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PUBLIC ENTERPRISES AND THEIR LEGAL STRUCTURE IN MALAYSIA*

Although the use of the various forms of public enterprise was by no means novel in Malaysia under Colonial Rule, the use of public enterprise[1] as a tool for achieving economic growth and development at a faster pace is a phenomenon that has materialised only after independence in 1957. The role of public enterprise in Malaysia is a very special one because of the peculiar political circumstances of this country. This paper will endeavour to set out the political and social considerations which govern the role of public enterprise in Malaysia. It is prudent to bear in mind from the outset that the single most important consideration is the unique racial composition of the country and the allocation of wealth among them. It is the prime objective of the Government to increase the share of the "economic cake" of the Bumiputras or indigenous people. Public enterprise is one of the chief instruments used by the Government in achieving this objective. In order to see the role of public enterprise in perspective in Malaysia it is therefore necessary to become acquainted with the economic, political and legal infrastructure of the country. It is only with a knowledge of these matters that it is possible to appreciate the national aspirations and objectives of economic development.

It must be borne in mind that the success or failure of a public enterprise can only be measured against the objectives set out for it. It will become apparent in the course of this paper that the objectives set out for public enterprise in Malaysia are not merely to boost economic progress. However, this paper will not pronounce judgment on the success or otherwise of public enterprise. Its aim, rather, will be to examine the legal framework within which public enterprises operate and to consider attendant problems of publicity, control and accountability and autonomy. In the course of this discussion the advantages of one legal form against another will also be considered. The emphasis throughout will be on legal problems arising, not only out of the form that the public enterprise takes

*This article is a revised version of a paper presented by the writer at the Asian Colloquium on Public Corporations in Colombo, Sri Lanka, in May 1974. Except where otherwise stated all figures stated were current in April 1974.

[1] The term "public enterprise" is used to embrace all forms of undertakings with Government backing. The terms "statutory corporation" will be used for bodies created by legislation and "public corporation" for bodies incorporated under the Companies Act, 1965 (Revised 1973).

but also the special problems confonted by public enterprises because they are public enterprises, and because of the special aims they are expected to fulfil.

This paper consists of three substantive parts. Part I deals with the political, economic and legal infrastructure of Malaysia. This part is nothing more than a very rough sketch of these matters, its purpose being to set in perspective the position and role of public enterprises in Malaysia. Part II consists of an outline of the areas in which public enterprises operate and the functions of some of the more important of these. Again, this part is by no means comprehensive, its main purpose being to show the extent of the participation of public enterprises in the economy of the country: there is no sphere of economic activity in which a major public enterprise is not involved. Part III forms the backbone of the paper. It considers the attendant legal problems of the various legal forms of public enterprises. Public enterprises take any one of three legal forms, namely (i) Government Departments, (ii) Public Corporations which are Companies promoted by the Government, and (iii) Statutory Corporations, which consists of enterprises set up by legislation. The problems of legal form are the most interesting and difficult to solve and it is felt that discussion of these is the most crucial.

I. THE POLITICAL ECONOMIC AND LEGAL INFRASTRUCTURE

The Federation of Malaya achieved independence on 31st August, 1957 from Great Britain after being under Colonial Rule for up to 171 years.[2] The British left their usual colonial heritage on Malayan society. The Constitution promulagated in 1957 is typical of the Constitutions of other former British colonies in many respects. The one outstanding peculiarity of the Federation of Malaya Constitution is that it sets up a Constitutional Monarchy within the British Commonwealth. The Head of State is the Yang diPertuan Agung, who is elected for five years by the Sultans of the nine states from amongst themselves. The Constitution also set up a bicameral Parliament consisting of the Dewan Rakyat (house of Representatives) whose members are elected, and a Dewan Negara (Senate), whose members are in part appointed by the Yang diPertuan Agung and in part elected by the State Legislative Assemblies. Together with this form of Government

[2]The whole of the Malay Peninsula was not colonised at one stroke, the different states coming under British influence at different times. The first was Penang in 1786, followed by Malacca in 1824 (Penang, Malacca and Singapore being known as the Straits Settlements); Perak in 1874, Pahang in 1887, Negri Sembilan in 1889, Selangor in 1895. (These formed the Federated Malay States). Kedah, Trengganu, Perlis and Kelantan in 1909, (The Unfederated Malay States); and Johore in 1914.

Malaysia also inherited British style party politics. However, the party system in not quite as vibrant as it is in Britain.

In 1963 Malaysia was formed, consisting of the Federation of Malaya, Singapore, Sabah (North Borneo) and Sarawak. The former Constitution of the Federation of Malaya was amended to become the Constitution of Malaysia. In 1965 however, Singapore separated from the Federation and formed an independent Republic.

Malaysia also inherited the British legal system in that the common law prevails and the doctrine of *stare-decisis* applies. Apart from the system itself the law as administered in Malaysia is very strongly influenced by English law. Hence decisions of English Courts are highly persuasive authority in Malaysian Courts. There is also provision for civil appeals to the Privy Council from decisions of the Federal Court with leave from the Yang diPertuan Agung. These decisions are absolutely binding on all courts in this country, as are decisions on appeals from other Commonwealth countries on a statutory provision which is *in pari materia* to Malaysian legislation.[3] There are also statutory provisions which incorporate English law into Malaysia. Hence s.3 of the Civil Law Act, 1956 (revised 1972) makes provision for application of English common law and the rules of equity where there is no local provision governing the matter; and s.5 provides for the adoption of English law in commercial matters where there is no parallel law in Malaysia.

Apart from the close adherence to the British Judicial system, there is also considerable similarity between British and Malaysian substantive law. Many Malaysian statutes are based on British ones and frequently a British statute is adopted almost in its entirety in corresponding Malaysian legislation. There is a trend, at present, however to turn to other countries for models and one of the more significant non-British models adopted, and one that is especially relevant here is the Companies Act, 1965 (Revised 1973), which is based on the Australian Uniform Companies Act.

The colonial economic strategy in Malaysia was typical. The colonies were looked upon as a source of cheap raw materials and were enforced markets for colonial manufactured goods; production and labour being concentrated in the extractive industries, particularly in the production of rubber and tin. Colonial Rule fostered the growth of two types of economic sectors within the country, one the modern urban and rural sector and the other the traditional rural sector. The modern sectors concentrated on modern trade, rubber production and tin mining. The control of these sectors was in the hands of the British and other foreign firms and drew into its sphere most of the Chinese and Indian communities in

[3] *Sundralingam* v. *Ramanathan Chettiar* [1967] 2 M.L.J. 211.

Malaya. The traditional sector consisted largely of the peasant population engaged in the production of padi and fishing using traditional techniques and little or no modern capital equipment. This sector was not significantly affected by British intervention; its markets, labour and capital being largely indigenous. This sector was dominated by the Malays and was concentrated in the Unfederated Malay States.

Under British rule, statutory corporations were assigned the role of catering for a particular activity which was best handled by an independent body. Thus, for example the earliest statutory corporations were set up to manage funds of an organisation e.g. the Labour Fund, or to run a particular enterprise or utility e.g. Port Klang, Penang Port, and the Electricity Board. Public enterprise was only sparingly used to enhance economic development, and the situations in which reliance was placed on public enterprise, was in specific areas in the modern sectors, particularly rubber. Hence the Rubber Research Institute was set up in 1925. The Colonial Government did not use public enterprise as a means of securing the economic development of the country on a grand scale. The first major use of a statutory corporation for the economic development of the country and its people was in 1953 when the Rural Industrial Development Authority (RIDA) was set up.[4] The object of setting up RIDA was to promote economic development and to assist the rural population in improving its living conditions. Another statutory corporation set up with general economic development objectives in view was the Federal Land Development Authority (FELDA) in 1956. This body was established to speed up land development by clearing jungle and making land available for settlers. The reason for the setting up of FELDA was that land administration was not sufficiently efficient to process applications for land and to allocate land in an orderly manner. The new organisation was intended to overcome these administrative obstacles by providing finance and technical assistance for developing large new settlements with integrated modern public utilities and services. FELDA, has grown to become the largest land developing agency in Malaysia, and, indeed, is now one of the most important public enterprises.

The setting up of these statutory corporations to promote economic development was not regarded as part of a grand plan for overall economic development through the public enterprise medium. They were established because they were regarded as being necessary to promote development in certain limited areas. It must also be remembered that the Colonial Government normally promoted development in those areas that best

[4] RIDA was replaced in a reconstituted form by the Majlis Amanah Rakyat (MARA) in 1966.

served its own interests. Hence no strategy was formulated for alleviating the lot of the neglected traditional rural sector.

It was not until after independence that development could be channelled towards national interest. The change in emphasis can be traced into five specific areas:[5]

(1) A change from an emphasis on a balanced budget to an emphasis on an expanding economy.
(2) A change from tacit emphasis on selective development, or development of the modern sector, to an express and actual emphasis on rural development, largely for the benefit of the Malays in the traditional sector.
(3) Social services became an area of high priority and were partially redefined as elements of investment rather than consumption.
(4) The creation of new organisations competent to plan and stimulate the development of the economy.
(5) A change in the character of protest from nationalism and communalism to communalism and class interests.

A model of this change in the objectives of national development can be seen in the Second Five Year Plan, 1961–1965, the first such plan to be undertaken by a wholly independent Malaya. They were:

(1) To provide facilities and opportunities for the rural population to improve its levels of ecnomic and social well-being;
(2) To provide employment to the country's population of working age;
(3) To raise the *per capita* output of the economy and to protect *per capita* living standards against the adverse effects of a possible decline in rubber prices;
(4) To diversify production in the agricultural sector by development of agricultural products other than rubber;
(5) To expand social services, expand educational opportunities, to extend public health services to cover the urban and rural areas, to assist in the provision of housing and to provide more adequately for rural and urban utilities.[6]

The new independent Government, despite its new goals of economic development had yet to employ public enterprises to achieve these goals. The Second Five Year Plan continued to rely on the statutory corporations established by the colonial government. FELDA continued its land development function, but on an expanded scale. RIDA, however was assigned new tasks by the Plan. The programme for RIDA concentrated on encouragement of small-scale industrial enterprise in the rural areas by the

[5] Garyl D. Ness, *Bureaucracy and Rural Development in Malaysia*, p. 89–90.

[6] Second Five Year Plan, 1961–1965, para 51.

provision of advisory services, extension of credit and provision of processing and marketing services to feed the requirements of the large-scale industries. RIDA also undertook the establishment of small enterprises for eventual hiving off to private ownership.[7] One of the most important units of public enterprise which participated in this Plan was government participation in a public corporation, Malayan Industrial Development Finance Ltd. (MIDF), which provided credit on reasonable terms for industrial ventures.[8]

Even after the formation of Malaysia in 1963 the use of public enterprises as a tool for achieving the objectives of development was minimal. Public enterprises were used only in selected spheres in which direct government intervention appeared unsuitable. The role carved out for public enterprises in the overall economic development of the country continued to be small under the First Malaysia Plan, 1966–1970, inspite of its wide aims and great ambitions. For example:[9]

(i) To integrate all the peoples of Malaysia through development which would promote the welfare of all.
(ii) To steadily increase incomes and consumption.
(iii) To increase the welfare of the inhabitants of rural areas and other low-income groups by raising their productivity.
(iv) To stimulate diverse economic activity, both industrial and agricultural, to reduce dependence on rubber.
(v) To open up more land for agricultural use.

Apart from the implementation of the last objectives through a statutory corporation, FELDA, the government had not planned to use public enterprises as the chief instrument in moving the economy in order to achieve the objectives of the Plan. However, new public enterprises were set up, both in the agricultural and industrial sectors but their field of operation was not sufficient to make a serious impact on the economy, nor were they instrumental in achieving Plan objectives. Some of the more important public enterprises established under the Plan in the agricultural sector were the Federal Land Consolidation and Rehabilitation Authority (FELCRA), it scope of activity being the rehabilitation of agricultural land by salvaging existing derelict schemes, and also the consolidation of uneconomic holdings into viably sized lots.[10] Bank Bumiputra, a public corporation, was floated to provide credit on reasonable terms to *inter alia* the rural community.[11] The Federal Agricultural Marketing Authority

[7] *Ibid.* para. 156.

