

CHAPTER 5

ECONOMIC DEVELOPMENT THROUGH THE NATIONALIZATION OF FOREIGN-OWNED PROPERTY: UGANDA AND TANZANIA:

UGANDA:

The measures carried out by the military government under General Idi Amin in Uganda to indigenize the economy were, however, a continuation of the earlier efforts initiated by the civilian regime under Dr. Milton Obote. The stated socialist policy of the civilian government was called by the name of the "Move to the Left" strategy. It might be pointed out here that the military government of Amin was completely unfettered by any constitutional restraints in its endeavour to bring about the localization of the economy; while, on the other hand, Dr. Obote's government had to start from the point of restructuring the inherited legal framework which was not always facilitative in the implementation of the much needed economic programmes along socialist lines. The purpose of this section of the paper is therefore, to trace the history of economic nationalism in Uganda in the context of the kind of legal problems encountered in that part of Commonwealth Africa, and also to show how the constitutional protection of private property rights in the Uganda independence Constitution was altered to permit the acqui-

sition of property by the state under more realistic conditions.

The genesis of economic nationalism in a clearly articulated form is probably traceable to the adoption of 'The Common Man's Charter' by the Annual Delegates' Conference of the ruling Uganda People's Congress, as the broad and basic policy of the Party and Government. This document, the Common Man's Charter, was adopted "for the realization of the real meaning of independence, namely, that the resources of the country, material and human, be exploited for the benefit of all the people of Uganda in accordance with the principles of socialism."¹ What the Party affirmed therefore, was a fundamental belief that economic power in Uganda should be vested in the majority of the people and not in the minority, most of whom were aliens at that time. It was in consequence of this that the charter stated that "the guiding principle will be that the means of production and distribution must be in the hands of the people as a whole", and that the "fulfilment of this principle may involve nationalization of the enterprises privately owned."² The Annual Delegates' Conference of U.P.C. directed the government to work towards the objective of, whenever it is desirable in the interests of the people, nationalizing any or all privately owned enterprises, mailo and freehold land and all productive assets of property, at any time, for the benefit of the people.³

But, 'the move to the left' strategy, as stipulated in the Charter, could not easily be realized because, as was the case elsewhere in Commonwealth Africa, the independence Constitution written for Uganda in 1962 and also its Republican Constitution of 1967, contained provisions entrenching the protection of private property rights. The provisions in question are the same requirement about "prompt payment of adequate compensation."⁴ Naturally, the first task in the direction of 'the move to the left', was for the government to use its legislative power to remove the constitutional obstacle posed to the realization of the nationalization stipulation in the Charter. This was duly done in 1970 by the enactment of the Constitution (First Amendment) Act, 1970. The Amendment Act deleted the reference in the constitution to "prompt" and "adequate" compensation, and thereafter the obligation was only "the payment of reasonable compensation". The amendment came into force on the 1st day of January, 1970 and five months later an act was passed to provide for acquisition of shares by the government or other public bodies in companies incorporated under the companies Act. The Companies (Government and Public Bodies Participation) Act, enacted that; "As from the close of business on the 30th day of April, 1970, the Government, or other public body declared by the Minister as such for the purposes of this Act by statutory instrument shall be deemed to have acquired such number of shares, not exceeding 60 per cent of each class of shares issued,

and shall, after the coming into force of this Act, acquire 60 per cent of any shares which may be issued by the companies specified in schedule 1 to this Act".⁵ The schedule under reference in the Act listed 84 companies with issued share capital which were affected by virtue of the coming into operation of the Act. Moreover, the Minister was empowered by the Act to amend schedule 1 by statutory order to add to, or subtract from, the list of the affected companies. It was further provided that until such time as nominees of the government or other public body were appointed to the Board of Directors of every affected company, such company was prohibited, on penalty of fine, to do any of the matters which were specified in schedule 2 to the Act. Thus a company to which the Act applied was forbidden to dismiss or engage staff, sell its assets including stocks and shares, declare dividends, take on new liabilities, issue new shares, change its assets, change the salaries or terms of employment of staff, including terminal benefits, cancel or allow to lapse existing insurance policies, go into voluntary liquidation or otherwise stop business, appoint new directors or in any way vary the conditions, terms of service or remuneration payable to its directors. The obvious intention of the government in writing these provisions in the act was to check on the anticipated possibility that some of the affected companies may engage in activities likely to frustrate government efforts to introduce a national component in the

economy.

As regards compensation to be paid to the former owners of the shares acquired, the Ugandan traditional approach of assessing this, which has been referred to elsewhere in this paper, obtained. The responsible minister was to appoint a number of valuers to determine the values of the shares acquired; and payment for such shares acquired was to be made on the basis of the valuation made by the valuers. As in Zambia and Tanzania, the Ugandan Act specifically provided that the government was to pay for the shares so acquired from the profits received from the company but in Uganda this was to be effected within a statutory period of time not exceeding fifteen years. And, any shareholder aggrieved by the determination of the value of his property by the valuers has a right of appeal, first to a tribunal appointed by the Minister under the Act, and from there to the High Court. It is significant, perhaps, to mention here that as far as valuation of the amount of compensation of the acquired property is concerned, the minister plays a very major role which may sometimes operate to the detriment of the former owner. Under the Companies (Government and Public Bodies Participation) Act, for example, the minister may make regulations providing for procedure for the valuation of shares, and may also make the same to provide for membership of the tribunal in hearing appeals under the Act. It is not without sub-

force to allege that the minister may prefer government's interest in the matter to prevail over and above that of an individual owner who is left completely unrepresented in the valuation process of his property. Through the minister's statutory power to appoint valuers and also members of the appellate tribunal, plus his power to lay down the regulations providing for procedure for the valuation of shares, political considerations can predominate in the whole exercise so as to stultify the owner's entitlement to compensation. On the other hand, the owner's right of appeal to the High Court is at least a relief in the sense that any assessment based on extraneous considerations and which operates unfairly to the former owner can, hopefully, be checked.

At the same time the Companies (Government and Public Bodies Participation) Act provided for a complete nationalization of the import and export trade. After the 6th day of May, 1970, no person other than the government or other public body was authorized to engage in import and export business; and any licence granted to anybody under any provision of any written law which was in force immediately before the appointed date of 6th May, 1970 was forthwith cancelled - but without prejudice to goods already in transit. The Export and Import Corporation⁶ exercised the sole right in the country, on behalf of the government, to import and export goods of any class

or description for the purposes of trade. The Corporation is empowered, for the purposes of carrying out its export and import business, to acquire compulsorily any of the premises, fixtures, fittings or any ancillary equipment used by the former importer or exporter in the course of his business. Any such former importer or exporter whose property has been subjected to compulsory acquisition effected under the authority of the act has a statutory entitlement to compensation from the corporation. The compensation is assessed on the basis of a valuation made by the valuers appointed in accordance with the provisions of the Companies (Government and Public Bodies Participation) Act, 1970 which has already been discussed. It is an offence, under the Export and Import Corporation Act, 1970, punishable by fine, to refuse to give or in any way to obstruct the corporation from taking of any premises, fixtures, fittings or ancillary equipment.

In 1969, Botswana also joined Zambia and Uganda by the felt need to adjust the constitution to permit the objectives of economic development to be implemented. The Constitution (Amendment and supplementary Provisions) Act, 1969 allowed the government of Botswana to compulsorily acquire property if the purpose of the act of acquisition is to secure the development or utilization of the property for a purpose beneficial to the community. The actual compelling motive behind the government's

intention in passing the amendment was the need for the exploitation, on a commercial basis, of the mineral deposits in Botswana, and the obvious necessity of having the mineralization of the country under the control of the state. For this reason the amendment went beyond the existing provisions which permitted compulsory acquisition if it is necessary or expedient in order to secure the development or utilization of property for a purpose beneficial to the community - now the amendment specifically extended the authority of compulsory acquisition to the development or utilization of the mineral resources of Botswana. In the second place the amendment enacted that the stipulation about "prompt payment of adequate compensation" "shall be deemed to be satisfied in relation to any law applicable to the taking of possession of minerals or the acquisition of rights to minerals if that law makes provision for the payment at reasonable intervals of adequate compensation".

TANZANIA:

In discussing the case of Tanzania with respect to the implementation of socialist policies, it is significant to note at the outset that that country has had no bill of rights. As the Presidential Commission on the Establishment of a One-Party State argued: "... decisions concerning the extent to which individual rights must give way to the wider considerations of

social progress are not properly judicial decisions. They are political decisions best taken by the political leaders responsible to the electorate."⁷ Uninhibited by a bill of rights, Tanzania has been able to carry through extensive programmes of nationalization - indeed Tanzania has probably excelled most of the countries in Commonwealth Africa in the practice of socialism especially with respect to the implementation of 'public ownership' programmes and also to the elimination of social inequality.

The dramatic starting point in Tanzania's revolutionary changes in the economic structure on a dynamic socialist programme of development is to be traced to the adoption of the famous Arusha Declaration in February, 1967 at a meeting of the T.A.N.U. National Executive Committee. The broad points of the Declaration included - a national policy of socialism and self-reliance, Tanu as a party of peasants and workers, economic development to be based on agriculture rather than on foreign - supported industry, stricter rules for the behaviour of leaders. For the purposes of this discussion, however, the critical paragraphs were:

The way to build and maintain socialism is to ensure that the major means of production are under the control and ownership of the Peasants and the workers

themselves through their Government and their co-operatives. It is necessary to ensure that the ruling party is a Party of Peasants and Workers.

The Declaration then enumerates what the "major means of production" are:

.....the land; forests; minerals; water; oil and electricity; news media; communications; banks, insurance, import and export trade, wholesale trade; iron and steel, machine tool, arms, motor-car, cement, fertilizer, and textile industries; and any big factory on which a large section of the people depend for their living, or which provides essential components of other industries; large plantations and especially those which provide raw materials essential to important industries.⁸

The Party's call on the government to implement the socialist policies enunciated at Arusha was immediately answered in a very dramatic manner. Within a week, the commercial banks were nationalized, about a dozen importing and exporting firms, and eight milling firms with associated food manufacturing interests were also nationalized; in the area of insurance, the National Insurance Corporation (N.I.C.) was brought wholly into public ownership by the acquisition of the minority holding

of 49 per cent which had formerly been owned by private insurance companies. And, although the industrial concerns were not nationalized, provision is made under the Industrial Shares (Acquisition) Act, 1967, enabling the minister to acquire a majority shareholding, not exceeding 60 per cent, in the eight scheduled industrial concerns. Beyond this the government had stated that it had no further plans for nationalization and by this the government hoped that within the non-nationalized fields private investment would still be encouraged and welcome. President Nyerere has stressed that Tanzania has not renounced its interest in receiving foreign capital and private investment. In this regard he has written of the effect of the nationalization measures in 1967:

"Does this imply that Tanzania is no longer interested in receiving capital aid from abroad, or in receiving private investment - either foreign or local? It should be obvious that it does not mean that. We have firmly rejected the proposition that without foreign aid we cannot develop. We shall not depend on overseas aid to the extent of bending our political, economic, or social policies in the hope of getting it. But we shall try to get it in order that we may hasten our economic progress, and that it may act as a catalyst to our own effort. Similarly

with private enterprise. We have rejected the domination of private enterprise; but we shall continue to welcome private investment in all those areas not reserved for Government in the Arusha Declaration".⁹

And to reassure potential private investors to their future in Tanzania, industry was divided into three categories.¹⁰

(1) Industries restricted to Government ownership: major grain milling establishments and arms industry;

(2) State-controlled industries: major means of production as enumerated at Arusha;

(3) Other enterprises - all those not covered by (1) and (2)

By this categorization it was hoped that a potential investor will know that there are certain industries or commercial activities reserved for Government; and secondly that there are those industries and commercial concerns in which Government will insist on having a majority share. Thirdly, the potential investor will know that in all other fields his investment will be welcomed.¹¹

To implement the Arusha Declaration, a total of five Acts were hurriedly passed in the National Assembly in February, 1967. These were: the National Bank of Commerce (Establishment

and Vesting of Assets and Liabilities) Act, 1967; the State Trading Corporation (Establishment and Vesting of Interests) Act, 1967; the National Agricultural Products Board (Vesting of Interests) Act, 1967; the Insurance (Vesting of Interests and Regulation) Act, 1967; and the Industrial Shares (Acquisition) Act, 1967. All these Acts provide for "full and fair" compensation in respect of the property rights expropriated thereunder. The Act affecting the Banks, for example, enacted that:

"The United Republic shall pay full and fair compensation in respect of the net value of the assets taken over ... after taking into account the liabilities also taken over."¹²

But in all the five nationalization legislation no provision is made as to how the compensation is to be determined and by whom. What is specified in this respect is that in every case, once the amount of compensation has been determined, the Minister of Finance is to issue a certificate setting out this amount which will become a charge on and be payable out of the Consolidated Fund;

"provided that the said amount of compensation shall be payable in such manner and in such instalments as the minister, after consultation with the person

entitled, shall determine."¹³

It should be pointed out here that the determination of the minister is that compensation money, estimated in 1968 to be in the region of £11.5 million, and representing 20 per cent of the total Central government and parastatal debt, was to be treated as a loan (at 7-7½ per cent interest) to the government. Of critical importance to the instant inquiry however, is this question: supposing agreement as to the amount of compensation cannot be reached between the government and the former owners, what is the procedure to determine compensation? In such an event it is probably "... considered that under the legislation as it now stands the government have assumed an obligation to pay compensation which in the last resort would be ascertainable in the Tanzanian High Court (and, on appeal, to the East African Court of Appeal)."¹⁴ And, from the nature of the provisions in the nationalization legislation, it is easy to imply that in default of agreement, the government cannot refuse to pay any compensation at all, nor can it unilaterally fix a sum which the former owners considered inadequate; and that if any of these events occurred recourse to a judicial assessment is available to the former owner of the assets expropriated.

