

ABSTRACT:

PROTECTION OF PROPERTY RIGHTS VERSUS ECONOMIC DEVELOPMENT

IN EMERGENT STATES WITH EMPHASIS ON ZAMBIA.

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emergent African states with special emphasis on Zambia". The

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The domain of this study is entitled, "the protection of property rights and the needs of economic development in the emergent African states with special emphasis on Zambia". The central point intended to be pursued is the proposition that economic development is a fundamental aim of any new, emerging state. Throughout Africa, the notion that political independence is meaningless unless accompanied by the indigenization of the economy is accepted. In fact the peoples of Africa had been promised (by their respective nationalist leaders) improvement from self-government. Dr. Nkrumah assured his listeners that "If we get self-government we'll transform the gold coast into a paradise in ten years". His fellow nationalist leaders elsewhere on the continent had made similar promises. And the African people genuinely believed their leaders. Consequently, support for anti-colonialism contained a greater weight of economic and social expectation than simply a desire to gain indigenous rulers. Political independence was eventually achieved by many of the countries. Indeed the 1960s is correctly termed as the decade of African independence. Firstly, it is argued in this paper that African leaders found it difficult to proceed with the implementation of economic development, based on the

nationalization of foreign-owned enterprises because the legal order which they inherited was not so conducive to the attainment of these objectives. Going through the bills of rights written in the independence constitutions for most of the Commonwealth African countries, there are provisions which have had the undesirable effect of limiting the power of the nationalist governments to initiate development programmes along socialist lines. Indeed there is evidence in support of the contention that the protection of property rights in the Commonwealth African bills of rights were consciously written in order to entrench, not the economic interests of the ex-colony, but those of the foreign power and its allied profit motivated companies. The adverse effects on economic independence induced by these kind of property provisions perhaps weighed more heavily on Zambia than any other Commonwealth African country, because the backbone of her economy, copper, was owned by a foreign company, the British South Africa Company. The extraordinary extent of the country's dependence upon copper, coupled with the immoral method by which the company acquired its title to the minerals, made its ownership intolerable to the nationalist government which took office in 1963. Yet the independence constitution written for Zambia 'completely' prohibited confiscation of property by the nationalist government. This obviously entrenched the rights of the company at the expense of the proper development of the country's mineral resources for the benefit of the

community as a whole. In this paper, measures which the Zambian government took to revise the colonially-inherited provisions relating to the protection of property rights so as to render them responsive to economic needs of the country are discussed. A similar discussion is undertaken with respect to the position in Uganda and Botswana. The neighbouring Tanzania has no bill of rights so that the situation there is slightly different. But, the discussion on protection of property rights and economic development in this paper is by no means limited to constitutional provisions on property rights; it covers any law, statutory or otherwise, insofar as it has some relation to the individual ownership of property - so that the nationalization legislation in Tanzania is properly in the scope of this inquiry and is discussed in the light of the economic development objectives and political philosophy which characterizes Tanzania's approach to the tackling of modernization problems.

It must also be pointed out that the proposition which this work seeks to establish is that every country, whether African or not, is entitled to take measures intended to protect her economy, and that these measures invariably aim at destroying the very legal foundation upon which protection of foreign-owned property rights is based. The paper then demonstrates that the principle of economic self determination is solidly entrenched in international law. According to the latter, the principle of economic

self-determination is bound up with the idea of the sovereignty of the state. As such every state possesses a permanent sovereignty over its natural wealth and resources. In the exercise of this sovereignty, a state government may deem it fit, in the name of public security or national interest, to nationalize, expropriate, or requisition any of the property lying within its boundaries. Purely national interest should override purely individual or private interests, both domestic and foreign. But although nationalizations of private property of aliens is permitted in international law yet the same imposes conditions under which these can be carried out. The paper discusses these conditions (which also found their way in the national constitutions of Commonwealth Africa) from the background of the exigencies engendered by the needs of economic development.

apart from arguing that economic development in a new nation must start from the point of restructuring the colonially-inherited legal order to one which would support the economic revolution, the paper also demonstrates that the only one reliable and effective instrument at the disposal of the African socio-economic reformers, is law. Law, and its personification, the state, are the only principal instruments through which the aims of economic development can be implemented. In making this statement, the author views economic development to comprise of other

interrelated elements which exist side by side with economic development but which may not be purely economic. Three of these "cooperant factors" involved in economic planning which are discussed elsewhere in this paper can easily be identified, viz: social equality, increased national productivity and equal distribution of wealth. In a very big way the work attempts to show that law and legal institutions have an important place in social change in general and in the rate of economic development in particular. Necessarily implicit in the contents of the paper is the assertion that an African legal scholar must abandon the habit of looking at law as merely a mechanism of conflict-resolution or as a regulative mechanism concerned only with reconciling social tensions among citizens. There is no question that this is one of the functions of law. But there are other functions of law aside from these, and in conditions of development, it is not even clear that those aforementioned ones are, in some transcendental sense, better than others. In the areas chosen for this study, Commonwealth Africa, legal education is generally oriented towards training lawyers in their craft, largely by teaching doctrine and technical legal skills. This education is highly deficient in development states as will become clear from the text of the paper.

Broadly, then one may say that, in part, the subject matter

of this investigation covers a study of the use of the normative system called law to bring about economic development. It is a study of how law and legal institutions can be used, in the words of Professor Lawrence Friedman, "to set off, monitor, or otherwise regulate the fact or pace of social change". In fact a long time ago Max Weber had already seen and forged connections between law, economy, and society.

It will be noticed that the third part of the paper deals with law as an instrument of social equality in emergent states: The subject of social equality has become very topical in socialist states of Africa. It must be stressed that African leaders are in as much search for 'social democracy' as they are for economic democracy and political democracy. Their commitment to socialism has instinctively led them to believe in the African version of 'social justice' which implies building a social order based on social equality and egalitarianism. The colonially-inherited social order was naturally intrinsically bound up with the values of capitalism which meant prevalence of social inequalities among the population, and also exploitation of man by man. Part three of the dissertation discusses the law which at least two African countries, Tanzania and Zambia, have passed to close up the inequity incidents among the population, and also the laws preventing, or at least making it difficult for, anyone to exploit his fellow man. Two legal institutions which have been

set up in Tanzania and Zambia to achieve the above stated social objectives are, (i) the leadership regulations, and (ii) the nationalization of land. As will be explained, Zambia has not as yet socialized its land tenure system although the legislation to this effect is in the pipeline. But the important point here is that both Tanzania and Zambia have 'passed' legislation whose ultimate purpose is to maximise social justice and to advance the ideals of building their respective societies based on egalitarianism.

In the abstract then, it is sufficient to summarise the object of this dissertation by saying that it is concerned with a review of the activities of the Commonwealth African legislatures insofar as these activities are aimed at introducing a certain legal order considered ideal to economic development, increased national productivity and social equality. This can be ensured, at least in a socialist state, by restricting the individual rights to property, and by giving legal power to the state to intervene in the national economy so as to give the latter a new socialist orientation.

ACKNOWLEDGMENTS

The contents and orientation of this thesis arises out of my keen interest that I developed in law and development studies during my undergraduate and graduate training at the University of Zambia. Principally because of this I began seriously to reflect over the whole notion of the relationship between law and legal institutions on one hand, and the need for economic development in emergent states on the other. For this I owe a great debt to Professor Robert Reidman who first enkindled my interest in the study of law and development in Africa. Professor Reidman also helped me quite considerably in the initial stages of the thesis by affording me time to discuss with him the basic outlines of this work. My thanks also go to Mr. Amanya-Kushera, my colleague and lecturer in the School of Law, University of Zambia, who gave me valuable insights about certain official publications on Uganda and also for the time he willingly gave to my often ignorant enquiries touching on Uganda's legislations, policy pronouncements, and reports.

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'Presidentialism in Commonwealth Africa'. I must say that I had a great fortune to benefit from his outstanding analytical abilities and long standing experience and understanding of the subject of 'constitutionalism' in the context of emergent states of Africa. Professor Nwabueze's critique and guidance of this thesis in all its stages proved to be particularly helpful in drawing my attention to some of the most interesting areas of this work. His unusually well developed critical faculties, his uninhibited enthusiasm and his continual interest in my research have been a spur to the completion of this dissertation.

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Lusaka

Lawrence Timba.

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INTRODUCTION:

Among the most urgent priorities in newly-independent countries of Africa, economic development and national security are rated to be in the forefront. Moreover demands for economic development have become a frequent feature of political pronouncements and scholarly works on Africa, especially since the attainment of political independence by most of the countries on the continent. This trend of events in this part of the world is to be associated with the recognition by governments and leaders of new nations that the primary task in the post-independence era is one of construction: Moreover this task has been interpreted to mean not just the establishment of appropriate democratic institutions necessary to uphold the dignity of man as an individual. This dignity, the argument goes, requires also the creation of the social, economic, educational and cultural conditions which are essential to the full development of his personality.

The view that effective exercise of the rights of the individual includes improvements in the quality of his economic, social, educational and cultural life was expressly recognized both at the International Congress of Jurists in New Delhi in January, 1959, and at the African Conference on the 'Rule of Law' held in Lagos two years later. The Declaration of Delhi, which sums up the conclusions reached by the Congress, states, inter alia, :

"This International Congress of Jurists ...

"Recognises that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which its legitimate aspiration and dignity may be realized;...."¹

Here it is not intended to denigrate the importance to the individual of civil or political rights (e.g. freedom of speech, freedom of associations, etc.) which every free and democratic society must aspire to uphold. But it is unlikely that a hungry man would be particularly excited about his freedoms; an illiterate man will certainly not effectively make use of his freedom of expression. He needs something more than education. However, it is possible that the proposition to the effect that material well-being is more important to an individual's personality and dignity may be over-stated: Professor Nwabueze has observed that:

"It is arguable that personal liberty, ... is more intrinsically bound up with the worthiness of the individual's existence than food and clothing, housing, education etc. The truth is that both liberty and material comfort are both necessary for a happy life. There should be no question of having one and not the other. Both must need^{to} co-exist,"²

Even the above view at least recognises the fact that material comfort has become an equally important component of the individual's life. This is a very relevant point in conditions of the Third World where a greater number of human race suffer from abject poverty, disease, and from ignorance. Efforts to improve the quality of the life of the individual in these areas therefore, must start with the need to combat the three ills of ignorance, disease and poverty. A new nation must aim at securing to the individual the minimum basic requirements for human existence - food, clothing, shelter, education, medical and sanitary services, etc. The practical fulfillment or achievement of these objectives is possible only under a socialist pattern of social and economic ordering of human behaviour in these countries. The identifying characteristics of a socialist economic system are chiefly these:

- (a) a vast increase in the range and detail of government regulation of privately-owned economic enterprises;
- (b) the direct furnishing of services by government to individual members of the national community; and - this is important to the instant inquiry;
- (c) increasing government ownership and operation of industries and business which, at an earlier time, were, or would have been operated for profit by individuals or private companies mostly those having connections with the colonial power.

This last point necessarily imply that effective realization of socialist ends, at least in emergent states, would involve buying out existing private and foreign-owned businesses through the mechanisms of 'nationalizations' or 'partial take-overs'. Yet active state intervention in the national economy involving forms of control and nationalization is obviously fraught with a strong likelihood of conflict with individual rights - especially the protection of property rights in the national constitution. Invariably, in all the Commonwealth African bills of rights, private property rights were, at the time of independence, entrenched so as to make it difficult (indeed almost impossible) for a new state to acquire private businesses compulsorily for the proper and bona fide utilization and development of the same for the benefit of the whole community. Now, it cannot be disputed that in the conflict between nationalization or state take-over with individual property rights, the interests of economic development must prevail - of course subject to certain safeguards.

THE DOMAIN OF THE INQUIRY:

- (i) The central thesis intended to be pursued in this inquiry is that bills of rights characteristic of Commonwealth African Constitutions has the undesirable effect of impeding the implementation of the needed socialist development programmes

in emergent states;

- (ii) that the protection of property rights in the Anglophonic African constitutions were written in order consciously to entrench the interests of the departing colonial power and those of its allied profit-motivated economic institutions regardless of the negative effects of this on the economic realities or needs of the new nations. Here it is not intended to claim that the protection of private property rights is not vital to the individual; rather the contention is that this must be meaningfully qualified by the power of the state to acquire property compulsorily on terms of payment of compensation;
- (iii) third, the paper intends to show that every country is entitled to protect its economy, and that the protection of foreign-owned property rights must, as a matter of compelling necessity, be reconciled with the principles of economic 'self-determination', and lastly;
- (iv) that the legal order of a new, emerging state must be so structured as to permit it to be seen as the chief vehicle through which the aims of economic development and social equality are implemented. And the constitution being at the apex of that order, and indeed controlling it, must be flexible and positively responding to the demands of economic transformation. Quite understandably a constitution operating in a socialized

economy must be compatible with the philosophy of that economic organization which holds that the right to enjoy the fruits of ownership of the means of production and distribution inheres in the people at large, to which ends development plans are formulated and implemented. In the same manner, one will expect that a constitution operating in an essentially capitalist economic system like the USA one will naturally tend to protect freedom of private enterprise, of contract and its dominant ideology of liberalism. In other words, there exists a theoretical nexus between law, the economy, and the polity. The ideas expressed so far can further be summarised under three headings and it is under these that the essay will be amplified upon:

- (a) the first Part deals with the pertinent question of 'economic self determination' or economic independence, i.e. the need for the new nations to seek complete and formal control of their respective domestic economies and the extent to which the bills of rights in Commonwealth Africa are inconsistent to the attainment or realization of that objective;
- (b) the Second Part dwells on the jurisprudential question, namely, that a new nation aspiring to develop via the route of socializing the economy must change the legal order inherited from the past which presumably supported a capitalist economic system. In other words this is an examination of the extent

to which new nations have attempted to restructure the colonially received constitutions in order to undertake nationalization programmes.

- (c) thirdly, we discuss the relationship between property rights and the aims of social equality as a component or specie of economic development. Social equality is a very recurrent topic on a discussion of socialism and economic development in new nations; as Ahmed Mohiddin has pointed out: "Socialism is a form of society in which people... live together under conditions of approximate social and economic equality. It is a system in which there can be effective equality of the people."³ It therefore becomes relevant to mark out the extent to which the attainment of 'social equality' in new nations can, and in fact do, conflict with individual property rights in the bill of rights. This is what the third Part of the essay is aimed to achieve.

PART I

CHAPTER I:

JUSTIFICATION OF THE PRINCIPLES OF ECONOMIC
SELF-DETERMINATION IN EMERGENT STATES.

In the ensuing discussion it is intended to look at the content of the principle of economic self-determination, its justification in the new nations, and also how it may be reconciled with the protection of foreign-owned property. The importance of economic independence is well demonstrated by George Schwarzenberger, who noted:

"Without a minimum of political, economic or military de facto independence, de jure independence is meaningless."⁴

Indeed the message such as is conveyed above have probably the greatest appeal to the leaders of new nations who feel that as long as the control over their economies remain in the hands of foreign persons their newly won independence is but a farce. From this has come the present nationalistic demand for the curtailment of alien economic domination and the need to bring the country's economy under close governmental control. By this it is believed that the people's interests will be more effectively and efficiently promoted by ensuring that the country's wealth and resources are exploited for the maximum benefit of the people. Thus from this

point of view the principle of economic self-determination as the right of states and peoples to determine their economic future assumes considerable importance.

