth and prosperity in the operation of formal legal rules — their adoption and/or implementation — do so only by overlooking history.<sup>176</sup> The presence of formal rules and their implementation may afford to the foreign investor a sense of security, but that perception is often illusory. The climate for privatization depends more on the overall political and economic structures of a society than on any reliance on formal legal instruments; however well-crafted and abstemiously followed. Proponents of privatization as a tool of modern economic growth thus ignore or underestimate at a substantial risk to the success of their programs the need to fold into and make part of the process the particularized needs of traditional communities.<sup>177</sup>

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173. For the development of this argument, see Maxwell O. Chibundu, *supra* note 43.

174. Interview with Mrs. Chigbue, *supra* note 171.

175. Compare Douglas Webb, *Privatization in Latin America and the Caribbean: Legal Issues*, 87 AM. SOC. INT'L L. PROC. 111, 113 (1992) ("[t]here are three principal components of the legal framework required to support privatization. The first is the guarantee of the rule of law, exemplified through a stable body of laws, readily interpretable, widely published and supported by effective judicial recourse.")

176. See e.g. David J. Trubek, *Towards a Social Theory of Law*, 80 YALE L. J. 4 (1972); JOHN GARDNER, *LEGAL IMPERIALISM* (1980); Maxwell O. Chibundu, *supra* note 43.

177. Noteworthy, albeit in a slightly different context, is the recent internationaliza-



The Obong's challenge exemplifies two very important structural trends that the Nigerian ruling classes now appear to recognize as essential to the making of a viable postcolonial society: political decentralization and greater local autonomy in the making and implementation of economic decisions.<sup>178</sup> Although nominally a "federal Republic," military rule and overdependence on revenue from the export of crude oil had, in the two decades following Nigeria's civil war, turned the country into a highly centralized society in which all but institutions of the central government lacked initiative and the accompanying sense of responsibility. By the late 1980s, it had become evident to the Nigerian intelligentsia (and indeed the ruling elites) that one way of grappling with the manifest failures at the center was to devolve power not only to the private sector, but to public regional and local bodies as well.<sup>179</sup> The confident exercise of local autonomy is invariably enhanced by the relative economic independence of the local entities, and Nigeria's privatization scheme appears to have embodied this assumption.<sup>180</sup> The Obong's challenge thus fits quite neatly into the emerging pathos of decentralization, and should have been viewed as an integral element of its structuring. Specifically, what role do "traditional" institutions (such as Efik land-tenure rules and the Obong's Court) have in the development of a "modern" economic state in post-independence Nigeria? Are these roles best sorted through the judicial mechanism? It may be that the "rule of law" — at least in its dominant Western (and, therefore, modern Nigerian) conception — is most convincingly demonstrated by the invocation of facially "neutral" procedural doctrines as embodied by the rules on "standing," "sovereign

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tion of conflicts within another southeastern Nigerian community, the Ogoni people, over the exploitation of crude oil resources found on their land. Although, in classic fashion, different interests have exploited the tragedies of that community to score propaganda points by simplistically reducing the issues to conflicts of evil and good — e.g. "human rights" versus "rapacious multinational corporations," "military dictatorships," "self-determination" and so on — undoubtedly central to the conflict has been a genuine disagreement among the Ogoni people, and between them and other Nigerians, as to the tradeoffs between external exploitation of their resources and the structure and distribution of political power within Ogoniland, and vis-a-vis the rest of Nigeria. See e.g. Wil Haywood, *In Ogoniland: The Last Days and Legacy of Ken Saro-wiwa*, THE BOSTON GLOBE, April 7, 1996 at 19; *A Tainted Hero*, THE GUARDIAN, March 23, 1996 at T24; Howard W. French, *Deadly Logic in Nigeria*, THE NEW YORK TIMES, November 12, 1995 at A18, Col. 1.

178. See e.g. Privatization and Commercialization Decree, *supra* note 75, art. 6; mimeograph report *supra* note 124 at 9. Compare Maxwell O. Chibundu, *supra* note 43 (discussing the pressures for political decentralization in contemporary African politics.)