[8] *Ibid.* para 61.

[9] First Malaysia Plan, 1966–1970 para. 3.

[10] *Ibid.* para 337.

[11] *Ibid.* para. 342–343.

(FAMA) was set up to facilitate the marketing of agricultural produce and to ensure that the farmers received a reasonable price for the produce.[12]

In the industrial sector further reliance was placed on MIDF for the provision of credit to small-scale industries. MIDF established a subsidiary Malayan Industrial Estates Ltd. (MIEL) to build factories and to sell them on credit terms[13] The Plan also provided for the setting up of the National Institute of Scientific and Industrial Research (NISIR) to provide industries with scientific and technical support and to research into the possibilities of industrially processing materials available locally.[14] The Federal Industrial Development Authority (FIDA) was established to co-ordinate the activities of all agencies concerned with industrial promotion and to make feasibility studies.[15] An existing statutory corporation, Majlis Amanah Ra'ayat (MARA) (which had been incorporated by a reorganisation of RIDA) was allocated a special role to promote Bumiputra participation in industry under the Plan. The activities envisaged for MARA were in the areas of education, by providing technical training, financial assistance, establishment of new industrial enterprises and their management initially until eventual alienation to Bumiputra hands.

It will be noted that the Plan did not make special provision for economic balance among the races. It will be recalled that the traditional rural sector, which was and is economically the most backward sector, is populated largely by the Malays. Although the Plan did make provisions for the improvement of the lot of the traditional rural sector, there was nothing explicit about what share of the "economic cake" each race should have. In percentage terms 55% of the population of Malaysia is Bumiputra, 35% Chinese and 10% Indian and others. But in terms of the proportionate economic participation of the races, due to the emphasis given by the British to the modern urban and rural sectors which largely comprised Chinese and Indians, the Malays are a distant third. Although the Plan did not make specific provisions for the economic upliftment of the Malays, the Government in practice did so. Such emphasis was implicit from the fact that economic development efforts were channelled towards the agricultural sector, which is populated largely by the Malays. Consequently, resentment to this built up in the non-Malays who pointed out that while the Government professed to be treating all the peoples of the country equally yet the Bumiputras were being given greater privileges. Likewise agitation built up among the Malays who felt not enough was being done to correct the colonial imbalance. These feelings errupted into bloody violence in Kuala Lumpur on May, 13, 1969. It was after this that

[12] *Ibid.* para. 347–348.

[13] *Ibid.* para. 393–394.

[14] *Ibid.* para. 398.

[15] *Ibid.* para. 398.

the Government dropped its equal progress for all races rhetoric. Constitutional amendments were passed which took the special rights of Malays out of the arena of public debate. [Constitution (Amendment) Act, 1971, Emergency (Essential Powers) (Amendment) Ordianance, 1971.] In order to greatly augment the participation of Malays in the economy the Government increasingly used the public enterprise tool. The substantial role now envisaged for public enterprise can best be understood in the light of the economic policy of the Government as laid out in the Second Malaysia Plan, 1971–1975.

The Second Malaysia Plan is more than just a plan for economic development.

> "The Plan is a blueprint for the New Economic Policy. It incorporates the two-pronged objective of eradicating poverty, irrespective of race, and restructuring Malaysian society to reduce and eventually eliminate the identification of race with economic function. In order to achieve this objective the Plan contains new strategies, priorities and programmes. In particular, it is intended that there should be more active and direct participation in commerce and industry, so as to make a meaningful contribution towards attainment of the economic and social goals."[16]

The New Economic Policy consists of, firstly, the eradication of poverty by raising income levels and increasing employment opportunities for all Malaysians irrespective of race; and secondly the correction of economic imbalances by reducing and eventually eliminating the identification of race with economic function. This is to be achieved by the modernisation of rural life, rapid growth of urban activities "and the creation of a Malay commercial and industrial community in all categories and at all levels of operation, so that Malays and other indigenous people will become full partners in all aspects of the economic life of the nation".[17] The Government has set a target under which 30% of the total commercial and industrial activities in all fields will be in the hands of the Bumiputras by 1990.[18]

In order to meet these targets the Plan states that the Government will participate more directly in the establishment and operation of production enterprises of all types.[19] The purpose of doing this is to create a Malay commercial and industrial community, the dispersal of industry, introduc-

[16] The Prime Minister of Malaysia, Tun Abdul Razak, in the Forward to the Second Malaysia Plan.

[17] Second Malaysia Plan, para. 2.

[18] *Ibid.* para. 135.

[19] *Ibid.* para. 26.

tion of commerce and agriculture into new growth areas, and to provide an opportunity for Malays to gain experience and entrepreneurship through participating in Government enterprises.[20]

II. SPHERES OF PUBLIC ENTERPRISE OPERATIONS

It is obvious that the Plan envisages a heavy reliance on public enterprises in achieving its targets, particularly in the correcting of economic imbalances. The medium of public enterprise is used to set up an undertaking which is initially operated by Government, and when it is sufficiently viable it will be hived off into direct Bumiputra ownership. Alternatively the public enterprise is used as a means of mobilising small Bumiputra savings and other finances into commerce and industry, or to obtain Bumiputra participation in investment collectively where individual investments would be too small to make a mark. Apart from this, public enterprises are also being relied upon to tackle particular problem areas where Government itself would be too clumsy to achieve quick results or where it is felt that a unit of public enterprise would be most effective in achieving development objectives.

Due to the great proliferation of public enterprises over the last five years it will be instructive to group together the more important bodies operating in the agricultural, industrial and commercial sectors and the regional authorities, and to describe briefly the activities of the major enterprises in each group. Hopefully, this will show the overlapping functions of many of the bodies and will demonstrate the extent to which public enterprise has taken hold on the economy of the nation.

(A) *The Agricultural Sector*

This sector has more authorities than any other sector. They cover almost every area of agricultural activity with a considerable degree of overlap. The great proliferation of public enterprises in the agricultural sector can be accounted for by the importance of agriculture in the economy of the country. This sector employs half the working population of the country and earns 50% of the country's foreign exchange.[21] The object of development in this sector is to modernise agriculture so that incomes in it will be comparable to those in the urban areas, and at the same time to bring about an integration of agriculture with developments in commerce and industry.[22]

The various public enterprises established in the agricultural sector can be divided into groups for the provision of agricultural credit, land devel-

[20] *Ibid.* para 27–28.

[21] *Ibid.* para. 352.

[22] *Ibid.* para 397.

opment and the modernisation of agriculture through introduction of new techniques in farming, processing and marketing. This is of course only a rough guide to the types of activities of public enterprises in this sector.

(i) Agricultural Finance:–

(a) Bank Pertanian: a statutory corporation established in 1969[23] to cater for the needs of agricultural finance.[24]

(b) Bank Bumiputra: a public corporation established in 1965 as a commercial bank, one of its objectives being to encourage and assist the flow of investment and capital into the rural areas.

(c) Farmers Organisation Authority (FOA): established in 1973 as a statutory corporation.[25] Its functions cover the advancement of all forms of agricultural activity by assisting farmers through Farmers' Organisations. The provision of credit is a special and important aspect of the duties of the FOA.

(ii) Land Development:

Proper land development through the opening up of new land for agricultural purposes so that new entrants into agriculture have sufficient land is one of the most important objectives of the Second Malaysia Plan.

(a) Federal Land Development Authority (FELDA): established as a statutory corporation in 1956,[26] is the most important agency responsible for clearing land for settlers. Its target is 60,000 acres per year.[27]

(b) Federal Land Consolidation and Rehabilitation Authority (FELCRA): a statutory corporation[28] with responsibility for rehabilitating fringe alienation schemes and developing new land blocks smaller than those developed by FELDA.[29]

(iii) Agricultural Modernisation, Marketing and Processing: A number of the authorities mentioned in relation to finance and land development in the agricultural sector also carry out functions in relation to the modernisation of agriculture through the sponsoring of implementation of new techniques of farming, marketing and processing. Thus the Farmers Organisation Authority (FOA) is charged with the overall welfare and promotion

[23] Bank Pertanian Malaysia Act, 1969.

[24] *Ibid.* s.6 sets out the functions of the Bank.

[25] Farmers Organisation Authority Act, 1973.

[26] Land Development Ordinance, 1956.

[27] Mid-Term Review of the Second Mlaysia Plan, para. 366.

[28] National Land Rehabilitation and Consolidation Authority (Incorporation) Act, 1966.

[29] Second Malaysia Plan, para. 407.

of Farmers' Organisations, and these organisations, by the Farmers' Organisation Act, 1973, s.6, are meant to be formed with the object of promoting the economic and social interests of their members.

The other public enterprises in this division are either concerned with particular commodities or are marketing, processing or research authorities covering all agricultural commodities. In looking at these authorities the point to note is that specific areas or matters relating to particular commodities are expressly excluded from the ambit of the wider authority. In some cases this has been done to such an extent as to leave the body with wider functions little scope of operation.

(a) Federal Agricultural Marketing Authority (FAMA): a statutory corporation,[30] its functions being the co-ordination of the marketing of all agricultural produce excluding pineapple, rubber, padi and rice.[31]

(b) Pineapple Industry Board: a statutory board[32] responsible for the regulation of the agreement on prices, pineapple production, grading, quality control and marketing of pineapple.[33]

(c) Lembaga Padi dan Beras Negara (LPN): a statutory corporation[34] established to stabilise prices for producers and consumers, to ensure adequate supplies and to promote the development of the rice industry.[35]

Apart from the marketing of oil palm, FAMA undertakes the marketing of only the minor agricultural commodities. Even oil palm is largely in the hands of private enterprise. Before the establishment of the LPN, the major concern and rightly so, of FAMA was padi and rice but with these commodities removed from the ambit of FAMA its importance is greatly diminished. The role marked out for FAMA with the establishment of LPN is limited to participation in the marketing and processing of fruits, maize, pepper, cocoa, groundnuts and other cash crops.[36]

(iv) Research

In the field of agricultural research there is a sharp division between research in rubber and research in other agricultural products. Research into rubber is in the hands of the Rubber Research Institute which was set up

[30] Federal Agricultural Marketing Authority Act. 1965.

[31] *Ibid.* s. 3 and s. 40.

[32] Pineapple Industry Ordinance, 1957.

[33] *Ibid. s. 7.*

[34] Lembaga Padi dan Beras Negara Act. 1971.

[35] *Ibid. s. 7.*

[36] Mid-term Review of the Second Malaysia Plan, para. 21

by the Rubber Research Institute Act, 1966, which consolidated all the previous statutes dealing with rubber research dating from 1925.

The chief instrument for conducting research into other agricultural products is the Malaysian Agricultural Research and Development Institute (MARDI), which was established as a statutory corporation in 1969.[37] Its functions are to conduct scientific, technical, economic and sociological research in Malaysia with respect to the production, utilisation and processing of all crops (except rubber), livestock and fresh water fisheries. It also acts as a centre for the collection and dissemination of information, and provides financial assistance for the purpose of scientific research.[38]

(B) *The Commercial and Industrial Sector*

In the commercial and industrial sectors it is the explicit aim of Government that Bumiputras be given a 30% participation of the total commercial and industrial activities in all categories and levels of operation in terms of ownership and management by 1990. "The objective is to create over a period of time, a viable and thriving Malay industrial and commercial community which will operate on a par and in effective partnership with non-Malays in the modern sector."[39] The Government has placed heavy reliance on public enterprises in this sector as well as to achieve the above objectives and to reduce the identification of race with economic activity. In reviewing the public enterprises in this sector it will be seen that they are so designed as to enhance the economic well-being of the Bumiputras, while at the same time partaking in the overall economic development of the country. Another feature to note in this sector is that public enterprises take the form of both statutory corporations and public corporations, whereas in the agricultural sector the public enterprises consist largely of statutory corporations.