ORIGIN OF ECONOMIC 'NATIONALISM' IN EMERGENT STATES:

Practically all leaders of emergent states assert that they have opted for some kind of 'socialism' as an appropriate system through which economic development can successfully be attained. This naturally raises a problem in these areas since the former colonial power before departure had ensured that the capitalist economic system shall continue to operate in these areas. For instance, it is not surprising that at independence the inherited economic institutions continued, as before to operate on capitalist lines and only interested in generating large profits for transfer of the same to their overseas shareholders. These institutions were only seeking to maintain the status quo. It is clear therefore that a new nation anxious to pursue a socialist approach to development is first of all faced with the problem of restructuring or a complete removal of economic institutions that grew up under the auspices of laissez-faire capitalism. As one African intellectual has pointed out: "The problem with the economic development of an African country such as Zambia is not how to improve within the system; for not much benefit could be derived from such improvements in an underdeveloped economy. The problem is to

establish a new society, which means, first of all, the creation of the basis of this society, that is, its economic, political, and technological infrastructure. Economic development encompasses all this, and more."⁵ With this background to the problems of African Economic Development it is easy to see why it is that African leaders have always looked upon political independence as incomplete, although a necessary and indispensable prerequisite to the attainment of economic independence and social equality. In this regard President Jomo Kenyatta of Kenya expressed what seems to be a representative view of all African Leaders in a rather eloquent language when he stated that;

"Our achievement of independence, for which we have struggled for so long, will not be an end in itself. It will give us the opportunity to work unfettered for the creation of a Democratic African Socialist Kenya. Democratic because we believe that only in a free society can each individual develop his talents most fully to serve his fellow citizens. African because our nation must grow organically from what is indigenous;.... Socialist because political Freedom and equality are not enough; our people have the right to be free from economic exploitation and social inequality".⁶

Implicit in the African attitude as expressed above is that Africans consider 'colonialism' to comprise many components. Conspicuous among these are political subordination, economic subordination,

social and cultural subordination. What may not be apparent is that African leaders and national movements are in revolt against economic domination in exactly the same way as they are in revolt against political domination (and indeed they are also in revolt to social institutions and values that colonialism fostered to establish). Lord Fenner Brockway has expressed the nature of the African resentment in the above matters as follows:

"Africans resent alien economic control as much as they resent alien political control. They are frustrated by alien ownership of mines, plantations and factories, and by the racial inequality of alien managements, alien skilled craftsmen, alien workers paid more than African workers on similar jobs... They resent the way in which white settlers and financial corporations have taken possession of their best land in many parts of Africa. They regard themselves as living under an economic occupation and identify their economic masters with the colonialism against which they are in revolt."⁷

In the context of the above remarks it is clear that African leaders have always felt a sense of commitment to the emancipation of their respective countries from the economic domination of the former colonial interests. They regard as an extension of political nationalism to free their countries from foreign control of their economics and regard socialism as the most effective weapon with

which to achieve this emancipation. This is why it said with respect to an African leader that "his nationalism leads him instinctively to socialism." He is obsessed with the idea that in order to effectively induce rapid economic development the dominant foreign-owned industries ought to be subordinated to public control or ownership. Now, the practical implication of adopting a socialist mode of economic development means that the basic means of production - 'the commanding heights in the economy' as President Nyerere likes to call them - have to be bought out. And in a new, emerging state where there is lack of private capital it is only the state that can find the enormous sums of money and organizational skill involved in the whole exercise of take-overs.

There is one relevant point that need to be pursued further here, and this relates to the importance the new nations attach to the role of the state in national development. According to Marxists, the state must wither away after the introduction of communism, a higher phase of socialism. This assertion was based on the postulate that the bourgeois state was a tool for the establishment of "democracy for a small minority, democracy for the wealthy". The marxists therefore take up the position that this apparatus, this bourgeois state, should be destroyed and replaced by another, a proletarian rule. With the end of an economy based on bourgeois capitalism and class conflict the state would become superfluous, and both the state and its product of coercive law would become unnecessary

and would "wither away". In the political and economic context of the new nations this is not the way the problem is looked upon. The state appeared as a result of successful struggle for national liberation. The state came together with independence. The state is viewed as the most effective means of preserving political and economic independence, of liberating the country from foreign tutelage. The African state cannot, with definite accuracy, be said to be a tool for the rule of one class over another for the simple reason that the existence of antagonistic classes seem not be justified in the traditional African societies. It is true that colonialism, by its very nature, created classes within the African societies; but with the attainment of independence in many countries on the continent there has come a solid desire to suppress the tendency. Here therefore, we cannot avoid reaching ^{an} conclusion that the African conception of the state differs considerably from the Marxist conceptions in terms of the definition and the functions of the state, the question of withering away and of the class struggle within the framework of the state. So it is that the state is presumed, and is under a duty, to be the chief organ for the purposes of ensuring that the country's wealth and resources are exploited for the maximum benefit of the people instead of leaving the task to the mysteries of open market. Professor Ann Seidman has clearly stated the case for the cruciality of the role of the state in the economic development of the emergent nations when she writes that:

"It is evident, ..., that to leave critical investment decisions entirely to private enterprise motivated by the search for profits was to leave the economy essentially as it was inherited from the colonial era: a dual economy hinged through the export enclave to the uncertainties of the world market. If the structure of the economy was to become more internally integrated, geared to increasing productivity to raise the levels of living of the entire population, it was necessary for the state to intervene to ensure the implementation of a meaningful development strategy."⁸

From what is stated in the preceding paragraphs it is beyond doubt that the evidence available support the proposition that one of the true motivations of the socialist option in the newly liberated states of Africa is nationalistic, i.e. an extension of political control. In the second place there is also a genuine desire on the part of African leaders to terminate alien economic domination and to safeguard national economic interest and not to attack the interests of foreign nationals as such! State participation in the economy which socialism envisages involves the nationalization of assets belonging to foreign nationals - so that the whole undertaking is not a matter to be justified only in terms of the municipal law of the nationalizing state; the validity of the nationalization of the property of aliens also has to be determined with reference to the Principles of International law. It therefore

becomes relevant to consider the question whether or not the Principle of economic self-determination (the Principle that envisages nationalization of foreign-owned property) is a fundamental and established principle of International law. Putting the question differently, is there anything in the practice of International organizations and states to support the existence of the rule that states and peoples have the inherent right to determine their economic future? Is, for example, the regulation by a state of its economic affairs a legitimate exercise of sovereignty? It is to a consideration of this question that we now turn.

INTERNATIONAL LAW, THE PROPERTY OF ALIENS, AND
THE PRINCIPLE OF ECONOMIC SELF-DETERMINATION:

This is what one writer on Public International law has observed in relation to the subject now under consideration:

"Respect for private property and the acquired rights of aliens is one of the recognized principles of International law. The International responsibility of a state has often been predicated upon a state's failure --. However, the expropriation of alien property for public purposes has not been considered to be contrary to International law. It is generally agreed that this right is implicit in the sovereignty of the state".⁹

This statement seems to reflect the accurate views on the expropriation of foreign property in International law and clearly confirms the concept of economic self-determination to be bound up with the idea of the sovereignty of the state. The activities of the United Nations in the past two decades has been in support and furtherance of the concept of economic self-determination. The World Body has passed resolutions concerning the recognition of the sovereignty of peoples over their natural resources and wealth and this has been done with due regard to the economic development of the under-developed countries. In Resolution 626(VII) of 12 December 1952, the General Assembly formulated the Principle that the right of peoples to exploit freely their natural resources and wealth is inherent in their sovereignty and recommended co-operation in the exercise of that right. Interestingly enough, this was the ground on which Iran defended her nationalization of the oil industry in the case of Anglo-Iranian Oil Co Ltd., v. Indemitsu Kabushiki Kaisha¹⁰. The Japanese High Court in upholding the Iranian Nationalization Laws said:

"The statement of Mr. Mosadique, Premier of Iran, and the Resolution adopted by the General Assembly of the United Nations on December 22, 1952, both of which were relied on by the respondents, show that the Nationalization Law coincides in its ideas with the recommendations adopted by the General Assembly of the United Nations concerning the exploitation of natural resources, and,

moreover, that the law was enacted for the public welfare of the country".

A significant step taken by the General Assembly towards consolidating the principle of economic self-determination was in 1958 when the Commission on Permanent Sovereignty over Natural Resources was established consisting of nine member States¹¹ "to conduct a full survey of the status of the basic constituent of the right to self-determination" and where necessary make recommendations for the strengthening of that right. Through the activities of the Commission, Resolution 1803(XVII) of 14 December 1962 was adopted in the form of eight principles.

Two of these principle are relevant to the instant inquiry and their recounting here is necessary: The First Principle declares that: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of the national development and of the well-being of the people of the state concerned". Then comes the fourth and most controversial principle to the effect that "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or national interest which are recognised as over-riding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty

and in accordance with international law...". It will thus be seen that although nationalizations of private property of aliens is permitted in international law yet the same imposes conditions under which that can be carried out. The nature of these conditions were specified in the Draft Convention on the Protection of Foreign Property Prepared by the Organization for Economic Co-operation and Development, the O.E.C.D., in the following precise terms:

"No party shall take measures depriving, directly or indirectly, of his property a national of another party unless the following conditions are complied with: (i) The measures are taken in the public interest and under the process of law; (ii) The measures are not discriminatory or contrary to any undertaking which the former party may have given; and (iii) The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay,...."¹²

Although a mere draft, this document seems to reflect the views held by the leading Western capital-exporting countries on the expropriation of foreign property. The requirement that nationalization or expropriation is to be justified on public interest, security or public utility needs just one clarification; namely that the nationalizing state should be presumed to be a better judge as to what is in the public interest, security etc. It is

submitted that the test is not to be determined by using objective standards and concepts but one that is strictly subjective and that once the nationalizing states is satisfied that it is in the interests of the state to nationalize a particular foreign-owned asset, no outsider can be heard to argue to the contrary. The second requirement to the effect that nationalization must not be discriminatory against foreigners should also not go without a comment. In many newly born African nations the most important sectors of the economy such as finance, mining, industry, and transport were dominated by foreigners - so that any nationalizations in those sectors necessarily would affect almost exclusively alien enterprises but cannot for that reason be held to be invalid in international law. The recent nationalizations in Zambia and Tanzania which we shall have occasion to discuss later in the essay, constitute good examples of the extent to which alien institutions can dominate another country's economy. The third and last requirement under which international law recognises nationalization of the property of aliens is that "appropriate" compensation must be paid. It will soon be clear that this differs from the standards of "prompt, adequate and immediate" compensation characteristic of many of the Commonwealth independence bills of rights. U.O. Umozurike has vividly illustrated the difference:

"--'Appropriate' compares with 'just' or 'reasonable' and represents the current trend. What is appropriate will depend upon all the circumstances of the case, such as the terms of contract, the nature of the terms, the circumstances of the contract, the nature of the resource, the amount of capital involved, the interests so far recouped, the effect of the existing arrangements on the people and the ability to pay compensation. An expropriation which involves a large amount of money will require a longer time to pay than one that is small---".¹³

The above comments have in fact sufficiently brought out the point that the rule of compensation must be laid down from the realities of each individual act of nationalization and that there are many attendant factors that ought to be considered before the quantum of compensation is decided upon. It would be unrealistic and unreasonable, for example, to require prompt payment of effective and adequate compensation in cases where nationalization of foreign-owned property may be effected as part of a general programme of social, economic and political revolution. Such a large-scale economic reform to be implemented by means of the nationalization of certain industries or means of production, distribution or exchanges is necessary especially in the less developed countries seeking rapid social and economic transformation - but they are very expensive in terms of the compensation money involved. Therefore to insist that compensation be paid immediately, and must represent an adequate and effective sum of money is

to have no due regard to the immediate problems facing new nations. It is for this reason that the use of the word "appropriate" compensation in Resolution 1803 (X VII) is to be appreciated for its consistency with the harsh realities of the Third World since it does not endorse the claim for 'prompt, full and adequate' compensation usually made by the capitalist-oriented lawyers. There is one further point that international law principles must be directed at; and this relates to the fact that where a right has been acquired through an unequal contract, or if it was obtained through force, the contract by virtue of which the right was acquired must be condemned as invalid and inoperative. This is certainly the rule in municipal law, namely, that the validity of a contract is vitiated if a party to it was compelled to give his consent under duress. No doubt the rule of international law is the same where the case is one of physical coercion, deceit and down-right robbery. This, it is submitted, was very much the methods used by foreign companies to acquire property rights of different kinds in many parts of Africa - and certainly in Zambia. The Zambian story on this point will be explained in due course but in the instant context it is enough to mention that the rights over Zambian mineral resources were acquired by an outright illegal means. The rights were obtained from illiterate Zambian chiefs through a combination of force, threats of force, deceit, etc. For articles of little value, the chiefs were made to give away right over their natural resources

in circumstances where there was no legal authority for them to give away the patrimony of the people to foreigners. U.O. Umozurike has again written that given the above circumstances, that is "If the original right was acquired through an unequal contract, or if it was obtained through force, the threat of force or deceit, expropriation----- will have the effect of restoration. This invariably affects the amount of compensation, if any. The foreign firm may have made profits wholly disproportionate to the amount of investment which amounts to depriving the people of wealth that rightly belongs to them. In such circumstances, there is no reason why in principle, expropriation may not involve the payment of extra amount by the foreign firm even after the property has been taken over".¹⁴

Apart from the activities of the United Nations on the Sovereignty over natural resources, the Covenant on Human Rights has also given prominence and recognition of the principle of economic self-determination. The Covenant in Part, Article 1, declares that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". The Covenant sounds morally encouraging when it asserts that "--- in no case may a people be deprived of its means of subsistence".

And, although not an entity or subject of international law, so to say, the question of expropriation has received the attention of

the international Commission of Jurists. The Commission, in the Congress of Athens 1955, resolved that in the case of expropriation or restrictions on the use of private property, adequate compensation, of which the persons entitled may freely dispose, should be awarded. This was elaborated in the Congress of Bangkok 1955. That congress declared that nationalization subject to certain essential prerequisites is not itself contrary to the Rule of Law, nor are restrictions on the use of private property including capital. It further recognised that many countries in the new nations have decided after free elections that certain sectors can no longer be left in private hands if the public interest is to be safeguarded. This technique has been resorted to prevent powerful accumulations of capitalist interests from dictating the trends of the economy, either in key areas or generally.¹⁵

But, as we shall find out shortly, the principle of economic self-determination sometimes comes in direct conflict with the protection of foreign-owned property. Normally the property rights of foreigners are protected and any action affecting them are required to comply with certain minimum standards that are outlined in the preceding paragraphs. These so-called 'minimum standards' in fact were set by the liberal regimes of the capitalist world who in turn influenced their infiltration into the body of international law and later in municipal laws of their former colonial territories. Upon departure from these territories, the

colonial power ensured that constitutions written for independent African countries retained what has come to be referred to as the 'compensation rule? Yet, respect for foreign-owned property may perpetuate an undesirable status quo that in fact originated in an illegal seizure of property rights by foreigners. In this paper it is to be advanced that the requirements of social transformation in emergent states are so pressing as in fact to amount to an emergency situation requiring special provisions in the law that may impinge on the right to property.

Before any attempt is made to demonstrate the nature and extent of the conflict posited between protection of individual property rights and the concept of 'nationalization', it is proper and necessary to map out the exact contextual use of the word 'nationalization! In other words what is the expression 'nationalization' taken to mean in this inquiry?

THE NATURE AND DEFINITION OF AN ACT OF NATIONALIZATION:

Writers who have attempted to define the concept under reference have done so by seeking to expose its essential characteristics. It is probably necessary to recount some of these classical definitions of nationalization and thereafter to list some of its salient features and then proceed to see whether what happened in Zambia, amounted to acts of nationalization properly so-called.

Foighel has said that nationalization is "the compulsory transfer to the state of private property dictated by economic motives and having as its purpose the continued and essentially unaltered explication of the particular property".¹⁶ White, on the other hand, concludes that the act of nationalization is "one which sets in motion a legal process whereby private rights and interests in property are compulsorily transferred to the state, with a view to the future exploitation of those rights and interests by and for the benefit of the state".¹⁷ Katzarvo, too, is not in distant disagreement with the views of Foighel and White when he calls nationalization to be the transformation, in the public interest of a superior kind, of specific assets or activities which are means of production or exchange into the assets or activities of the community with a view to their utilization in the public interest¹⁸. In the light of these formulations one can make a distinction between the idea of nationalization and expropriation. The latter is limited in scope, in the sense that they affect only individual instances of the taking away of property - the typical example is that of the acquisition of land by a public authority for a public purpose. In fact local authorities in this country, and indeed in many parts of the world, employ the legal institution of expropriation for the compulsory acquisition of a particular property; expropriation measures normally affect only the individuals concerned and would therefore have minimal social, economic or political impact on the country as a

whole. Nationalization, on the other hand, affects more or less the whole society and its social, economic or political effects are very profound indeed. As A. Bradley has rightly observed, although the concepts of nationalization and expropriation are obviously related in several respects, "nonetheless the motivation of nationalization measures, their economic and political significance, and the means by which they are implemented set them from individual instances of expropriation." An act of nationalization differs from that of confiscation which tends to be punitive, retaliatory and even discriminatory. In international law discriminatory and confiscatory measures against foreigners are forbidden. An Italian Court upholding the legitimacy of the expropriation in Anglo-Iranian Co. v. SUPOR made it clear that it would not have done so if there had been a breach of International Law.

"Italian Courts must refuse to apply in Italy any foreign law which decrees an expropriation, not for reasons of public interests but for purely political, persecutory, discriminatory, racial and confiscatory motives. Furthermore, the Italian Courts must refuse to apply in Italy such foreign laws, even for non-political and non-persecutory motives, decrees the expropriation of the property of any foreign national without compensation".¹⁹

Undisputably, confiscation, that is acquisition of property without

compensation, can be repugnant to all accepted codes of morality - since property represents the fruits of legitimate labour (sometimes for a long period) of an individual or individuals and it is unjust to take it away just like that without compensation.

