

THE LEGAL STATUS AND ORGANIZATION OF THE PUBLIC CORPORATION

W. FRIEDMANN*

I

The public corporation has, since the end of the first world war, become a familiar device for the organization of public enterprises and services in many different countries and legal systems.

Both its value and its elasticity can be gauged from the fact that it has been adopted in the socialist and entirely state-controlled economic system of Soviet Russia as well as in the non-socialist system of the United States.

The Soviet Union proceeded, only a few years after the revolution, to develop the institution of the state trusts¹ for the running of major industrial state enterprises. These trusts are constituted as autonomous legal units; they receive their charter from the Supreme Council of National Economy, which also appoints the members of the board; they have two types of capital assets which roughly correspond to the distinction between fixed and floating assets of British company law. The fixed assets belong to the state, the floating assets belong to the trusts—that is to say, they are state property at one remove and can be freely disposed of. The trusts enter into contractual and other legal transactions, and legal disputes between them are settled by special courts which have developed principles of mixed contract and administrative law.²

In Germany the public corporation appears in two forms. One makes the state or other public authorities a shareholder in a company; the undertaking is organized in the form of a joint stock company and governed by company law, with the state or other public authorities holding a controlling or substantial interest as shareholder.³ A more genuine form of public corporation was devised when the Dawes Plan constituted the German State Railways as an independent commercial company, under a control board with Allied participation, charged with reparation obligations and separated from the state budget.

By far the most highly developed and instructive type of public corporation for the British lawyer is the Tennessee Valley Authority (T.V.A.), an outstanding example of public enterprise in a non-socialist economy.

As the illustrations given in this paper will show, the public corporation has achieved particular significance in Britain as well as the British Dominions. A

* Professor of Law, University of Toronto, Toronto, Ontario.

¹ The first decree was of April 10, 1923.

² Cf. RUDOLF SCHLESINGER, *SOVIET LEGAL THEORY* 137-139, 247 (1945). HAROLD J. BERMAN, *JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW* 60-78 (1950).

³ This is known as "mixed public enterprise" (*Gemischt-Wirtschaftliche Unternehmung*).

multitude of enterprises of all kinds are organized in this form: from the British Broadcasting Corporation to the National Coal Board, and the other recently nationalized basic industries; from the Regional Hospital Boards and Management Committees administering the National Health Service, to the Australian Forest and Housing Commissions; from the Trans-Australian Airlines, operating in competition with private air services, to the Canadian Power Commissions and the Canadian National Railways; from the British Development Corporations set up under the New Towns Act, 1946, to the Australian Repatriation Commission, in charge of the civilian rehabilitation of ex-servicemen. It appears that in Britain and the British Dominions, which, despite many differences and changes of government, broadly concur in the blending of an extensive social service state with the preservation of a large degree of private enterprise, the public corporation is regarded as the best way in which to combine the principles of public service and ownership with those of managerial responsibility and financial accountability.

Lastly, the legal form of the public corporation has been adopted by the constitutions of the many functional international agencies created in conjunction with the United Nations Organization. Such institutions as the Food and Agriculture Organization, the World Health Organization, U. N. E. S. C. O., the International Monetary Fund, and others may conveniently be termed international public corporations.⁴ Their constitutions and functions naturally differ somewhat from those of the national corporations, as they are institutions of international law. They share with the national public corporations, however, the essential characteristics of a separate legal personality, and relative autonomy of management (represented by the director-general and his permanent staff), coupled with responsibility to a political body (the delegates of the member nations), and financial accountability.

II

DEFINITION AND GENERAL CHARACTERISTICS OF PUBLIC CORPORATIONS

A. General Characteristics

While the idea of an autonomous corporation, responsible not to private shareholders but to public authority, has thus commended itself to the most diverse legal and social systems, the structure and characteristics of the public corporation are inevitably determined by the difference in the legal and constitutional systems in which they are established. The objective is given in President Roosevelt's classic summary in his message to Congress in 1933 recommending the formation of the T.V.A.:^{4a}

. . . a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise.

But there are vast differences between the Soviet state trust which is under the all-

⁴ Friedmann, *International Public Corporations*, 6 MOD. L. REV. 185 (1943); Schmitthoff, *The International Corporation*, 30 TRANSACTIONS OF THE GROTIUS SOCIETY FOR THE YEAR 1944 165 (1945).

^{4a} H. R. Doc. No. 15, 73d Cong., 1st Sess. (1933); 77 CONG. REC. 1423 (1933).

pervading economic and political control of the Soviet government, in a completely socialized system, the T.V.A., whose responsibility towards Congress and the President respectively reflects the American system of division of powers, and the British public corporation which, after some experimenting, now reflects the British system of indirect responsibility to Parliament, through the government.

Even within the British legal system, the public corporation stands for a variety of functions and purposes.⁵ The first task is as clear a definition of its nature and characteristics as is possible.

From other public authorities such as borough councils or other local government authorities, or from the Crown itself, the public corporation is distinguished by its functional character. However widely defined its objectives (and such public corporations as the National Coal Board or the British Transport Commission do exercise vast functions and many powers), it is not a multi-purpose authority but a functional organization, created for a specific purpose: the provision of transport or broadcasting services, the management of hospital and health services, the development of colonial resources, the administration of compensation for the nationalization of development rights in land, the provision of houses for certain sections of the population, or the import and sale of raw cotton. The nature of these services thus varies widely, from commercial and trading to cultural and supervisory administrative activities, as well as the provision of social services. As will be shown later, the nature of the services performed is not without importance for the legal status of the corporation. It is, however, possible to outline certain universal legal characteristics of the public corporation, applicable to all types:

(1) The public corporation has no shares and no shareholders, either private or public. Its shareholder, in a symbolic sense, is the nation represented through government and Parliament.