The public enterprises operating in the commercial and industrial sectors can be divided into two divisions namely, those working exclusively for the implementation of the 30% Bumiputra participation target and those which have been set up for the overall advancement of industry and commerce either by the provision of specialist services or by undertaking the development of a particular industrial or commercial enterprise directly.

(a) Majlis Amanah Ra'ayat (MARA): a statutory corporation established by the reorganisation of RIDA in 1966.[40] It caters primarily for the

[37] Malaysian Agricultural Research and Development Institute Act, 1969

[38] *Ibid.* s. 3

[39] Second Malaysia Plan 1971–1975, para. 496

[40] Majlis Amanah Ra'ayat Act, 1966

advancement of Bumiputras, it statutory duty being to promote, stimulate, facilitate, and undertake economic and social development in the Federation and more particularly in the rural areas thereof.[41]

MARA has the power to and does participate in manufacturing, provides credit and technical assistance and training and has established a special unit trust, Saham MARA, for Bumiputras only.[42]

(b) Perbadanan Nasional Berhad (PERNAS): a public corporation established originally as a private company in 1969 and converted in 1971 to a public company. Its purpose is to speed up the entry of Bumiputras into modern sector activities. In so doing PERNAS has undertaken projects in timber, mining, chemicals and wholesale and retail trade. Many of its enterprises are on a joint-venture basis with local and foreign partners.

(c) Perbadanan Pembangunan Bandar (Urban Development Authority – UDA): a statutory corporation[43] established to give Bumiputras a base of operation in the prime commercial areas in the larger cities.[44]

(d) Food Industries of Malaysia Sdn. Bhd. (FIMA): a public corporation established in 1972 to accelerate rural industrialisation by the expansion of food processing industries using locally produced raw materials by the establishment of plants either by the public sector or in co-operation with the private sector.

(e) Malaysian Industrial Development Finance (MIDF): a public corporation in which the Government is a minority shareholder. It has obtained large loans from the Government, its role being to provide finance to small scale industries in particular. It has established a subsidiary, Malaysian Industrial Estates Limited (MIEL), which builds factories and other industrial units and sells them on easy credit terms to private businesses. MIDF also underwrites new issues of shares, guarantees loans and provides managerial, technical and administrative advice.

(f) Federal Industrial Development Authority (FIDA): a statutory corporation established in 1968[45] to supervise and co-ordinate industrial development by encouraging particular industries, evaluating applications for tax incentives and generally to ensure that Government policy on industrial development is properly carried out.

[41] *Ibid.* s. 6(1).

[42] *Ibid.* s. 6(2); Mid-term Review of the Second Malaysia Plan, para. 44.

[43] Perbadanan Pembangunan Bandar Act, 1971.

[44] Second Malaysia Plan, para. 502.

[45] Federal Industrial Development Authority (Incorporation) Act, 1965.

(g) National Institute for Scientific and Industrial Research (NISIR): a statutory corporation incorporated in 1971[46] under the auspicies of the Ministry of Technology, Research and Local Government, with overall responsibility for promoting, co-ordinating and undertaking scientific industrial research.

(C) *State and Regional Development*

Localised public enterprises are of two types, those established to promote regional development and those established to promote overall State development. The regional development authorities have been established to provide for the rapid development of a particular region. These authorities are not concerned with any one sphere of development and their activities cut right across all the various development activities. Hence they are concerned with land clearance and settlement, the growing of crops, the provision of civic facilities, development of small industries, provision of finance and all other related activities. These enterprises operate in conjunction with and co-operation of other public enterprises. These regional authorities exist at both State level and Federal level. The chief authorities at federal level are the Lembaga Kemajuan Pahang Tenggara,[47] the Kemubu Agricultural Development Authority,[48] the Muda Agricultural Development Authority[49] and the Lembaga Kemajuan Johore Tenggara.[50] All of these are statutory corporations.

The functions ascribed to the Lembaga Kemajuan Pahang Tenggara and the Lembaga Kemajuan Johore Tenggara by their respective statutes are wider than those of the other two authorities. As their names suggest the Pahang Tenggara and the Johore Tenggara authorities are more concerned with overall economic development of their respective ascribed regions. The functions of these authorities include the promotion, stimulation, facilitation and the carrying out of residential, agricultural, industrial and commercial development in their respective regions.[51] The powers given to these authorities by their respective enabling statutes cover almost all forms of development activity including the carrying on of commercial and industrial activity, the undertaking of feasibility studies, the co-

[46] National Institute for Scientific and Industrial Research (Incorporation) Act, 1965.

[47] Lembaga Kemajuan Pahang Tenggara Act, 1972.

[48] Kembu Agricultural Development Authority Act, 1972.

[49] Muda Agricultural Development AuthorityAct, 1972.

[50] Lembaga Kemajuan Johore Tenggara Act, 1972.

[51] *Op. Cit.* n. 47 and n. 50, s. 4(1).

ordination of other agencies and the efforts of State and Federal Government in their respective regions and to do any other thing in order to carry out their functions.[52]

On the other hand the functions of the two Agricultural Development Authorities, as their names suggest, are somewhat narrower. Although their respective enabling statutes do require the authorities to promote, stimulate, facilitate and undertake economic development and social development in their respective regions, their functions are more specially directed to the undertaking of agricultural development in their respective regions.[53] The powers of these authorities, however, include industrial activities such as manufacturing, assembling, processing, packing, grading and marketing, research and training.[54]

At State level the most important public enterprises are the State Economic Development Corporations (SDC). At the present time all the States have established a SDC, the first one being established in Selangor in 1964 by the reorganisation of the Petaling Jaya Development Corporation. The SDCs are set up by the State Legislatures and operate at State level only. Their functions, generally speaking, cover all spheres of activity including agricultural, industrial and commercial development. However, in practice the SDCs have concentrated on housing, industrial site development and participation in industries. Apart from the SDC the various States have established many agencies to cater for the welfare or development of particular sectors at State level.

(D) *Administration and Co-Ordination of Public Enterprises*

It will be seen from a glance at these pages that public enterprises in Malaysia are used at all levels to achieve a variety of Government aims; Government thus short-circuiting the long and bureaucratic process of specific subject areas; they are to be found at Federal level and at State level; there are agencies charged with wide duties which are overlapped by other agencies charged with a particular aspect of those general duties. Due to the multifarious sizes and contents of public enterprises proper co-ordination and administration at all levels is most important. The Second Malaysia Plan, by instituting many of the public enterprises, and by showing the need for still others to achieve Plan objectives, did not ignore organisation, planning and co-ordination.

The staff work on national development planning and implementation is the responsibility of the Economic Planning Unit (EPU).[55] The EPU also monitors the public sector to identify and prepare development

[52] *Ibid.* s. 4(2).

[53] *Op. Cit.* n. 48 and n. 49, s. 4(1).

[54] *Ibid* s. 4(2).

[55] Second Malaysia Plan, para. 328.

projects. There are also planning units in the major Ministries and in the larger public enterprises e.g. MARA, PERNAS, UDA and FELDA; there are still more such units at State level which help to identify and formulate projects and co-ordinate development.[56]

The National Action Council (NAC) was formed in 1971 to oversee the whole of national development and security. Its membership includes senior Cabinet members, the Chief Ministers of the various States and members of the Armed Forces. An executive committee of the NAC, under the Chairmanship of the Prime Minister, monitors the implementation of the Plan on a day to day basis. The staff of the NAC is provided by the new Implementation, Co-ordination and Development Administration Unit (ICDAU). The ICDAU, as secretariat to the NAC, looks out for problems of implementation and ensures that remedial steps are taken.[57]

The comparative success of public enterprises in Malaysia can be attributed to a large extent to the effectiveness of the overseeing of these bodies by the Government at the highest level and in achieving proper co-ordination in the implementation of projects and plans by the various public enterprises. The success of the methods of co-ordination is in turn attributable to the manner in which the various units described above actually operate, and above all the personal attention and direction given by the Prime Minister.

The NAC meets at least once a week under the Chairmanship of the Prime Minister himself. Each week one of the authorities is required to present to the NAC a report of its progress and to table its plans for the future. Before the report is actually presented to the NAC, ICDAU examines it and points out any shortcomings in implementation and planning. The agency then becomes answerable to the Prime Minister directly for its shortcomings. At the same time the agency concerned has direct access in this way to the highest level of Government and can make requests for its special needs for finance or any other assistance from Government thus short-circuiting the long and bureaucratic process of going through the responsible minister, the Treasury and the Minister of Finance to obtain assistance.

At the same time ICDAU is all the time investigating and monitoring all the various enterprises. Should anything be discovered to be wrong ICDAU can point it out to the enterprise concerned and require remedial steps to be taken. If this cannot be done at that level then ICDAU can raise the matter in the NAC and action will then be instituted to correct the situation.

[56] Mid-term Review of the Second Malaysia Paln. para. 288, 289.

[57] *Ibid.* para 290.

After the general elections of 1974 the Prime Minister announced that a Ministry of Public Corporations and Co-Ordination would be set up with the Deputy Prime Minister, Datuk Hussein Onn as the responsible Minister. This Ministry is meant to be the overall controlling and co-ordinating organ of public enterprises in Malaysia.

The Ministry has now been set up and is still very much in its infancy. At the present time (June 1975) the Ministry is responsible for the co-ordination and control of those public enterprises charged with the responsibility of helping bumiputras participate in commercial and industry so as to achieve the 30% target set out under New Economic Policy. The public enterprises falling under the umbrella of the Ministry at the present time are the 13 SDCs, PERNAS, UDA, FIMA, Bank Pembangunan, Bank Simpanan Nasional, MIDF, MARA, and LPN. In the case of these authorities only the Ministry processes their needs for finance, vets their projects and ensures proper co-ordination. Ministry representatives sit on the Boards of each of these authorities. The Ministry can demand information on any matter from any of these authorities. However, the NAC, EPU and ICDAU continue in existence as before and these authorities are still answerable to ICDAU, except that ICDAU will have to go through the Ministry before it can ask any of these authorities to present its case before it. Hence this Ministry appears to duplicate ICDAU in some respects and to supplement it in others. The main function of the Ministry appears to be to obtain information readily about the activities of these authorities and to exercise a tighter rein over them due to the importance of their role in the national plan. There is no doubt that PERNAS especially will now come under closer control.

In addition to these units of co-ordination and implementation at Federal level, the various states too have set up State Action Councils (SAC) to do the same thing at a state level. The SACs are under the Chairmanships of their respective Menteris Besar (Chief Ministers) and operate in essentially the same way as the NAC. Co-ordination between the SACs and the NAC is achieved by the fact that ICDAU has its representatives in the SACs and also, the Menteris Besar can be called on by the NAC to explain and justify the operations of the enterprises operating at state level.

III LEGAL FORM, STRUCTURE, CONTROL AND ATTENDANT PROBLEMS OF PUBLIC ENTERPRISES IN MALAYSIA

As has already been stated previously, public enterprises in Malaysia take one of three legal forms i.e. (i) government departments; (ii) Government controlled registered companies and (iii) bodies incorporated under statute

i.e. statutory bodies.[58] If one examines the various public enterprises and their legal forms, it often appears that the form was selected indiscriminately. Thus, for example, most public utilities such as electricity are run by statutory corporations, yet telecommunications is in the hands of a government department. The same indiscriminate use of legal form arises as between statutory corporation and public corporation. Thus, for example, some banks e.g. Bank Pertanian, have been set up as statutory corporations whereas others,such as Bank Bumiputra have been set up as public corporations. However, a broad rationalisation is possible. Where public enterprises are set up to partake in normal commercial and industrial activities in competition with or in partnership with private enterprises and where the objective is to earn profits, then almost invariably, the public corporation form is used. However, in the Malaysian context it must be borne in mind that the public corporations set up to participate in the commercial and industrial sector have been set up to provide Bumiputras a stake in these sectors and therefore it is not unusual for profit to be sacrificed in order to achieve this objective. It also sometimes happens that the public corporation form is selected even where the objective is to provide a cheap and efficient public service even when this might not produce profits that might otherwise be attainable. An outstanding example of this is the splitting up of the Malaysia-Singapore Airlines (MSA) into Singapore International Airlines (SIA) and Malaysia Airlines System (MAS). This was done due to the difference in opinion between the Malaysian and Singapore Governments as to the direction in which MSA should grow and the routes it should exploit. Whereas the Singapore Government wished to exploit the international routes as these were more profitable, the Malaysian Government wished emphasis to be placed on the increase in services of domestic routes which are admittedly not as lucrative as the international routes.

