

**ACTUALISING ECONOMIC DEVELOPMENT  
THROUGH PRIVATISATION LEGAL REFORM: A  
GENERAL ASSESSMENT OF PRIVATISATION IN  
AFRICA WITH A SPECIFIC CASE STUDY OF NIGERIA  
AND SUB FOCUS ON THE NIGERIAN ELECTRICITY  
SECTOR**

**NNAEMEKA ONYEBUCHI EWELUKWA**

**THESIS SUBMITTED TO THE UNIVERSITY OF  
LONDON FOR THE AWARD OF THE DEGREE OF  
DOCTOR OF PHILOSOPHY IN LAW**

**CENTRE FOR COMMERCIAL LAW STUDIES, QUEEN  
MARY, UNIVERSITY OF LONDON**

**JULY 2009**

# DECLARATION

I hereby declare that the work submitted in this thesis is my own

Signed.....

## ABSTRACT

This dissertation analysed the outcome of the adoption and implementation of privatisation by Nigeria, of which a legal framework has been put in place by the government to legalise the process of transferring the ownership and/or control of public enterprises to private entrepreneurs with a view to facilitating economic development in the country. Many other African countries have pursued similar reform paths with similar objectives and the thesis undertakes a general analysis of the outcome of adopting and implementing privatisation within the continent. Within Nigeria, the proposed power sector privatisation is specifically analysed. The dissertation focuses on the economic development outcome of privatisation, which encompasses key benefits that have been attributed to privatisation including the beneficial impact of privatisation on the public sector as well as the privatised enterprises, privatisation's contribution to overall private sector development, the benefit of privatisation to the citizens of the country and finally privatisation's usefulness as a conduit for beneficial foreign investment inflow to the country. These benefits are viewed collectively, of which achieving some of them at the expense of others may not augur well for broad based economic development in Nigeria specifically or Africa in general.

Using the analytical framework created in the thesis, various issues that have adversely affected the full realisation of these key economic development benefits and created a gap between the policy objectives behind privatisation law and the reality of implementation were analysed. The approach of International Financial Institutions (IFIs) (specifically the World Bank and the International Monetary Fund) to privatisation was also considered in the thesis owing to the fact that they have had some influence in its adoption and implementation in Nigeria, and Africa more broadly.

Privatisation entails more than just legal reform, thus, the research is interdisciplinary in nature and principally touches on legal issues, public policy issues and issues pertaining to economic development, including social issues.

## TABLE OF CONTENTS

<b>DECLARATION</b>	2
<b>ABSTRACT</b>	3
<b>TABLE OF CONTENTS</b>	4
<b>TABLE OF ABBREVIATIONS</b>	11
<b>DEDICATION</b>	21
<b>ACKNOWLEDGEMENT</b>	22
<b>CHAPTER ONE: Introduction</b>	23
1.1. Basis for Choice of Region, Country and Sub-Sector of Case Study in the Dissertation	36
1.2. Research Methodology	42
1.3. Defining the Scope and Limits of the Dissertation and Qualifying the Arguments	50
1.4. Structure of the Dissertation	52
<b>CHAPTER TWO: Examining the Case for Privatisation: its Meaning, Objectives and Process of Implementation</b>	55
<b>2.1. The Meaning of Privatisation</b>	55
<b>2.2. Reasons for Embarking on Privatisation: Examination of the Key Economic Development Benefits of Privatisation</b>	59

2.2.1.	Benefit to the Public Sector	60
2.2.2.	Benefit to the Enterprises	61
2.2.3.	Contribution to Overall Private Sector Development	64
2.2.4.	Benefit to the Citizens	64
2.2.5.	Conduit for Beneficial Foreign Investment Inflow	66
<b>2.3.</b>	<b>Analysis of the Prerequisites for Effective Privatisation Outcomes</b>	<b>67</b>
<b>2.3.1.</b>	<b>Designing an Effective Policy and Legal Framework</b>	<b>68</b>
<b>2.3.1.1.</b>	The Policy Framework of Privatisation	68
<b>2.3.1.2.</b>	The Legal Framework of Privatisation	73
<b>2.3.2.</b>	<b>Ensuring Proper Implementation of Privatisation</b>	<b>82</b>
<b>2.3.2.1.</b>	Is the National Environment Conducive to Embarking on Privatisation and Attracting Private Investments?	83
<b>2.3.2.2.</b>	Is the Institutional Framework for Implementing and Monitoring the Outcome of Privatisation Robust?	87
<b>2.3.2.3.</b>	Will the Strategic Approach to the Implementation of Privatisation Lead to the Realisation of Set Policy Objectives?	97
<b>2.3.2.4.</b>	Is the Privatisation Process Accountable, Transparent and Free from Corruption?	109
<b>2.4.</b>	<b>Evaluation and Concluding Remarks</b>	<b>111</b>