(2) The responsibility of the public corporation is to the government, represented by the competent minister, and through the minister to Parliament.

(3) The administration of the public corporation is entirely in the hands of a board which is appointed by the competent minister, sometimes after and mostly

⁵ The following major statutes establishing public corporations are repeatedly referred to in the text:

Agriculture Act, 1947, 10 & 11 GEO. 6, c. 48.

Air Corporations Act, 1949, 12, 13 & 14 GEO. 6, c. 91.

Coal Industry Nationalisation Act, 1946, 9 & 10 GEO. 6, c. 59.

Coal Industry Act, 1949, 12 & 13 GEO. 6, c. 53.

Electricity Act, 1947, 10 & 11 GEO. 6, c. 54.

Gas Act, 1948, 11 & 12 GEO. 6, c. 67.

Iron and Steel Act, 1949, 12 & 13 GEO. 6, c. 72.

National Health Service Act, 1946, 9 & 10 GEO. 6, c. 81.

New Towns Act, 1946, 9 & 10 GEO. 6, c. 68.

Overseas Resources Development Act, 1948, 11 & 12 GEO. 6, c. 15.

Town and Country Planning Act, 1947, 10 & 11 GEO. 6, c. 53.

Transport Act, 1947, 10 & 11 GEO. 6, c. 49.

without consultation with any special group or industry but invariably not on a basis of representation of specific interests.⁶

4. Where a public corporation needs capital—those of an essentially administrative character do not—it is provided, in the case of public corporations administering nationalized industries, through assets taken over from private ownership and capitalized through the issue of interest-bearing stock.

Such stock is either government stock or, in most cases, stock issued by the public corporation with a Treasury guarantee. The financial assets of public corporations which have not acquired the assets of formerly private industries (such as the Airways Corporations) consist of corporation stock with a Treasury guarantee, supplemented by the power of the minister to give certain Exchequer grants during the formative period. The industrial public corporations have furthermore the power to borrow money, with the consent of their supervising minister and the Treasury, within limits fixed by the acts.

(5) The public corporation has the legal status of a corporate body with independent legal personality.

(6) All public corporations are supervised by commercial accounting and auditing as well as some form of public control. But the type of accounting and public control varies according to the type of public corporation.

(7) All public corporations have a dual nature: they are instruments of national policy but they are autonomous units, with legal independence and certain aspects of commercial undertakings. The degree of independence varies, however, according to the type and purpose of the public corporation.

B. Three Types of Public Corporation

The nationalization of British industries has brought into prominence the industrial or commercial type of public enterprise. It now looms large, with such giant enterprises as the National Coal Board, the Transportation Commission, the British Electricity Authority, the Iron and Steel Board, the Gas Council, the Airways Corporations, the Colonial Development Corporation, and the Overseas Food Corporation. This type of public corporation, which may be described as the *commercial corporation*, is designed to run an industry or public utility, according to economic and commercial principles but subject to public responsibility to the appropriate constitutional authorities. There is, secondly, what we may term the *social service corporation*.⁷ This type of corporation is designed to carry out a par-

⁶ The Board of the Port of London Authority consists of representatives of the directly interested industries. The Board of the former London Passenger Transport Board was appointed by trustees. While the former method can be justified for the particular case of a port authority, the latter method has been criticized by both GORDON, *PUBLIC CORPORATIONS* (1937), and ROBSON (Ed.), *PUBLIC ENTERPRISE* (1937), as removing the board from proper public control. This method of "appointing trustees" has now been abandoned.

⁷ This terminology suggested in my paper, *The New Public Corporations and the Law*, 10 MOD. L. REV. 233, 377 (1947), has been accepted by Professor Glanville Williams in *CROWN PROCEEDINGS* 28 (1948). The term "commercial public corporation" is also used by the Court of Appeal in *Tamlin v. Hannaford*, [1950] 1 K.B. 18 (C.A.) (Denning, L.J.).

tical social service on behalf of the government. It is represented by such enterprises as New Town Development Corporations, Regional Hospital Boards and Management Committees, the Central Land Board, and the Agricultural Land Commission. These and similar public corporations also have to undertake numerous commercial and managerial functions. They have to employ staff, buy equipment, manage large institutions. But their essential purpose is that of undertaking a social service on behalf of a government department. They enjoy therefore a smaller degree of independence from managerial supervision than commercial corporations. For example, the Agricultural Land Commission manages and farms land vested in the minister and placed by him under the control of the Commission. It also carries out such other functions as may be entrusted to the Commission by the Act. The Central Land Board, it is specifically provided, exercises its functions "on behalf of the Crown."⁸ Because the Regional Hospital Boards are described as carrying out their functions "on behalf of the minister," it is provided that this shall not affect their legal liability.⁹ The difference between these two types of corporations is reflected in the provisions regarding accountability. After some considerable discussion, it was decided that the commercial corporations would have their accounts audited according to commercial standards and by commercial auditors, but not by the Auditor-General. Such social service corporations as Town Development Corporations and Regional Hospital Boards, on the other hand, must submit their accounts to the minister, who has them audited by the Comptroller and Auditor-General. This indicates a difference in the legal status and constitutional position of the two types of corporation.