Statutory corporations, on the other hand, are used where it is intended to concentrate efforts and resources on development activities, such as land clearing, the provision of infrastructure facilities or where a particular sector of economic activity can be enhanced by the provision of facilities in marketing, processing, finance and reserach.

[58] A new hybrid form of public enterprise has been created to oversee the petroleum industry in Malaysia. The Government has registered under the Companies Act a public company, Petroliam Nasional Bhd. (PETRONAS) but at the same time a separate statute, the Petroleum Development Act, 1974, has been passed conferring on PETRONAS special powers and vesting in the Prime Minister powers to control the Corporation. PETRONAS will be dealt with in a separate article by the writer at a future date.

The Government department form of carrying on a public enterprise is the oldest form now in use. In Malaysia, this form has lost popularity in favour of the other legal forms. Since the undertakings run by this legal form are normally public utilities and because of its well-known traditional qualities no more will be said about it in this paper.

(A) *Government Companies:*

This particular legal form has become increasingly popular in Malaysia. The Government forms a company which is registered with the Registrar of Companies in the usual way. The Company so formed must comply with the requirements of the Companies Act, 1965, (revised 1973) in all respects. The Companies Act covers all registered companies irrespective of whether they are floated by private persons or by the Government.

The Companies Act in Malaysia, forms a complete code which regulates the setting up and discipline of the organisation of the company so as to protect the public and shareholder interest. The Government has resorted to this legal form to secure the advantages of organisational form, flexibility, and freedom of managerial action. Several important public enterprises are constituted as registered companies, including MAS, Malaysian International Shipping Corporation (MISC), FIMA, MIDF and PERNAS. As far as development and achieving the objectives of the New Economic Policy as stated in the Second Malaysian Plan is concerned, FIMA, MIDF and especially PERNAS, cannot be ignored.[59] The fact that the registered company legal form has been selected for these undertakings means that the structure of registered companies must be examined to bring to light the inadequacies and shortcomings of the suitability of this legal form. As a distinct commercial form it is very much easier for a company, even if it is government owned to adhere to accepted commercial conventions and norms, so that those dealings with it are not daunted as they might be by a full-fledged Government agency which could conceivably bring direct pressure to bear on its competitors. In the form of a company it is possible for a public enterprise to be more bold and aggressive in the commercial and industrial sector, and take risks and adopt ideas that government officials would not be able to take within the rigid governmental structure. The company form also allows considerable delegation of powers and resources by government to management while ensuring that these powers and resources are not abused, since they can only be expanded within the limitations of the general law governing companies. An officer of a company is not only liable to be disciplined by the management of the

[59] The functions objects and role of these enterprises have already been discussed *supra*, p. 12–14.

company for breaches of duty but is also subject to the rigours of the Companies Act which imposes criminal liability for certain forms of dereliction of duties

The registered company form is also more convenient for the types of enterprises where the implementation of government objectives can be achieved by partnership between a government agency and private enterprise. Joint-ventures are most conveniently carried out through the formation of subsidiary companies wholly owned by both the private enterprise and the government owned company. This trend of going into partnership with private enterprise is becoming more and more popular. PERNAS for example has undertaken a number of projects on a joint venture basis.

(i) Registration and Shareholding

A company registered under the Companies Act, may be a company limited by shares, or by guarantee, or by both shares and guarantees or it may be an unlimited company.[60] Furthermore, the company may be a public or a private company. A private company *must* contain provisions in its memorandum of association restricting the transferability of its shares, limiting its membership to fifty and prohibiting invitations to the public to subscribe for shares or debentures or deposit money in the company.[61] A public company on the other hand may have an unlimited number of members and may or may not restrict the transferability of its shares. The companies established by Government have been both public and private companies. Thus, for example FIMA is a private company, and PERNAS was incorporated as a private company but later converted to a public company.

The restrictions imposed on the transfer of shares range from those which allow transfer only within a certain class of the populace even though the company is a public one, to those which allow free transfer subject to the discretion of the directors in registering the transfer. Hence cl. 7 of the Memorandum of Association of Bank Bumiputra provides that shares may only be issued to the Central Government, a State Government, or any public enterprise established by Federal or State Government, or any Bumiputras or Bumiputra controlled company, and shall not thereafter at any time be assigned or transferred to or held by any person or corporation or other legal person who or which is not any of the above stated as the case may be. This therefore ensures that only Bumiputras or the Government can be shareholders in Bank Bumiputra. On the other hand the Articles of Association of MIDF allow free transfer of shares but

[60] Companies Act, 1965, s. 14 .

[61] *Ibid.* s. 15 .

the Board may decline to register any transfer of shares at their absolute discretion without ascribing any reason thereof.[62] No doubt this provision may have the same effect as that of Bank Bumiputra's in practice, but at least the manner in which the discretion is to be exercised is not spelt out. (it is regrettable that the writer of this paper has not been able to obtain a copy of the Memorandum and Articles of Association of PERNAS to make a comprehensive study of such restrictions).

The restriction on transferability of shares among Bumiputras only raises a most important and complex problem. It must be borne in mind that many of the undertakings promoted by Government as companies have been so promoted because it is the aim of Government that these be eventually transferred to Bumiputras altogether. The problem, it is submitted, will not be so much in transferring control and ownership to private Bumiputra hands but in keeping the control within Bumiputra hands. A system must be devised whereby the marketability of these shares is in no way diminished in comparison to shares of ordinary companies, and it must be ensured that the value of these shares do not suffer by reason of their being transferable among Bumiputras only. It must be remembered that shares in a company are *choses in action* and they are only attractive as an investment because of their ready marketability and because of the returns obtained by holding on to them.

A number of ways have been suggested for keeping these shares within Bumiputra hands. For example it has been suggested that a separate stock exchange be established for such shares, in which only Bumiputras may buy and sell shares. The shares to be dealt with in this Exchange would include shares of ordinary companies specially reserved for Bumiputras. This suggestion is not wholly satisfactory. A stock exchange is only effective if there are a large number of counters to be dealt with and the dealings must be widespread both in terms of turnover and number of buyers and sellers. At the present time the economic position of the Bumiputras is not conducive to the successful establishment of such a special stock exchange. Another objection is that if shares of ordinary companies are also dealt with in this exchange then it is possible that the same counter would have two separate quotations. This would only encourage the circumvention of any law enacted to separate shares held by Bumiputras from shares held by others as both the Bumiputras and the others would seek to take advantage of the lower price in either one of the exchanges when buying and the higher price when selling.

The second problem in transferring control of Government owned companies to private Bumiputra hands is going to be the problem of conflict between Government national aims versus profit-making by the

[62] MIDF Articles of Association, art. 22.

company. The Government in setting up these public corporations puts in large sums of money to enable the corporations to achieve the objects laid out for them. These objects are national development objectives and the Government by-and-large is frequently prepared to sacrifice the profit element so long as the corporation fulfills the goals set out for it. Once the corporation is transferred to private hands, even if they are Bumiputra, the shareholders of the corporation are, sooner or later, going to look for a profit and a return on their investment in the form of dividends. In fact, before investing their money in the shares of such a corporation, the Bumiputra investors will be looking for some assurance as to their profitability. If no profits are forthcoming the private investors will no doubt subordinate national aims in favour of a more lucrative and commercial mode of operation in the long run. National development aims and profitability are not the best of bedfellows. However, it is to be borne in mind that at present it is part of the Government's development objective that the Bumiputras be given a 30% share of the economy of the country by 1990. Hence many of the public corporations have been set up with the intention of eventual transfer to private Bumiputra hands. This would be the achievement of national development aims in itself. Once the private Bumiputra sector takes over the public corporation and begins to turn it to earn profits which are then returned to the Bumiputra shareholders as dividends, this in itself would mark the carrying out of Government objectives for the undertaking. But some public corporations by their very inception and nature are designed to carry out specific development objectives at the expenses of profits. A transfer of these to private hands would most certainly mark an end to the implementation of development objectives. A very good example of this is the bus transport company set up by MARA as a subsidiary. The object of setting up this company is to provide a cheap and efficient means of transport particularly in areas where private enterprise will not venture as the profit element is lacking. It would be imprudent to transfer the control of such enterprises to private hands, although a minority of the shares could be so transferred. In fact in the case of MIDF a majority of the shares are in the hands of private persons. The one flaw in offering shares in public corporations with only development objectives to the public is that because profitability is not the main object of the carrying on of operations of the corporation, the private investor would be reluctant to invest in such a corporation without an assurance of at least substantial capital accretion of his investment.

(ii) Separate Legal Entity and *Ultra Vires*

Upon registration a company acquires a separate legal personality whereby it becomes capable of exercising all the functions of an incorporated company, with power to sue and be sued in its own name, having per-

petual succession, a common seal, and power to hold land.[63] This separate legal personality separates the corporation from its shareholders, which in the case of a public corporation is the Government. This curtain between the Government and the public corporation gives the public corporation an existence which is not directly identified with the Government, and it can operate like any other commercial entity. Although the public corporation may be doing nothing more than executing Government policy, yet in doing so it can at least make a semblance of being an independent person. This is particularly advantageous in contacts with the private sector.

The scope of activity of a company, be it an ordinary registered company or a public corporation, is however restricted by the doctrine of *ultra vires* to the extent spelt out in the objects clause of the memorandum of association. This restriction at the present time however is more theoretical than real. The modern memorandum of association grants a company power to do almost everything lawful. This is equally true of public corporations and is exemplified by the MIDF Memorandum of Association. In any event, the *ultra vires* doctrine has lost most of its teeth in Malaysia by virtue of s.20 of the Companies Act, under which no contract can be impugned only by reason of the lack of capacity or power by the company to do the act. In the case of public corporations, the Government gives the corporation a *carte blanche* to do anything it pleases. Therefore, in theory at any rate, the public corporation may pursue activities which were not originally envisaged of it. The way to prevent this from happening is by limiting the objects and powers of the public corporations in the memorandum of association. There would be little possibility of the corporation altering its memorandum to give it wider powers as the power to alter the memorandum is vested in the shareholders,[64] which is the Government in this case, and only such alterations will be made as the Government thinks desirable.

(iii) Appointments and Dismissals:

The Government, being the chief shareholder of a public corporation can ensure effective control whilst conferring a considerable degree of autonomy and flexibility through the appointments it makes to the board of directors of the corporation. As majority shareholder the Government can make such dismissals and appointments to the Board of Directors as it sees fit at the general meetings of the company.[65] Although the share-

[63] Companies Act, 1965, s. 16(5).

[64] *Ibid.* s. 28 .

[65] *Ibid.* s. 126, 4th Schedule, Article 67.

holders of a company cannot dictate the day to day running of the affairs of the company, they can lay down general policy which the directors must pursue.[66]

In a recent statement the then Group Chairman of PERNAS, Tengku Tan Sri Razaleigh Hamzah, commented that PERNAS did not work under Government control. He said: "We are a commercial organisation. We are left alone. There is no Government interference, except that it wants us to help solve its objectives."[67] This statement roughly summarises the legal position of a public corporation vis-a-vis its shareholders as discussed above. It is true that in law at any rate the Government cannot dictate day-to-day running of operations but through the control exercised in the appointment and dismissal of the directors and by laying down general policy, both of which the Government is able to do as majority shareholder, the Government is in a position to ensure that the public corporation does "help solve its objectives."