To come directly to the relevant point, there is nothing in the classical literature dealing with the definition of an act of nationalization that insists on a complete or total, (in the sense of a one hundred percent) state take-over of the enterprise concerned in order for an act to amount to 'nationalization'. Put differently, the acid test for an act of nationalization seem not to lie in the fact of complete acquisition of the assets in question; but more significantly, one has to look at the nature and objectives of the measures taken, and also their impact on the nation's overall social, economic and political set up. Such economic measures, for example, as was carried out in Zambia between 1968 and 1970 which enabled state participation of 51 per cent equity in the industrial, mining and financial sectors can properly be called 'nationalization' measures because nobody can doubt the tremendous impact they had on the nations' economic, even social and political life. In spite of the foregoing remarks, it is, however, more appropriate to call measures resulting not in a complete state control of the industry concerned, as 'partial take-overs' in order

to convey the precise state of affairs, namely, that the state, in fact, has only acquired a certain per cent of shareholding.

One thing is clear from the above formulations of the idea of nationalization, and this is that invariably in all cases the state employs compulsive techniques to acquire property hitherto belonging to a private individual or enterprise. The owner is compelled - and in most cases against his will, to sell his property to the state. He has no freedom of choice in the matter. To the extent that this is the case, nationalization or state take-over is obviously in conflict with individual rights entrenched under the national constitutions - at least in the Commonwealth bills of rights. In fact due to the nature of the constitutional conditions subsequent to compulsory acquisition of private property, desirable development projects might be defeated by the court at the instance of individuals alleging that a right guaranteed to them by the constitution has been or is likely to be violated. In these circumstances possible conflict between the court and the executive is likely to ensue.

CHAPTER 2

THE EXTENT TO WHICH THE PROTECTION OF PROPERTY RIGHTS IN COMMONWEALTH AFRICAN BILLS OF RIGHTS 'IMPEDED' ECONOMIC DEVELOPMENT

In chapter 1, it was charged that a bill of rights can, depending upon the nature of the protection, entrench private property rights in disregard to the needs of economic development. It becomes relevant therefore, to examine the extent to which the protection of property rights in the Commonwealth constitutions supports that charge.

To start with it should be noticed that compulsory acquisition of private property in all these bills of rights is permitted but within a relatively narrow range. There are at least two discernible approaches that Commonwealth bills of rights exhibit; the first one is that represented by Uganda (1962), Kenya (1963), and Sierra Leone (1961). These bills of rights provide that no property of any description shall be compulsorily taken possession of except where the taking possession of, or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such a manner as to promote the public benefit; and further that it has to be shown that the necessity is such as to afford reasonable

justification for the hardship that may result to any person having an interest in the property acquired.¹ The second approach is represented by Malawi (before 1966), Zambia (before 1969), and Botswana. In this category of the bills of rights, the government can justify the acquisition on the ground that it is either "necessary" or simply that it is "expedient" in any of the specified interests. Once again it is worthwhile to restate the proposition that the above provisions necessarily imply that compulsory acquisition cannot be embarked upon unless that acquisition can be demonstrated to be 'necessary' or expedient for one of the specified purposes. In other words the necessity or expediency of the acquisition is a condition precedent to the constitutionality of compulsory acquisition. But what does the principal expressions, 'necessary' and 'expedient', mean in the context? How do the two conditions compare in terms of scope within which they allow compulsory acquisition? In the Zambian case of Jasbhai Patel v. Attorney-General² Justice Magnus, as he then was, defined the expression "expedient" as something "conducive to the purpose" in hand or "suitable to the circumstances of the case"; and "it is, therefore, far short of what" is necessary" or what is "reasonably required". The Judge then held that the seizure, under statutory powers, of postal packets containing currency notes which were illegally exported out of the country, was expedient for a scheme of exchange control designed to secure the development of the nation's financial

resources for a purpose beneficial to the community.³

The second point to take notice of is the fact that confiscation, or compulsory acquisition of property without compensation, is virtually prohibited in the Commonwealth African bills of rights. However, the only limited scope within which confiscation is given recognition really amounts to no confiscation at all properly or strictly so-called. Indeed a closer examination of the circumstances in which a constitutional authorization of confiscation is given reveals that the act of deprivation of the property does not arise from a purely positive act of confiscation, "but from the failure of the owner to assert his right in time; it is, the Judicial Committee of the Privy Council has rightly observed, thanks to his own inaction". It is quite plain that this is the correct inference about 'confiscation' in Commonwealth African bills of rights where recognition to it, for example, arises in situations where property is taken (i) in satisfaction of a tax, rate or due; (ii) in execution of a judgement; (iii) by way of penalty for breach of some law; (iv) as an incident of a lease, mortgage or charge; (v) in circumstances where it is reasonably necessary to do so because the property is in a dangerous state or injurious to the health of human beings, animals or plants; (vi) in consequence of any law with respect to the limitation of actions; (vii) for so long as may be necessary for the purposes of any examination, investigation,

trial or inquiry or, in the case of land, for the purpose of the carrying out thereon of work of soil conservation of other natural resources or work relating to agricultural development or improvement, being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed to carry out. The bills of rights then add that in each one of these situations the law authorizing the deprivation of property as well as any action taken thereunder must be reasonably justifiable in a democratic society. None of the situations mentioned above in which confiscation is authorized can be said to amount to a direct conferment of authority on the part of the government to deprive the owner of his property. In other words confiscation, as a 'positive' act, is absolutely prohibited in the Commonwealth African bills of rights.

As it has been asserted elsewhere in this paper, it is proper that a bill of rights should have a moral basis and should seek to uphold decent moral ends in the society in which it operates. By their very nature, confiscatory acts are associated with discriminatory measures aimed at certain individuals or groups of individuals and takes the form of a penal measure. They are therefore in direct conflict with all accepted codes of morality. To compel certain individuals in a community, or certain categories of individuals, to give up their property for the general

welfare of the larger community without compensation is a very unfair situation. Property is, generally speaking, a result of legitimate labour or arduous venture and the compensation paid to the owners of the property taken represents precisely the corresponding contributions made by the rest of the community in order to equalize the financial incidence of this taking of private property. Thus the cost of acquisition in an ordinary case should be borne by the society as a whole and so the owner of the property is compensated for the special loss he suffers. But it is submitted that no morality is violated in a situation where the owner of the property has been at fault as in a case where he obtained the property through force, corruption, threats or deceit, through any other immoral methods. In these circumstances confiscation may in fact be the restoration to the people of property illegally taken away from them with resultant effects on the mode and quantum of compensation. It is morally objectionable that any individual or company should claim ownership of mineral rights in perpetuity as did Cecil Rhodes and the British South African Company with respect to the rich minerals of Northern Rhodesia (now Zambia). What is even uncompromisingly objectionable is that an alien individual or foreign company should claim to own the mineral wealth of any country in perpetuity. In fact if a strict view is taken about the circumstances in which the mineral rights of Northern Rhodesia were acquired and the extraordinary profits made over the years at the

expense of the people, the nationalization of the mining industry in 1969 could have been carried out without material compensation since the investors would be deemed to have more than compensated themselves. It is obvious that Zambia's philosophy of Humanism and the desire to retain the services of the skilled foreign miners contributed to the respect for rights illegally acquired.

It is plain that the British Government's intention at the time of writing the independence constitution of Zambia was to entrench the mineral rights of the British South African Company by totally prohibiting 'positive' confiscation of property, Fenner Brockway has in fact stated the case very rightly when he writes that "the financiers and capitalists of Europe and America would care little if they were to lose all their possessions on the continent of Africa so long as they retained their mineral wealth. Capitalism in Africa is the ownership of its minerals. One cannot think of an Africa which is socialist without the transference of its mineral resources and wealth to the people."⁴

The prohibition of expropriation without compensation in the Zambia's independence constitution was a very serious legal hurdle to the utilization of the mineral resources for the development of the country for the benefit of the community as a whole. It is necessary to pursue this matter a little further and to show the seriousness of the aspect of the constitutional provision under reference.

THE CONSTITUTIONAL PROHIBITION OF COMPULSORY ACQUISITION WITHOUT
COMPENSATION AND ECONOMIC DEVELOPMENT IN ZAMBIA:

When one talks about 'economic independence' this should not be understood to be referring to or confined to Africa or even to the underdeveloped countries only. Economic independence is a universal question. It is said for example, that such rich and industrialized countries as France and Canada have been concerned by the large-scale American investment without any local control on the same. With respect to Canada, it is estimated that more than 50 per cent of the country's entire production economy is American-owned. 25 per cent of Canada's fuel Companies (oil and coal) are American; 60 per cent of Canada's gas industry, 62 per cent of her mining and smelting 25 per cent of her railways, 13 per cent of her utilities are in American hands.⁵ About this state of affairs this is what Canadian Conservative leader John Diefenbaker once said:

"Canada's economy is altogether too vulnerable to sudden changes in the trading policy of Washington. Canadians do not wish to have their economic, any more than political, affairs determined outside Canada. Moreover we have become dependent on the U.S.A. which now largely controls our iron, petroleum, copper and the like".⁶

It is self-evident that the inability of a state to control any

aspect of its national activity leads to resentment and frustration. But the problem is however more acute in Africa, in the states that have recently attained political independence.

Zambia in particular affords a very revealing example of economic dependence than any other country within Commonwealth Africa. At independence in 1964 virtually the whole of the manufacturing industry, mining and the financial sector and a large part of other service sector, including retailing, were in the hands of foreigners. And because of Zambia's long economic association with the South, most of the businesses in the country continued to be dominated and controlled from Salisbury and South Africa.

But by far the most serious aspect of Zambia's economic dependence is the extraordinary dominance of copper in the economy.

Copper forms the backbone of the country's economy as is indicated below:⁷

	GDP	GNP	EXPORTS	REVENUE	EMPLOYMENT
ZAMBIA	40	34	93	68	15
CONGO (KINSHASA)	18	23	51	45	2
CHILE	4	3	65	14	3
PERU	2	1.5	18	12	1

None of the other three copper-producing countries so extensively depend on the commodity for their GDP, GNP, Exports, Revenue or Employment.

The neighbouring Congo (Kinshasa) in fact does so almost to the extent of half of Zambia's dependence. It is essentially because of this problem, that is the country's extraordinary dependence on copper, coupled with the Zambian government's inability to influence its price and to direct its proper development for the benefit of the Zambian people as a whole that there was a growing impatience that the copper industry should be nationalized. But government could do nothing in the meantime since it had no legal power to acquire property without compensation. It is clear that the British plan to prohibit expropriation of property without compensation in the Zambia's independence constitution was still persistently hindering the utilization of the country's mineral resources for the development of Zambia.

Apart from ownership of the title to the minerals, the BSA Company had also the power to decide who shall prospect and where. A prospector had to obtain the licence from the BSA Company to operate if and when he desires to start mining operations. If mining was successful, he had to pay royalties on production to the BSA Company. Indeed as far as mining was concerned, the BSA Company was the government of this country.

The rich copper ores of the country were mined by two company groups: the Rhodesian Anglo-American, Limited; and the Rhodesian Selection Trust, Limited - (known as Rhoanglo and RST, respectively). Exclusive rights had been given and held by these companies ever since the 1920's to prospect, explore and mine in certain areas which cover 70 per cent of the country's surface. The mining rights granted by the chartered company to the two mining groups included those granted in perpetuity under special grants. "It seemed morally indenfensible", observes professor B.O. Nwabueze, "that these rights should be protected against expropriation except on terms of payment of compensation".⁸ It was this state of affairs that the 1969 Constitutional Amendment was intended to correct, namely, to permit acquisition of the rights granted in perpetuity by the state without compensation. President Kaunda at Mulungushi directly attacked the constitution, he said:

"Perhaps this is an appropriate time for me to announce that Government has accepted in principle the need to amend that part of the constitution which relates to the compulsory acquisition of property. As humanists we are dedicated to upholding the protection of fundamental rights and the freedom of the individual. However property rights must be subject to the common good and to the general interests of the community. The existing section 18 of the constitution must be examined and replaced by more

realistic provisions".⁹

The constitutional amendment of 1969 greatly extended the permitted scope of confiscation beyond that stipulated in the independence constitution. The important new areas in which confiscation is now authorised include: a law which vests in the President rights of ownership, searching for, mining and disposal of minerals, and which empowers him to revoke grants of prospecting, exploration or mining licences upon failure to comply with the conditions of such licences; in addition confiscation is permitted by any law relating to (i) exchange control; (ii) abandoned, unoccupied, unutilized or undeveloped land; (iii) absent or non-resident owners; (iv) the acquisition of shares or a class of shares, in a body corporate on terms agreed by the holders of not less than nine-tenths in value of those shares or that class thereof; (v) the forfeiture or confiscation of the property of a person who has left Zambia for the purpose or apparent purpose, of defeating the ends of justice; (vi) the administration or disposition of property by the President in implementation of comprehensive land policy or of a policy designed to ensure that the statute law, the common law and the doctrines of equity relating to or affecting the interests in property enjoyed by chiefs shall apply with substantial uniformity throughout Zambia.¹⁰

For the purpose of implementing the amendment, two pieces of legislation were enacted. These were the Lands acquisition Act, 1970 and the Mines and Minerals Act, 1969 (effective January 1, 1970).

The Land Acquisition Act empowered the President compulsorily to acquire any property of any description whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do. This Act actually replaced the colonial legislation - the Public Lands Acquisition Ordinance Cap. 87. One discernible feature of the colonial legislation was that government policy relating to acquisition of property could be frustrated by the complicated definition of 'public purpose'. For any acquisition of property, the government had to show that it is justified on the ground that the particular property, was needed for a public purpose. The new Act avoids this by vesting a discretionary power on the President who has to be subjectively satisfied that the acquisitions is in the interests of the Republic. The advantage of the new legislation is that the owner of the property acquired will find it extremely difficult to defeat government action in a court of law merely by arguing that the acquisition was not in the interest of the Republic. There is a considerable number of judicial decisions to the effect that the exercise of a discretionary power cannot be challenged unless it can be shown that the person vested with the power acted

in bad faith or from improper motives or on extraneous consideration or under a view of the facts or the law which could not reasonably be entertained.

The Land Acquisition Act, 1970, also provides that no compensation is payable where an undeveloped land has been acquired. Also no compensation is paid in respect of unutilized land of an absentee owner. The only exception in this respect is that compensation is payable for any unexhausted improvements on unutilized land belonging to a resident in Zambia. But if the land is unutilized land belonging to an absent owner, i.e. a person not ordinarily resident in Zambia, no compensation is payable. Unexhausted improvement is defined in the Act as any quality permanently attached to the land directly resulting from the expenditure of capital or labour and increasing the productive capacity, utility or amenity thereof; The justification for the expropriation of unutilized land belonging to absentee or non-resident owner was explained by the then Minister of Land and Natural Resources, Mr. Solomon Kalulu when he was presenting the Bill in the National Assembly:

"...Later in the 1950's as the cry for independence hotted up in Northern Rhodesia, most of these settlers (white settlers) began to go away - of course having fenced up their farms. Now these farms are lying idle. We cannot touch them because

legally they belong to absentee owners. This Gordian knot can only be untied by legal means and this legal means is the Bill which is before this house. Either this Bill passes through or the nation is held at ransom by absentee owners who demand as high as K3,000.00 per acre for the land which they originally got at 6d an acre. I will not allow my Ministry to be a party to this comedy of weakness".¹¹

Evidently, it is of the abandonment of land that prompted the government to arm itself legally to forfeit these lands. In fact the white settlers had grabbed most of the fertile agricultural lands. The Monckton Commission of 1960 had revealed that the white settlers, numbered only in thousands, in the Rhodesias (Northern and Southern Rhodesia) took about 48 million acres of fertile land as against 41 million acres occupied by the African millions. Most of the land that Africans occupied were comparatively poor and with low capacity of soil fertility. In these circumstances it was only a reasonable recourse that the fertile agricultural lands belonging to absentee owners should revert to the state for its proper utilization in the interests of the nation.