<b>CHAPTER THREE: Critical Appraisal of the Adoption and Implementation of Privatisation in Africa and the Role of International Financial Institutions in the Process</b>	<b>113</b>
<b>3.1. Designing an Effective Policy and Legal Framework</b>	<b>117</b>
3.1.1. The Privatisation Policy Framework in Africa	117
3.1.2. The Privatisation Legal Framework in Africa	126
<b>3.2. Ensuring Proper Implementation of Privatisation</b>	<b>130</b>
3.2.1. Is the National Environment Conducive to Embarking on Privatisation and Attracting Private Investments?	131
3.2.2. Is the Institutional Framework for Implementing and Monitoring the Outcome of Privatisation Robust?	136
3.2.3. Will the Strategic Approach to the Implementation of Privatisation Lead to the Realisation of Set Policy Objectives?	141
3.2.3.1. The Pace and Sequencing of Privatisation	142
3.2.3.2. The Strategy for Engaging Foreign Investors	146
3.2.3.3. The Approach to Socio-Cultural Issues in Privatisation	153
3.2.3.4. Weighing the Cost of Implementing Privatisation against the Expected Benefits	155
3.2.3.5. Balancing the Economic and Social Issues in Privatisation in the Interest of the Citizens	158

3.2.4. Is the Privatisation Process Accountable, Transparent and Free from Corruption?	166
<b>3.3. Evaluation and Concluding Remarks</b>	<b>173</b>
<b>CHAPTER FOUR: Critical Appraisal of the Adoption and Implementation of Privatisation in Nigeria</b>	<b>175</b>
<b>4.1. Designing an Effective Policy and Legal Framework</b>	<b>179</b>
4.1.1. The Privatisation Policy Framework in Nigeria	179
4.1.2. The Privatisation Legal Framework in Nigeria	184
<b>4.2. Ensuring Proper Implementation of Privatisation</b>	<b>192</b>
4.2.1. Is the National Environment Conducive to Embarking on Privatisation And Attracting Private Investments?	192
4.2.2. Is the Institutional Framework for Implementing and Monitoring the Outcome of Privatisation Robust?	198
4.2.3. Will the Strategic Approach to the Implementation of Privatisation Lead to the Realisation of Set Policy Objectives?	205
4.2.3.1. The Pace and Sequencing of Privatisation	205
4.2.3.2. The Strategy for Engaging Foreign Investors	208
4.2.3.3. The Approach to Socio-Cultural Issues in Privatisation	212
4.2.3.4. Weighing the Cost of Implementing Privatisation against the Expected Benefits	216

4.2.3.5.	Balancing the Economic and Social Issues in Privatisation in the Interest of the Citizens	219
4.2.4.	Is the Privatisation Process Accountable, Transparent and Free from Corruption?	224
<b>4.3.</b>	<b>Evaluation and Concluding Remarks</b>	<b>229</b>
<b>CHAPTER FIVE: Critical Appraisal of the Adoption and Implementation of Electricity Privatisation in Nigeria</b>		<b>230</b>
<b>5.1.</b>	<b>Designing an Effective Policy and Legal Framework</b>	<b>233</b>
5.1.1.	The Electricity Privatisation Policy Framework In Nigeria	233
5.1.2.	The Electricity Privatisation Legal and Regulatory Framework in Nigeria	236
<b>5.2.</b>	<b>Ensuring Proper Implementation of Privatisation</b>	<b>243</b>
5.2.1.	Is the National Environment Conducive to Embarking on Privatisation and Attracting Private Investments?	243
5.2.2.	Is the Institutional Framework for Implementing and Monitoring the Outcome of Privatisation Robust?	245
5.2.3.	Will the Strategic Approach to the Implementation of Privatisation Lead to the Realisation of Set Policy Objectives?	249
5.2.3.1.	The Pace and Sequencing of Privatisation	250
5.2.3.2.	The Strategy for Engaging Foreign Investors	255