It is, however, useful to add a third though less frequent type of public corporation. This may be termed the *supervisory public corporation*. It has essentially administrative and supervisory functions, and it does not engage in commercial transactions, either to fulfil its main objective, or incidentally to the performance of a social service. A good example of this type of corporation within the British legal orbit is the Australian Broadcasting Control Board, created by a statute of 1948. It is established as a corporate body on the usual lines. Its main function is the supervision of both technical and cultural standards of broadcasting services (broadcasting in Australia is shared between a Commonwealth-owned public corporation and a number of commercial stations). This Board has certain powers of direction, including the power to grant loans for certain purposes, with the consent of the Treasury, but it does not itself undertake any commercial operations. The main reason for giving such institutions separate legal status rather than that of a government department, is the greater degree of managerial autonomy, and independence from civil service regulations.

⁸ Town and Country Planning Act, 1947, §3(3).

⁹ National Health Service Act, 1946, §13.

C. Constitution of Boards

In all cases the boards are appointed by the competent minister, who is not tied by any consideration of representative interests in his choice. Appointments have in fact been made throughout on an independent, non-party, and non-political basis, though the different members naturally represent various walks of life and experience.¹⁰ The relevant clause in the Coal Industry Nationalisation Act, 1946, is typical:¹¹

The Board shall consist of a chairman and not less than eight, nor more than eleven other members. The chairman and other members of the board shall be appointed by the Minister of Fuel and Power . . . from amongst persons appearing to him to be qualified as having had experience of, and have shown capacity in, industrial, commercial or financial matters, applied science, administration, or the organisation of workers.

While in some cases the qualifications of the persons whom the minister should appoint are specified, he is left complete discretion in others.¹² Some acts specify groups or authorities which the minister has to consult before appointment.¹³

The minister is usually given power to make regulations with respect to the tenure of office of the board. A standard practice is undoubtedly developing in this field.¹⁴ Neither the members of the board nor the staff of the public corporation are civil servants. The appointment is for a definite term and upon conditions as determined by the minister with the approval of the Treasury. Members of the boards may resign or be dismissed by the minister, in cases specified in the regulations. Apart from membership of Parliament, which is incompatible, the main grounds upon which the minister may "declare the office to be vacant" are the member's engagement in any trade or business including a directorship of a company, or a position as officer or servant in an organization of workpeople. But there is also a general power of dismissal in the case of continued neglect of duty (such as absence from meetings of the board for more than six months consecutively and unfitness to continue in office or incapability of performing duties). In all these respects the discretion lies with the minister, who is given power to approve exceptions, for example in regard to membership in a company or a workmen's organization. A necessary and wholesome provision in the regulations is the obligation laid upon every member of the board to disclose to the minister full particulars of any interest held

¹⁰ In the National Coal Board, for example, the various members have been chosen with regard to their technical knowledge of the coal industry, administrative experience, trade union and labor management experience, etc.

¹¹ Sec. 2, Coal Industry Nationalisation Act, 1946, in conjunction with §1, Coal Industry Act, 1949. Similar clauses are found in: New Towns Act, 1946, §2; National Health Service Act, 1946, Third Schedule; Electricity Act, 1947, §3; Transport Act, 1947, §1; Town and Country Planning Act, 1947, §2; Gas Act, 1948, §1; Iron and Steel Act, 1949, §1.

¹² *E.g.*, in the appointment of the National Assistance Board (National Assistance Act, 1948, 11 & 12 Geo. 6, c. 29, First Schedule). Its members are appointed by His Majesty by warrant under the Sign Manual.

¹³ *E.g.*, the university, the medical profession organization, and the local health authorities are to be consulted in the appointment of members of the Regional Hospital Boards. *Cf.* Third Schedule to National Health Service Act, 1946.

¹⁴ *Cf.* for example, S.R. & O. 1946, No. 1094, regulating appointments to the National Coal Board, in pursuance of §2 of the Coal Industry Nationalisation Act, 1946.

either directly or indirectly in any business similar to that carried on by the board. This includes interests in board contracts and membership in any firm interested in such contracts. It has been customary to provide for "staggered" appointments so that terms of office of the different members of the board shall not expire simultaneously, to the detriment of the continuity of administration.

Decentralization of management and legal responsibilities is a general problem of all the public corporations, which administer the basic national industries. But whereas in most cases, for example that of the National Coal Board, it has been left to the board to organize its own decentralization, the Gas and Electricity Acts provide for Area Boards. The Area Gas Boards, for example, are responsible for the gas supply in specified areas, and for that purpose have a number of ancillary powers, including the manufacture and distribution of gas and certain ancillary products. On a more limited scale, the powers of the Area Boards are parallel to those of the wider national corporation. They are, however, generally responsible to the latter, in a way roughly comparable to the responsibility of the national corporations to their respective ministers.¹⁵

D. Advisory Councils

The public corporation is not under the control of a shareholders' meeting. Theoretical though the control of shareholders is today in the case of most companies, the link established between the public corporations and Parliament, through the competent minister, does not create sufficient contact between the public corporation and the public. A series of advisory councils or committees have been constituted for the specific purpose of giving independent advice to the minister on behalf of the public in general, or of such groups of the public as are particularly interested in the enterprise concerned. Although the type and composition of these advisory councils varies according to the nature of the industry or enterprise concerned, a general pattern can be discerned. The advisory councils are appointed by the minister "as the minister may think fit," or "as the minister may from time to time determine."¹⁶ But the minister is directed in the acts to consult with certain organizations before he makes the appointments.¹⁷ Thus, in the case of the coal industry, an Industrial Coal Consumers' Council and a Domestic Coal Consumers' Council have been established. The minister is to consult on the appointments

with such bodies representative of the interests concerned as the Minister thinks fit and he

shall have particular regard to nominations made to him by the said bodies representative of the interests concerned of persons recommended by them as having both adequate

¹⁵ Cf. for example, Gas Act, 1948, §2(iv), §4(ii).