As a result of the nationalizations carried out in 1967, two new public corporations were established, namely, the State

Trading Corporation (S.T.C.), and the National Bank of Commerce (N.B.C.). In addition to this, two existing Corporations - the National Agriculture Products Board (N.A.P.B.), and the National Insurance Corporation (N.I.C.) were entrusted with increased statutory functions. The statutory functions of the State Trading Corporation are specifically stated in the Act, namely, to conduct the business of importers, exporters, wholesale dealers and retailers of such merchandise as its Board may from time to time decide. The S.T.C. is to "conduct its business in an efficient manner and in accordance with the best merchantile."¹⁵ The necessary import of this provision is that the corporation shall operate, and shall be judged, by commercial standards. On the other hand, the National Bank of Commerce took over all the banking business in all of the nine commercial banks in the country¹⁶ - including the banking businesses managed by the three big international banks of Barclays D.C.O., Standard, and National and Grindlays - who between them accounted for approximately 80 per cent of banking business in Tanzania, and indeed in East Africa as a whole. The statutory functions of the National Bank of Commerce is to conduct a national banking business,¹⁷ and to fulfil this responsibility without discrimination, except on grounds as are appropriate in the normal and proper course of banking business. What this statement amounts to is that "the banking services provided shall be in no way different from those provided by private banks." Further, it is a statutory provision that the N.B.C. must maintain the normal ban-

ker's duty of confidence regarding its customers' affairs.¹⁸ Coming to the N.A.P.B., its functions include the manufacturing and processing of agricultural products, and also, controlling production and marketing of agricultural products. The Board of the corporation is also charged with the responsibility of maintaining the balance between the interests of the growers of the agricultural crops and the interests of the customers. In the case of the compulsory acquisition of up to 60 per cent majority shareholding in the eight industrial companies,¹⁹ the plain intention of the Tanzania government was "to vest the shares so acquired in the National Development Corporation (N.D.C.) so that the companies will join the rapidly growing portfolio of the N.D.C. and strengthen its industrial holding."²⁰ In the insurance area, the National Insurance Corporation, as we have seen, took over the entire insurance business in the country with a provision for the punishment of the violation of such monopoly.²¹ The N.I.C. had been actually in existence even before the 1967 Act came into effect and was set up as a joint venture in 1963/64 as a limited liability company in which the government's equity participation was 51 per cent, while the 49 per cent shareholding was allocated to the private insurance interests. Under the Insurance (vesting of Interests and Regulation) Act, of 1967, the Corporation acquired the duty of providing adequate and proper insurance services and facilities throughout Tanganyika, and to have the monopoly of all new insurance business transacted in the country (life insurance

from 12th February 1967; general insurance from 1st January, 1968).²²

The object of causing the above changes in the institutional structure of the national economy is amply summarized by Professor Ann Seidman. She has written:

"The primary initial consequences of the Arusha Declaration was the implementation of measures to strengthen the institutional structure so that the plans once formulated would be effectively implemented. In particular the Government initiated measures to increase Government control of what have in Tanzania become termed "the commanding heights:" the commercial banks and financial institutions; export-import and internal trade; and the basic industry."²³

In her summary of the effect of the take-over measures, Professor Ann Seidman has added that:

"Through its control of the commercial banks the Government sought to direct the volume and kind of credit in a way which would ensure the agricultural and industrial growth required to achieve economic reconstruction. Through the State Trading Corporation, it hoped to attain a sufficient degree of national control of export-import and internal wholesale trade to direct the pattern of

trade to contribute more effectively to restructuring the national economy. By acquiring a majority share of ownership of several of the largest private industrial firms in the country through the National Development Corporation, the Government sought to ensure the implementation of an industrialization programme directed to increasing productivity throughout the economy."²⁴

PART III

PROPERTY RIGHTS AND THE NEEDS OF
SOCIAL EQUALITY IN EMERGENT STATES:

CHAPTER 6:

1. BACKGROUND

The phenomenon of social inequality came to be firmly entrenched in emergent African states in exactly the same way as did alien economic domination - both being the products of colonialism and practices of capitalism. It is often claimed with ample evidence that the capitalist penetration of the colonial economies had the effect of transforming the form of social organization characteristic of pre-colonial Africa. Pre-colonial Africa was essentially classless except for the chiefs and members of the 'royal' family who were often regarded as belonging to an upper class of individuals. Moreover, the subsistence economy prevalent in traditional Africa was conducive to the retention of a classless societal structure because everybody lived at much the same level, with no industries or other large-scale methods of production. Almost every member of the pre-colonial African society lived and worked in the traditional agrarian economy, using age-old simple productive techniques and implements. Modern methods of production based on specialization and exchange were unknown and there were therefore, no such relations

as owner of a 'factory', and 'worker' in the factory; employer and employee; etc. The coming of colonialism in Africa destroyed this type of social organization, and with it introduced a steady stream of immigrants in search of better opportunities. The economic roles played by these alien minorities were varied and have evolved over time, but in the earlier phases of the settlement the dominant roles were those of bureaucrats, missionaries, small-scale retail traders, workers on large-scale plantations, workers in the mines, bankers, insurance businessmen, etc. These European immigrants were thus grafted into the modern sectors of the economy and thus enjoyed a monopoly of all the decent facilities that a modern state provided. In every town there were Europeans enjoying in plain view vastly superior standards of living, housing, educational and medical care. These very small minority had the best paid jobs in the mines and the railways, worked the most prosperous farms and owned nearly all the financial wealth. They also held almost every senior position in the civil service.

With the end of the imperial era, rapid advances came to the Africans who replaced Europeans as government ministers, church ministers, parliamentarians, judges, top civil servants, directors of departments, chairmen and general managers of public corporations, etc. In practically every individual aspect of the national sphere of activity, Africans had made inroads as

high salaried officers - in the mines, in the University, in private international companies, etc. Across New Africa, invariably the critical variable that identifies almost all the members of this high-income African group is education. As far back as 1968, that is after only four years of Zambia's independence, President Kaunda detected and warned of the emergence of social classes in view of the serious rifts the fabric of the Zambian society was undergoing. In a speech at the University of Zambia Old Campus on the occasion of the International Literacy Day, Dr. Kaunda said that; "Already, as a result of the differences in our educational accomplishments, one can see the beginning of a class consciousness.... Zambia is in a situation whereby the educated had become "haves" and the illiterates the "have nots." In the majority of cases, the educated members of our society also happen to be the junior members, and through the good fortune of having the advantage of a sound education these young men and women are daily thrust into responsible public positions and offices of trust".¹ Four year later, in 1972 in an address to the National Council of the ruling United National Independence Party, the President again expressed the fear that "..... In a country where there are wide disparities in education this would be an invitation to 'the law of the jungle' in which the strong prey upon the weak. It will quickly lead to the rich exploiting the poor,

it will lead to inequality and thus destroy the very foundation of this nation.... Our duty as leaders is to work so hard to create conditions under which all men and women are able to get access to all available opportunities, to make self-improvement and prosperity possible and practicable".²

Let it be pointed out here that nearly every African leader has, with concrete grounds, been concerned with the educational factor as being responsible, in a big way, for inducing a status-oriented feeling and attitude.

Now, the case of the African leaders in the above matter is a strong one in view of the fact that the post-independence mobility of the indigenous population into progressive economic positions has not covered the whole population. Consequently wealth has not been evenly distributed among the population of emergent states; it has so far been concentrated in few hands - the politicians, top civil servants, the company directors, etc. In the private sector, which has expanded since, employment opportunities as well as new avenues for the acquisition of wealth by indigenous businessmen has only been enjoyed by few individuals in such capacities as contractors industrialists, transporters and traders. At this stage it is probably appropriate to mention the fact that the colonially inherited legal order expressly did encourage, and indeed permitted, anyone to aim at capitalistic ends. The rules relating to real

property, for example, favoured the emergence of a landlord class; it also permitted anyone to enter the market to acquire income-producing real property. The inherited capitalist laws never discouraged anybody to depend exclusively on salary, but instead permitted him to explore any means by which he could become rich. One can thus assert, in more general terms, that it was the inherited law that in fact structured economic opportunities for political elites and others to use their influence and power to become exploiters. They are aided enormously by the existence in the legal order of vast number of discretionary powers which, because of the nature of these powers, enable them to shower economic advantages on favoured individuals. These favours are usually extended to political elites by the old school mates, relatives, or friends who have the necessary discretionary powers. The existence of these conditions in emergent nations have usually generated situations of corruption, nepotism and abuse of responsibility.

Now, while the standard of life of the above named class of individuals was rapidly improving since independence, the real income of the ordinary clerk, artisan or peasant farmer, and consequently his standard of living has ever remained substantially as before. In the circumstances, Wraith and Simpkins have detected the emergence of four social classes.

"The huge mass of family farmers, living like the English

peasant of the middle centuries, illiterate, superstitious, handling very little money, their world bounded by the family or clan; wage-earners and urban proletariat, living like their counterpart in nineteenth century Britain, semi-literate, underpaid, badly housed, but beginning to understand their rights and to feel their power; the growing middle class of traders, teachers and officials, whose styles and standard of living approximate to those of the privileged class of the twentieth century; and the top professional and businessmen, whose material and often professional standard equal or exceed those of the western world."³ There quickly developed, therefore, social inequality immediately after independence in most, if not all, of the African states. It is this inequity and an unevenness in the sharing of national resources among the people of new African nations that has generated a genuine disquiet among African leaders. For the application of African socialism, to which every African leader is in some way, in support, involves suppression of the phenomenon of social inequality because it implies unequal distribution of the nation's wealth, and also encourages the exploitation of one class of the population by another. It needs to be stressed here that social equality is overtly an entrenched component of African Socialism and one of the goals of socialism is social justice which means, as President Sengor of Senegal has written "just distribution of the fruits of production among the producer"⁴

Hence African leaders have imposed upon themselves the duty of ensuring equal opportunities to all of their citizens and a total elimination of any traces or manifestations in any form of inequities. Again President Kaunda stated the case admirably when he said that:

"... In our society we must accept in true spirit that we are all equal human beings; we must reject classes which are glorified and sanctified in some societies. We must work for equal opportunity for all in various spheres of life. We Africans are traditionally communalists and mutual aid societies. We always have had built-in social mechanisms to make egalitarianism a more practical way of life. We must continue to create conditions under which people can live a full life, a decent life, a life of their own choice by which they can enhance their personal worth contributing to the greater happiness of the whole society... Zambia must firmly move in the direction of egalitarianism and attain the highest possible degree of economic and social democracy in order to maximise social Justice."⁵

In these circumstances one sees an immediately relevant question that merits investigation. The question in point can be put this way: What legal devices have the emergent African states instituted in an effort to attain 'social democracy' and hence the maximization of social justice? Efforts intended

to bring to the masses a rise in their own real income and thus enhance their standard of living require a somewhat drastic re-distribution of income and the diversification of the economy. The existing legal institutions handed down by the former colonial power have to be changed in order to take account of, and facilitate, the implementation of programmes designed for an equitable distribution of wealth. Naturally, the realization of these ideals, namely the socialization of national assets, may involve interference with individual rights. Nwabueze has detected three classes of right which have particularly been affected, viz. "the right of workers to strike, the right of property, and freedom of enterprise."⁶ Here, however, we shall be concerned with an examination of how efforts to attach a social function to property has affected the right of the same in Commonwealth Africa. As has been noted elsewhere, among countries in Commonwealth Africa that have been active and in the forefront in the process of the socialization of law aimed at the elimination of social inequality, Tanzania, followed by Zambia could be mentioned. The Interim constitution of Tanzania affirms in the preamble that it is the duty of the government to "conduct the affairs of the state so that its resources are preserved, developed and enjoyed for the benefit of its citizens as a whole and so as to prevent the exploitation of one man by another."⁷ This stipulation in the

Tanzanian Constitution squarely compares well with President Kaunda's directives to the National Commission on the Establishment of a One-Party Participatory Democracy. The President had instructed the Commission to approach the task on the basis that "Zambia is permanently opposed to exploitation of man by man and the people of Zambia will persist relentlessly in their struggle for self-reliance and the establishment of protective measures against possible exploitation by foreign and local economic interests. The people of Zambia will continue to fight against the establishment of economic, social, political and cultural classes in order to guarantee the equality of all human beings in a humanist society."⁸ And indeed Zambia's One-Party state constitution which came in operation in 1973 reiterated these directives in the preamble which, interestingly enough, has reproduced the exact wording of the stipulations in the Tanzania's Interim Constitution calling upon the state to conduct its affairs in a manner that would benefit the citizens as a whole and so as to prevent the exploitation of man by man. This parallelism of the Tanzanian and Zambian approach to the elimination of social inequality allows for a comparative study of the two situations. Here, it is therefore proposed, to investigate the subject of how the need to induce social equality has affected the absolute and exclusive enjoyment of property rights by individuals in the two countries mentioned. Two legal institutions or devices have been adopted in Tanzania and Zambia to alleviate the problem of inequality in the distribution and enjoyment of wealth:

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These are, the 'Leadership' Code, and the nationalization of land.

2. THE LEADERSHIP CODE AS AN INSTRUMENT OF INDUCING SOCIAL EQUALITY.

It was Karl Marx who firstly articulated a theory which revolved on the proposition that there exists an alliance between political and economic elites in more broader terms. He argued that such an alliance was inherently dangerous in a socialist state. This is so because the political elites who have at their disposal the instruments of law and state do make political decisions favourable to their economic positions. According to Marx and his disciples, the state and law arose as engines of compulsion to protect the class of property owners against the property-less class. The situation is of course acute in a society whose institutions are organized on, and are destined to advance, capitalistic ends. There, a capitalist class becomes richer and richer, and a proletariat is increasingly condemned to poverty. In the first chapter we argued that the functions and objectives of the African state, and its laws, should not be seen through the marxist spectacles. The African state is committed to the attainment of an egalitarian society by reducing the influences of capitalism as much as possible. The law relating to leadership code, and land tenure in some of the African states specifically aims at attaining that goal, namely, a classless society whose members should, prophetically, enjoy equality in their social, economic, and political life. But it must

be accepted that this is not an easy objective to accomplish in emergent African states, the reason being that most of these countries inherited typical laissez-faire capitalism whose values were already deeply implanted in the minds of most nationalist leaders. It is not, therefore, surprising that immediately after the attainment of political independence, political elites resorted extensively to the practice of capital formation, and the acquisition of property, for themselves and for their families.

Some African democracies have viewed the above stated developments as contrary to the socialist principle of 'social democracy; namely the desire to build an egalitarian society based on classless and equality ideals. Thus practical steps have been taken to entrench these socialist ideals. One such step is the introduction of leadership codes in at least three African states - Ghana, Tanzania and Zambia.

