

LEGAL DYNAMICS OF PRIVATISATION IN NIGERIA

1. THE EMERGENCE OF PRIVATISATION IN NIGERIA

How did privatization emerge in Nigeria? Nigeria after independence inherited a system of state control of enterprises from its colonial master, which itself was the product of the philosophy or ideology of the Labour Government of the post-war United Kingdom. In introducing the welfare state, the Labour Government was of the opinion that the market economy was very unfair and imperfect. Leaving the means of production, distribution and exchange to market forces was considered inequitable by the Nigerian Government and would lead to the marginalization and impoverishment of the people. It was important for Government to control important sectors of the economy to ensure a fairer distribution of the "national cake". Areas that came under state control as a result of this theory included telecommunications, energy, airlines, shipping, electricity, radio, television, and postal services to mention a few. In the mid seventies in Nigeria, the underlining theory of commerce was that Government must be in control of the **COMMANDING HEIGHT OF THE ECONOMY**. The ultimate manifestation of this philosophical position was the Land Use Act 1978. This Legislation sought to introduce a new land tenure system in Nigeria. It was essentially a major innovation in Southern Nigeria where Land was essentially held on communal, family or individual basis. In Northern Nigeria, a land tenure system similar to the one introduced by the Land Use Decree was already in existence. This new system transferred the ownership of land to the Governor of a State as the custodian of land for the people. Transactions on land including transfers, mortgages, leases etc. could only be carried out with the consent of the Governor. Government could acquire land from the owners for overriding public purpose. If land was so acquired, the owners of the land were only entitled to compensation in respect of the improvement on the land, for example crops and buildings. They were not entitled to any payment for the land itself. Consistent with this policy of controlling the commanding heights of the economy the Federal Government established many corporations including the following: (1) Nigeria Electric Power Authority (NEPA) (2) Nigeria Telecommunications Company Limited (NITEL) (3) Nigerian National Petroleum Company Limited

In addition to these Corporations, the Federal Government also took over the administration of enterprises that were hitherto run by the state governments exclusively or concurrently with the Federal Government. The Federal Government created the National Universities Commission which became the umbrella organization for administering Nigerian universities. Through the Nigerian Television Authority and the Federal Radio Corporation, it became the owner of all television and radio stations which were hitherto owned by the various state governments. Even the field of sports was not spared by the Federal Government. The various stadia existing in Nigeria including the Liberty Stadium in Ibadan built by the Government of the old Western Nigeria was brought under the control of the Federal Government of Nigeria by the creation of the National Sports Commission.

Private business enterprises were not spared from the acquisitive disposition of the Federal Government in Nigeria. The Daily Times of Nigeria which had been a well run privately owned newspaper was taken over by the Government. Oil Corporations had to cede 60% of their shareholding to the Government. Even banks previously owned by private concerns (both foreign and local) suddenly became Government institutions. Until a few years ago,

this outstanding institution, First Bank of Nigeria Plc was controlled by the Federal Government of Nigeria.

By the late seventies it became clear that Government as an entrepreneur had not succeeded. Most of her investments in commerce had been a colossal waste of government revenue. Interestingly the philosophical position in the United Kingdom had begun to shift. The Labour Government of Sir Harold Wilson had been defeated in the polls by the conservative Government of Margaret Thatcher. The Conservatives were of the firm view that Government had no business in commerce. The only role of Government was to provide an enabling environment for entrepreneurs to flourish. The source of revenue for Government was not in participating in these enterprises but in collecting taxes from these successful businesses. Pursuant to this an elaborate exercise commenced which led to the sale of almost all government enterprises in England.

The idea of Government in Nigeria divesting itself of its interest in commercial enterprises commenced in the early 80s. The experience of Government in Nigeria had been very similar to that of the United Kingdom. Almost all the businesses had become unsuccessful. The magnitude of the failure of these businesses becomes very apparent when it is realized that they failed even though they had no competitors as they were virtual monopolies. To stem the tide, in the 1980s the Shehu Shagari Government set up a committee to study the role of parastatals in the Nigerian economy. The administration accepted the recommendation of the committee that it was necessary to privatize the Government parastatals. It was however out of power before it could implement its decision. The succeeding Buhari Government equally appreciated the fact that something was amiss with the parastatals. The committee set up by the Buhari Government recommended government's withdrawal from purely commercial ventures. However the Government was not interested in the complete sale of Government assets. It preferred to commercialise these enterprises. For students of political philosophy the decision of the Government of Buhari was quite consistent with General Buhari's view of greater control of the economy by Government. This philosophical position guided the activities of his entire administration. The Government's ideas could not germinate before his Government was displaced by the Babangida Government. The Babangida Government demonstrated early enough in its administration through its 1986 budget speech that it would embrace the ideals of privatization and kept faith by promulgating into law, two years later, the Privatization and Commercialization Decree No. 25, of 1988.