5.2.3.3.	The Approach to Socio-Cultural Issues in Privatisation	257
5.2.3.4.	Weighing the Cost of Implementing Privatisation against the Expected Benefits	258
5.2.3.5.	Balancing the Economic and Social Issues in Privatisation in the Interest of the Citizens	261
5.2.4.	Is the Privatisation Process Accountable, Transparent and Free from Corruption?	266
	<b>CHAPTER SIX: Conclusion</b>	270
	<b>6.1. Designing an Effective Policy and Legal Framework</b>	271
6.1.1.	The Policy Framework of Privatisation	271
6.1.2.	The Legal Framework of Privatisation	272
	<b>6.2. Ensuring Proper Implementation of Privatisation</b>	272
6.2.1.	Is the National Environment Conducive to Embarking on Privatisation and Attracting Private Investments?	273
6.2.2.	Is the Institutional Framework for Implementing and Monitoring the Outcome of Privatisation Robust?	273
6.2.3.	Will the Strategic Approach to the Implementation of Privatisation Lead to the Realisation of Set Policy Objectives?	274
6.2.4.	Is the Privatisation Process Accountable, Transparent and Free from Corruption	275

<b>6.3. Case Study of the Nigerian Electricity Sector</b>	275
<b>6.4. Key Ideas Distilled from the Implementation of Privatisation in Nigeria and Africa</b>	277
<b>6.5. Suggestions for Future Research</b>	282
<b>Bibliography</b>	285

## **LIST OF ABBREVIATIONS**

ABULSJ	Law in Society: A Journal of the Law Society, Ahmadu Bello University
Afr Aff	African Affairs
African Econ Hist	African Economic History
Afr Stud Rev	African Studies Review
AJEP	African Journal of Economic Policy
Amer Econ Rev	The American Economic Review
Amer J Agr Econ	American Journal of Agricultural Economics
Amer J Econ Sociology	American Journal of Economics and Sociology
Am Polit Sci Rev	American Political Science Review
Annals Am Acad Pol & Soc Sci	Annals of the American Academy of Political and Social Science
Ann Public Coop Econ	Annals of Public and Cooperative Economics
BC Third World LJ	Boston College Third World Law Journal
BLR	Business Law Review
BPE	Bureau of Public Enterprises
Brit J Criminol	British Journal of Criminology
Brookings Pap Econ Act	Brookings Papers on Economic Activity

Brook J Int'l L	Brooklyn Journal of International Law
BTR	British Tax Review
BU Int'l LJ	Boston University International Law Journal
Bus L Int'l	Business Law International
Can J Afr Stud	Canadian Journal of African Studies
Can J Econ	The Canadian Journal of Economics
Cardozo J Int'l & Comp L	Cardozo Journal of International and Comparative Law
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CLJ	Cambridge Law Journal
CLWR	Common Law World Review
CMR	Contemporary Management Research
Commw L Bull	Commonwealth Law Bulletin
Comp Law	Company Lawyer
Comp Pol	Comparative Politics
Comp Stud Soc'y & Hist	Comparative Studies in Society and History
Const LJ	Construction Law Journal
Conv	Conveyancer and Property Lawyer

CR & I	Corporate Rescue and Insolvency
CTLR	Computer and Telecommunications Law Review
Currents Int'l Trade LJ	Currents: International Trade Law Journal
ECLR	European Competition Law Review
Econ Devel Cult Change	Economic Development and Cultural Change
Econ J	Economic Journal
Econ Policy	Economic Policy
ECOWAS	Economic Community Of West African States
EIPR	European Intellectual Property Review
EJIL	European Journal of International Law
EL Rev	European Law Review
ELB	Employment Law Bulletin
Energy Pol'y	Energy Policy
Ent LR	Entertainment Law Review
F & D	Finance & Development
Fordham L Rev	Fordham Law Review
Foreign Pol'y	Foreign Policy
Harv Bus Rev	Harvard Business Review

Harv J on Legis	Harvard Journal on Legislation
IBL	International Banking Law
ICCLR	International Company and Commercial Law Review
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
IELR	International Energy Law Review
IELTR	International Energy Law & Taxation Review
IFIs	International Financial Institutions
ILJ	Industrial Law Journal
ILO	International Labour Organization
IMF	International Monetary Fund
Int ALR	International Arbitration Law Review
Insolv L	Insolvency Lawyer
Int'l Aff (UK)	International Affairs
Int'l Bus Law	International Business Lawyer
Int JLC	International Journal of Law in Context
Int'l Law	The International Lawyer