GHANA:

The idea of a leadership code in Commonwealth Africa was first perceived by the late President Kwame Nkrumah. His efforts to cut the ties between the Ghanaian political elites and the economic ruling class, however, were far from successful. It was in his famous Dawn Broadcast of 8th April, 1961, that Nkrumah directed that "Any Party Member of Parliament who wishes to be a businessman can do so but he should give up his seat in Parliament.... This tendency

i.e. to enter into the private sector is working to alienate the support of the masses and to bring the National Assembly into isolation."¹⁰ In the same speech, Nkrumah then turned on specifically to members of the Convention People's Party: "I have stated over and over again, that members of the Convention People's Party must not use their party membership or official position for personal gain or for the amassing of wealth... In other words, no Minister, Ministerial Secretary or Party Member of Parliament should own a business or be involved in anyone else's business ... some Party members in Parliament ... are tending ... to become a social group of self-seekers and careerists...."¹¹ Henceforth it was ruled from the President's Office that party members should not own:

- (a) more than two houses of a combined value of £20,000;
- (b) more than two motor cars;
- (c) plots of land (other than those covered by (a) above) with the total value of £500¹²

Strangely enough, Nkrumah's leadership rules did not prohibit leaders from holding more than one government job, from investment generally in the private sector, or restraining leaders from entering business. Further, the rules were aimed only at party members; so that civil servants, chairmen and general managers of public corporations, university professors and lecturers, etc were not affected. To the extent that this was the case, the Ghanaian leadership code had a narrow reach and left a substantial cross-section of the popu-

lation is owed to capitalistic societies. It is probably easy to explain why Nkrumah's leadership code had a limited reach. At the time when he took the leader his measures Nkrumah's regime was undergoing a substantial loss of legitimacy. The factors which were responsible for this development were mainly those which resulted from Nkrumah's arbitrary acts of political authoritarianism, centering on widespread use of preventive detentions, and widespread corruption. Added to this was the regime's haphazard economic planning and the resultant economic chaos. This last factor was also tied up with the fall of cocoa prices. But it was because of the dictatorial nature of Nkrumah's regime that the Ghanaians started to doubt the democratic honesty of the C.P.P. In response Nkrumah interpreted this to have come about because the members of the C.P.P. were detaching themselves from the masses principally because of their economically acquisitive tendencies. He saw in the leadership code as the only device effectively capable of halting these tendencies and thereby hopefully restoring the lost legitimacy. Yet the evidence available shows that Nkrumah in fact took no vigorous steps to implement the Dawn Broadcast Speech, but instead he believed it necessary to surround himself with people personally loyal to him.

TANZANIA:

It was Tanzania which took the lead in Commonwealth Africa in formulating a comprehensive leadership code in 1967. The National

Executive Committee of the ruling Tanganyika African National Union (TANU), meeting at Arusha, adopted the Arusha Declaration which has already been referred to, but their relevance in the instant context is that, the declaration sets out among other things the dynamics of socialism in Tanzania. It points out three propositions as the main themes of Tanzanian socialism: (a) absence of exploitation; (b) major means of production to be under the control of farmers and workers; and (c) democracy. And it clarifies what a socialist state is:

"A true socialist state is one in which all people are workers and in which neither capitalism nor feudalism exist. It does not have two classes of people: a lower class consisting of people who work for their living and an upper class consisting of those who live on other people's labour. In a true socialist state no person exploits another, but everybody who is able to work does so and gets a fair income for his labour, and incomes do not differ substantially."

The argument of the National Executive Committee of TANU at Arusha is that "socialism is a belief"; that is, it can only be implemented by people who firmly believe in its principles and are prepared to put them into practice. Now, since a true member of TANU is a socialist, it follows that his first duty is to live by these principles in his day-to-day life. In particular a TANU leader should never live on another's labour, neither should he have

capitalist or feudalist tendencies. The successful implementation of socialist objective depends very much upon the leaders, because socialism is a belief, and it is difficult for leaders to implement it if they do not believe it." It was because of the need for 'leaders' and in particular party leaders to live up to the high ideals of socialism, that the Declaration lays down a "Leadership Code". The Declaration contains standards for leadership - the leadership regulations call upon every "leaders" to become either a peasant or a worker, and not, in any way, to be associated with the practices either of capitalism or feudalism, they forbid "leaders" from earning more than one salary, hold shares in a company, hold directorships in any privately-owned enterprises, own houses which he rents to others. The Leadership Resolutions then concluded with a definition of the term "leader" for the purpose at hand: The term comprises the following: Members of the TANU National Executive Committee; Ministers; Members of Parliament; Senior officials of organizations affiliated to TANU; Senior officials of para-statal organizations; all those appointed or elected under any clause of the TANU constitution; councillors; and Civil Servants in the high and middle cadres. In the context, "leader" is taken to include a man, or a man and his wife; a woman, or a woman and her husband.¹³ These provisions were incorporated into the Interim Constitution by

means of a constitutional amendment, and have thus been reduced to statutory form.¹⁴

Indeed being adopted by the resolution of a party conference, the code becomes part of the constitution and rules of the party, binding on party members who are within the definition of a leader as defined. But this method of giving binding force to the code would have rendered it unenforceable against leaders who are not party officials or whose offices are not dependent upon party membership. For this reason the Civil Service Regulations were amended to incorporate the code, thereby making it to affect civil servants; similarly the various regulations governing councillors and officers of parastatal organizations were amended to bring them under the code. The only reason for enacting an amendment to the Interim Constitution in 1967 was to add new grounds of disqualification for candidature of the National Assembly elections, and also at the same time to extend the grounds for removing a member of the National Assembly from his membership of the House. For the same reason the Local Government (Elections) Act, 1966,¹⁵ was amended by the Local Government Laws (Amendment) Act¹⁶ of 1968 in order to apply the disqualification to councillors in local government. It is important here to mention that the Local Government (Elections) Act, 1966, has since been repealed and replaced by the newly enacted law-the Elections

Act, 1970.¹⁷

Thus by way of recapitulation of what has been stated above, it will be seen that the source of authority of the Tanzanian Code differs for the four categories of leaders: for the members of parliament and ministers it is the constitution, for public servants the appropriate regulations for local government members and staff, the Local Government Act, and for party officials, the party resolution. Before the Tanzanian Leadership Code can be compared with its Zambian counterpart it is proposed to start with giving some background details of the Zambian model.

ZAMBIA :

The Zambian leadership code, like its Tanzanian counterpart, is aimed at divorcing power from wealth, tackling the problem of corruption among politicians and other holders of public office, and thereby achieving more egalitarianism with the masses. It was first proposed by President Kaunda as early as 1970. The 1970 code, which was never introduced, contained a number of provisions largely copied from the Tanzanian code, and it was aimed at 'party leaders' and senior public servants only. These class of people were, for example, forbade from being associated in any way with the practices of capitalism and other forms of exploitation; from participating in

business, either as an individual entrepreneur, as shareholder or as a director in a company. A leader also was prohibited to receive more than one income, or to let a house owned by him whilst in a Government house. The only reason for making the 1970 code to apply exclusively to 'party leaders' and senior civil servants was that "all these people handle, in one way or another, state secrets which they can take advantage of in pursuit of their own interests at the expense of their fellow men who are not privileged to know Government policy." Therefore, President Kaunda argued that; "For any measures to succeed in our endeavours to establish a society in which there is fair distribution of wealth and equal opportunity for all citizens, we need dedication and commitment to the national goals by our leaders...."¹⁸ This resulted in the establishment of a committee to study the question and the implementations of the decisions which the National Council of UNIP had passed regarding the leadership code. As indicated above the 1970^{code} was never implemented.

In 1972 the question was considered again. In a pamphlet called 'The Nation Is You', which contained the presidential addresses to, and resolutions of, the National Council of UNIP held at Mulungushi, Lusaka, from 4th - 6th March, 1972 - there is a resolution on the code of behaviour expected of the leaders. The National Council "resolved that in view of the fact that

Zambia is going through a significant metamorphosis that will lead to a One-Party State, the Central Committee should at its earliest convenience look at the question in order to produce tangible guidelines of what will be expected of the leaders in the new-look Zambia." Further, the resolution stated that "the guideline so produced should be such that the leaders are not placed in a doubtful position whether they themselves and their followers do not know what they should do or not do."¹⁹ Meanwhile, Dr. Kaunda had earlier on spelt out the position of leaders in such fields as renting houses, commercial undertakings in the field of trade, commercial farming etc. It is at this stage that President Kaunda gave the concept a fairly comprehensive formulation in that its outlines came to be more clearly defined. When the National Commission on the Establishment of a One-Party State was appointed, its terms of reference included "the Code of Leadership for Parliamentarians and other leaders in order to qualify for various positions in which supreme power normally vested in the people, is exercised by them indirectly on behalf of the people".²⁰ The National Commission came out in support of the code. The basic argument in favour of the code was that it "would eliminate corruption among leaders, ensure and maintain a high standard of discipline and portray an unquestionable rectitude as well as a high sense of duty and responsibility. Thus their public image

would be protected from unnecessary attacks and insinuations". The Commission further recommended that in implementing the code one of the cardinal principles was that a firm guarantee of social security measures by the Party and Government for leaders and their families be undertaken so that they would have no excuse whatsoever for turning to corruption as a security measure. In this respect it will be noticed that in Zambia, unlike in Tanzania, one of the motivating factor in introducing the code was that it was looked upon as a potential institution of combating corruption among the leaders. And it was principally because of the widespread practice of corruption among the Zambian leadership that the National Commission recommended a more long-term social security measures for leaders and their families. Similarly, the Commission also recommended that the penal code provisions on corruption or misuse of public funds be amended to include all offices whose holders receive remuneration or salaries from party or public funds. We shall revert to this latter recommendation in due course; but with respect to the question of corruption by the Zambian leaders, one explanation is that in Zambia unlike Tanzania, there are vast attractions of business and investment opportunities in the private sector. On the other hand in Tanzania, opportunities in the private sector have been narrowed sharply in that expatriate firms have been taken over by parastatal organizations.

Thus, when the One-Party State Constitution was written in 1973, the leadership code was made a constitutional institution. At this point it is significant to notice that the Zambian approach for giving it legal force is different from the method adopted in Tanzania. In Zambia it is to take the form of regulations to be made by a Leadership Committee set up under the constitution - "The Leadership Committee may by statutory instrument make regulations applicable to the holders of specified offices (which regulations are in this constitution referred to as the leadership code)".²¹ The Committee constitutionally consists of five members appointed by the President.²² No formal qualifications are laid down in the constitution for members of the Committee, but it is interesting to note that the Committee is remarkably a high powered body whose chairman is the Secretary-General of the Party, and the Prime Minister is the Committee's Vice-Chairman. The other remaining three members are all Central Committee members. Possibly the composition of the Leadership Committee reflects the importance Dr. Kaunda and the Party attaches to the code. In exercise of the powers conferred on the Leadership Committee contained in Article 33 quoted immediately there above, the Committee has made a total of four statutory instruments. Statutory instrument No. 249 of 1973 was the first to introduce the leadership code. This was revoked and replaced

by statutory instrument No.288 gazetted on 21st December, 1973. This was in turn revoked and replaced by instrument No.47 which was gazetted on 20th March, 1974. And finally instrument No.47 was revoked and replaced by statutory instrument No.108 of 14th June, 1974. This latter one, that is instrument No.108, is the current law relating to the requirements of leadership code of behaviour. It is significant to notice that in all the revoking statutory instruments, except for instrument No.288, provision is made to the effect that notwithstanding the revocation, a declaration of compliance validly undertaken under the relevant revoked instrument by a leader shall be deemed to be a declaration validly made and has therefore a legal effect.²³ The object is to avoid subjecting a leader to make a second, or third, or fourth declarations of compliance, as the case may be, each time a statutory instrument is revoked and replaced by another.

The reasons for the postponements of the leadership code and failure to reach an immediate finality in the drafting of the leadership regulations seem to be twofold. In the first place the government wanted to give sufficient time to the affected leaders within which to prepare themselves for the changes which the code was to introduce. In the second place the Leadership Committee appreciated that the regulations in their original form were incapable of a realistic functioning. There were

numerous loopholes, overt oversights, and even oppressive provisions in the earlier statutory instruments. It was therefore thought necessary to make modifications and adjustments in the manner of drafting the regulations with the aim of attaining a more realistic approach by avoiding some of the oppressive results which were inevitable if the earlier versions of the regulations were allowed to stand. Mr. Grey Zulu, Secretary-General of U.N.I.P. and Chairman of the Leadership Committee explained the reasons for postponement as follows; "In March, 1974, as a result of the representations, the Committee (Leadership Committee) decided that an amended Leadership Code should be introduced with a view to making the Leadership Code more realistic and effective. The Leadership Committee had accordingly made modifications in the regulations that now constitute the Leadership Code. These were published on June, 14 1974 under statutory instrument No.108 of 1974".²⁴

On a closer examination it emerges that Statutory Instrument No. 288 of December, 1973 is closely identical both in form and content with Statutory Instrument No. 47 of March, 1974. It is quite obvious therefore, that the reason for the revocation of Statutory Instrument No. 288 and its replacement by Instrument No. 47, appear to be that by far the majority of the "leaders" within the meaning of the code had not complied

with the code by the deadline of March 20, 1974 and so the Leadership Committee was forced to extend the period of compliance otherwise it would have meant that the recalcitrant leaders, who had not made their returns under the code, would have lost their jobs. According to Statutory Instrument No. 47 leaders were supposed to have complied within three months of its coming into operation, that is by June 20, of 1974. But a week before the statutory grace period of three months, Statutory Instrument No. 108 of 14th June, 1974 came into effect by revoking Instrument No. 47. According to Instrument No. 108 "... every leader shall, within twelve months after the coming into operation of this code or taking office or acquiring property or assets ..., dispose of all such property or assets to a person other than his spouse or child...."²⁵ In other words every leader must, by virtue of the current law, comply with the code by 14th June, 1975.

The postponements of the code must also in part be explained by the hypocritical attitude which some of the leaders in the Party and government adopted. There were outcries voiced by some leaders, especially political leaders, condemning the code as a device intended to make leaders 'poor'. There was widespread panic and conflict of interests and opinion among the entire leadership of the party and government. Most of

them already owned farms, houses, flats and houses for rent, taxicabs, retail/wholesale businesses, and they practically infiltrated the entire national economy in such capacities as investors, shareholders, partners, creditors, etc. in the various commercial undertakings. It is therefore understandable on their part why they have been active behind doors, and using delaying tactics in the introduction of the code. When the Chairman of the Leadership Committee, Mr. Grey Zulu, said that as a result of "representations" the Committee felt it desirable to make some "modifications" in the provisions of the code, and also at the sametime to postpone it, it seems obvious that the Committee was simply giving in to the demands of the high ranking party and government leaders. It is inconceivable that an ordinary member of the public who was caught as a leader by the code, could have any access, and possibly make any weight-carrying representations, to such a confined body as the Leadership Committee. In any case, the Committee was not taking any representations or feedbacks from the public on how best to make the code effective; so that it is a fair guess that the unusual postponements of the code and the accompanying changes in its contents and form reflect the extent to which the leadership interests have been accommodated. But this is not to claim that this was an overriding factor behind the Committee's decisions on postponements and

modifications of the code. Substantially, it was because of the existence of notoriously unrealistic and oppressive provisions in the earlier regulations that genuinely dictated Zambia's code to go through these progressions. Some of these provisions can now be reviewed.