2. **PRIVATIZATION**

Although privatization has come to be a buzz word in Nigeria, we still easily confuse its meaning. People tend to mention the word in the same breadth as commercialization, liberalization, deregulation, etc. While these various terms have a common stand – they allow for competition and a free market, they are in fact not synonyms. The Public Enterprises (Privatization and Commercialization) Act 1999 does not define privatization. However, its precursor, the Privatization and Commercialization, Decree 1988, which has now been laid to rest, defines it. Its definition of privatization is nonetheless, useful in the absence of any definition in the present law. By this definition, privatization is a process where the Federal Government or its agencies relinquish its equity or other interests in enterprises, which it wholly or partly owned.

3. PRIVATISATION LAWS IN NIGERIA

The privatization exercise in Nigeria is being presently pursued under Public Enterprises (Privatization and Commercialization) Act 1999. But the privatisation programme actually commenced under the Privatization and Commercialization Decree 1988. There are remarkable differences between these two laws. Under the 1988 Decree, State owned enterprises were listed for partial privatization and 67 for full privatization. A Technical Committee (TCPC) was set up to implement the programme.

The policy objective of that Decree included raising capital; removing bureaucratic control; encouraging Nigerian shareholders and encouraging employees. Shares of the listed companies for privatization were to be sold by Public Issue in the Nigerian Capital Market, (or by private placement where the TCPC so recommended to Government). The law expressly reserved between 10% – 20% of the shares of State owned enterprises to be privatized for associations and interest groups (i.e. trade unions), while a maximum of 10% was reserved for the staff of such State owned enterprises. State owned enterprises on the list that were not already incorporated as companies were to be incorporated within 12 months as public companies by the TCPC. In determining the sale of shares of listed State owned enterprises, the TCPC relied on the Securities and Exchange Commission. Significantly, TCPC was not autonomous as the President, Commander in Chief exercised a lot of control over it. For instance, the President could add, remove or alter the list of State owned enterprises to be privatized. Instructively, the Committee required the prior approval of the Federal Government before shares could be sold.

Evidently, the privatization exercise under this Decree was not very transparent. There was no mechanism for the valuation of shares to be offered for sale. By the time the Decree was replaced by the Bureau of Public Enterprises Decree No. 78, 1993, only about 87 State owned enterprises had been privatized. Under the new law, the Bureau for Public Enterprises was established to take over the implementation of the privatization programme, hitherto performed by the TCPC. Under this law, shares could be sold either by public issue through the capital market or private placement where the Bureau recommends to the Federal Government.

The Decree maintained the 10 – 20% shareholding reservation for unions and associations, and 10% for Staff. It also stipulated a maximum of 1% shareholding for any individual. The Bureau, like the TCPC, acted at the Federal Government's direction, and the wide powers of the President of Nigeria under the previous Decree were left intact. The new law created a Public Enterprises Arbitration Panel for effecting settlement of disputes between an enterprise and the supervisory Ministry.

By the time the Public Enterprises (Privatization and Commercialization) Act was promulgated in 1999, some 1000 State owned enterprises existed in Nigeria and successive Nigerian Governments were said to have invested an estimate of ₦800 billion in these companies. For this heavy investment the aggregate returns to the Government was less than 10% of the amount invested. In the Guidelines on Privatization of Government Enterprises, the objectives of the privatization programme were listed as including - restructuring and rationalizing the public sector in order to reduce dominance of unproductive investments in the sector; re-orienting State owned enterprises listed for privatization for performance and efficiency; raising funds for financing socio-economic developments in areas as health, education, and infrastructure; ensuring positive returns on public sector investment through

efficient management; avoiding dependence on treasury for funding and encouraging the use of the Nigerian capital market to meet such funding requirements; creating jobs, acquiring knowledge and technology, and exposing the country to international competition. Unlike the objectives of the previous regime, the policy was silent on the Nigerian shareholder. The emphasis of privatization changed from transferring assets to Nigerians to transferring the assets to any person who could enhance the business.