Int'l LF D Int'l	International Law FORUM du Droit International
Int'l Org	International Organization
Int Stud Quart	International Studies Quarterly
Int TLR	International Trade Law & Regulation
Int'l Soc Sec Rev	International Social Security Review
IPPs	Independent Power Producers
IPSR	International Political Science Review
Isr L Rev	Israel Law Review
JAL	Journal of African Law
JBL	Journal of Business Law
J Blacks High Educ	The Journal of Blacks in Higher Education
J Black Stud	Journal of Black Studies
JCL	Journal of Criminal Law
JCL & E	Journal of Competition Law & Economics
J Corp L	Journal of Corporation Law
J Econ Lit	Journal of Economic Literature
J Econ Perspect	The Journal of Economic Perspectives
JEL	Journal of Environmental Law

J Energy & Nat Resources L	Journal of Energy and Natural Resources Law
JFC	Journal of Financial Crime
J Fin	The Journal of Finance
JIBL	Journal of International Banking Law
JIBFL	Journal of International Banking & Financial Law
JIBLR	Journal of International Banking Law and Regulation]
JIEL	Journal of International Economic Law
JIFM	Journal of International Financial Markets
JL & Soc'y	Journal of Law and Society
J Lat Am Stud	Journal of Latin American Studies
JLE & O	Journal of Law, Economics & Organization
JMLC	Journal of Money Laundering Control
J Mod Afr Stud	The Journal of Modern African Studies
J Peace Res	Journal of Peace Research
Jnl Publ Pol	Journal of Public Policy
JPL	Journal of Planning & Environment Law
JPPL Lagos)	Journal of Private and Property Law (University of



JPPL	Journal of Private and Public Law (University of Jos)
J S Afr Stud	Journal of Southern African Studies
J Soc Sci	Journal of Social Sciences
Lat Am Perspect	Latin American Perspectives
Law & Contemp Probs	Law and Contemporary Problems
Law & Pol'y Int'l Bus	Law and Policy in International Business
Legal Stud	Legal Studies
LGD	Law, Social Justice & Global Development
LJIL	Leiden Journal of International Law
LQR	Law Quarterly Review
Marq L Rev	Marquette Law Review
Md J Int'l L & Trade	Maryland Journal of International Law and Trade
Minn J Int'l L	Minnesota Journal of International Law
Miss CL Rev	Mississippi College Law Review
MLR	Modern Law Review
NCLJ	Nigerian Current Law Journal
NCP	National Council on Privatisation

NEPA	National Electric Power Authority
NEPAD	New Partnership for Africa's Development
NERC	Nigerian Electricity Regulatory Commission
Nig JR	The Nigerian Juridical Review
NLJ	The New Law Journal
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
OJLS	Oxford Journal of Legal Studies
PHCN	Power Holding Company of Nigeria
PJ	The Police Journal
PL	Public Law
Popul Dev Rev	Population and Development Review
PPAs	Power Purchase Agreements
PPLR	Public Procurement Law Review
PS	PS: Political Science and Politics
QJ Econ	Quarterly Journal of Economics
Rev African Polit Economy	Review of African Political Economy
Rev Agr Econ	Review of Agricultural Economics

Rev Econ Statist	The Review of Economics and Statistics
Rev Int'l Stud	Review of International Studies
San Diego Int'l LJ	San Diego International Law Journal
Scand J Econ	The Scandinavian Journal of Economics
Stan L Rev	Stanford Law Review
Stat LR	Statute Law Review
Temp Int'l & Comp LJ	Temple International and Comparative Law Journal
Tex J Oil, Gas & Energy L	Texas Journal of Oil, Gas and Energy Law
Third World Legal Stud	Third World Legal Studies
Tilburg Foreign L Rev	Tilburg Foreign Law Review
Tulsa J Comp & Int'l L	Tulsa Journal of Comparative and International Law
TWQ	Third World Quarterly
U Kan L Rev	University of Kansas Law Review
U Maid LJ	University of Maiduguri Law Journal
UNSWLJ	University of New South Wales Law Journal
Util LR	Utilities Law Review
Wake Forest L Rev	Wake Forest Law Review

Wis L Rev	Wisconsin Law Review
World Bank Res Observer	The World Bank Research Observer
Yale Hum Rts & Dev LJ	Yale Human Rights & Development Law Journal
Yale J Int'l L	Yale Journal of International Law
Yale LJ	Yale Law Journal
Yale L & Pol'y Rev	Yale Law & Policy Review

**DEDICATED**

**TO**

A truly kind hearted individual, Chinedum Ewelukwa, my elder brother (of blessed memory) who did not live to see the conclusion of this thesis.