179. See generally JAMES S. WUNSCH & DELE OLOWU, EDs., *FAILURE OF THE CENTRALIZED AFRICAN STATE* (1990).

180. See *supra* note 123 and accompanying text.

immunity” and the like, but it is more likely that a sustained privatization program must come to grips with its distributive consequences on the polity. This is as true for the apportionment of political power, as it is for equity in the sharing of economic resources. By far, the vast majority of Nigerians — as well as the peoples of most sub-Saharan African countries — still operate outside of the asset-rich industrial, mining and service sectors that are being privatized.<sup>181</sup> For these people, association with the central government is rarely through a direct regulatory economic framework such as direct taxation, health or sanitary regulations, welfare payments or even public schools. Rather, such association is frequently mediated through socio-political institutions like the Obong whose claim on their loyalties depends in part on the institution’s capacity to deliver such economic goods as potable (usually pipe-borne) water and/or electricity, chemical fertilizers and insecticides for agricultural production, and, perhaps, a modest health clinic. If the privatization process is, as I have demonstrated, more than an exercise in economic rationalization,<sup>182</sup> there seems to be little reason why it cannot be effectively used in this intermediation process. Additionally, unless it is put to this task, the vast majority of the population would be excluded from its ambit, and it would be irrational to expect from that population any loyalty to it. Of course, the task is made no easier by the unpleasant reality that lacking the material resources with which to command the attention and services of practical lawyers, these interests might as well be nonexistent, and more than likely will generally be treated as such.

Nonetheless, whether longterm Western investors in Ashanti Goldfields — as separate from the transactional lawyers, investment bankers and accountants who put the “deals” together — will get the benefit of their investments, and will be encouraged, therefore, to make similar investments in the entities of other “emerging” markets depends in large measure on the solution that exists to the Ayip-Eku puzzle. For most African countries, entrenched postcolonial institutions and interest groups have put beyond debate such privatization schemes as “voucher” distributions, and the poverty of administrative, bureaucratic and organizational skills assure that complete state disinvestment is highly unlikely in the foreseeable future. Caught in this web, the only way of escaping the

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181. At its most expansive, Nigeria’s privatization involved at most 600,000 households; a minuscule number in an economy of over 90 million people. See mimeograph report, *supra* note 124 at a12. Compare *Nigeria: Appraising Privatization*, *supra* note 112 (as of 1991, 400,000 shareholders had been created as a result of the privatization process, representing over 60% of the shareholding population of Nigeria.)

182. See *supra* notes 120-124 and accompanying text.

unstable gyrations of partial nationalization and partial privatization<sup>183</sup> (that in the long-run do more harm than a stable equilibrium at either pole) is to assure the involvement in the privatization process of those socio-political institutions with claim to legitimation from a substantial cross-section of the population. These institutions cannot be limited to those that conventionally operate with ease in the modern sector such as civil service associations, labor and teachers unions, associations of the petty bourgeoisie and market women, or even state governments,<sup>184</sup> but should include those institutions of traditional authority that continue to exercise significant albeit generally overlooked sway over the habits and belief systems (i.e. law) that regulates the lives of those forgotten rural farmers and "informals" of urban centers.<sup>185</sup> These people may have no direct say on the particulars of the economic regime that their "modern" leaders adopt, but they remain perennial brooding presences in the rhetoric (and, therefore, actuality) of development programs; the creed that provides the ultimate yardstick against which the success or failure of a privatization program in sub-Saharan africa (and perhaps in Eastern Europe and Latin America as well) will be measured.

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183. See e.g. Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995).

184. See *supra* note 162 and accompanying text. But see R. Stephen Brent, *supra* note 61 ("the government cannot afford to bow to an interest group.")

185. Cf. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (June Abbott Translation 1989) at 135 *et. seq.* (analyzing the role of law influencing economic choices made by small enterprise oriented Peruvians functioning outside of the "formal" (i.e. legally prescribed and regulated) sectors of the economy.)