¹⁶ This seems an example of needless diversity in terminology.

¹⁷ See §4, Coal Industry Nationalisation Act, 1946; §6, Transport Act, 1947; §6, Iron and Steel Act, 1949.

knowledge of the requirements of those interests and also qualifications for exercising a wide and impartial judgment on the matters to be dealt with by the council generally.

The Iron and Steel Act provides for a single Iron and Steel Consumers' Council, consisting of an independent chairman and from fifteen to thirty other members appointed by the minister, after consultation with representative bodies. The Gas and Electricity Acts, in conformity with the policy of decentralization, establish a number of consultative committees, one for each Area Board.

It is the function of these advisory councils to advise and report to the minister on the matters on which they are competent. They are to make annual reports to the minister, who shall lay them before Parliament. The members of the councils are not full-time officials or employees. But provision is made for full-time staffs, whose remunerations are determined by the minister with the approval of the Treasury. There are some strange and apparently unnecessary inconsistencies in the constitution of the different committees.

Thus, the Coal Act lays down that the two Consumers' Councils shall consist of persons appointed by the minister "to represent the board." A similar provision does not exist in the case of the three Transport Users' Consultative Committees. The function of these committees, which is to represent the section of the consuming public concerned (including industry) in a position of independence of the board, and with full power to criticize it, seems incompatible with their representing the board. On the other hand, the Transport Act does provide that the full-time officers and servants of the consultative committees are to be provided by the Transport Commission itself (Section 7(7)). The Coal Industry Nationalisation Act, by contrast, provides that clerks, officers, and staff are to be furnished by the minister, with the concurrence of the Treasury. This is both more logical and more sensible if the consumers' councils are to have a position of independence towards the boards.

How far the advisory councils are in practice fulfilling the function of independent consumers' representatives, is a matter of some doubt. A recent report in *The Economist*¹⁸ asserts that the Coal Consumers' Councils—which have so far issued three annual reports—tend too much to regard themselves as part of the organization, and to whitewash the boards which it should be their duty to criticize if necessary. The danger of subservience, or at least lack of sufficient independence, is obviously greater where the officers and staff of the councils are supplied by the corporation. This is so with the Coal Councils, but not with the Iron and Steel Consumers' Council, or the consultative Council set up in the Electricity Act, for each Area Board. The latter are far closer to local opinion; but the chairman of the area council is also an ex-officio member of the area board. Suggestions have recently been made in Parliament that the advisory and consultative councils should be made more independent of the boards, by a complete separation of both finance and personnel.

¹⁸ *The Economist*, Aug. 5, 1950, pp. 276-278.

An altogether different institution is the Air Transport Advisory Council,¹⁹ which is constituted in the form of a tribunal with a legally qualified chairman and has the function of considering representations from any person

with respect to the adequacy of the facilities provided by any of the Airways Corporations, or with respect to the charges for any such facilities. . . .

The council has a wide discretion in rejecting representations which they consider frivolous, vexatious, or inexpedient.

Despite its semi-judicial composition, the council has only the power to make recommendations to the minister, and it must make an annual report which the minister shall lay before Parliament, together with a statement of any recommendations submitted by him in consequence, or any recommendations submitted to him by the council. It is difficult to see the reason for this fundamental difference between the Air Transport Advisory Council and the other advisory councils. Both are advisory, but both may have to deal with such matters as charges for goods and services. Nor is it apparent why the Air Transport Advisory Council should be constituted in the form of an administrative tribunal.

E. Legal Powers of the Public Corporation

A comparison of the powers clauses in all the relevant acts shows that the legislator has chosen wide and elastic formulas giving the corporations almost unlimited scope and discretion.²⁰

The formulations are, however, far from identical. The general pattern is that of setting out the specific tasks of the public corporation in question. This is followed by provisions specifying a number of particular activities which the public corporation shall be empowered to carry out, but without prejudice to the generality of the powers granted in the section as a whole. To this is added a general powers clause of varying formulation. Thus, the Coal Industry Nationalisation Act provides:

The Board shall have power to do anything and to enter into any transaction . . . which in their opinion is calculated to facilitate the proper discharge of their duties under subsection (i) [which defines the duty of producing and supplying coal] of this section or the carrying on by them of any such activities as aforesaid or is incidental or conducive thereto.

The Electricity Act chooses a slightly different formulation:

. . . which in their opinion is calculated to facilitate the proper performance of their duties under the foregoing section or the exercise or performance of any of their functions under the foregoing provisions of this section, or is incidental or conducive thereto. . . .

This is followed by a specific restriction on the powers of an area board in regard

¹⁹ Sec. 12, Civil Aviation Act, 1949, 12 & 13 GEO. 6, c. 67.