In the first place the definition of "emolument" in all the earlier three Statutory Instruments was too wide and practically covered any conceivable benefit one can think of: for it included "any salary, wage, overtime or leave pay, commission, fee, bonus, gratuity, benefit, advantage (whether or not that advantage is capable of being turned into money or money's worth), allowance, pension or gratuity paid, given or granted in respect of any employment or office wherever engaged in or held, save any allowance that may be deducted in the determination of income."²⁶ As is self-evident from the items included in the meaning of emolument, it is almost endless. It is difficult to see any justifiable reason for prohibiting a "leader" to be entitled, for example to gains or advantages derived through his own personal labour and initiative. For on what grounds should his pensions, annuities, proceeds from insurance policies, or payments in respect of the publication of his works, for example, be withheld? Some of the items touched upon by the earlier codes were matters which constituted vested rights and which, it is the

responsibility of a modern democratic government to advance and protect in the general welfare of the community. Zambia is a welfare state whose guiding ideology is 'humanism'. This means that the government imposes upon itself the duty to act positively for the well-being or welfare of the people as a whole; and also to help man fully to realize himself - his creativity, his dignity and his whole personality. Surely it is not in the spirit of this duty for the government to deprive an individual's entitlement of rewards naturally accruing to him as a result of his enterprise - e.g. publication of his work, researching, or overtime pay, or benefits due to him when he retires due to old age. In other words the definition of 'emolument' in the earlier codes went beyond what the social equality ideals, 'even' in a socialist society, can reasonably be said to require. Those ideals could still be achieved even within an atmosphere where social security measures for 'leaders' are maintained and also their general welfare preserved. It is this kind of inherently oppressive provisions in the code that justified the necessary changes in the operative Statutory Instrument. Thus the current code has narrowed the scope covered by the meaning of "emolument" and more significantly, it permits a leader to be entitled to receive, in addition to emoluments ordinarily payable to him in respect of the specified office or offices which he holds, "pensions; annuities;

proceeds from insurance policies; allowances or benefits (not being the salary) accruing to him by virtue of the specified office or offices which he holds; payment from educational institutions in respect of instructional, examining or invigilating services; pay in respect of the publication of his works; income accruing to him from any property or assets situated outside Zambia if he is not a citizen of Zambia; interest on moneys deposited within Zambia in a bank or building society; dividends on Government Stock; income derived from any land owned or occupied by him in accordance with the provisions of regulation 4(2); rent on any dwelling house let or sublet by him in accordance with the provisions of regulation 4(3); gains or advantage derived through personal labour on the land owned or occupied by him in accordance with the provisions of this code."²⁷

Another unrealistic aspect of the earlier versions of the code related to the provision that "a leader shall not put to his personal advantage or to the advantage of any other person materially or otherwise any information acquired by him during his term of office as a leader."²⁸ Here it may be unfair to blame the Leadership Committee for inserting this provision in the code. It was actually the National Commission which had recommended it.²⁹ Even among the commissioners there were objections raised against the recommendation under reference.

Commissioners Kasuka Mutukwa who sat on the Commission as a representative of the University of Zambia, and Commissioner David Phiri, Director of Anglo American Corporation Limited who sat on the Commission in his capacity as a representative of a private business community, but who is Chairman of the University's Council, felt very strongly that the spirit contained in the relevant recommendation will be a prohibition to the development of research, knowledge and the search for truth. They contended that it would be difficult to separate the complex role of a Lecturer/Researcher.³⁰

In spite of these representations the recommendation about 'information acquired during term of office' in its unqualified form stood in the Commission's Report and finally found its way in the first three leadership regulations drafted by the Leadership Committee. But whatever reasons, if any, the majority of the members of the National Commission had for refusing to accommodate the views of Messrs. K. Mutukwa and D. Phiri, research in all fields of national activities, has a role to play in relation to economic development especially in a developing nation which is constantly engaged in using experimental means in generating reliable knowledge upon which those involved in the task of implementing development projects are to act. Further, in a developing nation which is in a hurry for rapid change, the legislator must know something of the situation he

wishes to change or regulate. If he attempts to regulate certain kinds of facts without sufficient knowledge about them, it is doubtful that he will achieve the desired end. He may in fact produce undesired by-products. To avoid this, highly developed research methods in such fields as social sciences, agricultural sciences, and rural conditions, can be used. The implied prohibition of research in the initial codes was therefore, to operate against certain facets of economic development. Happily however, modification has been made in the current code which provides that; "Except for authorized scientific, research, educational, literary or other purposes of like nature, a leader shall not use or convert to his use or advantage or to the use or advantage of any other person any information acquired by him in the course of his duties or by virtue of the office or offices which he holds".³¹ The position under the current Instrument has actually put the objectives of the leadership code on the matter under discussion in its proper perspective. Apparently the rationale for the "information acquired during the term of office" provision in the earlier codes is implicit from Dr. Kaunda's remarks when he was elaborating on the 1970 abortive code to which reference has already been made. It will be recalled that the 1970 defined a "leader" only to include party members and "senior public servants". And the only stated reason for the application of the 1970 code to these section of the population

was that they "handle, in one way or another state secrets which they can take advantage of in pursuit of their own interests at the expense of their fellow men who are not privileged to know Government policy". It will be seen that the kind of leader envisaged to convert 'state secrets' to his own use was the one associated with the making of government policy or at least one who is strategically in a position to know about government policy proposals. But when the code ultimately emerged from the Leadership Committee, the concept of leadership was given a wider meaning so that it substantially covered those who were quite distant from government functionaries. This being the case, leaders in these extra category, since they have no access to state secrets or government policy proposals cannot be looked upon as threatening the usage of these information in pursuit of their own economic ends. In other words this provision is only relevant to political elites and top civil administrators and it loses meaning if extended further to affect certain roles of leadership in society like researchers, lecturers etc.

Another noticeable improvement which the current code makes, but which strangely enough, was not provided for by the earlier ones, is the fact that although a person may be holding any of the specified offices listed in the first schedule of the

Regulations, he, nevertheless, must be in receipt of an annual salary of K2,500 or more. This, however, corrects the ridiculous situation in which even a sweeper earning an income far below the 'subsistence' level is regarded as a 'leader' and hence not permitted to pursue extra means of generating income strictly for livelihood.

OBIGATIONS OF A LEADER UNDER THE (CURRENT) CODE.

Perhaps the best approach to adopt in discussing the current obligations of a leader under the code is to do it by considering one obligatory regulation after another as they are found in the code.

With respect to Regulations 1 and 2, these are self-explanatory except that the definition of a "leader" has now been changed. It is now only the holder of the specified office who is a leader. A leader's spouse or child is no longer "a leader" (as was stipulated for in the earlier codes) unless he or she also holds a specified office in his or her own right. The constitutional position at present, allows the Leadership Committee to introduce a code for "holders of specified offices"³² only so that wives and children cannot constitutionally be included as leaders as the previous codes purported to do.

Also, the definition of "land" has been added under the current

Statutory Instrument. The legal effect of this provision in the code is to render the whole code inapplicable to Trustland and land in the Reserves as defined by the Zambia (Stateland, and Reserves) Orders, 1947 to 1964, and by the Zambia (Stateland, and Reserves) Orders, 1928 to 1964. We discuss these pieces of legislations and their relationship to economic development in the next chapter; but their relevance in the instant case is that the code does not prohibit a leader to own or occupy land governed under customary law. But a leader is prohibited to own more than ten hectares of land in what was previously known as Crownland - known now as Stateland since independence. On a serious examination of the facts surrounding this provision, it transpires that the provision does not take us anywhere. Stateland in Zambia comprises only 10 of the country's land - and this is the land lying along the line of rail which were reserved for whites by the colonial regime. A leader therefore can still possess the Statutory permitted ten hectare of land in Stateland, and can, in addition, grab a 'limitless' amount of land in the traditional sector without being in contravention of the code.

Regulation 3, on the other hand, provides that a leader is entitled only to emolument payable to him in respect of the specified office he holds. As already explained, he is not allowed to receive any other remuneration from other sources and

is not permitted to carry on any business, trade or profession.

Among the acts prohibited by Regulation 4, is that a leader who is a Zambian citizen cannot own land outside Zambia. He is also not to let his house unless he is transferred from the place where the house is situated when he is allowed to let it on any agreed terms.

Regulation 5 permits a leader to carry on a business or own and occupy land and receive emoluments (which he would otherwise be prohibited by the Leadership Code) if he elects not to be paid a salary in respect of the office he holds. The land he owns or occupies can then be more than 10 hectares if he chooses to own and occupy the same in Statelands.

Regulation 6 prohibits a leader when discharging his duties from asking for or accepting any property or benefit or gifts of whatever nature for himself or for any other person on account of anything done or omitted to be done by him. However, bona fide gifts are permitted to be received by a leader. It is said that "this Regulation intends to ban the slavery system used by colonial administrators where villagers were asked to donate mealie meal, chickens, eggs, etc to the colonial administrators".³³ Well this observation may hold water, but it should also be understood in relation to what has emerged in the post-independence Zambia whereby some government officials

expect some gifts after rendering some services that come under their offices. The case of John Mulwanda referred to in chapter 3 immediately comes to mind to justify this allegation. The provision is also intended to guard against corrupt tendencies like granting citizenship, passport, licence, etc. with a hope that the issuing official will be given some kind of secret benefit.

Regulation 7 prohibits abuse of office. As in case of regulation 6, (and regulation 8 underneath), it is aimed to stop leaders from being corrupt. Under this Regulation leaders are called upon not to be extraneously influenced, but are required to use their discretion properly and to avoid being arbitrary or casual in making official decisions.

We have already commented on Regulation 8 which prohibits a leader from using to his personal advantage or to the advantage of any other person information acquired by him during his term of office. In the present context, it is necessary to mention that Regulation 8 also aims at prohibiting people using the information corruptly for their personal gain and that is why we said above that it is similar to regulations 6 and 7. But it must also be pointed out, in relation to Regulation 8 that, a person can write a better book after the experience he gains from a particular job. But what the regulation aims to remedy

is that it is wrong for a leader to reveal secret information for one's personal benefit. It is wrong, for instance, for a leader who knows of the increases on the prices of certain commodities to get his wife or servant or any person to buy those items in large quantities so as to escape the effects of any such measures in the pipeline.

TIME FOR COMPLIANCE WITH THE OBLIGATIONS UNDER THE CODE

Regulation 9 sets out compliance provisions. It provides that every leader shall submit to the Secretary-General of the Party a written declaration of all the property or assets he owns and all the liabilities he owes. This should be done within three months after the coming into force of the code or three months after taking office, as the case may be. Such declaration must contain all properties and assets (including cash in hand) and liabilities owed by the leader on the day the leader makes the declaration. Even if a person qualifies as a leader, he need not submit any declaration unless his assets or liabilities amount to K2,000 or more. In other words, assets or liabilities below K2,000 need not be declared.

And by Regulation 10, every leader is required, within twelve months after the coming into operation of the code or taking office or acquiring property or assets, to dispose of all such

property or assets to a person other than his spouse or child.

This regulation does not, however apply to any cash on hand; monies deposited in a bank or building society; monies invested in government stock; proceeds of sale of property or assets; land or dwelling house owned or occupied by the leader pursuant to the provisions of the code; and lastly, property or assets outside Zambia owned by a leader who is not a citizen of Zambia.

Interestingly enough, a very relevant political development relating to the compliance with the code has taken place in the country. President Kaunda had suspended a Cabinet Minister and two members of Parliament from their jobs and the Party "for failing to comply with the Leadership Code."³⁴ The President explained that the "Minister for North-western Province Mr. Amock Ihiri and the two Members of Parliament, Mr. Godfrey Laima and Francis Matanda, have been suspended because they did not declare all their property to the Leadership Committee." About two weeks before this action was taken the General-Secretary of the Zambia Congress of Trade Union (ZCTU) charged that (in support of an earlier presidential appeal) "leaders" who had not complied with the requirements of the code should resign from their posts because they were 'extensively' involved in the exploitation of workers and peasants. In fact the entire labour movements in the country, which are affiliated to ZCTU, came strongly in support of the urge to get rid

of 'leaders' who had not submitted their returns to the Leadership Committee.³⁵ Because of the intensity of this campaign by the union leaders in the country, and their threat to stage a mass demonstration against the recalcitrant 'leaders' President Kaunda appealed to union leaders and the general public "to stop castigating leaders at Party Committee or through the press... If they knew of any leader who had not complied with the Leadership Code they should follow the right channels".³⁶ The 'right channels' referred to by the President is contained in Regulation 11 of the Code which provides that any person who has reason to believe that a leader has committed a breach of the code or has not adequately complied with any of its provisions, can complain to the Secretary-General of the Party. The Secretary-General of the Party can then make arrangements to have the matter heard and decided by the tribunal referred to in Article 35 of the Constitution. But if the person in respect of whom the complaint is made, admits in writing that he has not complied with the code or that he is in breach of the code, the procedure to be followed is as provided in Regulation 13(2) of the Code.

But even the so-called 'right channel' also poses some difficulties to go by it. The question is how accessible will the declarations of assets and liabilities of leaders be to members of the public? For one thing the leadership code law does not,

anywhere, provide for some means by which members of the public who possess genuine and founded complaints against leaders who have not complied with the code can verify their complaints by allowing them access to the returns. Moreover, while it is appreciated that the public could help the Party and government to verify the declarations made by leaders, the privacy of each individual has also to be protected. Protection for privacy is constitutionally guaranteed under the Zambian constitution - as to how this guarantee should be qualified to take into account policies of social equality and economic development generally is not our immediate task here.

But it has been said that if anyone has any suspicion that a particular leader has made a false declaration, that individual may apply to the Secretary-General of the Party in writing for permission to scrutinize the declaration of the named leader, giving reasons why he wants to see the document.³⁷ This decision is, however, an administrative one and does not form part of the provisions of the code.

APPLICATION:

The Code defines a "leader" to whom it applies simply to mean "a person holding a specified office or offices". The First schedule to the Statutory Instrument elaborates on who are the

'holders of specified offices'. These are "all persons in the service of the Party, and Government; any local authority; any statutory corporation, body or board, including institutions of higher learning, in which the State has majority or controlling interest; any commission established by or under any law; the Zambia Congress of Trade Unions or any registered trade union; in receipt of an annual salary of K2,500 or more." So that the Code affects a wide range of persons some of them occupying economically strategic positions who can easily ipso facto, enrich themselves without any difficult.