(iv) Finance:

The chief source of finance of a registered company is the amount paid up on its issued share capital. Of course the company is also free to borrow such sums as it is able to from the usual creditors such as commercial banks and finance companies. In the case of public corporations, the Government normally sets them up with a sizable paid up share capital. Thus for ecample, MAS has an authorised share capital of $100 million of which $64,267,182 has been issued. PERNAS has an authorised share capital of $50 million of which $11,250,002 has been issued. Although public corporations do not receive annual grants from Parliament because they are outside the compass of Parliamentary Supply, the Government does give substantial financial assistance to them. Hence, under the Second Malaysia Plan $100 million each was ear-marked for PERNAS and MIDF.[68] These finances are provided to public corporations normally in the form of loans, which usually carry a very low rate of interest or are interest free. However this is very much of a formality only as the Government can write-off the loan at any time and release the public corporation from the liability to pay back the sum or convert the loan to paid-up share capital. Apart from the provision of finance in this form the Government also obtains finance from international aid agencies for these public corporations. Hence MIDF was given a long-term interest free loan of $245

[66] *Automatic Self Cleansing Fitter Syndicate* v. *Cunninghame* [1906] 2 Ch. 34.

[67] Suara PERNAS Vol. 1 No. 3, pg. 8 .

[68] Mid-Term Review of the Second Malaysia Plan, para. 45 and 48.

million by the World Bank under the First Malaysia Plan.[69] Being registered companies public corporations are also able to borrow from private sector sources without the need for formal approval by Government, but in practice the loan must frist be approved by the responsible Minister and the Treasury.

Government control of the manner in which a public corporation uses its funds takes the form of control that a majority shareholder has over the use of a company's resources by its board of directors. As stated earlier[70] this control is limited to policy matters and through the power of appointment and dismissal of the Board. Other than that the Government, through the responsible Minister, no doubt exercise a considerable degree of extra legal controls. The most important one of these is in the provision of finance. The Government could easily suspend or cancel any finances in the pipeline for the public corporation unless the corporation complied with ministerial requests. Futhermore, because the corporations are tools for carrying out national policy the Government in practice does exercise a close surveillance over their activities. It is probably not unusual for the responsible Minister or the Prime Minister to pick up the telephone and give directions to the management of a particular corporation on matters relating not only to general policy but also on specific projects.

(v) Publicity:

The corporate legal form whilst giving the Government the power to dictate general policy and to control the activities of a public corporation in general, also brings the enterprise before public scrutiny to a certain degree. The usual manner in which the public can obtain information about the affairs of the public corporation is through the annual accounts and the Annual Return.

Every company having a share capital must file an annual return with the Registrar of Companies in accordance with the form provided for by the Companies Act giving such particulars as are required by the Act. The Act requires that the Annual Return must give particulars pertaining to the share capital and membership of the company, including all expenses incurred which are incidental to the issuing of shares and debentures and all sums received on the shares. The Annual Return must also be accompanied by a copy of the last audited Balance Sheet and Profit and Loss account of the company.[71] The company is obliged to prepare a profit and loss acount and must lay before the Annual General Meeting a

[69] Para. 365

[70] *Supra*, p. 23–24.

[71] Companies Act, 1965 s. 165 and Eighth Schedule.

balance sheet corresponding to the date to which the profit and loss account is made up. The balance sheet must be duly audited. Attached to the balance sheet must be a director's report pertaining to the state of affairs of the company and giving certain details required by the Act.[72] These documents, which must be filed with the Registrar of Companies, will throw much light on the activities of the Public Corporation, and being public documents they are available for inspection by the public.[73] Hence, this gives the public an opportunity to comment on the activities of the public corporation and keep the corporation in line within the objectives set out for it. It also enables the public to know how the corporation spends money provided to it and the returns thereby realised.

(vi) Winding-up

The Companies Act also makes provision for the winding-up of a registered company, be it a voluntary winding-up or an involuntary creditors winding-up.[74] Public corporations would also be covered by these provisions so that once a public corporation has accomplished its objectives it could be wound-up and its surplus assets returned to its shareholders, the Government. However, the provisions of the Act also enable the creditors to bring about the winding-up of a company where the company is unable to pay its debts. In such a case the creditors would receive a proportionate share of the company's assets. A point of interest is whether a public corporation can be involved in an involuntary creditors winding up when its assets are not sufficient to cover its liabilities. Under the Companies Act no distinction is made between public corporations and other registered companies and accordingly all the winding-up provisions will no doubt apply. However, if the Government were to allow a public corporation to go bankrupt in this manner, it would amount to an admission of failure. Even if the public corporation had fulfilled its objectives, if the Government allowed it to go bankrupt and did not pay off private creditors in full, it would result in the loss of faith in the Government. Besides, it would be politically embarrassing for the Government to take this course of action.

[72] *Ibid.* s. 169.

[73] All documents required to be filed with the Registrar of Companies are public documents which must be made available for public inspection by the Registrar. Regrettably, however, the Annual Report on PERNAS is treated as classified information by the Registrar and is not made available for inspection. This course of conduct is *ultra vires* the powers of the Registrar, and no doubt if a writ of *mandamus* was brought against the Registrar, the courts would have to find in favour of the petitioner.

[74] Companies Act, 1965, Divisions 3 and 4

In conclusion, it can be seen from the above discussion that the public corporation form is a very useful means of carrying on a public enterprise, although it does pose problems. However the spheres in which public corporations are used are such that any other form of public enterprise would be unsuitable. Furthermore, the use of public corporations is the most convenient legal form in achieving the objective of hiving off these enterprises to private Bumiputra hands in the future. Any other legal form would bring about considerable dislocation. However this does not mean to say that the *status quo* answers all problems that have already arisen or might arise in the future. There is a need for close examination of the company law as it exists and its application to public corporations, which will probably reveal the need for a separate company law to cover public corporations.

(B) *Public Enterprises Established by Statute*

As seen from Part III above the most commonly used legal organisational form for public enterprises in Malaysia is the Statutory Corporation. This form of public enterprise derives its powers and authorities and is governed in all respects by the Act of Parliament which created it. Each statutory corporation is established by a separate statute, there being no general enabling legislation which empowers the Government to set up a statutory corporation without Parliament first passing an incorporating statute.

As in the case of public corporations, it is necessary to examine the general structure of statutory corporations to see what problems are raised by such a structure and whether that structure is adequate in enabling the corporation to achieve its objectives. Of course, in examining the general nature of statutory corporations, it must be said that in matters of detail each corporation may vary quite considerably from another corporation but most of the statutes establishing statutory corporations tend to have certain features in common. It is these common features which will be discussed here. It might also be noted that the statutory corporations at State level too have these common features, not only *inter se* but also with the statutory corporations at Federal level.

(i) Separate Legal Entity:

All Statutory Corporations being creatures of statute are conferred a corporate entity thus constituting them separate legal *personae*. The exact extent of the separate legal personality conferred on the corporations vary from statute to statute. Hence the older statutes, for example, merely constituted the statutory corporation, and left the legal consequences of the separate legal personality to be implied by law.[75] The

[75] For example s. 3(1) of the Land Development Ordinance, 1956 provides: 'There

recent statutes however spell out precisely the nature and extent of the separate legal *persona* of the corporation. Thus, these statutes specify that the body corporate is to have perpetual succession, a common seal and may sue and be sued in its own name, enter into contracts to carry out the purposes of the statute, may acquire, purchase, take hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest therein upon such terms as the statutory corporation may see fit.[76] Such a comprehensive enunciation of the consequences of conferring a separate legal *persona* upon a statutory corporation leaves the corporation free to do any act it wishes in its corporate name so long as it is within its objects and powers.

Although the two extremes of leaving the consequences of corporate personality to be implied by general law and the spelling out of all legal consequences in the incorporating statute are understandable some of the statutes have adopted a middle-of-the-road system whereby only some of the legal consequences of setting up a body corporate are spelt out and the others are omitted. Whereas in the case of those statutes where all the consequences of creating a legal personality are omitted or are stated in general terms it is possible to infer that all the consequences of a legal *persona* are to be conferred upon that statutory corporation, it is not possible to do so in the case of a statute which states some of the consequences of the legal *persona* of the body corporate created and omits others.

The most important of the legal consequences of a separate legal *persona* omitted by the middle-of-the-road statutes are the right to sue and be sued in its corporate name.[77] The result of this is that the statutory corporation can only be sued and sue through the responsible Ministry under the Government Proceedings Ordinance, 1956. This is an unnecessary restriction on the extent of the legal *persona* of a body corporate. After all if a statute creates a body corporate and gives it a certain set of objectives, it is an unnecessary hindrance to limit its legal per-

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shall be established for the purposes of this Ordinance a body to be known as the Federal Land Development Authority.' However, s. 15(1) goes on to state some of the consequences of incorporation i.e. it 'shall have perpetual succession and may sue and be sued in its said name', but then the section tails off into general terminology giving the Authority power to do all other matters or things incidental appertaining to a body corporate.

[76]Perbadanan Pembangunan Bandar Act, 1971 s. 3(2).

[77]Typical examples are the statutes establishing FAMA, FIDA and LPN.

sonality in this manner. An examination of the types of statutory corporations which are not given the full benefits of separate legal *persona* reveals that only those bodies which are essentially promotional in character and by reason of their duties have necessarily to work closely with the responsible Ministry are denied the full scope of corporate personality. Thus, FAMA, FIDA, and the LPN are all statutory corporations whose responsibility it is to carry out promotional or co-ordinating activities. These bodies do not descend into the arena of direct participation in commerce, industry or agriculture themselves, although it does happen that occasionally the corporation concerned does carry out projects of manufacturing or farming. For example FAMA is proposing to set up a factory to process coconut-oil. In setting up this factory FAMA will have entered into various contracts, and it is going to be cumbersome for it to enforce those contracts in court if they are breached and equally, the contractors will have to use a circuitous route to obtain enforcement against FAMA. On the other hand those statutory corporations that are directly involved in operating a project and have to initiate the job from the lowest level themselves are vested with the full consequences of a separate legal personality. Such statutory corporations include FELDA, FELCRA, UDA and even research bodies such as NISIR.

(ii) Objects and Powers

The statute creating the statutory corporations inevitably spells out the objects, purposes or functions of the corporation. These objects are usually couched in such terms so as to embrace most if not all the aspects of the sphere within which the corporation is meant to operate. There is a difference in the depth of the functions spelt out in the statutes that set up the older corporations and those that set up the more recent corporations. The older statutes specify the objects of the authority more generally whereas the more recent ones spell out its functions precisely. Thus, the duty of FELDA is "to promote and assist the investigation, formulation and carrying out of projects for the development and settlement of land in the Federation."[78] On the other hand the functions of UDA include[79]:

(b) "to promote and carry out projects in urban development areas with a view to achieve the distribution of opportunities among the various races in the field of commerce and industries, housing and other activities; and

(c) to translate into action – programmes the Government policy to re-structure society through urban development."

[78] *Op. Cit.* n. 75 s. 3(2).

[79] *Op. Cit.* n. 76, s. 3(1).