²⁰ *E.g.*, §1(3), Coal Industry Nationalisation Act, 1946; §2(5), Electricity Act, 1947; §2, Transport Act, 1947; §3(2), Air Corporations Act, 1949; §2, New Towns Act, 1946; §2, Iron and Steel Act, 1949.

to the manufacture of electrical plant and electrical fittings, which is reserved to the central authority.

The Air Corporation Act has a different and more complex powers clause. It first defines the duty of the Airways Corporations:

to provide air transport service and to carry out all other forms of aerial work. . . .

It secondly contains a general powers clause in the following form:

Each of the corporations shall have power, subject as hereinafter provided, to do anything which is calculated to facilitate the discharge of their functions under the preceding subsection or of any other functions conferred or imposed on the corporation by or under this Act, or is incidental or conducive to the discharge of any such functions.

The Act thirdly gives the minister the right to define the previously conferred powers for the purpose of keeping the public properly informed as to the nature and scope of the activities of the public corporation; but it is added that

nothing in any such order shall prejudice the generality of the powers conferred by the preceding provisions of this section.

The Act fourthly withholds from all three corporations the power to manufacture air frames or aero engines or air screws. The Act fifthly enumerates certain additional powers, again without prejudice to the generality of the powers previously conferred, to acquire auxiliary undertakings. It lastly authorizes the minister to issue an order which limits the powers of any of the three corporations, to such extent as he thinks desirable in the public interest, by making their exercise dependent on a general or special authority given by him. Such order must be laid before Parliament, which may annul it within forty days.

The powers clause of the Development Corporations under the New Towns Act is again different. It firstly defines their objects, and enumerates a number of specific powers, to which is added a general clause in the following form:

to carry on any business or undertaking in or for the purposes of the new town, and generally to do anything necessary or expedient for the purposes of the new town or for purposes incidental thereto.

The Act then specifically excludes the power to borrow money (other than ministerial advances under the Act) and authorizes the minister to give directions restricting the exercise of any of the powers of the corporation or to give instructions as to the manner of their exercise. But it is further provided:²¹

. . . any transaction between any person and any such corporation acting in purported exercise of their powers under this Act shall not be void by reason only that it was carried out in contravention of such directions unless that person had actual notice of the directions.

The Transport Act, alone of the laws setting up commercial public corporations, defines the powers of the Transport Commission by way of enumeration, without adding a general and elastic clause of the type mentioned before.

²¹ Sec. 2(3)(b), New Towns Act, 1946.

The clauses defining the powers of the non-commercial public corporations are markedly different. Their position is more that of auxiliary organs of the minister in the performance of a social service. Thus, the National Health Service Act provides in Section 11 that Regional Hospital Boards shall be constituted

. . . for the purpose of exercising functions with respect to the administration of hospital and specialist services in those areas. . . .

Section 68 of the Agriculture Act defines the function of the Agricultural Land Commission as:

(a) managing and farming land vested in the Minister . . . being land which is placed by him under the control of the Commission; and (b) advising and assisting the Minister in matters relating to the management of agricultural land, and with such other functions as may be entrusted to the Commission by or under the provisions of this Act.

Certain functions, such as the acquisition or the disposal of land except where specifically placed under its control, are excluded from the capacity of the Commission, but a general clause similar to those in the acts regulating the nationalized industries gives the Commission

. . . power to enter into such transactions and do all such things (whether or not involving the expenditure of money) as in their opinion are expedient for the proper discharge of their functions.

These functions are, however, much more limited and specific than those of the commercial corporation.

The degree of elasticity of the powers conferred upon the corporations, and in particular, the choice between an objective and a subjective formulation of those powers, has a direct bearing upon the question of ultra vires control. The greater the discretion placed in the hands of the governing body of the corporation, the smaller the scope of judicial control.

III

THE LEGAL STATUS OF PUBLIC CORPORATIONS

A. Corporate Character

Substantially similar provisions in all the acts provide for the establishment of the public corporations as "a body corporate . . . with perpetual succession and a common seal and power to hold land without licence in mortmain."²²

The acts do not state specifically that the public corporations are to be on the same footing as any private legal person in respect to legal duties, liabilities, charges, etc. That they are to be in such a position can, however, be inferred from two typical sets of provisions.²³ One says that

Nothing in this Act shall be deemed to exempt the Corporation from liability for any tax, duty, rate, levy or other charge whatsoever, whether general or local.

²² *E.g.*, §2, Coal Industry Nationalisation Act, 1946; §2, New Towns Act, 1946; First Schedule to Transport Act, 1947; Third Schedule to National Health Service Act, 1946.

²³ See, for example, the Iron and Steel Act, 1949, §§9 and 10.

This clause makes it clear that the public corporations do not participate in any privileges or immunities of the Crown. Another typical provision is as follows:

(1) The Public Authorities Protection Act, 1893, and section twenty-one of the Limitation Act, 1939, shall not apply to any action, prosecution or proceeding against the Corporation, or for or in respect of any act, neglect or default done or committed by a servant or agent of the Corporation in his capacity as a servant or agent of theirs.

(2) In their application to any action against the Corporation sections two and three of the Limitation Act, 1939 [which relate to the limitation of actions of contract and tort, and certain other matters] shall have effect with the substitution for references therein to six years of references to three years.

This provision implies that the public corporations are fully liable in law in actions for breach of contract, tort, recovery of property, etc. Their special position, and their duties as public authorities responsible to a minister, are reflected only in the privilege of a shortened limitation period.