Apart from this apparent policy shift, the 1999 Public Enterprises Act is remarkably different from the previous privatization laws. Unlike the previous privatization laws where the Federal Government had express direct control over the TCPC and the Bureau, the Bureau under the present law is answerable to the National Council on Privatization, a body under the chairmanship of the Vice President of Nigeria whose membership includes the Ministers of Finance and Industry, the Attorney General of the Federation, the Secretary to the Government of the Federation, the Governor of Central Bank of Nigeria, etc. Among other things, this body approves prices of shares for sale; the mode of selling the shares, (that is; whether by public or private issue, or otherwise) as well as the time of sale. Its function also includes approving the legal and statutory framework for State owned enterprises to be privatized.

Significantly, strategic investors are favoured under the present position. The programme reserves 40% of the shares for strategic investors, 20% to the Nigerian public through the Nigerian stock market, while the Government is to retain 40% of the shares. I have always found it difficult to understand the concept of the strategic investor. Why should any shareholder be allotted any volume of shares over and above all other willing buyers of the shares of the company? Why should the shareholder enjoy the right to install management to the exclusion of other shareholders. Isn't the ability to identify a consensus amongst shareholders on any issue including the installation of management the hallmark of shareholder democracy? With the introduction of the strategic investor policy is Government trying to replace the tyranny of Government with tyranny of a strategic core investor who does not derive its powers from the shareholders but from a process determined by a seller who has already been paid for his goods?

Unfortunately, the failure to create a transparent mechanism for the valuation of shares of State owned enterprises to be privatized in previous privatization laws has not been rectified under this law. Under the previous laws, SEC was to advise on share pricing. The present law provides for an arbitration mechanism for resolving disputes between State owned enterprises and the Bureau. Under the earlier law the mode of selling the shares of the enterprises was by way of public issue unless otherwise stipulated by the Government while under the present law, there is greater flexibility in mode of selling the shares. It can now be done "by public or private issue or otherwise and government would be accordingly advised."

4. OTHER RELEVANT LAWS

Nigerian laws dealing with the issues of privatization do not exist in a vacuum. It is part of the body of laws governing the transfer and acquisition of property in Nigeria. The most fundamental legal document in Nigeria is the Constitution of the Federal Republic of Nigeria 1999. Under sections 43 and 44 of the Constitution, the right of the individual to own movable and immovable property is guaranteed by the Constitution. As a corollary to this guarantee, these properties cannot be acquired by the Government without the payment of

compensation. The issue that has been discussed very frequently is whether the guarantees protect the sale of shares. This depends on whether the shares are movable property under the Constitution. It has been argued that since shares are choses in action they are not strictly so called movable property. They are a special specie, consequently they are not protected under the Constitution. If this argument prevails it means that if a NEW Government which does not share the philosophy of the recent Governments ascends to power, it can reacquire the shares which it had disposed off without any obligation to pay compensation for the share. At present the position of the Constitution should not create any serious alarm. Under the Nigeria Investment Promotion Commission Act, Decree No. 16 1995 (the law enacted to encourage inflow of investments in Nigeria) the Government of Nigeria guarantees expressly that no compulsory acquisition of enterprises and interests shall take place in Nigeria. This clearly includes choses in action. Despite this consoling provision, it is important that when the Constitution is going to be reviewed specific provisions guaranteeing in very clear terms that shares and other choses in action are protected from compulsory acquisition by the Government, would be entrenched.

It is doubtful whether the entire provisions of the Public Enterprises (Privatisation and Commercialization) Act 1999 will survive as an existing law under the 1999 Constitution. Under the Constitution, Decrees promulgated by the Federal Government of Nigeria take effect as Acts of the National Assembly if they are not inconsistent with the Constitution. Section 6 of the Constitution provides that the judicial powers of Nigerian courts shall extend to “all matters between persons, or between government or authority and to any person in Nigeria, and all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person”. This provision is irreconcilable and inconsistent with S 28(3) of the Public Enterprises (Privatization and Commercialization) Act which provides that the decision of the Arbitration Panel set up under the Act shall be binding in any dispute between the Bureau of Public Enterprise and the National Council of Privatisation and bars any appeal to any other Court.