What is astonishing about the Zambian code is that in its present form, it applies even to expatriate staff in Zambia who happen to occupy any of the specified office or offices. As stated in the preceding paragraph the code merely says, without any qualification at all, that a 'leader' is a person holding a specified office or offices. In fact the language of the code is explicitly clear that aliens qualify to be 'leaders' depending on whether or not they hold the specified offices. For example, at one point the Code provides that "... a leader who is a citizen of Zambia, shall not be entitled to own or occupy any land or other real property whatsoever outside Zambia". In other words, the instrument provides for two categories of "leaders" namely, a leader who is a citizen of Zambia, and one who is a non-citizen. The only difference is that while the

former is prohibited to own or occupy any land or other real property outside Zambia, the prohibition does not, naturally, apply to the latter. But a non-citizen 'leader', nevertheless, is required to comply with the code to the same extent as does a leader who is a citizen in respect of 'property' which he owns within Zambia.

At another point the code leaves us with no doubt that it affects aliens. The provisions relating to the disposition of assets requires every leader, within twelve months after the coming into operation of the code or taking office or acquiring property or assets, to dispose of all such property or assets to a person other than his spouse or child: "provided that this regulation shall not apply to -

(vi) property or assets outside Zambia owned by a leader who is not a citizen of Zambia."

In other words a 'leader' who is a foreigner is not exempted from disposing assets or property which he owns within Zambia. The Code applies to him in this respect and he is required to comply with all the obligations under it except where provision is made to the contrary. One observation can be made in respect

of a situation whereby persons who are not citizens of Zambia are made to comply with the leadership restrictions. If one examines the reasons behind the introduction of the leadership obligations, there seems to be an inherent paradox between the aims initially sought to be achieved through the mechanism of the code and its application to aliens. The leadership measures were designed to halt a trend through which those with political power and authority were beginning to use the influence of their positions to acquire large farms, were building houses for rent with government loans, or involving themselves in business venture of their own. Not only did this trend distract the Zambian leadership from public duties, but there was a danger that political office might come to be seen as merely a stepping-office into business, and that as a result political leadership would be confined to a group representing only propertied interests. It was therefore felt that, when introduced, the leadership code would operate to ensure that those making decisions will do so to the benefit of the broad categories of people in the country. Now, expatriate staffs, wherever they work in the country's institutions, are not political elites - for they do not hold political authority or power in the policy; nor do they make decisions of a political nature which they can conceivably convert to the use of their own personal interests. It is true that some of them do possess abundant influence on the making

of certain decisions, especially those who happen to be advisers to the administration in many capacities - some advise on the nationalized insurance company, banks, mining industry, commercial enterprises, etc. To this extent the contention that aliens have also found their way in the inner processes of the country's politico-economic system is valid. But the point is that it is difficult to say at once that this invasion is being accompanied by the aliens' pre-occupation to use their influences for their personal gain or advantage. If any single such case is proved there is enough law that regulate the conduct of aliens while working in Zambia which the government can resort to. In other words, we submit that it does not seem ^{fair} ~~fair~~ that the leadership restrictions should affect non-citizens of Zambia because these were aimed at the Zambian leadership, however, defined. Happily, the Attorney-General of Zambia, in an interview with the author on this particular aspect of the code, indicated that the government intends to amend the current statutory instrument so as to make it non-applicable to persons who are not citizens of Zambia.

On the other hand, the code is explicitly clear on the question whether or not it applies to Zambians working in the Zambian embassies abroad. As long as a diplomat is in receipt of an annual salary of K2,500 or more, and since he is a person in the service of the government, he cannot "own or occupy any land

or other real property whatsoever outside Zambia". Further, he is required to dispose of all property or assets to a person other than his spouse or children - of course, with the exception for those assets or property to which the code do not apply as provided under S 10(1) of the instrument.

THE EFFICACY PROBLEM:

Two aspects of the code seem topically recurrent both from within the Zambian 'leadership' and from without. From within the 'leadership' camp there has always been the cry that the leadership obligations are inherently meant to generate hardships and unfairness against those affected. On the other hand, the other camp representing ordinary workers and peasants, who are themselves not leaders, has always insisted on effective measures meant to secure strict enforcement of the code. We have seen for example how, the labour movements, representing the workers camp; have been engaged in press castigation of leaders who are failing to comply with the code and who have been involved in devising techniques by which to evade the leadership restrictions. In what follows we assess the validity of the assertion that the leadership obligations do generate specific incidences of hardships and unfairness to those affected. In the second place we make a survey of some problem areas in which legal enforcement of the code may prove difficult.

DISCRIMINATING AGAINST LEADERS.

The first point to take notice of is that the code purport to prescribe vastly and radically changed behaviour and attitude by the leadership at great personal sacrifice and cost. Leaders, like any other individuals in society, pursue ways that they perceive to maximise the benefits and rewards offered by their environment. Among those benefits and rewards is their interest in maximising their personal political and economic position, and that of their reference group. But quite indisputably leaders are doing what any member of the community does in his day-to-day life. One criticism of the code can therefore be made at this point; and this is that this institution is discriminatory as against leaders.

If one of the good reasons for instituting a leadership code in Zambia is to achieve more egalitarianism then it is difficult to see any justification for not making it to affect everyone. The Commission on One Party Democracy evaluated the situation quite ably and saw a possible conflict between the egalitarian dictates of Humanism, Zambia's governing ideology, and a code discriminating against leaders by forbidding them entrance in the private sector. "If such a charge were to be proved correct," the Report stated, "the solution appears to be either eliminating all forms of private entrepreneurship so that the code would affect everyone in the Republic or allowing the present economic

structure to continue so that any capable person could become a leader." The Commission rejected the first alternative, which it believed "implied a radical socialization of the whole economy. We thought two dangers might be eminent:

(a) that our economy would be left open to sabotage by foreign powers that have vested interests in it; and

(b) that we would be coming up against a formidable force of resistance from Zambian nationals who already had property."

Moreover, it was believed "that if leaders were forced to relinquish their posts in preference for retaining their private enterprises we would be creating a separate but powerful class of property owners divorced from active participation in the affairs of the country."³⁸ The situation in Tanzania is slightly different.

There, the opportunities in the private sector have been narrowed sharply as a result of that country's pre-occupation to socialise every economic activity. As we have seen in Chapter five, most expatriate firms have been taken over by parastatal organizations. Even where they continue under the management of the old owners, as is frequent, their pay schedules must conform to the national incomes policy, and their managers must subscribe to the Leadership Code. The development of parastatal organization in areas

formerly readily available to private penetration (such as agriculture, wholesale trade, import-export trade, etc.), has reduced the potential for private investment in formerly lucrative pockets of the economy. Most important, in 1970, the State, by the Acquisitions of Buildings Act, 1971, expropriated a substantial number of private rental housing in Tanzania, thus removing at a stroke the single most lucrative and popular investment opportunity for the newly rich Tanzanians. In fact Tanzania, more than any country in Commonwealth Africa, has taken a variety of positive steps to reduce high elite incomes. President Nyerere set the example himself by voluntarily reducing his own salary and that of his ministers by twenty per cent in 1966. Also salaries of higher 'public' officials have since been reduced, so that the spread of income in the civil service is officially stated to be at the ration of 1:18 (as compared with Zambia's 1:27). Parastatal organizations are comparable to the civil service in terms of wage structure. Ministers have been deprived of their car allowances. Higher officials are forbidden to vote themselves loans from government sources for houses.³⁹ Taxation laws and pricing policies have consciously been designed to reduce liquidity in the upper income groups. The importation of all private automobiles has been prohibited save for Volkswagens and Volvos. The era of the "wa-benzi", the symbol of the new political elite, the symbol of success, a demonstration that

one "has arrived", is a thing of the past in Tanzania; but this is far from being the case in some of the neighbouring states.

Whatever good things might have been said about the leadership code its implementation may, and in fact does involve hardship and unfairness to those affected by its operation. In the first instance the leadership restrictions enforces an undue pre-occupation with exploitation. This is true of the Tanzanian scheme. It is submitted here that acquisition of property or wealth does not always carry with it exploitation of man by man, nor does it always involve harmful social consequences. Naturally, exploitation becomes bad and undesirable if it involves a conscious attempt on the part of the leader to accumulate wealth and if this pre-occupation conflict with his leadership. In these circumstances it becomes proper that that leader should be prevented from corrupting his position of leadership in order to amass wealth. But it seems indefensible to prevent him from investing his legitimate savings in company shares or in any aspect of the national economy. Further, these regulations may induce economically undesirable effects of limiting the incentives to save and the possibility of investing among the very section of the population which should be most encouraged to do so - the better educated, better paid, and better informed Africans. In this respect, the leadership regulations may have the effect of killing individual enterprise which should be regarded

as a vital asset in the economic development of an emergent nation; and moreover, the exclusion of the above mentioned well-to-do class of the community to invest in productive enterprises must be considered as a loss to the nation. Considering the number of people that the leadership code affects, the situation the code is inducing is regrettable. In Zambia, the number of those affected constitute a vast population of more than 200,000 people. With their families, they probably make up one quarter of Zambia's population, and the overwhelming proportion of its wage-earners. In Tanzania, President Nyerere has all along been saying that his "Government intends to encourage private investment both by Tanzanians and by foreigners", and at the same time, he points out that if any Tanzanian leader chooses to be a capitalist, then he must forfeit his right to lead a socialist party or hold a position of responsibility in a government committed to socialist objectives. To this assertion, it might be objected that this might induce a situation where those leaders who can contribute most efficiently and effectively may choose not to be leaders, and this would undoubtedly constitute a loss to the government and country. One such adverse effect is that the more able young men and women who have no family fortunes to start on in life will keep out of politics and public affairs until they have gathered enough money to live comfortably in town rather than in the villages. It ought also to be noticed that the

attractions of business and investment opportunities in the private sector which in Zambia, unlike Tanzania, do exist, might prove irresistible for many of the "leaders". To the knowledge of the writer no reliable study has been made about the effects and efficacy of the much relatively older Tanzanian Code which has been in force since the Arusha Declaration. But it has been reported⁴⁰ that only one MP failed to complete the declaration by the deadline of 5th March, 1968. The MP in question although a long-standing TANU politician and former Junior Minister and Regional Commissioner, was working for one of the large international companies. And in August 1969, another member's seat was declared vacant by the High Court following a petition claiming he had not submitted his annual return. This rather favourable response demonstrated by many Tanzanian parliamentarians, except the two, in complying with the Code may be contrasted to the fate chosen by many district and town councillors. When the Local Government Laws (Amendment) Act,⁴¹ 1967 required them to abide with the same leadership conditions, as many as a quarter of them decided to withdraw from politics. The explanation for the different response in Tanzania is that councillors are not salaried, so that only those with independent means could afford to get involved in local politics. The situation in Zambia is not likely to be any better when the code becomes fully operational after the deadline of 14th June, 1975.

Coming back again to Nyerere's statement citated above, it seems that most leaders, especially those who participated in the independence struggle, will obviously choose to abide with the leadership restrictions than to come out in the open by giving up the right to lead in preference to be a "capitalist". There is that feeling of self-restraint, that is, a psychologically self-induced fear, that fellow members of a socialist community would regard with disapproval the decision to give up leadership in preference to freedom of acquisition. In fact there is much more to this view; Professor Nwabueze, for example, has observed that; "The choice has little reality for those already in leadership positions, as it means choosing between their career and their investment. No one can be expected lightly to give up a job in which he has made a career, merely because he is a shareholder in a business enterprise and is unwilling to divest his interest in it. It is an unwarranted interference with vested rights."⁴²

FEASIBILITY OF ENFORCING LEADERSHIP REGULATIONS:

One of the topical aspect of the leadership codes of Tanzania and Zambia relates to the feasibility of enforcement. Merely to ordain that "leader" should give up the property that they have accumulated over a period of time and also to block any acquisitive practices by them does not in itself, or is not sufficient to, induce the newly prescribed leadership behaviour, leaders,

like any other class of people, act pursuant to choices they make among the various courses of action open to them, according to the in which they perceive reality, and the economic implication or results which they believe are likely to follow upon their behaviour. Therefore, to induce the prescribed behaviour, the leadership code must be surrounded by workable sanctions against the tendency of evasion by the leaders. In Tanzania, for example, the government has taken no steps to block the loophole of evading the leadership code by creating trusts. On the other hand, it is not possible, under the Zambian Code, for leaders to evade the leadership restrictions by way of creating trusts of their houses, real property, or shares in favour of their children or relatives while reserving to themselves power of revocation. For in this respect Zambian legislation is explicit when it provides that;

"A leader who does or omits to do or causes to be done through any other person anything against the provisions of this Code shall be deemed to have committed a breach of this Code".⁴³

The only direct sanction for violation of the code both in Tanzania and Zambia is dismissal from the leadership and suspension from the party. In Zambia breach of the code by the holder of a specified office (other than the office of president, Judge of the Supreme Court, judge of the High Court, Investigator-General, director of public prosecutions and auditor-general)

operates to vacate the office, if it is established either on a written admission or by the decision of a tribunal established by the constitution with a right of appeal to the Supreme Court. The Tribunal consists of a chairman appointed by the Chief Justice and two other presidential appointees; the chairman must be a judge or a person qualified to be a High Court Judge.⁴⁴ Statutory Instrument No.289 of 1973 provides for rules, 'The Leadership Code (Tribunal) Rules', by which the Tribunal is to be governed in such matters as initiation of proceedings before it and procedure at its hearings. The Instrument also provides for such matters as powers of the tribunal as regards attendance etc, of witnesses, proceedings of the tribunal in public, observance of the rules of natural justice, powers of the tribunal to receive evidence, documents, etc.

And the only reason why breach of the code by the holder of the office of president, judge of the Supreme Court, Judge of the High Court, investigator-general, director of public prosecutions, and auditor-general does not operate to vacate the office, is that provision is made under the national constitution specifying ways and means by which holders of the offices under reference can be removed.