The normal commercial public corporation, such as the National Coal Board or the Transport Commission, is politically responsible to the minister and through him to Parliament. But legally, it is in no sense an agent or servant of the minister or the Crown. This is brought out clearly by certain differences in the drafting of the relevant statutes. Some of the social services corporations are specifically assigned their functions "on behalf of" the executive. Thus, the Town and Country Planning Act, 1947, stipulates that "the functions under this Act of the Central Land Board, and of their officers and servants, shall be exercised on behalf of the Crown." The National Assistance Board, which administers assistance to "persons . . . without resources to meet their requirements," in supplementation of the National Insurance Act, 1946, also exercises its functions "on behalf of the Crown."²⁴ The National Health Service Act, 1946, states in Section 13

(1) A Regional Hospital Board and the Board of Governors of a teaching hospital, shall, notwithstanding that they are exercising functions on behalf of the Minister, and a Hospital Management Committee shall, notwithstanding that they may be exercising functions on behalf of the Regional Hospital Board, be entitled to enforce any rights acquired, and shall be liable in respect of any liabilities incurred (including liabilities in tort), in the exercise of those functions, in all respects as if the Board or Committee were acting as a principal, and all proceedings for the enforcement of such rights or liabilities, shall be brought by or against the Board or Committee in their own name.

(2) A Regional Hospital Board, Board of Governors or Hospital Management Committee shall not be entitled to claim in any proceedings any privilege of the Crown in respect of the discovery or production of documents, but this subsection shall be without prejudice to any right of the Crown to withhold or procure the withholding from production of any document on the ground that its disclosure would be contrary to the public interest.

The precise legal effect of such provisions is not easy to ascertain. It is possible that the Central Land Board is meant to participate in the privileges and immunities of the Crown, in regard to statutes, taxes, and other rights and liabilities. The Re-

²⁴ National Assistance Act, 1948, First Schedule, §9.

gional Hospital Boards and Management Committees might be in the same position, except for the specific provision of the National Health Service Act, 1946. The Australian courts, which are still greatly preoccupied with the problem of the "shield of the Crown,"²⁵ would probably so hold. The English Court of Appeal, in *Tamlin v. Hannaford*,²⁶ leaves it at least open whether it would have come to a different decision in the case of the Central Land Board. But it is equally possible that the Court would separate the question of legal liabilities from that of constitutional responsibilities. The public corporations exercising their functions "on behalf of" the Crown are on the ministerial budget, and subject to a far closer degree of ministerial supervision and responsibility. This also means greater latitude for questions in Parliament.

No corresponding provisions exist in regard to any of the commercial corporations. In the only English decision so far on this matter, the Court of Appeal in *Tamlin v. Hannaford* rightly deduced from this difference in drafting, that the British Transport Commission—and this applies to all the nationalized industries—was not a servant or agent of the Crown, and could not therefore be held to participate in the Crown privilege of immunity from the Rent Restriction Acts. The Court reinforced its argument by a consideration of the general structure of the public corporations, whose characteristic feature is legal autonomy coupled with political responsibility.

B. The Shield of the Crown

In short, in the *Tamlin* case the Court of Appeal gave the only interpretation consistent with the true purpose and function of public corporations in the modern legal and economic system of Great Britain. It specifically acknowledged that public corporations are public authorities, but separated this question from that of their legal relation to Crown and Parliament. It acknowledged the dual character of this new form of public authority:²⁷

In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

The problem of the so-called "shield of the Crown" is no longer of much significance in English law. It is true that its importance has been greatly reduced by the Crown Proceedings Act, 1947,^{27a} which makes the Crown itself fully liable in civil proceedings. There remain, however, a number of Crown privileges, of which the most important are immunity from taxes and rates, and in particular, immunity from the binding effect of statutes, unless they are by specific or necessary applica-

²⁵ Cf. *infra*, p. 589.

²⁶ [1950] 1 K.B. 18 (C.A. 1949).

²⁷ Per Denning L. J., *id.* at 24; [1949] 2 All E.R. 327, 329 (C.A.).

^{27a} 10 & 11 GEO. 6, c. 44.

tion applied to the Crown.²⁸ It is now clear, partly from express statutory provisions, and partly from the interpretations of their status and character as given in *Tamlin v. Hannaford*, that the commercial corporations at least will not participate in any remaining Crown privileges.

Unfortunately, however, this problem is still a matter of great importance in Australia, which has a multitude of public corporations but none of the unifying legislation which has clarified the status of the modern British public corporations. It is precisely because the dual status of the modern public corporation, its Janus head as a public authority and a legal person of private law, has not been sufficiently appreciated in the Australian courts, that the judicial authorities on this subject are in a state of great confusion.

The whole problem can be traced back to some English decisions of the late nineteenth century. In the *Mersey Docks and Harbour Board Trustees v. Gibbs*,²⁹ one of the earliest public authorities, a public harbor authority was held liable for negligence. Blackburn, J., observed as follows:

It is well observed . . . of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions, on a large scale, for individual enterprise. And we think that, in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.

Some years later, the House of Lords held, on the other hand, that land owned by the justices of the county of Berkshire, used for the building of a court of assizes, was exempt from rates and taxes, because the administration of justice was "a proper and inalienable" government function.³⁰ From these cases, a rule gradually emerged that the status of a particular public authority depended on its purpose and function. If it exercised a proper government function, it was within the shield of the Crown and shared its privileges; if not, it was outside the shield.