The Mines and Minerals Act, on the other hand, vests all rights of ownership in, of searching for, mining and disposition of, minerals in the President on behalf of the Republic. By virtue

of this Act every title to, interest in right over any minerals, of whatever nature, subsisting immediately before the commencement of the Act was extinguished. Thus all the concessions acquired at the beginning of the century by the BSA Company came to an end. Minerals not included in the Company's rights, such as those lands reserved to the paramount chief of Barotseland (now Western Province) as a result of the concession agreement with the company also passed to the state. Introducing the Mines and Minerals Bill in the National Assembly, the then Vice-President, Mr. Simon Kapwepwe, spoke at length in outlining the objectives which the Bill was intended to achieve:

"The vast undeveloped areas over which mining rights have been tied up, stagnating for years, decades, almost for centuries will now be thrown open for development. Let us not shed any tears for those who have lost their mineral rights to-day. If they had prospected and explored their areas with energy and enthusiasm, if they had the courage to invest money in the development of new mines, we would have been only too pleased to encourage them. But they did not. ... Through the attitude of these people, development of the Zambian mining industry has been crippled and deliberately held up. This was a situation which we as a people's Government could not tolerate and which it was our duty to correct. The Bill which I am introducing achieves that object; by eliminating the old concessions and Special Grants the Bill will provide

up-to-date procedures designed to control prospecting and mining activities in Zambia for the benefit of the people of Zambia. We are going to make quite certain that there is no repetition of Cecil Rhodes and his granting of mining rights in 'perpetuity' or 'forever and ever'." ¹²

It is quite evident therefore that government's policy behind the passage of this Act was to ensure that in future prospecting rights, exploration rights or mining rights will only be held for bona fide purpose of prospecting, exploration or mining, as the case may be. The Act stipulated the period of time for which these rights will be held - a mining licence was to be initially valid for six months, renewable for a further period of twenty five years as long as the holder of the licence submits a satisfactory programme showing that ore reserve remain to be exploited. In each case the government reserve the right to participate in any mines which may result from any new mining operations. Government's ultimate aim in passing this law was obviously to induce rapid development of the mining industry by making it possible for vast areas previously held by the two major companies, the Anglo-American and Roan Selection Trust, and which areas were hitherto unexploited under the special grant system, to become available for prospecting by other interested companies.

COMPENSATION PROVISIONS IN COMMONWEALTH AFRICAN CONSTI-
TUTIONS AND THEIR RELATIONSHIP TO ECONOMIC DEVELOPMENT.

Having demonstrated that Commonwealth African bills of rights in fact completely prohibit expropriation of property of any description without compensation, it is now appropriate to look at the technique adopted by most of the African countries within the Commonwealth family to compulsorily acquire property. The practice of compulsory purchase has been instituted by most of these countries, so that the owner is compulsorily required to part with the property and for this he receives for the property acquired its equivalent in money. In a sense it is as if the property has only changed the form as a result of a compulsory order of the government. It follows from this that if the property is not diminished in amount, but has only changed in form, the owner is entitled to its corresponding equivalent amount in form of money. The underlying idea is that the owner of the property compulsorily purchased ought to be put in as good position pecuniarily as he would have occupied if his property had not been taken. The question of the quantum of compensation with respect to a property compulsorily purchased assumes considerable importance in a development' state from at least two points of view. First, is the immediate financial effects of payment on the nation's limited domestic capital essential to economic develop-

ment; and second, is the effect on foreign sources of capital as regards future investment in the country. For the present purpose our attention shall be primarily focussed on the first of these view points, because the second view does not raise any problems of a constitutional significance.

Practically in all of the Commonwealth Independence bill of rights, payment of 'adequate' and 'prompt' compensation is a condition sine qua non if nationalization of foreign property is undertaken. Tanzania, which has never had a bill of rights, is the only exception. But even here, the Tanzania statutes provide for "full and fair" compensation for the expropriated property rights-and prima facie, therefore, Tanzanian compensation laws do not provide for "prompt" or immediate compensation at the time of taking.

"Adequate"

The first constitutional condition subsequent to nationalization is that 'adequate' compensation must be paid to the owner compulsorily deprived of his property. The inherent problem here is one of finding a workable definition which should be attributed to the concept of 'adequate' compensation! Should this, for instance, be taken to mean that the owner of the property acquired should be indemnified the full and perfect equivalent in money of the property taken? The U.S.A. Supreme Court had no difficulty to

find some practical standard by adopting the concept of market value. The owner has been said to be entitled to the "value", the "market value", and the "fair market value" of what is taken. By this the court presumably meant that the owner is entitled to be awarded the amount equivalent to the price he would have bargained for if he was a willing seller selling in the open market.¹³ This is obviously the intendments of the bills of rights; in fact the Kenyan bill of rights omits the use of the expression "adequate" and in its place stipulates "full compensation". Granted therefore, that open market value is a permissible basis for calculating 'full' and 'fair' compensation, its application will certainly raise a complex of difficulties. Chief of this is the difficulty of imagining the circumstances in which open sale of the undertakings might take place. Where for example, can an open market sale be available for the sale of the assets belonging to the mining companies, to the international banking institutions, or to the large industrial undertakings operating in the new nations? It is obvious that in these cases the assessment of ordinary market value will just involve assumptions which will make it unlikely that the appraisal will reflect the true value of assets with precision. This in effect, means that the application of the concept of market value in the above circumstances will involve, at best, a guess by informed persons..

It might be contended that where an open market does not exist, then the fair value of the property at the time of nationalization must be awarded. The problem of using 'a fair market value' as the basis of paying compensation is that it can be challenged by the owner of the property that a fair market value is something less than a full market value and not therefore equal to 'adequate compensation' within the meaning of the constitution. It is quite obvious that a fair market value may be, and often is, less than full market value. Where therefore an owner of the property was dispossessed of it compulsorily, he was able to challenge the constitutionality of the statute on the ground that a fair market value was something less than adequate compensation.¹⁴ Quite rightly, he pointed out that a fair market value was not an exact or full equivalent in money to a full market value and therefore the expropriating authority had given him an amount which falls short of that which the constitution envisages. Thanks to the open mindness of the Nigerian court which refused to declare the statute void on the ground that it is not always that a willing seller in the market get a full market value; and so if he gets a fair market value he is happy and contented - and accordingly compensation based on fair market value is adequate compensation within the meaning of the constitutional provision. Moreover, a fair compensation, the court added, though not an exact or full equivalent in money, is nevertheless a just equivalent.

The experience encountered in the Nigeria's High Court shows that unless the court is open-minded with respect to the prevailing economic needs of the country, government's programmes of the expropriation of private assets can easily be frustrated by the legal alertness of the owners of the assets concerned that they are entitled to a correct constitutional standard of assessing compensation. But what is more interesting about the Nigerian experience is that the court decided the case on purely 'policy' considerations - the policy that government's genuine intention of bringing about utilization of a property in the interests of the whole community surely prevail as against individual enjoyment of that property. There are few Lawyers in the common law areas who address themselves to the question that law is not purely an institution of conflict-resolution mechanism. Unlike the judge(s) who decided the Nigerian case, most of the lawyers in the Anglophonic legal world (of which the Commonwealth law tradition is a part) do follow the classifical English legal ideology, analytical positivism, which teaches that the correct concern of a jurist is what the law "is" about. By this is meant that once a conflict is brought before the court, that court has to resolve the conflict from within the existing, or from pre-established, rules; analytical positivism does not train a lawyer to resolve the conflict by taking into account what the law "ought" to be - i.e., from policy considerations. The guiding

dogma in the training of a lawyer in the whole of the Commonwealth world revolves on the concept of what Max Weber has called a "logically formal rationality", "Legal thought is rational to the extent that it relies on some justification that transcends the particular case, and is based on the existing, unambiguous rules; formal to the extent that the criteria of decision are intrinsic to the legal system; and logical to the extent that rules or principles are consciously constructed by specialized modes of legal thought which rely on a highly logical systemization, and to the extent that decisions of specific cases are reached by processes of specialized deductive logic proceeding from previously established rules or principles".¹⁵ The function of the courts was thus limited to law-finding since its sources were limited to the legal order itself. To say that decisions of courts must be derived from pre-established rules is to leave no room for the court to generate appropriate law in an ongoing society. Courts do not function in a vacuum; they must follow the example of the Nigerian court which decided the Esi case by appreciating the fact that legal decisions must be reached from the background of the primary concern of a new, developing nation namely, economic development. The interpretations of the constitutional provisions in emergent states must surely take account of socio-economic realities and needs of these areas and should not merely

end at satisfying one individual as against the community at large.

"Prompt"

Commonwealth bills of rights further required that in the event of a compulsory acquisition of property, 'prompt' payment of compensation must be made. This requirement of prompt payment probably constitutes a serious challenge on the capacity of a new nation to launch development along the lines of state ownership. Professor B.O. Nwabueze in his usual eloquent language has summarised the grave effects of the stipulation in the constitutions of emergent states that compensation has to be paid promptly: he has written:

"-- It is a drag on development, because a new state, desirous of pursuing a programme of public ownership in both the industrial and commercial sectors, may lack the capital to pay prompt compensation for taking over privately-owned industries, banks, building societies, insurance companies and other commercial enterprises. What is objected to here is not the principle of compensation as such, for, ---it is right that, in the ordinary case, the state should pay compensation for depriving a person of the legitimate fruit of his labour or investment. But the principle of compensation should have been satisfied by the state accepting the liability to compensate,

but without being obliged to do so promptly. Instead of prompt payment, the value of the property could be treated as a loan to be paid out of the profit of the business over a period of years".¹⁶

In fact Professor Nwabueze's view point was raised by Mexico in her dispute with the United States; Mexico pleaded economic inability to pay "prompt" compensation for the real properties she had nationalized. She contended that a "transformation of the country, that is to say the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only lucrative ends".¹⁷ In answer, United States Secretary of State, Hall, rejected this on the ground that under every rule of law and equity no government is entitled to expropriate private property for whatever purpose, without provision for prompt, adequate and effective payment therefor. Hall's argument has been reinforced by Ree who contends that:

"irrespective of the national policy underlying the expropriation, be it a general reform measure calculated to achieve social justice or an ordinary taking for the construction of a highway, for example, foreigners are entitled to compensation pursuant to the requirement of international law",¹⁸



In the same way Domke has put it that "no justifiable reason appears to exist which would impose upon foreign owners the burden of contributing to economic improvements in the country from which they, mostly non-residents, will not derive benefits themselves".¹⁹ One should probably comment here that these arguments are not wholly empty; but they unsympathetically fail to appreciate the situation that exists in the new and developing states. As professor Nwabueze has pointed out above, the issue is not that compensation shall not be awarded in respect of any nationalized foreign-owned assets, but one of devising a more realistic method of payment taking into account the financial position of new nations. Many of these countries had endured long periods of exploitation by the nationals of the colonial masters together with their (the colonial masters') companies.

It is quite obvious that this state of affairs must be corrected immediately after political independence - and the process of correction cannot be expected to wait until a new state is in a position to pay "prompt" compensation to the aliens. A German court has expressed sympathy for the position of an ex-colonial country. That court in the Indonesian Tobacco Case held that the principles of compensation would be applied to.

"individual expropriation of the usual kind and --Here, however, the expropriation of the Dutch Companies constitutes at the same

time a shifting of proprietary relations ...which was affected by a former colony after its independence, in order to change the social structure... Compensation could not be paid in full and promptly out of the substance, but only made out of the proceeds of the nationalized enterprises. Compensation as to time and amount must therefore be made in accordance with the conditions in the expropriating state. Thus the long-standing principle of strong protection of private property clashes here with the modern concept that underdeveloped countries must be given the possibility of using their own natural resources".²⁰

In the international arena, the Harvard Convention has squarely repeated the position taken by the German Court. That convention has declared that where property is taken by a state in furtherance of a general programme of economic and social reform, compensation may be paid over a reasonable period of years provided that the method and modalities of payment apply to nationals and non-nationals alike, a reasonable part of the compensation due is paid promptly, taking into account the general financial situation of the non-nationals concern.²¹

The prohibitive effect on socialist programmes of development of the guarantee of property in terms of prompt payment of adequate compensation led Kenya to reject nationalization as a technique of development. According to the Government White Paper on 'African Socialism and Its Application to Planning in

would most obvious leave the country increasing the country's foreign exchange and skilled manpower problems. In spite of all these problems that accompany nationalization, Kenya did not entirely reject resort to that technique as a means towards economic development. There were specified circumstances within which compulsory acquisition would be a reasonable recourse irrespective of the costs involved. Nationalization will be used in Kenya in the following situations:

- (i) When the assets in private hands threaten the security or undermine the integrity of the nation; or
- (ii) When productive resources are being wasted; or
- (iii) When the operation of an industry by private concern has a serious detrimental effect on the public interest; and
- (iv) When other less costly means of control are not available or are not effective.²³

Also specifically mentioned as an area where nationalization is desirable regardless of cost, is where a service is vital to the people and must be provided directly by government as part of its responsibility. In all cases the government of Kenya has insisted that when an industry is nationalized it must be operated efficiently so that it can cover its costs and earn a profit at least equivalent to the taxes paid when operated privately. This should be so, the government further argues, because if taxes are

used year after year to subsidize the nationalized industries, the nation has in fact gained little if anything by the act of nationalization.

The Kenyan Government is also using its limited development money to buy some of the formerly European-owned land and to make it available to Africans. Such purchase have avowedly proceeded on a willing buyer/ willing seller basis so as to avoid the constitutional provisions which would operate to control the transactions if such land was compulsorily acquired. Yet such purchases would have the same effect on development as indiscriminate nationalizations; namely to substantially reduce the amounts the government can spend on new development schemes.

THE PROCEDURE FOR ASSESSING AND PAYING COMPENSATION

UNDER THE AFRICAN COMMONWEALTH INDEPENDENCE BILLS OF RIGHTS:

One further interesting feature that merits discussion with respect to the taking of possession of property under practically all the independence bills of rights in Commonwealth Africa is in reference to the following provisions: that the determination of (a) the legality of acquisition, (b) the right of the owner of property to compensation, and (c) the amount of such compensation, shall be matters within the jurisdiction of an ordinary court of law to adjudicate upon ... under the independence consti-

tutions of Uganda (1962), Sierra Leone (1961), Malawi (1964, and Zambia (1964), the provisions were substantially similar in wording, namely, that where property is compulsorily taken possession of under any of the exception heads, the act of dispossession shall only be justified where:

"..Provision is made by a law applicable to that taking of acquisition securing to any person having an interest in or right over the property, a right of access to the High Court (only "court" in Zambia) ..whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation".²⁴

And, although the Kenyan independence constitution of 1963 contains a somewhat different wording, the basic principles now under reference is nevertheless upheld, namely that, "every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the Supreme Court to:

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property,

interest or right, and the amount of any compensation to which he is entitled -....".²⁵

It should be pointed out here that the suitability of the regular Court of law to determine the legality of an acquisition of property and the owner's right to compensation is not questioned: this is in fact a traditionally appropriate function of a law court. But is the court a fit or appropriate forum for the purposes of assessing the amount of compensation? The exercise of assessing compensation is a technical and complex matter that does not, and cannot, only be based on formal accounting principles in which case expert knowledge and advice can be available. Nor can one argue that controversies arising out of the implementation of socialist programmes can be disposed of by applying legal principles and procedures, pure and simple. Such considerations as the country's financial position, its foreign exchange position, the existing priorities and allocations between competing claims and the like - all these are matters that cannot be left out in the process of deciding upon the amount of compensation payable. Thus it can be argued that the court is ill qualified for the task especially if what is acquired is a big business enterprise whose assets include goodwill and profit prospects.

As can be seen the task of arriving at the amount of compensation can sometimes be a matter of straight bargaining in which

policy and other considerations predominate.