Going hand-in-hand with the statutory objects of a corporation are the powers conferred upon it. Generally, the statutes tend to include a long list of powers which are extremely wide, and these powers are further widened by the concluding clause on powers which goes on to give the corporation the power to do all such things as are expedient or reasaonbly necessary or incidental to the carrying out of its functions, or which the corporation considers desirable or expedient.[80]

The width of the statutory objects of a statutory corporation and the scope of its powers removes most of the sting of the *ultra vires* doctrine, and the extent of the control exercisable by the courts in relation to statutory corporations. Even if a statutory corporation were to exceed the express powers conferred upon it, it could turn to the general powers clause which would cover almost everything. It is only when the statutory corporation does something that has absolutely nothing to do with its functions, that it becomes possible to sustain a charge of *ultra vires* against it. Hence the functions of the Rubber Industry Smallholders Development Authority (RISDA) as stated in its incorporating statute, are concerned with the rubber smallholder's welfare. However, it is at present actively engaged in the promotion of all sorts of crops for smallholders, such as maize, tapioca, and palm oil, amongst others. For RISDA to be prevented from pursuing this course it must be challenged in the courts by a private individual and it is submitted that one would be hard put to find a private individual who is so concerned with the legalities of RISDA's operations to take steps to put a stop to them. Alternatively, the Government itself must institute proceedings, which is highly unlikely.

Not only is it difficult to affix a statutory corporation with *ultra vires*, it is equally difficult to compel a statutory corporation to perform its functions because its powers and functions are so very wide. Because the incorporating statute provides that the corporation may do such things as it thinks reasonably necessary or expedient, it would be difficult to pinpoint any particular course of conduct which is reasonably necessary for the corporation to pursue for it to fulfill its functions.

It can hence be seen that the control exercised by the courts over statutory corporations is negligible, if not non-existent. The courts, in relation to statutory corporations are merely arbiters for disputes that arise which bring in the statutory corporation as a litigant. Such disputes however are limited to mundane everyday disputes, such as contractual and tortious claims made by or against statutory corporations similar in nature to those that would arise between citizens.

In relation to the objects clause, both in the case of public corporations and statutory corporations, a careful balance must be maintained. On the

[80] *Ibid.* s. 3(4) (g).

one hand the objects and powers of the public enterprise must not be so wide as to enable it to do anything it wishes. Each enterprise is set up to carry out a particular function or to remedy a particular short-coming in the economic structure of the country. If every public enterprise set up could do anything it wished then there would not only be a considerable degree of overlap and duplication, at the same time there would be a misuse of scarce national resources. On the other hand the objects of the corporation must not be so narrow so as to disable the corporation from growing naturally and from diversifying into areas that could usefully be carried on with its main activities. What is needed is for reference to the Government to sanction and authorise the new activity proposed to be undertaken by the corporation. In the case of statutory corporations the solution might perhaps be that the incorporating statute confer only narrow objects and powers to the corporation. If the corporation desires to be beyond those powers then an extension would have to be obtained by proper notification in the Gazette. This would therefore ensure that the Government is fully informed of the direction the corporation is taking, that the public are aware of the new range of activities and that Parliament has an opportunity to debate the matter. This therefore provides both, flexibility and proper knowledge, control and co-ordination.

There is yet a further problem in relation to the objects and powers of subsidiaries incorporated by the principal statutory corporation. Most statutory corporations are given power to set up subsidiaries, and if a subsidiary is set up as a wholly-owned registered company it will be governed by the provisions of the Companies Act, 1965. In such a case the subsidiary can be given powers which the principal corporation itself does not have. For example, UDA, can borrow money only with the approval of the Minister of Finance.[81] But UDA can set up a subsidiary company with the power to borrow and no approval would be needed for such borrowing. Hence the statute setting up the principal corporation should provide that the corporation cannot do indirectly what it cannot do directly and that the subsidiary cannot be given wider powers than those of the principal corporation.

(iii) Finance:

A statutory corporation is usually not self-supporting. Therefore it has to obtain funds from some source or other to finance its projects and to service the enterprise as a whole. Usually the incorporating statute makes provision for the means of finance of the corporation. Generally speaking the incorporating legislation will require the statutory corporation to establish a Fund into which are to be paid all sums received by the corpor-

[81] *Op. Cit.* n. 76 s. 26.

ation and out of which all expenses are to be defrayed. Included in this Fund are all sums allocated to the statutory corporation by Parliament from time to time. Further, the statute normally requires the corporation to prepare and submit an estimate to the Minister responsible. The Minister then notifies the statutory corporation as regards the expenses approved, either specifically or in general.

If the statutory corporation's resources itself are not sufficient to meet its approved expenses the Government must find the money for the corporation. Any money made available by the Government to the corporation must be charged on the Consolidated Fund, or it must be expressly authorised by Parliament in the form of a Supply Act. In either case the provision of finance to a statutory corporation gives Parliament an opportunity to debate the affairs of the corporation. If the sum is charged on the Consolidated Fund it must be included in the Financial Statement as part of the estimates of expenditure which must be laid before Parliament.[82] More usually however the appropriation to statutory corporations is provided for in the Supply Bill.[83] Expenses to be met from the Consolidated Fund but not charged to it in the Financial Statement must be included in the Supply Bill for formal sanction by Parliament. When the appropriation for the statutory corporation is done through the Supply Act, Parliament is presented with an even better opportunity to scrutinise the affairs of the statutory corporation. However, it must be borne in mind that the appropriation for any particular statutory corporation is but one of hundreds of other appropriations requiring approval. Due to the lack of time and pressure of Parliamentary work rarely are the affairs of any one statutory corporation carefully scrutinised. The Parliamentary debate on the Bill boils down to one on general principles and political differences. Therefore little or no real control is effectually exercised by Parliament at this stage and little or no important disclosures are called for by Government on the affairs of any particular statutory corporation.

The financial provisions governing State statutory corporations and the financial procedures governing State legislatures in appropriating funds to State statutory corporations are essentially similar to the Federal provisions and procedures. There is however one question of concern in relation to the provision of finance to the SDCs. The States have power to legislate and take action in relation to those matters laid out in the State List and the Concurrent List of the Federal Constitution[84] This includes the appropriating of funds to the SDCs to enable them to carry out development projects. The functions and powers of the SDCs however are very wide and when literally interpreted could cover matters outside the State List and the Concurrent List. In fact some of the SDCs do undertake

[82] Federal Constitution Article 99

[83] *Ibid*, Article 100

[84] Article 74, List II and List III.

projects which a State Executive Council itself could not undertake as they would be beyond the scope of the State List and Concurrent List. Thus, for example, the State List and Concurrent List do not cover the incorporation of companies and trading, which are matters reserved to the Federation by the Federal List. However, the SDCs do incorporate registered companies as subsidiaries which companies indulge in trading and manufacturing. Accordingly, money appropriated to SDCs to undertake such projects is unconstitutional.

It must be borne in mind that although the SDCs and other statutory corporations are set up by the States, they could have been set up by the Federal Government in the first instance anyway. The difficulty referred to above has been neatly circumvented by the Incorporation (State Legislatures Competency) Act, 1962 which empowers the various states to set up statutory corporations, *inter alia* for the development of urban or rural areas. S.5 of the Act provides that a statutory corporation incorporated by a State shall for all purposes be deemed to be a body corporate throughout the Federation, as if the Enactment or Ordinance creating such body corporate had been enacted by Parliament. The putting on par of State statutory corporations with Federal statutory corporations is taken a step further by the Second Schedule to the Incorporation (State Legislatures Competency) (Amendment) Act, 1974, cl. 4. of which provides that in addition to the duties imposed on the corporation by its incorporating statute, it may undertake such other functions and expend such other monies for such purposes as the Federation or the State or any statutory authority may assign to it and in so doing the corporation shall be deemed to be fulfilling the purposes of the law establishing the corporation. Since a fair portion of the finances of State statutory corporations comes from Federal sources through the State, it is not surprising to find that cl. 2 of the Second Schedule provides that a State may establish a corporation only after it has made arrangements with the Federal Government.

The incorporating legislation of statutory corporations also usually gives the corporation the power to borrow in certain manners and for certain purposes, subject to the approval of the responsible Minister. Different types of borrowing powers are given to different corporations. Hence some corporations are given the widest possible borrowing powers as in the case of MARA. By s.20 of Majlis Amanah Ra'ayat Act, 1966 MARA may borrow such sums as it thinks necessary to meet its obligations or discharge its duties upon such terms as regards interest, period, methods of repayment or otherwise as the Minister of Finance may approve. However, the power of borrowing normally given is narrower and the statute usually specifies the purposes for which the corporation may borrow. Generally speaking borrowing is only permitted to meet capital expenditures, and is excluded where the

statutory corporation wishes to make a fresh borrowing to repay an old one. The form of borrowing may either be a straight forward loan or overdraft arrangement, or it may be by the issue of bonds, debentures or by the issue of shares or stock.[85] No matter what form the borrowing takes an important check on the blanket power of the statutory corporation to borrow is that most incorporating statutes provide that the prior approval of the Minister of Finance must be obtained. This gives the Minister of Finance an opportunity to find out why the statutory corporation requires the loan and whether the purpose for which the loan is proposed to be taken is a proper one. As assessment as to the viability of the project intended to be undertaken by the use of the loan can also be carried out. This check goes some way in ensuring that the statutory corporations do not abuse their wide powers, both in relation to carrying out their functions and in relation to the raising of finance.

The securities that a statutory corporation can offer for a borrowing are far more extensive than those available to private enterprise. Apart from all the usual forms of security, namely, mortages, charges, liens, floating charges and others, most statutory corporations are authorised to issue bonds which are charged on the Funds of the respective statutory corporations. Probably the best form of security available to public enterprises for their borrowings is underwriting of the credit by the Government. Lenders are only too pleased to accept Government guarantees.

Apart from the wide choice of securities that a statutory corporation can offer, it also has a wider choice as regards the persons it can borrow from. They have available to them all the usual lenders such as finance companies and the commercial banks. In addition they can borrow from the Government itself. Furthermore, the Government can also arrange loans for them from international sources such as the World Bank and the Asian Development Bank.

(iv) Management and Staff:

The incorporating statute usually provides for the management composition of the statutory corporation. Normally, the statute provides for the appointment of a Chairman or Director and a Deputy Chairman or Deputy Director. Both of these posts are normally full-time posts and usually persons of considerable ability and calibre only are appointed to them. The statute also makes provisions for the appointment of other members. The statutes frequently provide that some of these members are to come from various Ministries which are directly or indirectly concerned with the activities of the statutory corporation. Hence in the case of

[85] *Op. Cit.* n. 76, s. 26

MARA, the composition of the Authority must include one member from the Ministry of Finance, one member from the Ministry of Commerce and Industry, one member from the Ministry of Agriculture and Co-operative and two members from the Ministry of National and Rural Development.[86] However, not every incorporating statute requires representatives from the various ministries to be appointed to the governing body of the statutory corporation. On the other hand it is usual that provision is made for the appointment of a number of persons having experience in the field of operation of that body.

In the case of the SDCs the Menteri Besar (Chief Minister) is always the Chairman, and the enactment usually also provides for the appointment of the State Financial Officer and State Engineer as ex-officio members. The other members of the governing board are appointed from amongst prominent persons with expertise and knowledge in the areas in which the SDC operates.

The appointment of officials from the various ministries on the governing boards of statutory corporations has both advantages and drawbacks. The immediate and obvious advantage is that where the functions of a statutory corporation and of a ministry overlap it is useful for the Ministry to be aware of what exactly the statutory corporation is up to so that there can be some degree of co-ordination. At the same time the Ministry official can identify high priority areas as far as that particular Ministry is concerned and, in conjunction with the representatives from other Ministries, a programme of priorities can be worked out. The greater rapport between the statutory corporation and the ministries represented also means that those ministries cannot disclaim responsibility for the activities of the corporation which accordingly means that a tighter rein at ministerial level will be kept on the activities of the statutory corporation. On the other hand the representation of the ministries in the governing body takes away some of the major advantages of setting up a statutory corporation. It is a generally held opinion that statutory corporations operate more successfully and efficiently as they are not subjected to the bureaucracy that envelops Government departments. The independence of thought, the implementation of innovations, the coining of new ideas, the working under a separate identity outside the usual hindrances of Government are all taken away when the governing body of a statutory corporation is composed of civil servants. It is best to leave a statutory corporation to get on with the job at hand without too much close quarters surveillance by the various ministries affected by its activities.