The fallacy and impracticability of such a test should be apparent. Without the adoption of a radical *laissez faire* philosophy, and the definition of state functions, as they were current in the days of Adam Smith or Herbert Spencer, it is utterly impossible to sort out proper from improper government functions. A moment's thought on the implications of modern defence, government control over industrial research, education or broadcasting, quite apart from direct industrial enterprise, should show the futility of this distinction. At a time when every common law country, the United States as well as Great Britain and the British Dominions, owns

²⁸ For a fuller discussion, see Friedmann, *Public Welfare Offences, Statutory Duties, and the Legal Status of the Crown*, 13 MOD. L. REV. 24 (1950).

²⁹ 11 H. L. Cas. 686, 707, 11 Eng. Rep. 1500, 1508-1509 (H. L. 1866).

³⁰ *Coomber v. Justices of the County of Berks*, 9 App. Cas. 61 (1883).

and operates a multitude of public enterprises from the Tennessee Valley Authority to the Trans-Australian Airways or the National Coal Board, it is obviously impossible for the lawyer to lay down an entirely different definition of state functions. The work of such men as Gény, Heck, and others on the Continent, of Dicey in England, of Holmes, Cardozo, Pound, and others in the United States, has shown that the courts must follow the main evolutions of public opinion in their interpretation of general legal problems. As Mr. Justice Holmes observed, the constitution does not enact Herbert Spencer's Social Statics. This applies equally to the definition of state functions for legal purposes. Such an approach has now been accepted by the United States Supreme Court, in the *Saratoga Springs* case.³¹

In this case the issue was whether the State of New York was liable to the federal tax on mineral waters on the sale of mineral waters from its state-owned and operated Saratoga Springs. Majority and minority judgments, in particular those of Frankfurter and of Douglas, agree on the uselessness of the former test, as laid down by Sutherland in *Ohio v. Helvering*,³² that liability to taxation depended on the distinction between the State as government and the State as trader. In the words of Douglas,³³

A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . . What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable.

At present many functions are exercised by public authority which are not a substitute for private enterprise but the outcome of new conceptions of social responsibility. If Railway Commissioners or the National Coal Board may be regarded as a substitute for privately owned railways, the Forest Commissioners cannot. Their functions are not confined to the purchase or sale of timber but they comprise what Roscoe Pound has described as one of the vital social interests protected by modern law: the conservation of social resources. A Housing Commission exercises many of the functions of a private builder, but it also discharges a social responsibility of the state and is bound to give priority to social policy considerations. Again, the Development Corporations established in the British New Towns Act, 1946, exercise many commercial functions. They acquire and dispose of land, they control building and personnel, they enter into a multitude of contracts. But their essential function is one which cannot be regarded as a substitution for private enterprise: the coordinated development of planned townships under a general national plan of re-distribution and re-development. Commercial and non-commercial aspects are as inextricably mixed as public and private law.

Australian Courts have been well aware of the difficulties in defining the proper functions of government. In order to determine the status of a public corporation,

³¹ *New York v. United States*, 326 U. S. 572 (1945).

³² 292 U. S. 360, 366 (1934).

³³ *New York v. United States*, *supra* note 31, at 591.

they have therefore increasingly relied on a number of subsidiary technical tests.

Chief Justice Latham, in his survey of the problem in the *Grain Elevators Board* case,³⁴ enumerates the essential factors: Firstly, incorporation; secondly, financial autonomy; thirdly, the amount of independent discretion given to the public authority towards the government and the public; fourthly, the right of appointment of the members of the authority by the Crown; lastly, the question whether the authority fulfills a governmental or a non-governmental function.

There is also fairly universal agreement that none of these tests singly gives a conclusive answer. It all depends on the words and the implied intention of the statute, on the respective weight of any one or several of the above-mentioned tests, and last but not least on the somewhat "chancey" ideas of the court on the nature of government functions.

The extreme difficulty of deriving any satisfactory and consistent practical conclusions from these tests may be illustrated by a few examples: the New South Wales Forest Commission is liable in tort,³⁵ but the Victorian Forest Commission is not.³⁶ The Victorian Railways Commissioners were given the priorities of the Crown for claims arising out of the sale of coal from a coal mine vested in them.³⁷

More recently, the Victorian Supreme Court held the Victorian Railway Commissioners not bound by the sectional regulations regarding landlord and tenant,³⁸ but this decision was subsequently overruled by the Full Supreme Court,³⁹ which held that the Commissioners might be an instrumentality of the Crown for some purposes, but not in their capacity as landlords. On the other hand, the New South Wales Housing Commission was held not to be bound by the building regulations of a Local Government Act.⁴⁰ The Commonwealth Repatriation Commission, which among other activities makes business loans to exservicemen, was held entitled to the Crown priorities in seizing assets for the satisfaction of its claims.⁴¹ In an earlier decision, however, the Sydney Harbor Trust Commissioners were held bound by the Employers Liability Act.⁴² More recently, the High Court of Australia—the highest court of the country—held that land vested in the Grain Elevators Board of Victoria (which stores and sells grain) was not "land the property of His Majesty." The reasoning of the Court and in particular the judgment of Dixon, J., was close to that later adopted by the English Court of Appeal in *Tamlin v. Hannaford*; the public functions of the Board were separated from its legal liabilities. In the *Grain Elevators Board* case,⁴³ Dixon, J., said:

³⁴ *Grain Elevators Board (Vict.) v. Shire of Dunmunkle*, 73 C. L. R. 70 (1946).