For the above reasons it becomes relevant for an African legislator to consider the institutions or agencies that should be established to implement various aspects of development strategies especially those relating to the implementation of nationalization programmes. This is so because sometimes choice of the wrong institution could be fatal to development efforts. Legal history shows that there is no inherent social role that a particular legal institution or agency must play. The belief, for example, that adjudication is the sole monopoly of law courts is not tenable. The potential of administrative agencies, like tribunals, should be exploited to the fullest. It is submitted that when faced with the task of evolving an appropriate machinery for the purpose of compensation - assessment of amounts due to the owners dispossessed of their properties, creation of^a compensation tribunal would probably be a more suitable resort. The composition of such a tribunal must make available the presence of persons having special knowledge in the art of valuation. Further, the tribunal should only be made to operate within the framework of the statutory principle upon which compensation is to be computed; but, at the same time, leaving the power to adjudicate upon claims and disputes relative to the amount of compensation to the tribunal. One obvious virtue of instituting a tribunal

as a machinery of compensation settlement is that the procedure and approach in the resolution of the disputes will be flexible and therefore compatible to the needs of economic development. Laws pertaining to the economic sphere of social life should be less difficult to enforce: but we know that the traditional judicial system is surrounded by an elaborate and rigid rules of how to go about deciding cases. This system developed and grew through historical periods when the present-time socio-economic problems were unknown. Modern problems dictate that a new approach to dispute-resolution must be resorted to. At least three Commonwealth countries (two outside Commonwealth Africa, and one within) have adopted the device of 'tribunals' as a means of assessing the amount of compensation to be awarded to the claimants whose properties have been condemned for compulsory acquisition. In India, for one example, the Air Corporation Act, 1953, created two statutory corporations, namely the 'Air India International' and the 'Indian Airlines: This was done after the Central Government of India had nationalised all air transport companies carrying on the business of passenger traffic, and vested the business as well as the assets of the nationalized units in the two corporations. The Act then established a tribunal for the settlement of amounts of compensation to be paid to the companies whose business had been taken over by the corporations.²⁶ The amount of compensation was determined by the corporation with the approval of the

government; but if the air company did not accept the compensation offered, it could have the matter referred to the tribunal comprising of three members, of whom at least one was to be either a sitting or a retired judge of the High Court or the Supreme Court, and one was to be a person having special knowledge of matters relating to the enquiry. The Act further stipulated that the decision of the tribunal within its jurisdiction was to be final, thus putting it beyond the jurisdiction of any court. On this last aspect of the Act, one wishes to observe that there is no convincing reason as to why the decision of the tribunal should not be challenged in the ordinary court (say in the high court or supreme court) if the aggrieved owner of property acquired alleges that the decision of the tribunal is erroneous in point of law - as for example where the tribunal has failed to confine itself within the statutory principle upon which compensation is to be determined. For although the tribunal is presided by a judge of either the High Court or the Supreme Court, its decision is not entirely based on legal principles pure, and has no corresponding independence to that enjoyed by the court of law. Indeed the finding of a tribunal may unnecessarily be influenced by outside factors, such as political considerations, in disregard of the principles of natural justice. Yet it seems morally proper that the tribunal should arrive at its decision with a sense of responsibility and its duty is to mete out justice to

both the individual affected by government action on one hand, and the government on the other. A tribunal is expected to act according to principles of natural justice; though such a body may not act as a court, yet while deciding on the rival claims of parties (especially where one party happens to be the government) it must act with fairness and in a just and equitable manner. It is therefore submitted here that the owner of the property acquired must have access to the supreme court, if he alleges that the tribunal assessed compensation arbitrarily. The English 'Lands Tribunal Act, 1949, expressly recognises the principle that where a person aggrieved by the decision of the Lands Tribunal alleges that that decision is erroneous in point of law, he can proceed on appeal to the court of Appeal of England. The Lands Tribunal Act, (effective on January 1, 1950) enabled the establishment of the Lands Tribunal to determine certain questions relating to compensation for the compulsory acquisition of land and other matters. The Act provides that the jurisdiction of the Tribunal "does not affect the principles upon which matters are to be determined".²⁷ This means that the tribunal should always decide cases involving the quantification of compensation for the compulsory acquisition of land within the principle upon which such determination is based. It will be ultra vires the statute if the tribunal fails to comply with this principle. Under section 2(1) of the Act, the

tribunal shall consist of a President and such numbers as the Lord Chancellor may determine. The President is either a person who has held a high judicial office in the United Kingdom or a barrister-at-law of at least seven year's standing. Of the remaining members of the tribunal, it is a statutory requirement that some of them should be persons who have had experience in valuation of land appointed after consultation with the President of the Royal Institution of Chartered Surveyors. Under section (4) of the Act, the decision of the tribunal is final, but as already indicated above, there is a proviso to this particular provision to the effect that any person aggrieved by the decision of the tribunal as being erroneous in point of law can proceed on appeal to the Court of England.

Coming back nearer to the Commonwealth African scene, Uganda has also adopted the technique of constituting a special body to compute the amount of compensation. In 1970 an Act of Parliament²⁸ was passed which provided for the appointment of a number of valuers by the Minister for the purposes of determining the value of the shares acquired by Government. This means that the amount payable for the shares acquired by the government or other public body is based on the valuation made by the valuers. Any shareholder who is aggrieved by the decision of the valuers may appeal to a tribunal appointed by the Minister;

and from the tribunal appeal against its decision lies to the High Court.

But it must be pointed out here that the argument that a court is not a fit forum to assess compensation should not be pushed further or be exaggerated. Nor is it absolutely accurate to say that resort to special tribunals to compute compensation payable is panacea to the problem of assessing compensation competently. In the first instance, "it may be argued that a court judgement affirming an owner's entitlement to compensation may be largely stultified if its amount is to be fixed by some other body, which may then so under - assess it as to render the right meaningless. It may also be said that its daily work and experience in the quantification of monetary values in all sorts of cases involving, say, personal injury, values of buildings, businesses, patents and copyrights, etc., eminently qualify a court to undertake the assessment in this kind of case too. And its task may be facilitated by the use of expert valuation ..."²⁹ Another alternative technique that seems perfect is to constitute three sets of valuation, one made on behalf of the government and another on behalf of the business being acquired, the third being a valuation made independent of both. The only foreseeable problem inherent in this formula is that there is bound to be differences when it comes to accept any one of the three sets of valuation. It is quite

obvious that the amount arrived at both for the government and the individual will not coincide - because a valuation on behalf of the government will most likely reflect the desire to pay as less an amount as possible, while the contrary is true with respect to a valuation on behalf of the owner of the property. In the circumstances it is not clear how the conflict can be solved. Probably it may be assumed that from the three valuations, it is possible to arrive at a figure approaching the true value of the assets.

SHOULD LOSS OF 'GOODWILL' BE COMPENSATED?

In the ensuing discussion attempt is made to address ourselves to the pertinent question of whether or not loss of 'goodwill' in relation to a property taken away should be compensated or not. All along it has been assumed that a taking of any property by the government relates only to a taking of tangible or physical assets: But can property rights in the nature of intangible 'assets' (of which 'goodwill' is an example) be said to be the subject of a taking for which compensation must be paid? Put differently, would the action destroying goodwill amount to an expropriation for the purposes of compensation? It has been said, for example, that where an enterprise is seized by the state, the normal method of computing compensation would be to take into account the value of the enterprise as a going

concern; and as such, compensation would usually include at least some payment of 'goodwill'. This is so, it has further been suggested, because one of the elements of 'value' of individual pieces of property which a state might seize includes the unique value of the property to its owner.³⁰ Consequently a new nation employing the technique of nationalization as a means towards economic development is urged to include payment of good-will in every compensation amount in respect of any property acquired. There is no doubt that the claim that goodwill forms a substantial part of the value of the property in question, is a desire to introduce a capitalist criteria in assessing compensation. It must be pointed out here that the criteria to be used in computing compensation is of critical significance in terms of future supplies of foreign investment and technology. Thus "how much to pay depends fundamentally on whom the country is trying to satisfy ... a payment that succeeds in not scaring off capitalist investors in time should generally satisfy investors from countries where previous shareholders live..., the more a country rejects capitalist criteria for compensation, the more likely it is that the socialist countries will be pleased and willing to supply technical expertise".³¹ For the foregoing it is clear that the choice of a criteria for compensation must be consistent with future economic planning and foreign aid in the fields of skilled manpower and

financial investments. But whatever the case may be, it does not seem proper that goodwill in a socialist country must be compensated. Moreover, it does not seem morally justifiable that even after the former owners of the businesses taken-over have been extracting massive profits over a period of half a century using an unbelievably cheap labour, should still get large sums of compensation by insisting that invisible property rights should be taken into account as subjects of compensation. It must also be added that these capitalists earned the so-called 'goodwill' due to a number of factors - one of which was the supply of cheap labour by the economically colonized country; yet it is not known, and indeed highly unlikely, as to whether they ever took into account the fact that the country should be left with something in appreciation of its role in making it possible for their success.

Further it should not be imagined that economic right of a foreign company can continue indefinitely in the nationalizing state free of legislative interference; for "property ... is no longer defined as a compound of tangible, real and personal assets, but is the totality of all rights and interest capable of legal protection which have economic value";³² In other words, the legislative introduction of a socialist structure does not require compensation for every interest which is of economic value while the capitalist system continues. As Fatouros has said; "a

"a radical change of the existing conditions may eliminate altogether the value of certain intangible assets. Thus, in a socialist economy operating under a strict state plan, the concept of goodwill or possession of customers largely loses its meaning".³³ An undeveloped country should therefore, be left to pay as much and 'no more' than will buy what it wants, whether it be management goodwill or investor goodwill.

PART II

TOWARDS ECONOMIC INDEPENDENCE THROUGH THE
INSTRUMENTALITY OF LAW IN EMERGENT STATES:

INTRODUCTION:

In this Part of the thesis it is intended to examine the 'efforts' undertaken by new states of Commonwealth Africa consciously to direct the productive forces into desired paths so as to ensure that the wealth and resources of these countries are exploited for the maximum benefit of the people at large. The 'efforts' referred to in this context are those of a legal nature which were carried out in the general campaign to alter the character of the bills of rights - especially the protection of private property rights, so that the constitution in question becomes consistent and responsive to the pressing crisis of economic development of a new nation. It must be added here that no ex-colony wanting to push through some programmes of rapid economic, or even political change can succeed in this endeavour unless it makes bold changes in its law - more so in the supreme law which regulates the creation and contents of the other lower legal norms. Radical social transformation implies a radical change in the law. The law will have to support and implement the new political, social, and economic order. To take the inherited colonial institutions for granted is to condemn the ex-colony to the position of a neo-colony. Where a particular country has rejected a laissez-faire capitalism and has instead adopted a socialist approach to economic development (as most emergent African States have in

effect done), a changed situation has been induced which must require corresponding changes in the law to support the emerging socialist institutions. Now, we all know that where a country opts for socialism it has, in most cases, ¹⁶placed all basic means of production in the hands of the state. The government does this through the institution of 'nationalization'; what is being advanced here is that this 'institution, i.e. nationalization must be supported and encouraged by the constitution and by the manifold legal documents in the land. It is for this reason that the constitution must be the first target in the process of inducing rapid economic development; that is, the inhibitive provisions on economic transformation must first be removed and replaced by more realistic ones. The Zambian experience in this regard is quite telling of the way public ownership must first start changes in the law. It thus becomes necessary to illustrate our theme by recounting that experience. To do this the country's background of 'economic revolution' must be appreciated in the first instance.

CHAPTER 3:

ECONOMIC INDEPENDENCE VERSUS PROTECTION

OF PROPERTY RIGHTS - THE ZAMBIAN EXPERIENCE:

It has already been said that Zambia inherited a laissez-faire capitalist economy that was built on the principles of free enterprise, private ownership of resources, and on profit motive. In relation to the form of the independence constitution that was written for the country, it has further been revealed that that document reflected and entrenched the interests of foreigners who had their roots not in the Zambian community as a whole, but in the developed money economies of Britain and South Africa. In what follows an attempt is made to relate what practical steps were taken to establish a new economic order based on 'public ownership'. Actually the measures were announced in the form of policy statements by President Kaunda. Since the attainment of independence in October 1964, there have been three such speeches; viz:

- (i) The Mulungush Speech on April 19, 1968, "Zambia's Economic Revolution";
- (ii) The Matero Speech on August 11, 1969, "Towards Complete Independence"; and

- (iii) A Speech on November 10, 1970, "This Completes Economic Reforms: Now Zambia is Ours".

THE TAKE-OVER OF THE INDUSTRIAL SECTOR OF THE ECONOMY:

At Mulungushi, the state sought to invite certain 27 companies to offer to the state a 51 per cent shareholding in their enterprises. The measures were taken to guard against exploitation by the foreign-and-expatriate-controlled companies.^{*} President Kaunda elaborated on this when he charged that:

"They (the firms affected) operate price rings with similar companies and create a false monopoly position because of the buoyant demand and the difficult supply position. They do not make enough efforts to move away from unacceptable sources of supply and outdated management philosophies. They still maintain personnel and training policies which are not in accord with the nation's present needs. They are failing to reinvest sufficient portion of their profits for the general expansion and development ... we have to safeguard the national economy and prevent unfair exploitation of the boom of conditions."¹

From the above remarks it is clear that government's motive for the take-overs of the industrial field was the desire to check inflation and to supervise investment policies in the interest of the nation, and also the need to put up comprehensive

programmes for the localization of staff in this section. It is probably appropriate at this juncture to point out that the government was made sensitive by the unilateral Declaration of independence in Rhodesia and by the boom condition it induced in Zambia for both foreign-owned and expatriate-controlled non-mining companies. The 'profit boom' occurred in the 1966/67 period when these companies made fantastic profits which, according to the government, enabled these companies to expatriate a substantial proportion of it from the country. The Mulungushi Speech therefore, was intended to design measures to prevent exploitation by these foreign-and expatriate-controlled companies. The companies selected were in the construction industry where "prices have soared to astronomic heights"; in the transport section to "rationalize and co-ordinate the activities" of the transport companies "to direct them to co-operate in the national interest"; in the retail/wholesale sector, including all five retail chain stores as a measure of control and a check on inflation; in the brewing industry because of the monopoly position and "excessive profits"; and a few miscellaneous ones.² The Industrial Development Corporation Limited (INDECC) was charged with the responsibility of looking after the State's participation in the industrial private business. Suffice it here to mention that INDECC was already in existence even before the above events had taken

place; and had been earlier established as the arm of the government in business and participated in that regard to a greater or lesser extent in some twenty companies in commerce, industry, transport and other fields.

INDECO, being a commercial public corporation incorporated under the Companies Act, Cap 686, was charged to run the companies taken over in a proper and businesslike way keeping in mind the national interest. It was also left to INDECO to negotiate values and terms of payment, but the President made it clear "that what they will pay is a fair value represented by the book value. There is no such thing as business goodwill or paying for future profits as far as I am concerned". He further threatened that should the negotiations result in a deadlock, government was going compulsorily to acquire the shares in the enterprises concerned. One interesting thing about the implementation of these take-overs was that the owners of the business taken-over came out amicably well as far as negotiations on the question of compensation was concerned; in the first place they accepted an assessment based on "fair value represented by the book value", which, because it excluded goodwill and future profits, was clearly less than the adequate compensation stipulated for in the constitution. In the second place they accepted to be paid out from future profits. It should be pointed out here that when these take-overs took place, the

constitution had not been amended and had the "adequate", "prompt" payment provisions still standing. Had the owners of the companies taken-over insisted on their rights under the constitution, the reforms might have proved difficult to implement, since the government would not easily have raised the needed large sums of money to compensate the owners. On the other hand the affected companies were well advised to agree to payment of compensation being spread over a period of time if they wished their activities to continue in Zambia. It was also well advised that they adopt a positive attitude to the new form of co-operation and to negotiate for the most favourable form of agreement as a basis for their future activities. It is true that government also contributed to the overall success of the negotiations by offering attractive incentives. For although the state became the majority shareholder in those businesses, operational control of the companies remained in the hands of the former owners under the management/consultant agreements. The government in entering into these agreements had intended to retain the expatriate staff in view of the lack of skilled personnel locally-particularly at the managerial level. The government also agreed to relax the exchange control regulations so as to exempt the 49 per cent shareholders from the requirement that the amount of remittable profits be limited to 50 per cent. The attractiveness of these benefits explains why

other companies who were not affected by the measures were reported to have voluntarily entered into negotiations with INDECO with a view to invite state participation in their ventures.

On the other hand the take-over of the mining industry involved a considerable amount of background work on the part of the government. Here the amount of money involved was so enormous that it seemed imprudent for the government to trust on the mining companies accepting its terms. Moreover, it was not an easy task for the government to change the constitution at that time in order to remove the restrictive provisions relating to compulsory acquisition under Section 18. It will be recalled that at Mulungushi President Kaunda had announced that government has accepted in principle the need to amend that part of the constitution which relates to the compulsory acquisition of property.³ The British had ensured in writing the independence constitution for Zambia that none of the fundamental rights (protection of private property right included) could be altered - except with the approval of a two thirds majority of the National Assembly and also the approval of a 51 per cent majority of those of the electorate entitled to vote on a referendum. Moreover the 51 per cent required was to be out of the registered voters; which means that those who were absent, those who did not vote properly and the dead ones, were counted to have

voted. It was in these circumstances that a Referendum was held on 17th June, 1969 to remove the above constitutional provision requiring that a Referendum should be held prior to the amendment of the fundamental freedoms and certain other provisions. An overall majority was duly obtained approving this course and the Referendum (Amendment) Act⁴ was passed to implement the above new developments. The only requirement now to change chapter III of the constitution was a two-thirds majority of the National Assembly. With this the Government was now in a position to repeal section 18. Mr. Simon Kapwepwe, the then Vice-President and leader of government business in the House spoke highly on the constitution (Amendment) Bill when he was presenting it to the House. He said:

".... With this mandate (approval by the electorate to remove the referendum clause in the constitution) we are now capable of going forward to remove the colonial obstacles which were put in our constitution with satanic intentions. I have used the word 'satanic' purposely, because this constitution... was imposed on us. It was to protect the British interests in this country. As such we were left out of the economic stream and our people could not participate in the economy of their country. In some cases we, the Government, were left powerless to fight poverty and economic inequalities. Let it not be said that we got political independence but we failed to achieve the economic

independence for our people".⁵

It has already been said that the 1969 constitutional amendment enabled the government to acquire without compensation mineral rights still held by individuals and private companies. But its relevance in the instant context is that the restrictive provisions in the constitution were abolished. The abolished provisions were:-

- (a) the requirement that compulsory acquisition had to be necessary or expedient in certain specified interests;
- (b) the requirement that compensation had to be adequate and paid promptly;
- (c) the guarantee of the right of the owner to remit the compensation money to any country of his choice;
- (d) his right of access to the court for the determination of compensation was also abolished.