The incorporating statutes usually provide that the members of the governing body are to be appointed by the Minister responsible for the

[86] Majlis Amanah Ra'ayat Act, 1966, s. 3(3)

corporation or by the Yang diPertuan Agung. The Minister or the Yang diPertuan Agung also has the power to revoke any appointment at any time. In fact this power of appointment and dismissal is one of the most effective means of ministerial control over the activities of statutory corporations. The implied threat or fear of dismissal is often the best spur in ensuring the proper carrying out of directives and efficient operation. This power usually extends to the Chairman and Deputy Chairman and any other members of the governing body, except for ex-officio members.

The incorporating statute also usually empowers the statutory corporation to appoint staff at all levels. Until the implementation of the Report of the Harun Commission,[87] statutory corporations were free to work out their own salary structures and terms of service for their staff. But the Harun Commission Report imposes uniform salary structures and terms of service on all statutory corporations. This Report in fact seeks to unify, as far as possible, service in statutory corporations with Government service. This takes away one of the biggest advantages of setting up a statutory corporation, i.e. to get away from civil service rectrictions on staffing and attracting top quality managerial staff by offering terms competitive with the commercial sector. The effects of the Harun Commission Report are already beginning to be felt in some statutory corporations where senior staff are already beginning to seek appointments in the private sector. However, employees of statutory corporations are usually made expressly subject to the Penal Code as they are classified as Public Servants by the incorporating statute. This means that officials of statutory corporations are liable under the Penal Code if they accept bribes or other inducements which temper their decisions or actions as employees of the statutory corporations.[88] At the same time, the benefit of the Public Authorities Protection Ordinance, 1948, is also extended to statutory corporations. Therefore, the period of limitation for any wrongful act committed by an employee of a statutory corporation in the course of his duties is three years.

(v) Ministerial and Parliamentary Control:

Various aspects of ministerial control have already been considered above. Only those aspects of Parliamentary control through ministerial control will be dealt with here. The extent of control exercisable by ministers under the incorporating legislations varies from statute to statute. However, most statutes provide that a minister shall have power to give general directions not inconsistent with the provisions of the statute. Most statutes then go

[87] Royal Commission on Salaries and Service in Statutory Bodies.

[88] See Penal Code Chapter IX

on to give express power to the responsible minister to give directions in relation to certain specific matters, which usually relate to the disposal of capital assets, and the application of the proceeds thereof. The statutes also empower the minister to request and obtain such information as he may require from time to time.

These powers to give general directions are extremely useful in keeping the statutory corporation in line with Government planning and thinking. They can be used to ensure that no one statutory corporation frustrates Government efforts in a certain direction. Once the minister gives a direction as regards general policy, the statutory corporation must abide by it. Together with the other powers already dealt with, in particular the power of appointment and dismissal, it ensures substantial ministerial control over the affairs of the corporation. To give the responsible minister express power to give directions in relation to specific matters would cut across the very purpose of setting up a statutory corporation, for it would then amount to little more than a ministerial department. In any case, because of the other powers exercisable by a minister it is no doubt, not unusual for him to give specific directions informally.

Parliament is in a position to exercise some slight control over statutory corporations through the minister's power to give general directions to the statutory corporation. Thus, members of Parliament can use the various Parliamentary procedures to question the Minister on the affairs of a statutory corporation, particularly when a general direction has been given to the corporation. On the other hand, Parliament can require the Minister to make a particular direction. However, Parliamentary control, even through this devise, is weak and generally ineffective. The most important manner in which Parliament obtains information on the activities of a statutory corporation, and can use the opportunity to take the responsible minister to task is at the time the Annual Accounts and Annual Report of the statutory corporation is laid before it. The incorporating statutes invariably require statutory corporations to prepare annual accounts, and have them audited either by the Auditor-General or by an auditor approved by the Minister, and to prepare an Annual Report. Both the Annual Report and the audited accounts must be transmitted to the responsible minister, and he must then table them in Parliament. Parliament can then debate the report. However, it is rare that any one report is specially debated by Parliament ostensibly due to the lack of Parliamentary time. More commonly there is a debate on the activities of statutory corporations in general, with no one corporation getting any special attention.

It is thus clear that the only real control over statutory corporations comes at ministerial level. Parliament is substantially powerless as an instrument of control, and frequently Members of Parliament are too ill informed as to the activities of statutory corporations seriously to question

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It is thus clear that the only real control over statutory corporations comes at ministerial level. Parliament is substantially powerless as an instrument of control, and frequently Members of Parliament are too ill informed as to the activities of statutory corporations seriously to question

the Government on their activities. Even the practice of appointing Government backbenchers to the boards of statutory corporations does not effectively extend Parliamentary control.

(vi) Winding-up:

Unlike public corporations there is no general law which governs the structure of statutory corporations and hence there is no general law applicable to all statutory corporations governing the winding-up or dissolution of a statutory corporation. Since each statutory corporation is set up by a separate piece of legislation, the structure and workings of the corporation are governed by its statute. Accordingly, the statute itself must make provision for the dissolution or winding-up of the statutory corporation.

The more recent statutes give the power to wind-up and dissolve any subsidiary corporation set up by the parent corporation in pursuance to the powers given to it in the statute by publishing an order in the Gazette directing the winding-up and dissolution of the subsidiary corporation. Any surplus assets of the subsidiary corporation are then transferred to the parent corporation.[89] The question of interest that arises here is, what happens if the assets of the subsidiary corporation are not sufficient to meet its liabilities? The statutes appear to envisage that the parent corporation will only institute the winding-up of a subsidiary after it has achieved its purposes and if it is solvent. But there is nothing to prevent a dissolution where the subsidiary is insolvent in which case creditors will obtain only a proportionate part of the assets of the subsidiary corporation in settlement of their claims. Hence, can a subsidiary corporation go bankrupt? The statutory provisions authorising parent statutory corporations to set up subsidiary corporations merely state that the parent corporation may establish such corporations as it thinks fit to carry out its functions by publication of an order in the Gazette. There is nothing that states that the liability of the parent statutory corporation in relation to the subsidiary corporation is limited. Although the subsidiary corporation is conferred a separate legal identity, it appears that it is not conferred with the benefit of limited liability as well. Accordingly, it is submitted that the parent statutory corporation would be fully liable for the liabilities of the subsidiary corporation. In any event it is unthinkable that the parent statutory corporation would allow any of its subsidiaries to go bankrupt. Where a subsidiary had been set-up by registration under the Companies act, 1965, and conferred limited liability, then the provisions of the Companies Act on winding-up would apply, and the possibility of insolvency, in such a case, cannot be ruled out.

[89] See as a typical example Perbadanan Pembangunan Negara Act, 1971, Fourth Schedule para. 6 .

As regards the statutory corporation itself, it is entirely a creature of statute, and accordingly, it can only be wound-up and dissolved if there is a provision to that effect in the statute or if Parliament enacts the necessary legislation. Alternatively, the Government can simply allow the statutory corporation to become defunct without any formal winding-up. The incorporating statutes do not generally make provision for the winding-up and dissolution of a statutory corporation. A special statute would have to be passed to wind-up any particular statutory corporation by repealing the incorporating legislation and making provision for the disposal of its assets. This has only been done when a statutory corporation has been reorganised to form a new corporation, and the assets, rights and liabilities of the old corporation transferred to the new corporation. Hence RIDA was reorganised to form MARA. The statute incorporating RIDA was repealed and its undertaking transferred to MARA.[90]

The question again arises whether a statutory corporation itself could go bankrupt. This could happen in two ways. Firstly, if it was not a profit-making enterprise and the Government stopped pumping money into it, it would no longer be able to function and it would hence become bankrupt in the normal way. Secondly, it could be dissolved by Act of Parliament and if it was found in the winding-up that its liabilities exceed its assets. In either case it is not in a position to pay off its creditors in full. The sceptre of insolvency looms particularly large in the case of statutory corporations that borrow heavily from the private sector. These would collapse if the Government withdrew its support.

Although statutory corporations, like public corporations, are bodies corporate, unlike public corporations, nobody holds any shares in them. Statutory corporations are literally created out of thin air and constituted separate legal *personae*. Public corporations, on the other hand have to be registered as such by their promoters, the Government, and they obtain their finance from the amount paid up on the shares allotted to its shareholders. Statutory corporations, are however, given an allocation out of the general revenues of the country. The creation of a separate body corporate does not *ipso facto* confer upon it limited liability. Public corporations have limited liability because they are incorporated with limited liability. It is, however, possible to incorporate a company with unlimited liability.[91] The statutes establishing statutory corporations do not state that the corporation is to have limited liability and there is no measure of limited liability spelt out in the statutes; in the case of public corporations, the memorandum of association specifies how liability is limited. There-

[90] Majlis Amanah Ra'ayat Act, 1966, Part VII

[91] Companies Act, 1965 (Revised 1973) s. 14(1)

fore it would appear that statutory corporations cannot claim limited liability and therefore cannot go bankrupt as the Government would have to meet their liabilities.

The one objection that this submission meets is that a statutory corporation is after all a separate legal entity. There is nothing in the incorporating statute which stretches the liabilities of a statutory corporation beyond the corporation itself. The corporation is given its own rights, obligations and powers, which it exercises under ministerial control to achieve Government objectives. Yet, this does not mean that the Government is liable for the actions of the corporations. The very purpose of setting up the corporation is to divorce the activities of the corporation from the machinery of Government. Since the statutory corporation has been set up as a separate legal *persona* it should face up to its own actions, and persons dealing with it should be taken as dealing only with the statutory corporation itself and not with the Government. Applying this reasoning it is quite feasible that a statutory corporation can go bankrupt. However, it is envisaged that the Government would never allow this to happen as it would be tantamount to an admission of failure. The public sees the hand of Government in the actions of statutory corporations and it would be politically disastrous for the Government to allow a statutory corporation to go bankrupt. It might be added that there has been no instance of a statutory corporation going bankrupt or professing bankruptcy in Malaysia yet.

The more recent enactments establishing the SDCs make provision for the winding up and dissolution of the corporation. For example by s.27 of the Malacca State Development Corporation Enactment, 1971, the Governor-in-Council may make rules for the winding-up of the Corporation. Surpluses in the winding-up are to be paid into the State Consolidated Fund, and deficits are to be defrayed out of monies provided by the Legislative Assembly. In this case it is clear that the Corporation cannot go bankrupt and all creditors will be paid in full. The State has taken it upon itself to make good deficits. However, the enactments establishing the older SDCs e.g. the Selangor SDC merely provide that the Sultan-in-Council may wind-up and dissolve the corporation. Although the surplus is required to be paid to the State no mention is made as to how any deficit is to be made good. The fact that the surplus has to be paid to the State does not necessarily mean that the State must make good any deficit without an express provision to that effect. The paying of the surplus to the State is logical and fair as it is the State that established the Corporation, the position being analogous to that of a company going into liquidation with a surplus, which surplus must be returned to the shareholders proportionately. However, as in the case of Federal statutory corporations, nothing in the incorporating legislation

limits the liability of the corporation and accordingly the same issues raised in relation to the bankruptcy of Federal bodies would apply equally to the SDCs.

(C) Subsidiaries and Joint Ventures of Public Corporations and Statutory Corporations

The total number of subsidiaries set up by public corporations and statutory corporations, either to carry out a particular aspect of the functions and duties of the parent corporation or to enter into joint ventures with partners from private enterprises at the present time far outnumber the total number of public corporations and statutory corporations. If the great proliferation of public enterprises are thought to create problems of control, administration and co-ordination, the greater proliferation of subsidiaries raise the same problems, if not more so. Subsidiaries are established not only at Federal level but also by the SDCs. For example PERNAS alone has 19 wholly owned subsidiaries and joint-ventures running at the present time.