³⁵ *Ex parte Graham; Re Forestry Commission*, 45 S. R. (N. S. W.) 379 (1945).

³⁶ *Marks v. Forest Commission*, [1936] Vict. L. R. 344.

³⁷ *In re Oriental Holdings Pty. Ltd.*, [1931] Vict. L. R. 279.

³⁸ *Victorian Railways Commissioners v. Greelish*, [1947] Vict. L. R. 425.

³⁹ *Victorian Railways Commissioners v. Herbert*, [1950] Vict. L. R. 211.

⁴⁰ *North Sydney Municipal Council v. Housing Commission of New South Wales*, 48 S. R. (N. S. W.) 282 (1948).

⁴¹ *The Repatriation Commission v. Kirkland*, 32 C. L. R. 1 (1923).

⁴² *The Sydney Harbour Trust Commissioners v. Ryan*, 13 C. L. R. 358 (1911).

⁴³ *Grain Elevators Board (Vict.) v. Shire of Dunmunkle*, *supra* note 34, at 85.

It is probably correct to say . . . that it conducts what is just as much a governmental undertaking as the State railways and that it falls within the Department of the Minister of Agriculture of the State of Victoria. . . .

But that appears insufficient to overcome the plain intention of the legislation that, like the Victorian Railways Commissioners, the State Savings Bank Commissioners, the State Electricity Commission, and many other statutory governmental bodies, the Grain Elevators Board should be an independent corporation owning its own property legally and beneficially and acquiring its own rights and incurring its own obligations.

The most recent decision on this subject, however,⁴⁴ though of less authority than that of the High Court, held the Electricity Trust of South Australia to be immune from the South Australian rent restriction legislation, partly on general grounds, and partly because of the statutory provision under which the Trust "shall hold all its assets for and on account of the Crown."

This truly disturbing confusion of authorities is a matter of considerable practical as well as theoretical importance. As the scope of the public enterprise grows, such matters as immunity from local rates, or immunity from rent restriction legislation, affect a growing proportion of public life. The finance of local authorities, which depends on rates, is upset: the citizen who can be evicted because his house is owned by Railway Commissioners or a public Electricity Trust, cannot but have a strong feeling of injustice and resentment. The absence of any consistency in the judicature is due mainly to two factors: first, failure to recognize the dual character of public corporations, which is incompatible with the tests usually applied; second, the absence of a clear and simple principle of legal policy.

As regards the test of financial autonomy, used by the Australian Courts, the position of the public corporations varies considerably, but none is entirely autonomous. Most have their own capital, some issue government stock, but all carry a Treasury guarantee, and in many cases, the Exchequer may make grants or advances for specific purposes.⁴⁵ The commercial public corporations have their separate budgets, and profit and loss accounts. They are expected to make good their own deficits, and apply their profits to the enterprise, but to the extent that they have received grants from public funds, they must of course make repayments into the Consolidated Fund. All the accounts of public corporations must be laid before Parliament and can be criticized. Some of the social services corporations, such as the Regional Hospital Boards, are carried on the department budget, but, as we have seen, this does not affect their legal liability in private actions as well as for public charges.⁴⁶

The same duality of position is apparent in the method of appointment and the degree of autonomy of management. As stated earlier, the normal method of appointment is by the minister, or, in the Dominions, by the Governor-General, or

⁴⁴ *Electricity Trust of South Australia v. Linterns Ltd.*, [1950] *Argus L. R.* 551.

⁴⁵ *E.g.*, *Air Corporations Act, 1949, §§13-16*; *Victorian Railways Act, 1928, §103*; *Electricity Trust of South Australia Act, §19*.

⁴⁶ *National Health Service Act, 1946, §13*.

the Governor-in-Council. This provides an obvious and deliberate link with the executive which is reinforced by the general power to give directions to the boards in matters affecting the national interest. But, in the general conduct of business, there is far-reaching autonomy of management. Reluctance to restrict it has been the main justification for the British Government's refusal to have the accounts of the commercial public corporations audited by the Comptroller and Auditor-General, as well as by commercial auditors, and for the refusal of ministers to answer questions on details of management in Parliament.⁴⁷ There is no contradiction between the principle of the widest possible autonomy of management, and the right of the nation, represented by Cabinet and Parliament, to call the corporations to account on matters of general public policy or the misuse of public money. Equally, security of tenure goes far, but is not absolute.

IV

The problem just discussed demonstrates the necessity for a clearer appreciation of the many new public law problems which confront the courts as well as others concerned with the application and development of the law. Precedents are either so scarce or so conflicting that the courts have a relatively free hand in helping in the evolution of the law. Nor is there, in this case, a conflict of legal policies between which the courts might find it difficult to choose. Advocates and opponents of public enterprise are agreed on the necessity to subject it to legal liability and commercial accountability. The public corporation is an institution deliberately designed to integrate public enterprise with the existing common law system. The courts can help this purpose by a full appreciation and application of the principles governing the public corporation. They can hinder it by applying nineteenth century ideas to twentieth century problems.

⁴⁷ *Cf.* the debate in the House of Commons, Mar. 3, 1948, 448 H. C. DEB. 391-455 (5th ser. 1948).