A similar provision is to be found in S 244 of Investment and Securities Act 1999. Under S244 of the Act an Investment and Securities Tribunal is established with jurisdiction, power and authority over disputes and controversies arising under the Investment and Securities Act. Section 242 of the Act expressly ousts the jurisdiction of the civil courts. These two provisions are inconsistent with Constitution of Nigeria and therefore invalid.

Earlier on we stated clearly that the philosophical undertones of the various governments informed their attitude to the concept of sale of public enterprises to private entities. A major factor which provided a catalyst for the privatization process was the need to attract foreign investment. The commanding height of the economy theory had failed to attract investments. The oil boom had disappeared and it was necessary to augment national revenue through foreign investment. The laws governing the allocation of foreign exchange had to be adapted in such a manner as to make it very attractive to the foreign investor. Consistent with this spirit of liberalization and privatization of the economy the rules governing the importation and repatriation of the foreign exchange were further relaxed in 1995 by the promulgation of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree 1995. The Decree repealed the Exchange Control (Anti-Sabotage) Decree 1984, The Foreign Currency (Domiciliary Account) Decree 1985 and the Second Tier Foreign Exchange Market Decree 1986. It created the Autonomous Foreign Exchange Market (AFEM). One of the interesting features of this new law was that the responsibility of accepting foreign exchange into Nigeria and repatriating it out of Nigeria is now conferred on the authorized dealer (who is

not necessarily a bank) who can receive foreign currency being remitted into Nigeria as an investment or for any other legitimate transaction. If a foreign investor wants to invest in Nigeria all he has to do is to transfer the money into Nigeria through an authorized dealer who has the duty of issuing a certificate of capital within 24 hours to the importer. This situation has made the importation of capital into Nigeria for any legitimate purpose very convenient and has aided the privatization process considerably.

5. NIGERIA'S PRIVATIZATION PROGRAMME: THE JOURNEY SO FAR:

A close observation of the privatization programme shows that it has been a mixed grill. There have been remarkable progress, but there are also drawbacks. Under the present privatization regime some 35 State owned enterprises have either been partially or fully privatized, out of which 25 were successful and financially closed and the sum of ₦57.47 billion has been generated according to BPE. But what is also true is that some of the State owned enterprises privatized are not without their problems, while State owned enterprises that are very strategic to the economy are yet to be privatized. I mention in this regard NEPA, NITEL, NIGERIA AIRWAYS, etc.

A close examination of the programme would reveal that the lack of a clear cut policy upon which it is based, and an inchoate legal framework is largely responsible for these drawbacks.

As we have seen, the early privatization regime of the late eighties expressly provided for associations like trade unions, - an unmistakable policy that Government sought to use the programme not only to raise capital, but also to redistribute wealth. This is similar to the policy objective of Britain's privatization programme of the early 1980's. Conversely, the current programme appears to be unpretentious about its policy objective in essentially raising capital. Apart from creating jobs, nothing exists in the policy affirming a desire to redistribute wealth. This view is strengthened by the fact that 40% of shares to be sold are reserved for strategic investors, (who had no mention or preferential role in previous regimes) and private placement as a method of sale is an express option. My feeling is that the persistent agitation by the Senior Staff Association of Utilities, Statutory Corporations and Government Companies (SSAUCGOS) in the ongoing privatization programme could have been better addressed in a clear policy and more articulate law. Recently, the staff of NICON obtained an injunction restraining its privatization. NUPENG, PENGASSAN and the NLC have also joined in the clamour against the privatization of some State owned enterprises. This lack of a clear policy is also demonstrated in the case of NEPA. Although listed as one of the State owned enterprises to be privatized, contradictory positions have been expressed by very senior Government officials of cabinet rank on whether it would be privatized. The same applies for State owned enterprises such as the Nigerian Ports Authority (where maritime practitioners are against any move to privatize) and the Nigerian Security Printing and Minting Company (where legislators are pitched against the BPE on whether it should be privatized). The policy incoherence apart, the present law is not adequate and not in harmony with other laws that normally would have complimented it.

The lack of a clear valuation mechanism has not helped speculations that the programme is not transparent. State owned enterprises have not been known to have gone through a proper audit in years. It is therefore important that the process of valuation of their Shares would be expressly stated, and precede any privatization/sale of their shares. This explains why in spite of due diligence by prospective investors, the books of some of these State owned

enterprises have been found to be “cooked”. African Petroleum Plc is one notorious example, serious enough to cause Government to set up a Tribunal of Enquiry. Recently, it was revealed that the Aluminum Smelting Company of Nigeria (ALSCON) one of the State owned enterprises listed for privatization was, as a result of due diligence, found to be technically bankrupt with Government’s liability running into approximately ₦300 billion thereby threatening its privatization. Some of these problems could be avoided with a clear valuation process.