In Tanzania, the enforcement of the leadership regulations which are enshrined in the Interim Constitution is the function of the

Attorney-General. The National Assembly (Qualifications of Members) (Forms and Procedure) Act,⁴⁵ has laid down the procedure for the Attorney-General to follow in taking proceedings in the High Court for a Declaration as to whether the seat of any member he suspects of violating the Code has become vacant. On the whole, it seems that the Zambian Code is attended with more elaborate legal mechanisms designed to secure its efficacy. For example, the National Commission on the Establishment of a One-Party State had recommended that "the office of the Investigator-General investigates all cases in which the infringement of the Code has taken place; that the Penal Code provisions on corruption or misuse of public funds be amended to include all offices whose holders receive remuneration or salaries from party or public funds; that the State and Party guarantee more long-term social security measures for leaders and their families."⁴⁶ Implementing these recommendations the government passed the Penal Code (Amendment) Act.⁴⁷ The object of the amendment was in the main to redefine "a person in the public service"; to provide the mandatory forfeiture of property which has passed in connection with the commission of offences of official corruption and corrupt practices; and, to increase the penalty for the offence of official corruption. Consequently, Section four of the Penal Code (i.e. the interpretation section) was amended in the definition of "person employed in the public service" by the addition therefor of "or a person in the

employment of any corporation, body or board, including any institution of higher learning, in which the Government has a majority or controlling interest or any director of any such corporation, body or board."⁴⁸ Section ninety-four of the Penal Code on official corruption was amended by the deletion of "a misdemeanour and is liable to imprisonment for three years" and the substitution therefore of "a felony and is liable to imprisonment for fifteen years."⁴⁹ Similarly section ninety-five of the Penal Code on extortion by public officers was amended by the deletion of "a misdemeanour and is liable to imprisonment for three years" and the substitution therefor of "a felony and is liable to imprisonment for fifteen years."⁵⁰ Lastly, Section ninety-six of the Code providing for public officers receiving property to show favour was amended to increase the penalty from imprisonment for three years to imprisonment for fifteen years.⁵¹

To summarise the discussion on the establishment of leadership codes at least in two Commonwealth African States (i.e. Tanzania and Zambia), one can say that the institution has been instituted because the African political elites have developed, or tend to develop, strong ties with private business, and are rapidly becoming petty-bourgeoisie. This situation has been induced largely because the existing legal, political, social institutions received at independence not only permit it, but foster it, as does the post-independence policy of africanization. High

incomes, opportunities for investment, access to credit, africanization policies, public discretionary decisions by public officials have created the elites. Education has been their hallmark. It is largely because of these situations that social inequality between leaders and the common man has emerged. In these circumstances, it is imperative that the new state and its legal institutions have to be harnessed to close up this inequity situation. The leadership regulations are some of those legal devices aimed at divorcing power from wealth, tackling the problem of corruption among politicians and other holders of public office, and thereby eliminating inequality and achieving more egalitarianism.

CHAPTER 7:

THE NATIONALIZATION OF LAND AS A MEANS TO ECONOMIC DEVELOPMENT
AND SOCIAL EQUITY.

Most African leaders hold the view that land, being one of the principal means of production, must be collectively owned in the same way as the other resources of strategic importance to the national economy are. Legal measures have therefore been taken in some countries to nationalize land. Tanzania is in the forefront in this regard. As will become clear Zambia is also in the process of preparing the law which will effectively enable the government to have some control on land use and vest land in the president on behalf of the people. But even the current law relating to land matters in Zambia vest ownership of land in the president.

The nationalization of land in some African countries is justified on the ground that this reproduces the situation pre-existing in customary law where land is said to belong to the community as a whole, with individuals or groups having only a right to use it. President Nyerere for example, asserts that; "To us in Africa land was always recognized as belonging to the community. Each individual within our society had a right to the use of land, ... But the African right to land was simply to use it; he had no other right to it, nor did it occur to him to try to claim one".¹

It might be pointed out here that this notion of customary land is not universally true of all African societies, especially to some West African societies. In Southern Nigeria, for example, the unit of landholding is not the community, nor the village, but rather the family.² But, nevertheless, communal ownership of land is true of the traditional societies of what is now Tanzania and Zambia, and since the ensuing discussion is limited to these two countries, we accept the argument that the present-day tendency of some African government to assert that land should remain an asset of the state should be explained as merely re-establishing the position pre-existing in customary law. The African leaders have insisted that no individual could treat land as a private property unless the uses to which he puts it could be regarded as consonant with the general welfare. Each individual in the customary land tenure system, had a right to use land. Land was never bought, and although the chiefs and the elders had overall control, this control was exercised on behalf of all the people. Colonialism again, introduced a flatly different concept of land tenure namely, the concept whereby an individual was permitted to treat a piece of land as his own with the freedom to use it or not use it if he so chooses. According to this concept, which is capitalist-oriented, land is regarded as a marketable commodity. The contents given to property by the capitalist law has two aspects - the positive and a negative aspect; (a) it is a right to disposal which is both absolute and also unlimited³ - this is the positive

aspect; (b) it is exclusive, which means that it confers upon its holder the power to perform an act of disposal⁴ - this is the negative aspect. What this capitalist attitude towards property implies is that property rights are outside the intervention of the outside world. But, as Professor Katzarov has written, "property is a relative concept; its content at any one time represents the attitude to property of a certain society at a certain period".⁵

The validity of this proposition is seen by the rapid changes in the attitudes to property that various contemporary states have evolved towards the concept under consideration. For example, as long ago as 1917, the Mexican Constitution declared that the paramount title in the land belongs to the nation. The nation alone, therefore, could grant citizens the right of private property, which derives from the nation's own right. The idea embodied in the Mexican enactment is that private property does not constitute a divine or natural right which man holds from say, God or from nature, but a right belonging to society. But this should not lead us to believe that private possession of land was extinguished in Mexico, what it leads one to conclude is that if private property still continued in the post 1917 Mexico, this right derived from the nation or from the state. Further, the Mexican Constitution has a place where provision is written to the effect that; "The nation shall at all times have the right to

impose on private property such limitations as the public interest may demand".⁶ The plain import of this provision is that private property only exists subject to the general interest.

The Mexican experience has deliberately been picked up for illustration because it bears a striking resemblance in terms of the objectives it sought to accomplish with those of African aspirations in land matters. African leaders, and African socialist theorists alike, contend that the tendency of private ownership of land induces social inequality. Free marketability of land overtly implicit in the practice of private ownership encourages what has been called, 'land speculation', which in turn generates exploitation. In the period immediately after the attainment of independence in Zambia, for example, individual possession of land attracted many people both foreigners and Zambians alike. It was the same in Tanzania. In the circumstances it is feared that a poor village peasantry would be attracted by money to sell his land to land speculators thereby becoming landless individuals. President Nyerere long ago, argued against the commercialization of land saying that this works to the detriment of the Africans and to the advantage of the rich immigrants and a few rich indigenous class of people. In this regard he made this important point based on his observation of freehold in Tanzania:

"In a country such as this where, generally speaking, the Africans are poor and the foreigners are rich, it is quite possible that,

within eighty or a hundred years, if the poor African were allowed to sell his land, all land in Tanganyika would belong to wealthy immigrants, and the local people would be tenants. But even if there were no rich foreigners in this country, there would emerge rich and clever Tanganyikans. If we allow land in Tanganyika to be sold like a robe, within a short period there would only be a few Africans possessing land in Tanganyika and all others would be tenants."⁷

In most cases land speculators, or as Nyerere likes to call them a "class of parasites", usually do not buy land with a view to developing it but may decide to wait until the value of the land has enhanced through the actions of their neighbours or the activities of the government, and then resell it at an inflated price, thereby enjoying an "unearned increments" in the value of the land due to the general growth in the community. A land speculator may also wish to remain the landlord, even an absentee one, collecting artificially raised rent from those who genuinely need to use land. Because of high rents the tenant is subjected to, he is often left with no capital for further improvements at all. Further the inflation of prices of land may mean that only those who are rich can buy land.

The second argument against private ownership is absentee landlordian. On a discussion about the policy behind the passing of the Lands Acquisition Act, 1970⁸ in Zambia, it was stated that one of the motivating factor for this enactment was elimination

of absentee landlordism. African leaders not only dislike this phenomenon but also abhor it and have sought strong legal measures to put an end to it. The cause of a widespread practice of absentee landlordism is to be sought from the fact that on independence some settlers being uncertain as to the ability of the African government rule, or being afraid, may, because of their possible loss of the privileged status they enjoyed during the whole life of the colonial rule, prefer to return to the metropolitan country, but still claiming remote control of their lands which they intend to use for speculation. Meanwhile, the land remains idle and unproductive in many cases. As has already been stated⁹ the colonial government encouraged this action by entrenching as a fundamental clause in the independence constitutions the right to property which, therefore, becomes virtually inviolable without a referendum. It is this kind of legal means by which the absentee landlords' interests are protected that independent governments which are committed to building socialist societies regard as inimical to the sovereignty of the country and are therefore promptly removed from the constitution.¹⁰

Because of the problems inherent in private possession of land in the context of the African situation, this has provoked some African leaders to maintain, in the name of African socialism, that power to control land use must reside in the state. They categorically assert that land must remain the property of the state - and they adduce convincing reasons to defend their stand.

Land ownership by the state, they argue, ensures against the dangers recounted in the preceding paragraphs because in making grants of land, the state will have regard to the principle that no one gets more land than he actually requires, and also the state will make continued use a condition of the grant. Prices of land would be determined in such a way that they are brought within the ability or reach of a common man. Incomes from land sales and rents would enure to the whole community, instead of enuring to private individuals. There is no doubt that state ownership of land would maximise social justice in that the nation's wealth represented by its land would be more equitably distributed, and any possible exploitation inherent in landlordism prevented, or at least checked, is a valid one. However powerful these arguments are, they nevertheless overlook at least one important virtue often put forward by the champions of individual ownership of land in the context of economic development. The argument in question has been ably articulated by Professor Nwabueze:

"It is doubtful whether state ownership of land serves the interest of social progress better than private ownership. It seems that progress can be more effectively pursued under a system which permits free, though regulated, individual enterprise and initiative in regard to land. There is little virtue in allocating land to a person who has no money to develop it or withholding it

from a person who can, merely on the ground that the latter has a plot already. If an individual is able through his initiative and enterprise to establish two or more plantations or farms or to build two or more houses and thereby make more food, employment or accomodation available to the community, the state should not stand in his way in the name of social equality. Ability to develop, rather than any doctrinaire adherence to the principle of social justice, should be the criterion for the allocation of land."¹¹

Champions of state ownership of land, it may be added, fall into error when they imagine that control and ownership of land by the state will guarantee the proper use of land invariably to the advantage of the community. Ownership, it seems, is capable of being abused whether by a private individual or by the state. If what is objectionable to the African leaders is landlordism with all the adverse effects on economic development that accompany it, then it seems that these resultant evils can be cured simply by devising appropriate control techniques - thus maintaining a kind of 'controlled' individual ownership system of land tenure. The techniques that immediately comes to mind may take the form of controlling some variables such as land tax, price, rent and output controls, income taxes, agricultural development conditions, and various other devices which can be used selectively or in combination, as the case may be, to ensure limitation of profits,

and hence influence the distribution of gains. Kenya has chosen to tackle problems of land tenure by applying the formula under consideration. A Kenyan Sessional Paper has stated Kenya's view that "ownership", "is not an absolute indivisible right subject only to complete control or none. Practical systems have demonstrated that the resources of society are best guided into proper uses by a range of sensitive controls each specifically designed for the task to be performed". Consequently, the approach post-independence Kenya has favoured is to make development requirements independent of title, so that the granting of freehold titles on a large scale is not inimical to the government's policy of securing economic development. Government controls are imposed on landlords through the Agriculture Act¹³ in the interest of good estate management and on occupiers, whether owner occupiers or tenant farmers, in the interest of good husbandry. Failure to fulfil these duties either by the landowners or occupiers of ensuring good estate management or good husbandry, they face government action of placing them under supervision; and if no further improvements are being made at this point in time, the government is statutorily empowered by the Agriculture Act to take the following action: if the occupier is not the owner, the owner may be required to farm the land himself or let it to an approved tenant; if the occupier is the owner, he may be required to give up possession and let it to an approved tenant.¹⁴ And even further drastic action amounting to compulsory deprivation of the land in

question can be taken against any landholder for continued recalcitrancy. In this event the landholder now dispossessed of land is entitled to the full market value of his land.

It may also be argued in favour of the technique of control to check landlordism, that this institution may also serve to give ample scope for the attraction of private and public capital from internal and external sources. On top of this, it may also serve as a magnet, attracting managerial talents from abroad so that adequate supplies of experienced and sufficiently experienced people are available in countries where the availability of this resource is causing serious set-backs on development efforts.

In spite of all virtues that a controlled system of land tenure might have in the context of economic development, Tanzania has chosen to nationalize titles in freehold lands-her intention being to secure possible control of development and the regulation of priorities through conditions. Although policy statements regarding land tenure in Zambia are made by the government quite often - and imply state ownership, there has been very little effort made to implement the stated socialist land reforms. On the contrary, Tanzania has gone considerably far in this regard. Quite a number of legislation has been passed since 1967 which have put the state as the only effective landlord and has accorded the land holder only a limited and controlled interest in the land. Thus in July 1, 1963, all freehold titles in Tanzania were natio-

nalized by converting all existing fee simple in possession into government leases for not more than 99 years, so that the former owners became thereafter rent-paying tenants of the state.¹⁵ The government lessee was not required to pay economic rent for his occupation of the land, but only a nominal one, and was in many cases, though not all subject to no development conditions. On a closer examination, this conversion in fact amounted to an expropriation of the reversion on the 99 years term. This course of action was naturally possible to pursue in Tanzania for the Tanzanian Constitution does not make any special protection of property rights. Consequently, for that loss the rent-paying tenants of the state received no compensation at all because, as the government argued, it is not morally justifiable for anyone to own land in perpetuity. This argument is of course deeply rooted in the principles of African socialism which hold that land is a God-given-gift for the benefit of all 'members' of the community who are themselves the beneficiaries to the gift.