The amended constitution authorizes compulsory acquisition effected under the authority of an Act of Parliament which provides for payment of compensation for the property, or interests, or right dispossessed of. An Act of Parliament such as is referred to shall also, among other things;

- (i) provide that compensation shall be paid in money;

(ii) specify the principles upon which the compensation is to be determined, and

(iii) provide that the amount of the compensation shall, in default of agreement, be determined by resolution of the National Assembly. No such compensation determined by the National Assembly can be questioned in any court on the grounds that it is not adequate.

The Lands Acquisition Act referred to already was passed to implement these provisions.

THE TAKE-OVER OF THE MINING INDUSTRY:

Thus armed legally with the above changes in the constitution, and specifically against the eventuality of a default of agreement on the amount of compensation and the terms of payment, the President announced the government's intention to acquire a 51 per cent share participation in the two mining companies. The mining companies were those of the Anglo-American and Roan Selection Groups. With regard to the value and terms of payment, the President announced that he again intended to leave these matters to INDECO to negotiate. However, he made it clear again that what the Government will pay is a fair value represented by the book value and that the government had no money to pay as a deposit against the shares acquired. INDECO was

therefore left to negotiate payment out of future dividends bearing in mind the advantage the shareholders will derive from associating with the State.

For the Zambian Anglo - American Groups, the assets, undertakings and liabilities of Nchanga, Rhokana, the Rhokana Copper Refineries, and Bancroft in which the government wished to acquire a 51 per cent holding all merged into one Operating Company, the Nchanga Consolidated Copper Mines Limited (NCCM Ltd.). 51 per cent of the shares of this company was then to be distributed to a newly created government mining company, the Mining Industrial Corporation Limited (MINDECO Ltd). The agreed audited accounts of the assets of Anglo - American at 31st December, 1969, gave a total book value of K127,642,137 (US \$178,698,992). Repayment of this amount was to be in form of a compensation stock to be issued by the wholly government owned Zambia Industrial and Mining Company (ZIMCO) which in turn wholly owned MINDECO Limited. This stock was to be repayable in 24 semi - annual instalment at 6 per cent per annum each of \$10,551,639 - as from April 1, 1970 and ending on April 10, 1982. The only qualification to this was that if, in any year after the fourth repayment, the total amount of interest and principal repayable in that year was more than two-thirds of the dividend that Mindeco received from NCCM then there would be an accelerated repayment such that a total of two-thirds of

the dividend would in fact be applied to debt repayment. No such accelerated payment can be used as a set-off in any instalment period when profits are not earned or are insufficient.

For RST similar compensation terms obtained. The assets of RST which had been consolidated into one Operating Company - the Roan consolidated Mines Limited (RCM Ltd.) were valued at K165 Million at 31st December, 1970. 51 per cent of this is K84.15 million (US \$117,810,000). Repayment at 6 per cent took place in 16 semi-annual instalments each of \$9,519,638 commencing on 10th October, 1970. The same acceleration terms applied as for the Anglo-American Group except that they applied after the first rather than second year.

Payments for the acquired shares were to be in U.S. dollars so as to protect the shareholders of the mining companies from the devaluation of the Zambian kwacha. The compensation amounts involved in these take-overs speak for themselves: had the government not employed foresight to use its power to amend the constitution so as to remove the "prompt" and "adequate" provisions, and assuming the companies had insisted on their constitutional right to immediate compensation, then no doubt the take-over measures would have been frustrated because Zambia could hardly have found money in one lump sum to pay for the shares acquired. Moreover, had the assessment been based on

the 'full market value', so that goodwill of the businesses acquired was to be taken into account, the compensatable amounts would certainly have been much higher. One can therefore conclude that the constitutional amendment of 1969 served a useful role in ensuring the successful implementation of the take-over measures.

The government also made a number of concessions to the mining companies in the same way as it did with respect to its previous participation in the industrial sector of the national economy. Thus payments on both sets of bonds were unconditionally guaranteed by the Zambian Government and rank *pari passu* with all other unsecured indebtedness arising from money borrowed or guaranteed by Zambia. They were also made free from any Zambian exchange control restrictions (except for residents of Rhodesia) and free from all present or future taxes excepting those normally applying to residents in Zambia. At the time of writing the position has of course substantially changed and opportunity is available to relate the changes at some stage in the paper. Our immediate concern therefore must be confined only to the analysis of the salient structural aspects of the take-over agreements as obtaining at the time of their conclusion in 1969. Perhaps the most crucial aspect of the mining take-over agreements is the 'Management and consultancy Agreements'. Again the government entered into agreements by which the operational

and management control of the mining Industries remained in the hands of the former owners of the companies. Each newly created Operating Company signed service agreements with its previous parent company for the purposes of management and consultancy matters. In the words of the RST/RCM agreement:

'RST shall provide to RCM all managerial, financial, commercial, technical and other services which prior, to January 1, 1970, were supplied or provided by the RST Group to Mufulira, Luanshya and Mwinilunga with the intention that the business affairs and operations of RCM shall be maintained in a manner no less efficient and to an extent and standard no less than those before 1st January, 1970, and which shall be directed towards the optimisation of production and profit of RCM and any subsidiary companies'

The relationship and terms of the contract of Zambia Anglo-American (ZAA) and NCCM are closely identical. As can be seen the scope of these agreements covers a very wide area indeed. The areas the services cover not only include the more administrative and technical services such as project consultancy, preparation of reports and financial statements, work study, computers and management information services, industrial relations, recruitment of expatriate staff, external purchasing services and provision of personnel but also the preparation of business

plans, viability studies and advising on production and the policy towards economic research and development. It is submitted that these latter functions are those which government should have some measure of control as co-owners of the mining industry. It will be recalled that one of government's main criticism levelled against the mining companies was the virtual lack of mining development since independence' and one of the chief objective in the take-over was to accelerate mining development in the country. The government could not have hoped to fulfil this objective since the responsibility of scheduling expansion plans and production rests in the former hands by virtue of the management/consultancy agreements. Yet these are matters upon which there could be a considerable divergence of objectives between Government and RST as co-owners of RCM, or ZAA and NCCM, as the case may be. Moreover the government should have given itself a second thought before committing itself to these Agreements which specified that all essential decisions, especially decisions on investment and financing of investment, must be approved by separate majorities of the "A" Directors (Government) and the "B" Directors (representing the 49 per cent minority interest) and that the companies must be run so as to optimize production and profit. The Agreement then attached the penalty of making all ZIMCO loan stock and bonds due and payable immediately in the event of breach of the Master Agreement, including also breach of the management con-

tracts. It is obvious that the net result of these agreement was a considerable reduction of government influence on the companies to use the profits gained for investment in say non-mining ventures. If the "B" shareholders decided to have their profits distributed as dividends, this course was entirely open to them to pursue - and it is perfectly probable that they would prefer this course. To say that a concurrence of "A" Directors and "B" Directors is a prerequisite to initiate all expansion plans out of profit is necessarily to imply that the "B" Directors voting separately have a veto on the "A" Directors who undoubtedly will be in favour of the proposed expansion plans. The only qualification in the agreements is that the "B" Directors' veto must not "unreasonably withheld having regard to the interests of RCM and NCCM and to the interests of the shareholders". But who decides what is in the interests of RCM and/or NCCM and the interests of the shareholders? Certainly not the Zambian Government - at least the government cannot be the sole judge in the matter. Along with the above mentioned assignment on the part of the "B" Directors is yet another specific provision in the agreements requiring the "B" Directors to run the companies on commercial principles, and are further vested with the power not to approve any undertaking for which the companies cannot raise money on "commercially compentitive terms". Here again it is plain that what is a 'commercially viable' project in which the companies can invest is left to the subjective

determination of the "B" owners; the government was excluded from the whole exercise. As Bostock and Harvey have vividly observed: "It.. seems that the "B" Directors, need not approve any plan that is not sufficiently attractive to appeal to outside capital. Insofar as the Zambian capital market is not big enough to finance mining projects, this means that the criteria applied to investment in Zambian mining by foreign financial sources can be used by the "B" Directors in assessing the commercial viability of new projects".⁶ It can therefore be contended that in the light of the 'commercially viable' stipulation in the agreements the government did not come out sufficiently equipped to control the level of development spending and the appropriation from profit for development or expansion spending. One may therefore go further to assert that the government did not attain the means through which their initial desire for mining development and expansion could be translated into real terms.

Another area of the agreements where oversight is apparent when the government concluded these arrangements relates to the omission to provide for a long-term programming of the localization of the personnel to run the mining industry in the foreseeable future. If one sees the 1969 take-over as an initial step towards the eventual nationalization of the industry, one would have expected that the government should have insisted

on some specific mention, in the agreements, to the effect that the companies also undertook to launch a comprehensive timetable for the training of local personnel. Since this was not done it remained to the companies to decide the rate of the localization of top management jobs. Yet the data available establish that at the time of the take-overs there was only one indigenous Zambian on the Boards of the main Operating Companies and at higher management levels little effort was being made, except on the personnel side, to train Zambians for administrative line management. It is also evident that expatriates recruited to run the industry would be bent only to retain and protect their jobs; and since they would feel that their jobs will be immediately threatened to be filled by local personnel they may not prove co-operative enough to train local men on the job. Moreover the expatriate staff will always feel that their allegiance and loyalty is to the former companies who after all recruited them, and may not, to that extent, respond positively to the needs of the nation. In other words what is being argued here is the fact that the government should have secured some provision in these agreements that would have given them some measure of influence in the fields of the training of local men, promotions in the industry, recruitment, etc. Merely to seek co-ownership of a such vital industry in the national economy, and to leave management operations entirely in private hands is

to precariously leave critical decisions respecting the structure and environment of the industry to foreign control against which Zambia is basically in revolt. It is obvious that at the time of the take-overs of the mining industry the government was not particularly concerned with the Zambianization of the mines as Zambianization in other fields. The application of the 'quota system' with regard to the different specializations at the University of Zambia which opened its doors in 1966, is evidence of this. By far priority was given to producing secondary school teachers both in the humanities and natural sciences to replace a quoted number of '90 per cent' expatriate teachers in 1970. On the other hand the mining industry deserves credit in that they have substantially been sponsoring candidates at the University of Zambia and to Universities and Institutes of technology abroad to specialise in various fields relating to the mining industry. The companies have also been actively in the background in pressing for the establishment of the School of Mines at the University of Zambia - the School of Mines was established in 1973.

The take-over agreements also touched the areas of 'taxation' and exchange control'. Besides guaranteeing that the bonds issued as compensation will be free from local taxes except insofar as interest on them must be treated as income for the purpose of assessing the personal taxation of local residents,

the government appeared to have made a number of guarantees on the future taxation of the reconstituted operating companies themselves. In the first place the government enacted a new tax legislation, the Minerals Act, 1970,⁷ which introduced a new system of mining taxation. Henceforth this was to be based entirely on profits earned from per unit production. The new tax system replaced the old one which contained three separate taxes: royalty, export tax, and income tax. The old system was a source of discontent among the mining companies in Zambia and also inhibited further mining developments in the country.

President Kaunda recognised the defects of the old system and the demands by the companies for a tax reform. At Matero Hall, the President said; "instead of royalties and instead of the export tax I ask the mining companies to pay 51 per cent of their profits in the form of a new mineral tax which I intend to introduce. The mineral tax, which replaces the royalties and copper export tax, is based on profit and in this I have met the mining companies' demands 100 per cent".⁸ However, there was one inherent difficulty in the implementation of the new tax reforms insofar as the country's development was concerned.

This related to the fact that royalty and export tax are normally collected almost immediately whereas taxes based on profits have to be postponed to a date until audited accounts become available in order to see the true profits thus earned. To this the President replied that, "... we cannot afford to give the

mining companies a tax holiday until their audited accounts are ready before they pay the mineral tax. We need to collect this tax immediately because we need the money for our development plans. The mineral tax will, therefore, be collected on the LAYE basis in the form of a fixed charge per ton of copper produced".⁹ To implement the immediately quoted presidential directive, the Mineral Tax Act, 1970 provided that, "notwithstanding that an assessment has not been made the commissioner [of taxes] may demand monthly provisional payments of mineral tax and the amount of each such monthly payment shall be based on an estimate of assessable income provided by the person paying the tax. Provided that a return showing how the estimated assessable income was determined shall be submitted to the commissioner".¹⁰

On the other hand, by virtue of the Income Tax (Special Provisions) (No 1) Act, 1970, for so long as the bonds were outstanding RCM, NCCM, and their subsidiaries were not to be subject to an aggregate direct tax greater than 73.05% of taxable income resulting from a combined mineral and income taxes. Furthermore, the dividends payable in the future by RCM and NCCM to shareholders who were not residents of Zambia was to be free of any withholding, or other tax in excess of the company income tax. Finally neither RCM nor NCCM were to be subjected to any indirect taxation, again for so long as the SIMCC bonds were

outstanding. It is significant to point out that the Zambian government undertook not to alter any such laws on taxation as long as the Zimco bonds and loan stock were outstanding. In other words the government had agreed to legally impose upon itself the constraint of not increasing taxes on RCM and NCCM: But it has been said that the rate of 73 per cent is quite high by any world standard - so that the state came off very well in this area of the bargain.

The government also made some important concessions in the field of exchange control regulations. Besides guaranteeing the free remittance of all interest and principal repayments of the Zimco bonds (other than to residents of Rhodesia), the Mines Acquisition (Special Provisions) Act, 1970¹¹, specifies, in the first instance, that for as long as the Zimco bonds are outstanding all dividends declared by RCM and NCCM to persons who are not residents of Zambia will be freely remittable. Section 6 (1) of the Act lists the item which were made to be free of any Exchange control restrictions:- the section can be reproduced here in order to establish the Scope of the Exchange Control exemption on certain remittances: Section 6 (1). The following shall be free of any Exchange control restriction:

- (a) payment of dividends on the shares and other securities of an operating company to persons who, at the time of payment,

are not, for the time being, residents of Zambia for so long as there is outstanding any Bond issued in respect of shares in that operating company;

(b) (i) payments of interest on and principal of the Bonds and the remittance thereof outside Zambia;

(ii) such other payments due to be made by Indeco under any trust deed or indenture by which the Bonds are constituted as the Minister may certify.

(c) transfers of "B" ordinary shares of an operating company other than by or to persons who, at the time of transfer, are, for the time being, residents of Zambia;

(d) (i) payments of the fees specified in paragraph 7 of the Zamanglo Agreement and the remittance thereof outside Zambia;

(ii) the remittance of profits derived by Anglo-American Corporation (Central Africa) Limited from any services provided under the agreement referred to in paragraph 7 of the Zamanglo Agreement,

(e) any other payment or transfer of assets which is certified by the Minister to be in pursuance of any provision of the Master Agreement or either of them requiring the payment or transfer to be free of Exchange Control.

Thus by virtue of this legislation, RST and Zamanglo succeeded in ensuring that their service and dividend payments would not be frustrated by arbitrary action on the part of the government.

The arrangements provided that in the interpretations of the Agreements reached between the government of the mining companies the law to be used will be Zambian law as it existed on 24th December, 1969 - the date of signing the Master Agreement. In the event of any dispute between the parties this is to be arbitrated through the medium of the World Bank's Convention on the settlement of Investment Disputes between States and Nationals of other States which was ratified by Zambia in the Investment Disputes Convention Act, 1970. The convention under reference provides for the setting up of a centre, called the 'International Centre for the Settlement of Investment Disputes (ICSID), which is "to provide facilities for the conciliation and arbitration of investment disputes between contracting States and nationals of other contracting States in accordance with the provision of the convention".¹²

Article 54 of the convention provides that parties agree to carry out an award under the convention as if it were a judgement of their courts. In other words, any ICSID award will have the same force and effect in Zambia as a judgement of the Zambian High Court. At the same time the ICSID affiliation raises some significance with regard to Zambia's international financial

which have investments in Zambia will come up with as much disapproval as possible in the event of Zambia not honouring her financial obligation. The ICSID affiliation was bound to generate such outcome if and when Zambia breached the agreement.