Competition is a common thread shared by the concepts of liberalization, deregulation and privatization. The privatization policy actually lists it (competition) as one of its objective. Nothing however exists in that law that creates a framework for competition. The effect is that true competition, one of the notable by-products of privatization cannot be achieved in Nigeria in the present circumstances. It is hoped that the present Competition Bill sponsored by House of Representatives would be signed into law soon so that the full benefits of privatization can be felt. The same goes for a Consumer Protection law. Developed countries have these laws to protect consumers. In Nigeria, we should expect strategic investors to be aggressive about quick returns. It is the consumer that would bear the brunt ultimately as is already playing out in the telecommunications sector over high tariffs.

And this also explains why staff of these State owned enterprises are apprehensive. It is believed that strategic investors would relieve them of their employments, some of which have gone on for decades. Retirement in itself ought not to be a source of concern where there is an effective pensions legislation. It is in this regard that the Pensions Bill presently before the National Assembly is welcome, as it would no doubt compliment the privatization programme.

The weak enforcement mechanism to support privatization is considered the strongest drawback for the privatization programme. Here the frequently referred to, yet seminal comments of Prof. Olson, Professor of Economics, University of Maryland, USA, are apposite:

“Societies cannot realize the potential of a market economy unless they have institutions that protect rights to private property and to contract enforcement... without such institutions, the gains from privatization are uncertain”.

A formidable legal system is indispensable to the realization of a forward-looking economy. Collectively, there is a need to ensure that the system of delivery of justice in Nigeria is seriously enhanced. As is today, only a substantial risk-taker can invest in Nigeria. The reason is that if his investment does not go as planned, he cannot ensure a quick resolution of issues involved.

We have seen that under our laws it is the NIPC Decree that expressly guarantees against compulsory acquisition of equity interests. Our supreme law, the Constitution, is not clear on the point. Areas where the Constitution is clear on, other laws have tried to encroach as we have seen with the Arbitration Panel in the 1999 Privatization Law, and the Tribunal in the 1999 Investment and Securities Law. Even the Bureau that is vested with the power to organize privatization in Nigeria, is shielded from law suits under the Privatization Law. The Public Officers Protection Act is also another piece of legislation that potentially stands in the path of justice. Under that law, Public Officers can only be sued under certain

circumstances. Public Officers are defined as including persons carrying out public duty in the employment of enterprises where Government has control. It is debatable who has control between Government and a strategic investor who both enjoy a 40:40 shareholding in a company.

6. LOCAL LEGAL COMPETENCE

The role of solicitors in respect of privatization deserves some mention here. In BPE's advertisements, they invited local and foreign solicitors to participate in the programme. A lot of people felt this was wrong. In a recent debate featured in Thisday Newspapers, BPE tried to justify the policy of inviting foreign lawyers by explaining that the legal competence to undertake the privatization exercise was not available in Nigeria. It is contended that even if this is true, BPE's position is legally and morally unjustifiable. By inviting foreign solicitors, BPE has in fact allowed them to render legal service in Nigeria, and in so doing contravened Nigerian laws. The law is clear on who can render legal service in Nigeria. It is only a legal Practitioner admitted to the Nigerian Bar, or granted exception as stipulated in the law. Even if our laws permit them to practice in Nigeria, it would still be morally wrong to pass Nigerian Lawyers over. It would be remembered that when Britain initiated its privatization programme, it had never attempted it as its economy was very regulated. The legal competence probably did not exist in that society, but the British Government nevertheless did not import foreign lawyers for the exercise. It engaged British solicitors who in turn had the prerogative of deciding in what area, and from where outside skill was needed. This way the legal competence was developed for privatization. A new management has taken control of BPE and it is hoped that it would address this issue quickly.

In conclusion, the lack of considerable success in the privatization process is largely accounted for by lack of originality. If more original ideas had been introduced to the exercise it would have been more suited to the expectation of Nigerians. It would have addressed the peculiar experience of this country. It is hoped that some of these concerns have been addressed in the Privatization and Commercialization Bill before the National Assembly.