Reference has been made above to the small concession that had been made to the government lessee under the conversion act which was that he was not required to pay economic rent for his occupation of the land, but only a nominal one, and quite a large percentage of those involved were not bound by development obligations. Now, by the Government Leaseholds (Conversion of Rights of Occupancy) Act, 1969,¹⁶ even the concession under discussion was revoked

and instead the government introduced the concept of mere rights of occupancy under which it became an obligation of the holders to pay economic rent and also were made to comply with development conditions - again all these changes in the law affected the occupant without compensation. But when one notes that about 95 per cent of the land in Tanzania is held under customary law, and therefore the conditions of tenure in Tanzania are largely governed by customary law and not by statute, it seems that, at least on the face of it, private ownership and landlord/tenant relationship will tend to grow instead of being discouraged. However, the extent of land held under customary law is said to be diminishing because of the impact of urbanization; and any land which comes to fall within the range of the urban centre, ceases to be subject to customary law on payment of compensation to the former customary owners. Moreover, under the Land Laws (Miscellaneous Amendments) Act, 1970,¹⁷ the President is vested with power to revoke a customary, - or indeed any - right of occupancy if, in his opinion, it is in the public interest to do so. A person to whom a right of occupancy is issued in place of a customary tenancy is under an obligation to pay for the value of any unexhausted improvements existing on the land at the time of his taking occupation. There is no such obligation when the President directs that no compensation is payable to an absentee owner on the revocation of his right.¹⁸ This is the only instance when compensation for existing improvements is denied. The expression "unexhausted improvements"

is taken to denote anything or any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity the utility or the amenity thereof, but does not include the results of ordinary cultivation other than standing crops or growing produce.¹⁹ What emerges from the Tanzania model of the socialization of land law is that security of tenure of an individual holding land is made dependent upon land development requirements and at the same time discouraging absenteeism. In every certificate of right of occupancy and government leasehold issued there is an implied undertaking by the interest-holder to comply with development requirement contained therein. It is reported by researchers²⁰ that the government has been very active and strict with regard to enforcing development conditions on rights of occupancy and government leasehold; for example there is always a constant checking by the land officers just to make sure that the conditions under discussion and terms in the grants or leaseholds are fulfilled.

At this stage it may be relevant to point out that in a development state it is significant that the government should provide incentives to develop the land. Of importance are the legal incentives which should not always be negative and coercive, as for example, deprivation of a piece of land for non-development but also incentives in the form of rewards. There are rewards

that the law and, indeed, the community can offer a developer who develops his land. From this point of view it is suggested that renewal of a grant of the land should be effected on purely individual merit taking into account individuals' previous record with regard to the development of land. Compulsory acquisition of land interest from the property owner is justifiable, we submit, if it can be shown that he failed to make improvements on the land, or that someone else, say a tenant, is the one who is actually cultivating the land. In these circumstances it is proper, in the interest of the country that that land should be acquired from the rights holder and transferred to the cultivator-tenant. Tanzania has passed three pieces of legislation to give legal effect to the situation just described. Thus under the Rural Farmlands (Acquisition and Regrant) Act, 1966,²¹ and the Urban Leaseholds (Acquisition and Regrant) Act, 1968²², development by one who had no title to the land may be rewarded by a grant of the rightsholder's title to him and under a redevelopment scheme instituted under Part 3 of the Land Acquisition Act,²³ only the "development owner" is assured of a regrant of the land. This Act, i.e. the Lands Acquisition Act, was enacted specifically to provide machinery by which redevelopment schemes in urban or peri-urban areas may be implemented. The statutory meaning attached to the expression "peri-urban" is, an area so designated by the minister responsible for land situated within a radius of five miles outside the boundaries of an urban area. The main purpose

of this new machinery is to enable the government to achieve a planned or orderly development of such an area. Section 34 of the Act vests a discretionary power in the responsible minister that upon his satisfaction to the effect that an area within an urban or peri-urban area is primarily developed for housing purposes but contains a greater proportion of houses which are unsuitable as urban dwellings and plans for the redevelopment of the area are or will be made, he may declare that area as a redevelopment area. Upon such a declaration, which should be published in the gazette, all interest in or over land within the redevelopment area, with a few exceptions, are extinguished and the land becomes subject to the disposition by the president. The president then, through his responsible minister, is empowered to regrant rights of occupancy to the "development owner." This latter is defined as the actual occupier/builders in preference to the former owner who has not developed the land. No provision is made in the statute for compensating the non-development owner. This then is an outright case of confiscation of property-because the taking away of the right in the property takes the form of a penal measure. In other words, the government is looking solely to the personality of the non-development owner who has been guilty of the non-development of the land, and wishes to punish him through a compulsory acquisition of his right in the land without compensation - even for unexhausted improvements. In this regard it may be observed that while the government is not under an obligation to compensate

a former owner now condemned as a non-development owner, it is nevertheless argued that there must be an obligation on the part of the person to whom the land is subsequently granted to compensate the former owner for unexhausted improvements on the land. In fact there seems to be a conflict between the Lands Acquisition Act's non-compensation provision and S. 14 of the Land Ordinance which implies a covenant on the part of the grantee calling him to pay to the government, on behalf of the previous owner, the amount found in respect of any unexhausted improvements existing on the land at the date when the former entered into possession.²³

On the other hand, the other two legislation, i.e. the Rural Farmlands (Acquisition and Regrant) Act, 1966, and the Urban Leaseholds (Acquisition and Regrant) Act, 1968, were passed with the aim of divesting title in the land from the 'inactive' rightsholder to the tiller or tenant-cultivator. The Rural Farmlands (Acquisition and Regrant) Act, specifically aims at giving the government power to acquire compulsorily any rural farmland which is normally given for agricultural, pastoral or mixed purposes. When such land is compulsorily acquired from the rightsholder by the government it is granted to the tenant-cultivator or developer, the primary object being to eliminate 'absenteeism and promote continuity of development in land.' But such a tenant-cultivator must have rendered appreciable and substantial improvements on

the land to be entitled to a grant under the Act. For the purposes of the Act, a 'cultivator' is defined to include a person other than the owner, who cultivates the rural farmland, or uses it for any agricultural, horticultural or forestry purposes or for the pasturing of livestock or other domestic animals or for mining purposes, i.e. mining for salt or building materials but not mining for other minerals. The Urban Leaseholds (Acquisition and Regrant) Act, 1968, extends the principle contained in the Rural Farmland Act to urban centres, i.e. lands in an urban area which are held on a government lease or under a right of occupancy. The kinds of improvements which may entitle a tenant to a grant under the urban Leaseholds Act consist of the construction of a building or buildings on the land. At the same time the Customary Leaseholds (Enfranchisement) Act²⁵ of 1968 had been introduced to affect the status of tenancies in the traditional sector. The Act is being applied piecemeal to different parts of the country as and when the need arises. The Act enfranchises existing customary tenancies, but prohibits the creation of new landlord - tenant relationship in areas where it has been brought into force. The system of private landlord and tenant relationship is condemned to reflect the value of a capitalist society, and is seen to operate at its best when land is scarce so that land prices are artificially inflated. Under the Act the landlord whose land has been enfranchised is entitled to compensation for unexhausted improvements only, and not for the land itself.

It is quite obvious from our review of the Tanzania land reform legislation that their ultimate aim is redistribution of land and hence redistribution of income. The legislation also aims at the elimination of absenteeism and the need to promote continuity of development in the land - especially securing agricultural production. One may therefore observe that Tanzania has done considerably well in restructuring the inherited land tenure system in the context of the needs of a socialist society. To attain these objectives, Tanzania was initially concerned with building up a kind of legal framework which was thought to facilitate, and to be compatible with, a socialist formula of economic development based on land.

Zambia, as compared with Tanzania, is very much behind in tackling the problems of land reforms aimed at breaking up the inherited feudal and capitalistic institutions governing titles to land. Zambia has taken no radical legal measures to ensure that the government is in a position to control developments and to regulate priorities through the mechanisms of covenants and development conditions to which the grant should be subjected. It is quite true that the government's policy in land matters has been made amply clear, and if implemented the Tanzanian approach is likely to be reproduced in Zambia. For example, on 30th June, 1975, President Kaunda in an address to the National Council of the United National Independence Party announced

far-reaching land reforms. He announced that all freehold titles were to be abolished immediately, and that these titles (i.e. freehold) will have to be converted to 100-year leaseholds. Further unused tracts of farmland are to be taken over immediately by the government. The President laid particular emphasis on profiteering on undeveloped land. He gave an example of three small plots covering an area of 0.2048 hectares in Lusaka being sold to Solar Investments (Zambia) Limited for K150,000. On the same day the Development Bank of Zambia bought one of the plots of only 0.0927 hectares at K100,000. The President announced that this being "broad day robbery" this land and the K100,000 will be forfeited by the government. In the same speech the President directed that Real Estate agents will have to close immediately; "the functions of real estate agents connected with houses and buildings are more properly the responsibility of the Zambia National Building Society". Moreover the President charged that real estate agencies "have been largely responsible for inflated prices of land and housing". It was further announced that in future no individual will be allowed to build houses for rent. And rented buildings owned by individuals are to be taken over by local authorities. Similarly all vacant plots and all vacant and undeveloped land in and around Lusaka and all other cities and towns will likewise be taken over by local authorities.

In an official pamphlet entitled "UNIP: National Policies For the Next Decade 1974 - 1984"²⁶, a summary of the government's land policy is available in these words; "Land is the most precious God-given gift any nation has. Thus the Party has unequivocally declared that land must remain the property of the State to-day. In pursuance of this ... the Party will take the following measures:

1. all land will continue to be vested in the President of the Republic of Zambia on behalf of the State;
2. all existing freehold titles to any land will be replaced by leasehold titles for terms of 99 years;
3. Leasehold titles will be subject to such terms and conditions as may be prescribed to ensure proper utilization and exploitation of land in the national interests, good husbandry and estate management.

In this connection further freehold grants of land will be stopped immediately;

4. Laws of succession to land will be enforced to favour maximum (economic and social) improvement on land;
5. alienation and sub-division of land by any lessee will be strictly controlled and regulates so as to prevent speculation. uneconomic uses, fragmentation and dissipation of our land"

The government's policy towards land tenure as represented in the above pronouncements are beyond any shadow of doubt-they are aimed at socialist ends, that is, elimination of landlordism and the exploitation that goes with it; redistribution of land; a controlled land tenure system so that the government can direct the course of land development. Unfortunately the government has so far done very little if any, to translate these policies into law.

The only encouraging effort made by the government in this respect is the drafting of a National Assembly Bill, the Law Reform (Land Titles and Restrictions) Bill,²⁷ 1974 which was gazetted as a Bill but was later withdrawn from the National Assembly. At the time of writing the Law Association of Zambia is studying the Bill, and as soon as it has made its representations the bill will be redrafted and re-presented to the National Assembly. Its importance in the instant discussion however, is that if made law the above quoted government policies with respect to land tenure in the country will be implemented. The 'law' will make a drastic impact on the existing system of land alienation, and will give the government some control over land in order to prevent its misuse by a lazy owner occupier or an incompetent tenant. The object of the withdrawn Bill is "to provide for the conversion of titles to land, for the imposition of restrictions on sub-division, assignment or sub-letting of land, for the control

of sale, transfer and other alienation of land for value, and for matters connected with or incidental to the foregoing". The bill converts all freehold tenures in respect of any land in Zambia and all tenures which give to any person the right to hold land absolutely or in perpetuity into leasehold tenure for the statutory term of ninety-nine years. The president will hold the reversionary interest on behalf of the people of Zambia. And any land to which this 'law' shall apply shall be granted subject to such terms, conditions and covenants as the President may determine. Further, no holder of land shall sub-divide, assign or sublet land except with the approval of the responsible minister signified in writing and in accordance with such terms and conditions as the minister may think fit to impose. Similarly, no person shall sell, dispose of, transfer, confer any interest in, or otherwise deal in any land for value save at the price, premium or consideration, and in accordance with the terms and conditions approved by the minister. These later provisions shall not, however, apply to land which in the opinion of the minister has unexhausted improvements. And observance of terms, conditions or covenants stated in the lease shall be the criterion used in considering whether the tenant shall be entitled to a renewal of the statutory lease upon its determination by effluxion of time. In the case where a statutory lease is not renewed by reason of the tenant's failure to observe any term,

condition or covenant stated in the lease, the tenant shall be entitled to compensation for any unexhausted improvements on the land - the Zambian bill defines "unexhausted improvements" to mean anything resulting from the expenditure of capital or labour which increases the productive capacity or utility of land, but does not include growing produce. In essence this definition of 'unexhausted improvements' stand in a striking resemblance to that obtaining in the Tanzanian statutes that have earlier been reviewed.

No compensation is to be payable to any person by reason of the conversion of his freehold tenure by or under the provision of this 'law', and conversely no claim for compensation or breach of contract shall be imposed on any person who, for the purpose of complying with this 'law', reduces the term of his title to land. And, it will be an offence, punishable by a fine not exceeding five thousand kwacha or to imprisonment for a term not exceeding three years, or both, for any person to contravene any of the provisions under the 'Act'.

It is self-evident in the light of the contents of the Law Reform (Land Titles and Restrictions) Bill discussed in the preceding paragraphs that, like Tanzania, Zambia also intends to nationalize titles in freehold lands by converting all existing fees simple in possession into government leases for a period of 99 years subject to the annexing of development requirements. The

government's plan in undertaking this measure is obviously to ensure proper utilization and use of land in the national interest and also to entrench its position so that control of developments and the regulation of priorities through covenants and conditions as instruments of land use. It is also hoped that land nationalization would lead to reduction in land prices and may ensure that "unearned incomes" are creamed off for the benefit of the community. The government has also seen it fit to enact restrictions against the free disposition of land. This will afford an opportunity for land officers to scrutinize every application for the transfer alienation, or sub-division of an estate or interest in land so as to ascertain whether it is made in good faith, and in order to strictly control and regulate such activities in the interest of economic use of land. Such opportunity of surveillance will also enable the government to prevent speculative transactions and also to uproot the practice of land accumulation. Thus Zambia is also moving in the direction in which Tanzania has passed through by inducing land tenure changes which are concerned with economic development by creating a machinery conducive to land utilization and to penalising the non-user of land. The primary aims of these 'land reforms' which are in the pipeline in Zambia is obviously the breaking up of feudal and capitalistic institutions revolving around title. But as indicated earlier, the Law Reform (Land Titles and Restrictions) Bill is under study and

scrutiny. The situation just narrated above therefore has no legal basis at this point in time. However, the late Attorney-General and Minister of Legal Affairs, Mr. Silungwe, had assured the author that the 'bill' will definitely be debated in the National Assembly and is to become the law governing land tenure in Zambia. This being the case it has, therefore, some relevance to the instant discussion on the nationalization of land as a means of attaining economic development and social equality.