THE PRESENT - DAY RELATIONSHIP BETWEEN THE ZAMBIAN GOVERNMENT
AND THE MINING INDUSTRY

On 31st August, 1973, President Kaunda announced that important changes were to be made regarding the structure and environment of the Zambian mining industries. In order to enable government to exercise more effective control of the mining industry the President announced that negotiations were going to be underway with a view to reach an agreement to terminate the managerial, consultancy and, sales/marketing contracts. It was further proposed that the Managing Directors of RCM and NCCM should in future be appointed by the majority "A" shareholders (the government) instead of the minority "B" shareholders. President Kaunda had in fact named Mr. David Phiri as Managing Director - designate for RCM, and an ex-cabinet Minister, Mr. Wilson Chakulya as Managing Director - designate for NCCM. In the meantime the two appointees could not occupy their offices effectively because approval of the appointments by the minority shareholders, who under the old arrangement were entitled to give the go - ahead, had not been secured.

Since the Gambian Government also wished to discontinue certain special privileges enjoyed by the mining companies since the take-over in 1970, it redeemed the outstanding Zimco bonds 1978 and Zimco loan stocks 1982 in September 1973. It will be recalled that the major concessions in the area of taxation, exchange control, and the duration of the management agreements were limited to the life of the Zimco bonds and loan stock; so that as soon as the bonds and loan stock are repaid the government were free to alter the law and to remove exemptions in the fields of taxation and exchange control. Therefore, in September, 1973 the government was entirely free to remove the special privileges guaranteed during the negotiations in December 1969. Consequently, exchange control regulations were now made to apply to the remittance of dividends to the external shareholders of RCM and NCCM. In addition, the ordinary dividends became, upon payment, subject to deduction of withholding tax. Government also, as a result of the redemption of the Zimco bonds and loan stock, was contemplating a new tax reform on the mining operating companies. In the words of Mr. E.A. Kashita, Minister of Mines, and also chairman of NCCM: "Government is in the process of formulating new tax legislation to replace that which was withdrawn last year. Pending the enactment of such legislation, the charge for taxation has, with effect from 1st October 1973, been calculated on the basis of capital allowances which applied

until 31st December 1969, with the result that NCCM stands to pay this year an additional K16 million over and above what have been payable had the 100 per cent capital allowances been in force".¹⁴

The implementation of President Kaunda's policy statement that he wanted to see the management, consultancy and marketing arrangements terminated took its turn on the 15th August, 1974. On that date a joint statement issued in Lusaka by the Minister of Mines and Industry, Mr. Andrew Kashita, and Anglo-American corporation's Chairman for central Africa, Dr. De Beers said that "agreement had been reached to terminate the present managerial, consultancy and marketing agency agreement..."

The joint statement made it clear that the new arrangements mean that NCCM will become self-managing and its managing director will be appointed by the majority shareholders of the "A" shares. Mr. Chakulya who had been managing director-designate now has taken over. The marketing side of the previous arrangement was now to be done by the recently formed Metal Marketing Corporation (MEMACO). Throwing more light on the statement Mr. Kashita explained that the termination of the agreement was merely a move towards putting Zambians in charge of the mining companies and "not because government wants to do away with AAC mining experts"...., the group's mining engineers and other staff currently working in Zambian mines will

be engaged on secondment to the NCCM".¹⁵ This provisions in the new arrangement was obviously made to retain the skilled expatriate manpower in the absence of local personnel. However, it can be said that the conclusion of this new arrangement was a significant move towards total control of the copper mining industry in this country.

THE TAKE-OVER OF THE FINANCIAL SECTOR:

Although state participation had so far been extended to the mining sector and the industrial field, the state did not have any stake in the area of finance, that is, the fields of banking, insurance and the building societies. It was imperative therefore that the government should take measures to bring ^{the} financial sector under government control if the other take-overs narrated above and the measures to indigenize the retail/wholesale businesses were to be effectively implemented: For how could an emerging but aspiring Zambian businessman, who had just taken advantage of the new reforms in the retail/wholesale field of the economy, be expected to go any far in the absence of favourable credit facilities which could only be induced by financial institutions? The evidence available at the time of the nationalization of the financial sector indicated that banks in the country formulated their investment policies primarily in terms of the interests of their outside parent organizations

rather than by the interests of the new nation. President Kaunda was very open in condemning the attitude of banks in this country:

"comrades, traditionally banks have been seen as the epitome of capitalism, the ultimate owners of the means of production. Our experience in Zambia has been rather different. We disapprove of many of the policies of the head offices of the local banks I would merely say that they have been excessively conservative in their staff policies, in opening new branches in the rural areas and in their credit policies. For example, they have only just started recently making loans to emerging farmers".¹⁶

The take-over of a 51 per cent share participation in all banks in the country was announced on the 10th November, 1970 in a speech to the National Council of the ruling United National Independence Party (U.N.I.P.). The government took these measures in the hope that in future banking facilities must be spread in the rural areas where their availability are urgently needed; and also to influence formulation of more liberal policies towards lending money to emerging Zambian entrepreneurs. In the same speech the President announced that government had decided to nationalize completely building societies doing business in the country.

The reasons for this decision was that building societies have been slow in adapting themselves to the interests and needs of the nation. For example, they still preferred commercial loans to housing loans; they still preferred to lend to companies rather than individuals; they liked to lend in the urban and not in rural areas. The government intended to provide remedy to the above inadequancies that building societies had generated. To implement the one hundred per cent take-over of the building societies, the Building societies (Amendment) Act, 1970¹⁷ was passed. Section 3 of the Act amends the principal Act so that now the Minister of Finance may, "if he is of the opinion that it is in the public interest so to do, cancel the registration of a building society". The discretionary power conferred on the Minister was no doubt intended to be used in order to implement government policy to assume a monopoly position by the state in the building field of the economy. Section 4 of the Act provides that a building society may by resolution of its board of directors transfer its engagements to the Zambia National Building Society.

In the field of insurance, President Kaunda also announced that no insurance company was going to be allowed to write up new business in Zambia. The already established Zambia State Insurance Corporation was to be enlarged in order to become the only insurance company in the country. The then existing insurance

companies were not, as from 31st December, 1970, to renew their existing insurance policies. They were to hand over their operations to the State Insurance Corporation which was to remain the only insurance company in Zambia. The government passed the 'Insurance Companies (Cessation and Transfer of Business) Act, 1970 - "An Act to restrict, regulate and prohibit the carrying on of insurance business in Zambia; to provide for the transfer of subsisting contracts of insurance; to make provision for the protection of policy owner, and to provide for matters incidental thereto". The Act prohibits any person other than the State Insurance Corporation to enter into any contract of insurance after the end of the current year (i.e. 1970). Further no person other than the Corporation was to renew any contract of insurance.¹⁸ In Section 5 (1) of the Act, all contracts of insurance subsisting at the commencement of the Act was to be transferred to the corporation. The Act imposes the duty on the corporation to provide, in accordance with sound insurance principles, adequate and proper insurance services and facilities of all classes throughout Zambia.

In order to administer the field of national finance a new corporation, called the Financial Development Corporation Limited (FINDECO), was set up. The idea of establishing a monopoly over the entire insurance business had been applied in Tanzania in 1967. The Tanzanian legislation, the Insurance (Vesting of Inte-

rests and Regulation) Act, 1967, provided for the acquisition of the entire insurance businesses in the country and the vesting of a monopoly of insurance in the National Insurance Corporation. The Tanzanian and Zambian Acts sanctioning the transfer of all insurance businesses into a state - controlled company, do not provide for compensation to be awarded to the former owners of the insurance assets - the implication being that the owners of the companies affected are without remedy in Tanzanian and Zambian laws. This brings us to a consideration of a pertinent question in this regard, namely: Were not the owners of the insurance businesses who were forced to pack up and go not entitled to some form of compensation? Although the state merely proclaimed a total monopoly position in this field, and did not actually transfer to itself any corporeal assets, yet it is arguable that the government by so doing had incurred actual losses of a foreign insurance company forced to discontinue its activities. The losses thus incurred include:

"the losses incurred in closing down the company's business, disposing of assets, premises, office equipment etc, the original expenses of which would have been incurred as an investment in the expectation of continuing business in the future; another example of the same kind of loss would be expenditure on training local citizens in insurance work; ..." ¹⁹

On the other hand, it has been argued that no government is

bound to allow foreign interests to carry on business indefinitely and that a foreign investor must take the risk of changes in the law of the country.²⁰ Assuming that this argument is tenable, the government is nevertheless under some moral duty as to how it terminates the permission given in the past to earn livelihood in the country. For although that permission might have been given by the former colonial power, still this alone should not be reason for an abrupt cancellation of insurance licences of foreigners. Moreover Article 10 (3) (a) of Harvard Convention on the International Responsibility of States for Injuries to Aliens provides that:

"A taking of property includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference".²¹

Easily, the declaration of a total monopoly by the state in the field of insurance business rendered the property of those formerly participating in the business economically useless so as to frustrate the proper enjoyment of the property. Nor is it conceivable that the property involved could be disposed of within a reasonable time after the inception of government interference. The former insurance companies may have entered

into contracts that extended over a considerable period in the future; their performance may thus have been completely frustrated and the expected profits thereon lost. In Zambia Kaunda announced that as from the 31st December, 1971, existing companies will not be able to renew policies in the country". He said this on the 10th November, 1970 - and so the period of grace given to the companies to wind up their affairs was only one year. In Tanzania the creation of a state monopoly of insurance was to have immediate effect first with respect to life policies, and later, after an interval of eleven months, all forms of general insurance. The point that is intended to be put across here is that any government which excludes aliens from a certain means of livelihood must arrange a reasonable time in which to arrange their affairs. The fixation of time must not be arbitrarily determined but must be based on accurate professional information as to how long it can take an insurance company to dispose of its assets. It must be emphasized that this is intended for the protection of individuals who have lost their means of livelihood rather than for the companies.

CHAPTER 4:

THE INDIGENIZATION OF THE RETAIL/WHOLESALE SECTOR OF THE
ECONOMY: THE ZAMBIAN AND UGANDA APPROACHES CONTRASTED.

One notable feature of the economies of emergent States soon after independence is the domination of the retail and wholesale businesses by foreigners. Probably with the exception of the remote rural areas, practically all of the urban retail/wholesale activities are controlled and dominated by European and Asian business communities whose members have been residing in these countries for many years. The take-over of the big commercial, financial, industrial and mining concerns would, therefore, still have left the retail and wholesale trading enterprises in the hands of foreigners. Yet this is one area where local entrepreneurship would conceivably be promoted quite readily and with least organizational and financial difficulties. This is so because most of these concerns are relatively small businesses which can be easily handled. Consequently, most of the newly liberated African countries have taken measures intended to achieve indigenization of the retail and wholesale field. The means employed to achieve this objective differ from country to country, but the Zambian and Ugandan approaches to the problem exhibit quite a sharp contrast. In what follows we attempt to compare the two approaches.

THE ZAMBIAN APPROACH:

At Mulungushi, simultaneously with the take-over of the twenty-seven selected companies in the industrial sector, President Kaunda also announced far-reaching measures intended to activate Zambian entrepreneurship. The President complained that, "the banks, the insurance companies, the building societies, the hire purchase companies and other financial institutions have not been willing to assist the Zambian businessman. So the level of Zambian business has remained low and unless we take firm action now our Zambian businessmen will never catch up with the level of the resident expatriate businessman. These people have access to loan funds from banks, building societies, insurance companies, hire purchase companies, and every financial institution that exists in the country. It is therefore time to take more drastic steps to assist the People's business to bridge the gap that exists between it and the resident expatriate business".¹

The first measure which the government took in this regard was to restrict local borrowing of expatriate enterprise, i.e. from this moment henceforth the banks, the building societies, the insurance companies, the hire purchase companies and all the other financial institutions in the country were instructed to ensure that before approving a loan for business purposes to a company or partnership or an individual businessman, they must be satisfied that; if it is

a company its members, its shareholders are Zambians; if it is a partnership, that all the partners are Zambians; if it is an individual, that he is a Zambian. At the same time it was announced that if the application for a loan came from a non-Zambian, the matter was to be referred to the Exchange Control Authorities who will approve it or reject it using the same criteria as the one obtaining in approving or rejecting applications for loans from foreign-controlled companies. Now, as a matter of explanation, foreign companies, even before these measures were introduced, were not allowed to borrow money without limits. The amount of money they could borrow stood in some kind of relationship with the amount of money they brought in the country. This is the criteria that the government intended to use with respect to the resident expatriate-controlled retail/wholesale enterprises, namely, the amount of money they were allowed to borrow was going to depend on the amount of their own investment. By this, the government thought that the financial institutions would then deflect their excess liquidity to promote Zambian business.

In the second place the government took the measures of confining the areas of retail trading by non-Zambians to the centre of ten big towns only. From 1st January, 1972, the ban on retail trading licences to non-Zambians was extended to the main town centres. Implementing these measures the Trades Licensing Act, was made to contain additions to the effect that:

"save with the consent in writing of the Minister responsible for Commerce and Trade , no Licensing Authority shall issue a reserved licence to an applicant who is not a citizen of Zambia..."²

The Act also provided that any such reserved licence issued in contravention of the above provision to a person who is not a citizen of Zambia shall be void. If such a licence is issued to a person who, by reason of any event, ceases to be a citizen of Zambia during the period of validity of the said reserved licence, it shall upon the happening of such event, expire. Further the Minister responsible for commerce and industry was empowered to revoke, by statutory order, any reserved licence issued earlier to a non-Zambian.³ By S 17 (4), a citizen of Zambia means:

- (a) in relation to an individual, an individual who is a citizen of Zambia;
- (b) in relation to a partnership, a partnership which is composed exclusively of persons who are citizens of Zambia;
- (c) in relation to a body corporate, a body corporate which is incorporated under the laws of Zambia Cap 686 - i.e. the Companies Act and
- (i) is certified under the hand of the Minister to be
- (ii) A. whose membership is composed exclusively of persons who are citizens of Zambia; and
B. whose directors are exclusively citizens of Zambia; and

C. which is not controlled, by any means, directly or indirectly, outside Zambia, or by persons who are not citizens of Zambia or who are associated in the capital structure thereof with persons who are not citizens of Zambia.

The stated objective of the ban recounted above in the area of retail/wholesale of the national economy was to compel non-Zambians to sell their businesses to Zambians through normal private contracts. This being the case therefore, there was not question of compulsory acquisition within the meaning of the constitution. What had happened therefore was that the government had simply used its power through the mechanism of granting or denial of trading licences. The interesting legal issue is, however, whether the owners of these businesses could have successfully argued that the measures taken by the government amounted to a contravention of the constitutional protection against discrimination. Our view is that it is difficult to sustain that contention; for the following reasons:

- (i) The relevant provision in the constitution on the protection of discrimination is contained in article 25 (1) which reads:

"Subject to the provisions of clauses (4), (5) and (7) no law shall make any provision that is discriminatory either of itself or in its effect".

It will be seen that this protection is made subject to the provisions contained in clauses (4), (5) and (7). Clause (4) provides that clause (1), that is, the protective provision, "shall not apply to any law so far as that law makes provision: ...(b) with respect to persons who are not citizens of Zambia...." The effect of these provisions in fact amounts to a non-protection (so far as the constitutional guarantee against discrimination is concerned) of non-citizens of Zambia.

- (ii) Secondly, the law regulating the issue of trading licences, the Trades Licensing Act, 1968, which has already been referred to, vests the discretion in the licensing authority to refuse an application for a licence, if he is satisfied that it would be against the public interest to issue it, and the minister can say on behalf of the authority what appears to him to be against the public interest.⁴ As has been said elsewhere in this dissertation, an exercise of a discretionary power requires only the subjective satisfaction of the person or body vested with the discretion - in this case, the licensing authority. It seems clear therefore that a denial of trading licences to non-citizens by the licensing authority cannot easily be challenged to be unlawful on the ground that it is against the public interest. This last statement should be tied up with our third reason: namely,

- (iii) That measures which are taken, such as the denial of trading licences to non-citizens, which are intended to transfer the economy, or an aspect of it in the hands of indigenous people are measures "reasonably justified in a democratic society" such as Zambia - and any constitution deeply rooted in the values of 'African' democracy must seek to advance that objective. Let it be stressed once again that one of the primary functions of any democratic government in the newly born state is to seek to establish the socio-economic conditions under which the dignity of its indigenous people must be judged - and the indigenization of the retail trading field is surely one practical and effective step towards that end.

THE UGANDAN APPROACH - IDI AMIN'S DE-ASIANIZATION POLICY:

With the Zambian approach at the back of our mind of how the retail trading sphere of the economy was indigenized, we can now move to study the Ugandan case before an attempt is to be made to compare the two approaches.