The large number of subsidiaries give rise to concern at two levels. Firstly, the Government is confronted with serious problems in ensuring that the subsidiaries are carrying out the objectives of the New Economic Policy as laid out in the Second Malaysia Plan. Secondly, the parent corporations themselves are presented with serious problems of supervision, control and co-ordination of so many subsidiaries. As regards control and supervision by the parents of their subsidiaries the problem lies in the creation of a proper system of overall administration of the subsidiaries. In the quest for a suitable system, the experience of the multi-national commercial corporations may be drawn upon. Eventually the relationship between parent and subsidiary should be one which gives the subsidiary maximum freedom and flexibility of running the undertaking on a day-to-day basis. However, the parent should have strong controls over goals, planning and capital expenditures. This involves the making of comprehensive short and long terms plans which then constitute the blue print of action for the subsidiary. The subsidiary should be required to make periodical reports on its progress, performance, production and the problems confronted by it in meeting the targets set down for it in the plan. These reports should not be merely the accounts of the subsidiary but detailed reports dealing with specific matters. The threat of dismissal of the managers of the subsidiaries is an effective means of ensuring that the managers make every effort to implement the plans and targets laid down for them, even though they have a considerable degree of freedom in the means of implementing those targets.

The problems of control, supervision and co-ordination at Governmental level of subsidiaries are even more difficult. In looking at these problems, it must be remembered that public corporations and statutory

corporations set up their subsidiaries in different ways. A public corporation sets up a subsidiary by registering it with the Registrar of Companies in the usual manner. Accordingly, the subsidiary is subject to all the provisions of the Companies Act, 1965, and the consequences of incorporation and control discussed for public corporations will equally apply here.[92] Hence all the powers of control possessed by a majority shareholder will be available to the public corporation.

In the case of statutory corporations, a subsidiary is set up under the authority of the statute incorporating the parent corporation. This is usually done by notification in the Gazette although now most subsidiaries of statutory corporations are also incorporated by registration under the Companies Act. As regards the formal relations between the subsidiary and the parent statutory corporation, the statute governing the parent usually empowers it to make regulations in respect of, management, and the relations between the corporation and the parent, and the rights of control of the parent over the subsidiary.[93]

Although the legal means of control and supervision available to the parents of the subsidiaries of public corporations and statutory corporations are considerable, it is clear that the Government is one step removed from the subsidiaries and it can only exercise its control through the parents. In the case of public corporations, the Government can exercise its powers as a majority shareholder[94] to coerce the parent to carry out its wishes in relation to the subsidiary. In the case of statutory corporations the Government can rely on its statutory powers[95] in relation to the parent corporations to get its way in the subsidiaries. Hence although the Goverment does have indirect means of legal control over the subsidiaries of public enterprises, it is submitted that the real problem is not so much one of legal means of control but of the practical means of ensuring proper co-ordination and supervision and assuring implementation of Government objectives. The means relied upon at present are the various planning, implementation and co-ordination units set up by Government.[96]

There is yet a further problem in the case of joint ventures with private enterprise partners. Joint ventures usually take the form of registered companies to which both the partners subscribe for shares. Generally speaking the object of a private enterprise in undertaking any commercial or indus-

[92] See *supra*, p. 23–26.

[93] Perbadanan Pembangunan Bandar Act, 1971, Fourth Schedule, para. 1

[94] See *supra*, p. 23–25

[95] See *supra*, p. 31–38

[96] See *supra*, p. 15–17

trial venture is ultimately to make profits. Bearing in mind that it is frequently not the aim of a public enterprise to make profits but to achieve objectives of national development, sooner or later there will arise a clash of interests between the public enterprise body and the private partner to a joint-venture. Generally, where a public enterprise body enters into a joint venture with a private enterprise partner, the public enterprise holds the controlling interest, which means that the public enterprise can get its own way in most things. However, a substantial portion of the ownership of the joint venture is usually in the hands of the private partner, and this can be used to block the public enterprise partners in achieving their objectives in many ways. Thus, for example if the private partner holds more than one-quarter of the shares of the joint-venture subsidiary, the public enterprise partner will not be able to secure the passage of any special resolutions without the co-operation of the private partners.[97] This problem is further aggravated where the private partners hold a majority of the shares.[98]

Although it is true that many private enterprises, particularly foreign companies, do not have an immediate profit-motive in entering into a joint venture with a public enterprise, their object being to gain favour with the Government, in the long-run the shareholders of the private enterprises will raise their voices if the joint-venture does not produce a return. Bearing in mind that in the long-run it is the object of the Government to hive off its enterprises to private Bumiputra hands, including the joint-ventures, once this is done there would not be such an apparent conflict of interests between the private enterprise partner and the private Bumiputra shareholder. Both partners would then be seeking to make a profit. There is yet another danger. If the shares are held by a large number of private Bumiputras on the one hand and by one large private enterprise corporate owner on the other, effective control of the undertaking would vest in the hands of the private enterprise partner, even if overall it holds a minority of the shares. One shareholder holding a large block of shares in a company can frequently win his way through in the running of the affairs of a company as there is no real counter balancing united block that can stand up against him. In practice a 20% to 30% shareholding by one person has been sufficient to secure effective control of a company.

IV. CONCLUSION

It is obvious that every legal form and structure presents its own special problems of management, administration, co-ordination, accountability,

[97] Companies Act, 1965, (Revised 1973) s. 152

[98] For example PERNAS holds only 39% of the shares in Goodyear Malaysia Sdn. Bhd.

and control. These problems are further aggravated when it is remembered that public enterprises in Malaysia are expected to achieve both economic goals and social goals by helping to re-structure society. Since no legal form is perfect, the question arises whether then is a need for any legal form at all? In a society in which the rule of law prevails, and where the public enterprises are constantly in touch with the man on the street, it is obvious that these public enterprises must take some legal form. In performing their functions they have to operate within society. There must be some limits placed on the exercise of their powers and where these powers are exercised so as to infringe the rights of the individual, then that power must be exercised in accordance with given procedures and rules. For example many of the statutory corporations, have power to purchase land compulsorily. It is of utmost importance that this power be exercised with due regard for the rights and interests of the individuals affected and in accordance with the general body of law. Furthermore, a better public and Governmental check on the performances and activities of public enterprises can be maintained if the enterprises takes a particular legal form. The legal form goes some length in laying down the framework within which the public enterprise must operate. If no legal form is given to public enterprises what little public control there is available, at least in theory, would be lost. Public enterprises would then become governmental limbs, both in form and substance. The advantages of efficiency, separate legal identity and greater degree of active participation at grass-root level in all spheres of activity would be lost. Governmental red-tape and administrative bottle-necks would enmesh what are meant to be essentially commercial activities of public enterprises, which would in turn result in a considerable slackening in the pace of growth and general performance of public enterprises.

The great proliferation of public enterprises in Malaysia since 1969 has given rise to serious problems of co-ordination and control. It can almost be said to be true that the monster created has swallowed its creator. The fact that the Government itself feels the need for greater co-ordination, control and supervision is evidenced by the creation of the Ministry of Public Corporations and Co-Ordination (*see supra*). However, this Ministry being in its infancy and having only a few authorities under its control has yet to prove its effectiveness. But in its very inception a number of difficult problems arise. Firstly, it will be observed that both statutory corporations and public corporations come under it. In the case of the statutory corporations (eg. UDA, and MARA.) the Ministry merely takes over the role of the ministry or department prescribed under the incorporating statute as the controlling ministry. Since its sole job is to control and co-ordinate public corporations no doubt the control and supervision exercised over the authorities concerned will be more close than was possible under a ministry having a host of other duties. But the question is whether the

incorporating statutes themselves have provided for sufficient ministerial control. No doubt all funding must be made through the Ministry, and this will be the chief means of control. Proper co-ordination can only be achieved if supervision can also be exercised at project level, especially in planning and monitoring implementation, but in order for the Ministry to be able to do this the incorporating statute must make adequate provision conferring upon the Ministry such powers as are necessary. The problem is further accentuated in the case of those authorities which are incorporated under the Companies Act. (eg. PERNAS and FIMA). As seen above, in the case of such authorities the only control which Government can exercise is that of shareholder, which control is by no means extensive. Even the chief control of finance is lacking as public corporations are free to borrow in the private sector, there being no limitations on their powers to borrow under the law other than those limitations under the memorandum and articles of association of the company. Generally speaking, these documents only contain such restrictions on borrowing powers as are common for any other commercial company.

In view of these difficulties, even with the creation of a special ministry to oversee public enterprises, it is suggested that steps be taken to streamline the legal structure of public enterprises while preserving the distinction between public corporations and statutory corporations. This distinction continues to serve a useful purpose because of the different areas and methods of participation of different corporations and their different objects.

In the case of statutory corporations, it is suggested that legislation be enacted providing for certain common features applicable to all statutory corporations. These common features could include things like separate legal entity, the extent, degree and nature of ministerial control, the manner of preparation of accounts and carrying out of audit, publicity, and the winding-up of the corporation and distribution of its assets. A separate statute would nevertheless have to be enacted each time the Government wished to set up a corporation. This statute would provide for its objects and powers, area of operations, composition of the board of managers, and any other matters special to that corporation. Such a system would ensure uniformity in matters of control and supervision while giving the corporation its special function and sufficient flexibility in achieving it. Parliament would still continue to be able to question the Government when it seeks to establish a corporation.

In the case of public corporations, it is suggested that a separate division be enacted into the Companies Act dealing with companies set up by Government. This division could confer upon the Minister special powers of control, confer upon the company special powers and privileges and make special provision for publicity and accountability. In all this, however, care must be taken to ensure that the advantages of in-

dependence, flexibility and the ability to function as a commercial entity are not eroded: a careful balance must be maintained.

A cursory comparision between the structure of Malaysian statutory corporations and British statutory corporations reveals a high degree of similarity between the two. Malaysia has adopted the British model even though the baseline and objectives of statutory corporations in Malaysia are radically different from those of their British counterparts. Whereas the important statutory corporations in Britain are the result of the nationalisation of existing industries for political purposes, in Malaysia statutory corporations have been set up from scratch with heavy Governmental backing to achieve given social and economic goals. The question that arises is whether the British model is really suitable in Malaysia where the aims and desires for setting up the statutory corporation are completely different. The checks and balances of autonomy versus accountability which are to be found in the United Kingdom are absent in Malaysia. The party system in the United Kingdom is much stronger than in Malaysia and Parliament in the United Kingdom is certainly a more effective forum for public debate. Ministerial responsibility for the activities of public enterprises is more real in the United Kingdom than it is in Malaysia. Hence most of the conditions prevalent which make the use of statutory corporations in the United Kingdom desirable are lacking in Malaysia.[99]

The least that can be done in Malaysia to bring about greater public knowledge of the affairs of public enterprises and to afford an opportunity to scrutinise their affairs, is to set up an investigatory committee on the lines of the United Kingdom Select Committee on public corporations. This committee would be able to keep tabs on the activities and performances of public enterprises and indirectly give the public more information about them. The knowledge that a public enterprise is subject to the scrutiny of a permanent committee will also go some length in ensuring that the public enterprise does not embark upon obviously misconceived projects and does not squander public money. The committee will also act as a brake on indiscriminate ministerial control and directives as the minister will become answerable for his conduct in relation to the public enterprise to the committee.

The two most anomalous features of public enterprises in Malaysia are first, the fact that very little research on the legal implications of public enterprises in the light of Government objectives has been done,

[99] For an excellent analysis of the pitfalls of a developing country relying on the model of a developed country for its public enterprises, see R.C. Pozen, *"Public Corporations in GHANA: A case study in Legal Importation"* [1972] No. 3, Wisconsin Law Review, 802.

and secondly it appears that a cloak of secrecy covers all public enterprises. One is confronted with considerable difficulty in prising any information out of Government officials and officials of public enterprises. There is an urgent need for a co-ordinated and comprehensive study of the legal structure and accountability of public enterprises in Malaysia.

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