The operative legislation in Zambia in matters relating to alienation of land is the Reserves and Trust Land (Adjudication and Titles) Act.²⁸ According to the Orders made in pursuant to this Act, land in Zambia is divided into Trust land, State land, and Reserves. Under the Zambia (Trust Land) Orders, 1947 to 1964,²⁹ all Trust Land, which is defined as land set apart by Section 3 of the Order, for the sole use and benefit of the natives of Zambia, vests in the President for the use or common benefit of the natives of Zambia.³⁰ It is further provided that no titles claimed by person other than natives to the use and occupation of any such land shall be valid unless and until they have been confirmed by the President;³¹ but the president may, when it appears to him to be in the general interests of the community as a whole, grant rights of occupancy of Trust Land to natives or non-natives and demand a rental for the use of land so granted,³² or he may acquire Trust Land for public purposes.³³

In the same way, all rights in or in relation to 'State Lands' and 'Reserves' vest in the President - this is by virtue of the Zambia (State Lands and Reserves) Orders, 1928 to 1964.³⁴ These pieces of legislation do in fact vest ownership of land in the President on behalf of the State. The President has also been given sufficient statutory powers to direct ways in which land has to be used in the general interest of the whole community. But in Zambia, unlike Tanzania, there seems to be no legal means by which the grant of land is accompanied by development requirements upon which tenancy can be made dependent. The only thing which the Zambian legislation guards against is absenteeism. It will be recalled that one of the primary purposes for the passage of the Lands Acquisition Act, 1970³⁵ was to legalise the expropriation of unutilized land belonging to absentee or non-resident owners. Under this Act the government was able to forfeit the unutilized or undeveloped land belonging to absentee owners without compensation.

In conclusion the view can be entertained to the effect that Tanzania and Zambia, and indeed many other African Commonwealth countries, are to varying degrees, basically agreed to exercise effective control over the most principal means of production-land; and to pursue policies which ultimately will ensure collective ownership of the resources of the countries as represented in the land. And legislation has been passed to imple-

ment the aforementioned desires with a definite hope that this will ensure equal distribution of wealth and the elimination of inequity which flourishes best in the fertile conditions of landlordism. Indeed this is one effective way of ensuring social equality, and progress in all its manifestations.

CHAPTER 8

CONCLUSIONS

In our conclusions it may be proper for us to reflect, very briefly, on some of the outstanding points which have emerged from our study. It is not, however, intended to restate our views on the fine points of the relationship between the legal protection of property rights and economic development in the context of emergent states which have already appeared in the text; but rather to express our concluding remarks through two closely related recommendations. First is the recommendation that constitutions in emergent states should contain an express and substantive stipulation of ideology of the nation. Second, and probably more important, there is need that constitutions in emergent states should incorporate some form of broad directive principles of state policy. The need and justification for incorporating these items in the body of the constitution is the prevailing crisis of economic development in emergent nations.

It will be recalled that Chapter One of this dissertation substantially dwelt on the thesis that practically every modern government on the globe has come to be concerned, to some varying degree, with attaining economic and social democracy. Indisputably the magnitude of this task is greater in a new

state. Development, as has been asserted earlier on, is the challenging and supreme need of the emergent states. It is the most urgent need. And it is a feature of life in developing countries that the government shoulders responsibilities in excess of those normally devolving upon governments in the developed ones. No other institution has sufficient capacity, resources or indeed legitimacy to undertake so formidable a task.

If it be accepted that a modern African State in the contemporary development era has increasingly to be concerned not only with the political organization of the government but also with its economic structure, then there is no reason why its fundamental law should merely end at laying down the political structure of the government and fail explicitly to deal with the economic structure and activities of the state. It is very possible to argue, in the context of the economic conditions of emergent states, that the idea of constitutionalism should not be understood only with reference to the needs of political democracy. It is true that in earlier times, a constitution was a purely political charter, the freedoms and safeguards which it ensured being of a strictly political nature. Any attempt, if any, to solve problems through the medium of the constitution was, generally speaking, indirect and flowed from the political and civil rights and liberties which were recognised. This function

of the Constitution was appropriate when the state was mainly thought to be concerned with the maintenance of law and order and the protection of life, liberty and property of the subject. Such a restrictive role of the state is no longer a valid concept - more so in a developing country. An emergent state is as much concerned to solve economic problems as it is to solve political problems. For this reason it becomes necessary that increasing attention be paid to the solving of economic problems through the fundamental law in the land. This means that a constitution in an emergent state should devote a special chapter or chapters to the future economic and social structure of the state. It ought to stipulate that economic activity is one of the obligatory functions of the state. Incorporation of some form of directive principles of state policy in the constitution serves the objective in question by laying down certain economic and social policies which are to be pursued by the state: the idea being that these directive principles would impose certain obligations on the state to take some positive action in certain directions in order to promote and advance the much needed material welfare of the people and achieve economic democracy.

In the second place, the African leadership has just passed through a period in which considerable elucidation on ideological principles has been achieved. Indeed, for a new nation,

there is a great need for a national ideology to act as an inspiration and guide for action. It infuses a sense of purpose and direction in the leadership and in the people at large. And a sense of purpose and direction has virtue because of its unifying influence upon the actions of the members of the state.

"Ideology defines specific goals for society, prescribes the institutional forms and procedures for pursuing them, and by so doing seeks to direct and concert the efforts and actions of the people towards the achievement of those goals. In this way it seeks to unite the society into one people bound together by common attitudes, common institutions and procedures, and above all an acceptance of common social objectives and destiny".¹

Nkrumah also had this to say about the need for ideology: "the dominant ideology is that which in the light of circumstances decides what forms institutions shall take, and in what channels the common effort is to be directed".²

Julius Nyerere also explaining the need for an ideology has said that, despite the many socialist measures launched by his government, "it gradually became clear that the absence of a generally accepted and easily understood statement of philosophy and policy was allowing some government and party actions which were not consistent with the building of socialism, and which even encouraged the growth of non-socialist values and attitudes".³ Indeed it was to meet this need that the Arusha Declaration was made in 1967. As a statement of the country's national ideology, it "provided the necessary

sign-post of the direction in which the nation must travel to achieve its goals".⁴

It is because of the cruxiality that an ideology in a new nation occupies that we submit here that a constitution of a new nation must incorporate an express and substantive stipulation of ideology of the nation. The evidence available shows that practically in every constitution of the areas under study no statement of national ideology is mentioned in the substantive provisions of the constitution. The closest situation in this regard is to be found under the Zambian One-Party State Constitution of 1973 in which there is found a preambulatory reference to 'Humanism' as the national philosophy. But as we shall come to notice in due course, a preamble is no part of the constitution and creates no legal rights or obligations. Therefore a mere recital of a statement of ideology in the preamble is not enough for our purpose. We are submitting that a statement of ideology and directive principles of state policy must substantively form part of the constitution. By doing this the framers of the constitution would be paving the way to the future legislatures and executives as to the manner in which the exercise of legislative and executive powers should be carried out.

DIRECTIVE PRINCIPLES OF STATE POLICY SHOULD BE NON-JUSTICIABLE:

Having advocated for the inclusion of some form of directive

principles of state policy in a national constitution of an emergent state, we should now consider a more critical question which such a measure implies: And this is whether the directive principles should be made enforceable by a court of law. In answering this question the situation under the Pakistan and Indian constitutional systems will be of much assistance since both countries have written in their constitutions broad directive principles of state policy.

Without going any far, the wording of both the Pakistani and Indian constitutions is to the effect that the courts cannot enforce a Directive Principle as it does not create any justifiable right in favour of any individual. This means that no court is constitutionally entitled to declare any legislation as invalid on the ground that it does not conform to the spirit of any of the directive principle. In this way, therefore, the directive principles differ from the fundamental rights which enjoin the state to refrain from taking prejudicial action against a guaranteed right. One can therefore say that directive principles merely impose a moral obligation on the state to use its legislative and administrative machinery to secure socio-economic ideals. The idea of incorporating them in the constitution is that they serve at least an educative value, and also as guidelines of those in power, and those who may capture power in future, so that they are not free to do what they like; but

to exercise such power with due respect to the directive principles. Although, it is true that they may not have to answer for their breach before a court of law, they may, nevertheless, be answerable before the electorate at the time of election. In other words the sanction behind the directives is only political and not judicial.

The proposition that so far as the courts are concerned the directives are not enforceable is explicitly clear when one looks at the Pakistani constitution, and at the Indian Constitution too. Chapter two of the Pakistani Constitution provides for the 'Principles of Policy,' and is worded thus:

- 7 (1) The Principles set out in this Chapter shall be known as the Principles of Policy and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority.
 - (2) In so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the Principles shall be regarded as being subject to the availability of resources.
- 8 (1) The responsibility of deciding whether any action of an

organ or authority of the State, or of a person performing functions on behalf of an organ or authority of the State, is in accordance with the Principles of Policy is that of the organ or authority of the State, or of the person, concerned.

- (2) The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground."⁵

Similarly, by Article 37 of the Indian Constitution, the Directives are made expressly unenforceable by the courts. But the relevant point to the instant inquiry which the Indian and Pakistani approach help to establish is that it removes the argument by many of the African framers of constitutions to the effect that inclusion of directive principles of state policy in the constitutions will create difficulties founded on the possibility that an individual can challenge the validity of a law as contravening the directives. By making the directives unenforceable this difficulty is avoided.

THE UTILITY OF THE DIRECTIVES:

In order clearly to appreciate the usefulness of the directive

principles of state policy as substantive items of the constitution, they must, in the first instance, be distinguished from fundamental rights pure. A guarantee of fundamental rights in the Constitution enjoins the state from taking any action violative of the rights in question. In other words they impose a negative duty on the state. On the other hand, directive principles will require positive action by the state. Moreover such action can be guaranteed only so far as is practicable in the circumstances. The expression 'practicable in the circumstances' obviously refers to the availability of resources which makes it possible to initiate any positive action in the implementation of welfare schemes. This is why the Pakistani Constitution has expressly provided that "... In so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the Principle shall be regarded as being subject to the availability of resources."⁶ For this reason it would be unrealistic for any emergent state to make directive principles of state policy to be justiciable for the obvious reason of the scarcity of resources.

Perhaps one distinctive feature of directive principles under the Pakistani and Indian constitutions is that they are more widely worded than the declarations regarding fundamental rights. Possibly the reason for the general and flexible

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character of the language of the directive principles is to leave enough scope to the government to frame their policies from time to time, according to their own discretion and the circumstances prevailing. But the important point is that it may happen at times that a legislation passed in pursuance of a directive principle comes in conflict with a fundamental right - and more so on a guaranteed property right, because efforts to socialise an economy invariably involves tampering with private properties or assets. In such an event, the Indian Supreme Court had no difficulty in holding that a directive principle cannot override a fundamental right. In the case of State of Madras v. Champakam,⁷ the Indian Supreme Court laid down the principle that:

"The directive principles of State policy which are expressly made unenforceable by a court cannot override the provisions in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or Directions under Art. 32. The chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate Article in Part III. The Directive Principles of State Policy have to conform and run subsidiary to the Chapter on Fundamental Rights... That is the correct way in which the provisions found in Part III and IV have to be understood.

However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the Legislative and Executive powers and limitation conferred on the State under different provisions of the Constitution."

But the statements made above should not lead us to suppose that directive principles even if included in the national constitution would after all be utterly valueless from a legal point of view. It is the same Indian Supreme Court, in Re Kerala Education Bill,⁸ which has stated that "... in determining the scope and ambit of the Fundamental Rights relied on by or on behalf of any person or body, the court may not entirely ignore these Directive Principles but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible..."⁹ This means that courts can in fact use the directives in interpreting the bill of rights. In the context of an emergent state directive principles, if substantively written in the constitution, should exist as qualifications to some of the guaranteed rights. They can, for example, be used as an index of what a public interest, or a public purpose, is intended to be. The point intended to be put across here is that when a law is challenged as constituting an unreasonable restriction upon a fundamental right guaranteed by

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the constitution, the court must reject that contention if the law seeks to carry out an object desired by the directives; for a restriction which is intended to promote economic progress in an emergent state cannot be regarded by courts to be 'unreasonable.' Thus in the Indian case of Buddu v. Municipal Board,¹⁰ it was stated that prohibition of slaughter of cows, bulls and bullocks to enable the public to have sufficient supply of milk and to ensure availability of sufficient number of draught cattle for agricultural operations has been held to be a reasonable restriction under Article 19(6) in view of Directive Principles in Article 47 and 48 of the Indian Constitution. As the Court put it, "If with a view to increase the milk supply and the production of foodgrains the Board by framing a bye-law placed a ban upon the slaughter of bulls, bullocks, cows and calves, the action was in pursuance of the policy of raising the level of nutrition and promotion of public health, a policy which is enjoined alike by the Constitution (under the Directive Principles, Art. 47) and the U.I. Municipalities Act". Again the Directive in Article 48 of the Indian Constitution for preserving, protecting and improving livestock has been used by the Supreme Court to spell out the limits within which the state could prohibit the killing of animals and thus impose restrictions on the trade of butchers under Arts. 19(1)(g) and 19(6).¹¹

Professor Nwabueze has argued that, "The national economy is no

less important to a new nation than national security, and there is no reason why it should be any more objectionable as a ground for derogation in the bills of rights."¹² Only the 1967 Ugandan Constitution expressly recognised the interests of the national economy as a ground for derogation in the bills of rights. Moreover in that constitution a number of freedoms - freedom of expression, correspondence, assembly, association, conscience and movements - were all qualified by the demands of the national economy - so long as the law authorizing derogation, and the action taken thereunder, was reasonably required in those interests and was justifiable in a democratic society.¹³

Apart from the Ugandan example under the 1967 constitution whereby the interests of the national economy operated to qualify the enjoyment of some guaranteed rights, no similar provisions exist in any of the post-independence constitutions of Commonwealth Africa consulted for the purposes of this work. The best so far achieved in this respect is the inclusion of a preambulatory recital to the Tanzanian Interim Constitution to the effect that it is the duty of the government to conduct the affairs of the State so that its resources are preserved, developed and enjoyed for the benefit of its citizens as a whole and so as to prevent exploitation of one man by man. A similar recital was reproduced in the preamble to the Zambian one-party state constitution of 1973. In the latter constitution 'Humanism' is also

stipulated as the philosophy of the nation.

On the face of it one may be tempted to think that these preambulatory recitals calling upon the state and government to appropriate the national resources along certain ideological lines (also stipulated in the preamble) are in fact binding on the government. The position is that a mere declaration in a preamble has no legal effect. At least in the British conception, a preamble "forms no part of a statute, and so can create no legal rights or obligations, though its spirit may be a guide in the interpretation of the substantive provisions."¹⁴

So whatever effect the recitals on the economic organization in the Tanzanian and Zambian preambles have, can only be of a moral and educative one. In fact the framers of the Tanzanian constitution themselves recognised the 'emptiness' of a mere recital in a preamble, and therefore urged that in addition to it "everything possible should be done to win for these principles a strong commitment from the citizens". Our view is that the interests of economic development, being factors of great importance in emergent states, should find a substantive place in the constitutions of these areas and should exist as the framework within which the guaranteed rights including the protection of property rights are to be interpreted.

NOTES

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49. Section 4.

50. Section 5.

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