General Idi Amin's method to Ugandanize the commercial businesses hitherto held by foreigners of Asian origin was rather brutal. On the 9th August, 1972, the military government under General Amin took what has been described by many as 'a most historic decision'

that British citizens of Asian origin and the nationals of India, Pakistan and Bangla Desh must leave Uganda within 90 days from the very day of announcing this measure, i.e. from 9th August, 1972. It should be pointed out here that this method used by Amin to effect the transfer of assets from aliens to nationals is not a unique experience in human history: there was for example the mass slaughter of chinese mercantile class in Indonesia, wholesale expulsion of Indians from Burma combined with confiscation of their assets, mass repatriation of Indians from Ceylon, and liquidation of Arabs in Zanzibar.⁵

However, there was no strong reason as to why Idi Amin should not have followed the example of Zambia and other African countries, like Kenya, in employing gentler measures to bring about greater indigenous control and ownership of the economy. President General Idi Amin, on the 12th August, 1972, delivered a message to the nation the purpose of which was to explain the reasons that led his government to take the decision under consideration. He said:

"... my Government believes that one of its primary duties is to ensure the welfare of all members of the community. This means, for example, that no one section of the community such as Asians, can be allowed to dominate, control or monopolise the business of a Nation. No country can tolerate the economy of a nation being so much in the hands of non-citizens as is the case in Uganda

to-day. No Government can tolerate foreigners like Asians in Uganda sabotaging the economy of the country and engaging in numerous forms of corruption".⁶

Elaborating on these charges which characterized the activities of Asians in Uganda, the General said that his country up to now had not been economically independent because her economy has been controlled by Asian foreigners. As was the case in Zambia, the businesses which lived up in big towns of Uganda such as Kampala, Jinja, Mbale, Fort Portal, Arua, Gulu, Lira and others were in the hands of Asians or other individuals who were non-citizens of Uganda. His Government had therefore decided to put the economic life of the Ugandan Nation in the hands of the rightful owners, that is in the hands of the indigenous people of Uganda.

The Asian Community was also charged of involving itself in numerous malpractices which were inherently detrimental to the economy of Uganda. For instance, the Asians were cited to be the most notorious people for the abuse of Exchange Control Regulations. In this regard some of them were said to export goods abroad but could not bring back the foreign exchange earned. On the other hand some of them exploited the tendency of undervaluing exports and overvaluing imports in order to keep the differences in values in their overseas accounts.

Moreover Amin's Government abhorred the well known malpractice in trade by Asians to keep their business in their family circles, and of deliberately failing to absorb as many local Ugandans as possible in their businesses. When it came to the payment of Income Tax, Asians had carried the malpractice of submitting one set of documentation specially designed for ^{inspection} ~~inspection~~ by the Income Tax Department while the other which shows the true and correct account of their business and which shows that more money had been earned than had been declared to the Income Tax Department is kept aside. The whole purpose of this practice was to ensure that they paid less income tax than they ought to do. It also came to the light of the government that whenever the Asians wanted services to be rendered to them by any government department or parastatal organization they tended to corrupt the officials concerned. This practice of corruption by Asians had the result of interfering with the officer's decisions which should always be based on honesty, justice, equality and rationality. In Amin's own words;

"As the whole Nation is aware, my Government has sworn to stamp out corruption in this country".

In the eyes of the government therefore the Asian community was sabotaging the economy of Uganda; was frustrating all attempts which Ugandans were making to participate in the economic life of their own country and that many of them have been responsible for practising

and spreading the practice of corruption. It was the duty of the government in these circumstances to step in to remedy the situation. This, the military government argued, was the only course open, since other avenues, such as appealing to the Asians to identify themselves with Uganda had failed. At independence they were offered the chance to become citizens - the majority rejected the offer. Even the few who became citizens, the government argued that they did so half-heartedly as they had no faith in the country. In spirit they remained 'citizens' of other countries. General Amin also was greatly perturbed by the fact that Asians keep themselves apart as a closed community. They refused to integrate with Ugandan Africans.

For the above reasons and other minor ones, General Amin declared that his "Government could not at all under any circumstances allow this situation to continue any longer. Moreover, when Members of the Armed Forces took over the Government and handed over power to me on the 25th January, 1971, I was charged with the responsibility of ensuring that the economy of this country is put into the hands of Ugandans. This is, therefore, an obligation and irrevocable commitment on the part of the Government of the Second Republic".⁷

Perhaps it should be stated here that no one who had had contact with Asian traders even in this country, Zambia, can doubt the truth of their corrupt tendencies. The recent case of John Mulwanda is

evidence of the manner in which Asians can corrupt government officials, or parastatal officials so that their ends can be met. No doubt General Amin had good reasons for the need to indigenize the businesses formerly in the hands of Asians. This much is not what is in issue here. The issue is whether the methods he employed to achieve that end was morally, or even, legally, right.

Implementing the above measures, the military government passed a Decree - the Immigration (Cancellation of Entry Permits And Certificates of Residence) Decree, of August 9th, 1972.⁸ The purpose in making this decree was obviously to cancel entry permits and certificates of residence held by Asian persons in Uganda and for other purposes connected therewith. The Decree is short and is worth reproducing in full; it reads:-

1. Notwithstanding any provision of the Immigration Act, 1969, to the contrary, but subject to the provisions of section 2 of this Decree, on and after the commencement of this Decree, every entry permit or certificate of residence issued or granted under the provisions of the Immigration Act, 1969, to any person who is of Asian origin, extraction or descent and who is a subject or citizen of the countries specified in the Schedule of this Decree shall cease to have any validity whatsoever.
2. The Minister responsible for internal affairs , may, in his

absolute discretion, by statutory order, re-instate any entry permit or class of entry permit or certificate of residence cancelled or revoked under section 1 of this Decree.

The countries specified in the schedule to the Decree are:-

1. The United Kingdom of Great Britain and Northern Ireland.
2. The Republic of India.
3. The Republic of Pakistan.
4. The Republic of Bangla Desh.

The 'absolute discretion' vested in the Minister responsible for internal affairs to re-instate any class of entry permit or certificate of residence cancelled or revoked pursuant to Section 1 of the Decree, has been exercised in respect of Asians who are engaged in professional establishments. Thus Asians exempted included:- all those in the employment of government, government bodies, co-operative movement, East African Community and International Organization; and professionals such as teachers, practising lawyers, medical practitioners, pharmacists, dentists, chemists, auditors, architects, etc.

In the first place the ninety days' notice given to the Asians to leave the country was certainly grossly insufficient to enable them wind up their affairs, especially negotiating for the price and sale of their businesses and the terms of payment. In another sense the

ninety days' notice was inadequate because these Asians who were affected by the expulsion order could not arrange, within that time limit, how they were going to live even in their own countries. Obviously they had no prior plans about their future, and those of their children in the new environment. Some of them had not sufficient money to enable them to stay, probably in hotels, while looking for some means of livelihood. What was even worse on their part is that the proceeds to be realized from the disposal of their properties were not received immediately by them. Surely to uproot an estimated number of 40 thousand people suddenly from their homes and sources of livelihood without adequate notice seems to be an irresponsible act. In the light of the Zambian approach with respect to the localization of the economy, it seems that Idi Amin exercised governmental power in a rather brutal manner because he could have achieved his economic objective by simply restricting the right of non-nationals businesses to trade in certain localities or in certain commodities - or complete denial of trading licences to foreigners: So that one can easily say that Amin's measures went beyond what the economic independence of Uganda can reasonably be said to require. Moreover the initial announcement that the expulsion order also extended to Ugandan Asians came as a surprise to many people and governments of the world. Whilst the compulsory removal of non-citizens from a country is within the power of that country's government to exercise, the expulsion of citizens, even

naturalized citizens, undermines any moral basis of government whose foremost duty is obviously the protection of all its nationals, irrespective of race, tribe, place of origin, political opinions, colour or creed; As President Nyerere, who labelled Amin to be a 'racialist' for carrying out this aspect of his de-Asianization campaign said; "they are either citizens of Uganda or they are not". In other words, all nationals are to be treated equally and under uniform laws; discriminatory treatment of nationals on any of the above mentioned grounds is legally and morally wrong. Although the expulsion order against Ugandan Asians was later with-drawn, yet its initial announcement down-graded Amin's standing in this whole exercise and only portrayed a very unpopular image of him. On another count General Amin failed to apply even the simplest logic: if the principal purpose of uprooting Asians from Uganda was because they were non-citizens of that country, how then does he expect another country to receive Ugandan citizens and to offer them some means of livelihood? Other countries also are engaged in economic activities intended to transfer their economy to their respective indigenous peoples. A Ugandan Asian, who is a foreigner in any one of those countries will hardly get a chance to make any in-roads in other countries' economies.

With respect to the question of how the properties belonging to the departing Asians were to be disposed of, the government announced that these properties was to be centrally sold by the government

itself and not by private transactions between the owners and the buyers. General Idi Amin, on the occasion of the conference of Representatives' of the people on the transfer of economy into the hands of Ugandans,⁹ had stated that the decision for the government to act as a seller had been taken so as to protect the interests of the Ugandan prospective buyers as government has machinery to determine the true value of properties. This also was to ensure that Ugandan buyers were not to be over-charged. Secondly the government also wanted to ensure that the properties were distributed to as many Ugandans as possible. It is without truth perhaps, that if the transfer of properties was left between individual sellers and buyers, a few rich Ugandans might purchase so many shops and houses, while most of the aspiring people without influence would get nothing. This machinery was absent in the Zambian situation because what the government of Zambia did was simply to impose a statutory prohibition in the issuance of trading licences to foreigners, and left it to private individuals to buy/sell the properties. Consequently those who had enough money took advantage of the opportunities and purchased many properties formerly in the hands of foreigners. The Leadership Code, to which we shall turn at some stage in this paper, came quite very recent and in any case it is, at the time of writing, not in effective operation. Moreover, the code affects only "leaders" as defined therein - people working in private companies and those who are privately employed,

like businessmen, are not affected - and yet this class of people are what we may call, 'economic elites' - i.e. they are the individuals who earn quite well over and above the average Zambian, and therefore capable of exploiting the new situation of buying to themselves as much property as possible. In Uganda, the third reason why the government wanted to act as agent in disposing of property belonging to the Asians was also the need to protect both sides in the transaction so that the seller who will have left Uganda was expected, in due course, to receive his dues. To legalize the authority of the government to carry out the duties of an 'agent' to centrally sell property belonging to the expelled Asians, the military junta made a Decree - The Properties and Business (Acquisition) Decree, 1972¹⁰.

Under this Decree all the properties and businesses scheduled thereto (some twenty six businesses) and any interest or right appertaining to such property or business vested in the government.¹¹ Section (1) clause (2) guaranteed to pay compensation in respect of any property or business, interest or right acquired under the provisions of the Decree. Thus the whole exercise was a straightforward case of compulsory acquisition of private property for which compensation should be payable; but how was the amount of compensation to be assessed? The Decree had in fact provided that the Minister shall appoint a Board of valuers consisting of such members as he may deem necessary. Any compensa-

tion payable was to be in accordance with the valuation made by the Board. Under the Decree also, a person claiming an interest in the property or business acquired and who is aggrieved by any valuation may appeal to a Tribunal appointed by the Minister for the purpose. Any party aggrieved by the decision of the Tribunal may still proceed to the High Court by way of appeal.¹² It may be added here that under this Decree, no person may be appointed as a member of the Tribunal established under it unless he is qualified accountant; a person of proven ability and experience in business administration or banking; or qualified to practise as an advocate.

Simultaneously with the making of The Properties And Business (Acquisition) Decree, the military government also made 'The Declaration of Assets (Non-Citizen Asians) Decree; 1972, which provided that no Asian leaving Uganda by virtue of the expulsion order shall transfer his/her immovable property, or business, or even livestock to any other person; mortgage his immovable property, business, or, again, livestock to any person; in the case of a company, issue new shares, appoint new directors, etc..¹³ To assist the military government speedily dispose of the property of the departing Asians, appropriate forms were prepared and, under the Declaration of Assets (Non-Citizen Asian) Decree, it became an offence either to refuse to give the required information or to give wrong information.

There are two practical questions that arise from such mass and sudden expulsion of foreign traders and the ambition of replacing them by local entrepreneurs. The first question relates to the problem of raising sufficient capital by the local people in order to effectively get these businesses in operation. The second question is the problem of the lack of business knowledge by the local dealers. In Uganda, as in Zambia, the government hoped that since the banks and other financial institutions have, in the past, been preferring to lend money to foreigners, the result of the measures would be to reverse the trend-with the removal of foreign elements in retail trading. Moreover, with the departing of Asians in Uganda and their repayments of whatever loans they had to the banks, the liquidity of the banks were presumed to be steadily improving and no excuse by them could be accepted for not lending money to the emerging local traders and businessmen who demonstrated their credibility by hard work, sincerity, dedication, efficiency and integrity.

But, even assuming that in the above task the government succeeded in inducing favourable credit facilities for the local traders and businessmen, yet this alone is not sufficient in business success. The traders must also possess sufficient business knowledge and acumen. In Zambia there seemed to be no initiative forth coming from the government to put up some kind of an institutionalized device to assist local business men to acquire the necessary know-

ledge in business management. In other words the government left individual traders up to themselves to take over the businesses formerly held by foreigners without setting up some kind of a special management training and advisory centres. On the other hand Uganda under Amin came off very well in this regard. The government of Uganda through the newly established Management Training and Advisory Centre of the Ministry of Commerce and Industry, was preparing a crash programme of training for traders. This was done in anticipation of the problems that might arise in the area of business management of big industrial and estate enterprises that were left by the Asians. The courses will be designed to meet the requirements of the retailers, wholesalers, distributors and importers. Later on, courses on specialized lines such as Grocery, Pharmacy, Hard-ware were also mounted. The government raised instructors to get the courses underway from teachers at the University of Makerere; teachers from the Uganda College of Commerce and from other higher institutions of learning; from University students, Bankers civil servants and businessmen. Besides the courses thus planned for the local traders and businessmen, the government also mounted another programme by which the Trade Development Department, which was another unit in the Ministry of Commerce and Industry, offered the qualified staff to give an on-the-spot advice to traders. It was the duty of these staff to help audit the books and accounts of the traders who were not as yet in a position to hire the services of professional and practising

auditors and accountants. It was also one of the most important functions of the Trade Development Department to ensure that money borrowed from the banks was put to the use for which it was meant.

It should perhaps be appreciated here that the government was well-advised to embark on such comprehensive measures to ensure that there was an effective and efficient succession in the running of some of the giant enterprises that were open for purchases. For example, among the businesses that were thrown open for sale to the Ugandan African was the giant Madhvani group, the biggest industrial enterprise in East Africa, which operated a steel factory, a sugar works, a brewery, a textile mill, a match factory and tea estates, with a capital of K36 million, and a turn-over of nearly K55 million, and a labour force of 20,000.¹⁴ In such a situation, individuals without management experience cannot be expected to run such a business otherwise they end up by messing up the operations of an industry so vital to the economy of Uganda itself, and indeed the economies of the rest of the East African Countries.

Perhaps one reason why the Zambian government did not concern itself with the actual sale operations of the assets of non-citizens to Zambian citizens, was that the retail businesses affected by the measures were normally of a small-scale, such as jewellery shops, groceries, shops for hardwares, etc.. These businesses were not of strategic importance to the national economy

and involved a small amount of turn overs.

In Uganda there was also a strong likelihood that during and after the departure of the Asians, there was going to be a slowing-down in the importation of the essential goods for the Industries and other consumption. The same fears obtained in Zambia when the ban on non-citizens to renew their trading licences was imposed. But, in both countries no hard-hitting shortages of essential commodities were reported. On the contrary the supplies of goods were quite normal. President Kaunda reported to the Nation two years after the indigenization of retail/wholesale measures that ".... Despite prophesies of doom, despite threats of cancellation of orders, despite fears that the country would run out of supplies, we forged ahead with the reforms. And we have been very successful. Not a single one of these ills happened, and instead we have built up a very efficient Zambian business nucleus in the trading field".¹⁵ In Uganda success in this respect had to be induced through institutional techniques. There, in order to ensure that essential goods and commodities are imported and distributed to every part of the country, the government established a State Trading Corporation by the making of the State Trading Corporation Decree.¹⁶ This Corporation replaced the Export and Import Corporation and the National Trading Corporation earlier on established by Obote's government. The State Trading Corporation was charged with the duties to import and to export goods for trade purposes. The

government also reserved to itself the power to assign to the Corporation to import specific essential commodities and goods and even to require it to distribute them throughout the country. It had established a number of depots throughout the country.