## ACKNOWLEDGEMENT

I would like to utilise this opportunity to convey my gratitude to those who played one role or the other in the actualisation of my dream of pursuing a doctorate degree in law. First of all, I would thank Almighty God who gave me the inner strength to surmount some of the difficulties and personal challenges that arose in the course of doing my research, and who ultimately guided me to successfully complete the work.

On a human level, I am immensely grateful to the university authorities for granting me a research studentship, which made it possible for me to commence and complete this research. I must recognise the untiring efforts of my primary supervisor, Professor Loukas Mistelis in the shaping and moulding of the thesis. Right from the formative stages when I was still preparing the proposal for the research, he has been extremely helpful and has always been ready to advise me on any issue pertaining to the work. Indeed he has functioned as a supervisor, mentor and career adviser all combined, and deserves considerable credit for the finished product of the research. I must also thank my secondary supervisor, Professor Marise Cremona, who helped in fine-tuning my research focus especially at the commencement of the programme. Professor Mistelis' secretary, Mrs Sandra Baird also deserves special mention. Over the years, she has always meticulously scheduled my appointments with him. Her efficiency and warm disposition are quite commendable. Many thanks also go to Ms Angie Raymond who teaches International Commercial Law at the Centre for Commercial Law Studies, for her kindness and support over the years, and to Jonathan Claydon, the PhD Administrator, for his timely assistance regarding various issues.

I also thank my examiners Professor Peter Muchlinski and Dr Federico Ortino, whose earlier comments on the work greatly assisted me in substantially reshaping it.

My parents, Professor and Mrs Ewelukwa, and siblings - Chinedum (of blessed memory), Oforbuike, Uche and Anuli - have been most supportive throughout the years that I pursued this research and indeed both before and after my arrival in the United Kingdom for postgraduate studies. Their prayers, financial support, encouragement and advice have all contributed to the successful outcome of the research. I also owe a debt of gratitude to my girlfriend, Chinwe and all my other friends who have been constant pillars of support in my life, and also specifically in the course of writing this thesis, including Ben, Okey, Emeka, Austin, Peter, Mba, Ike, Eze, Nnamdi and Ade.

# **ACTUALISING ECONOMIC DEVELOPMENT THROUGH PRIVATISATION LEGAL REFORM: A GENERAL ASSESSMENT OF PRIVATISATION IN AFRICA WITH A SPECIFIC CASE STUDY OF NIGERIA AND SUB FOCUS ON THE NIGERIAN ELECTRICITY SECTOR**

## **CHAPTER ONE: INTRODUCTION**

This dissertation seeks to assess the extent to which privatisation legal reforms that have been implemented in Nigeria have facilitated or are likely to facilitate economic development in the country, and it seeks to also identify and analyse key factors that could affect the realisation of this policy goal in Nigeria generally and the Nigerian electricity sector in particular. Before narrowing the discussion to Nigeria however, a broader examination of the outcome of privatisation legal reform in Africa is undertaken. It should be noted from the outset that viewing privatisation through economic development lens entails making a normative assumption about the goal of adopting and implementing privatisation in a country and while economic development may be the key goal in many African countries, there are bound to be instances both within Africa and beyond where this is not the primary goal of policy makers in a country. It is also imperative to clarify how the term 'economic development' is used in this dissertation since it could be open to different interpretations. In the quest to achieve economic development, many countries have amongst other things, sought to adopt policy measures that would lead to greater enterprise efficiency and the production of top quality goods and services, which would pave way for the attainment of rapid economic growth. In addition to these ends however, economic development also has a vital social component i.e. the realisation of social development objectives like poverty reduction or eradication, inequality reduction and middle class expansion, and increase in the employment and real income levels in the country aimed at achieving full and rewarding employment.<sup>1</sup> As noted by Jeswald Salacuse:

... The definition and focus of "development" has shifted and evolved over time. In the 1950s and 1960s, development meant simply economic growth as measured by gross national product per capita in individual developing countries. ... Later, concerns about the equitable distribution of the results of economic growth and the needs of the Third World's

---

<sup>1</sup> JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 Currents Int'l Trade LJ 37, 40; F Stewart, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?' (1991) 9 Development Policy Review 413, 415.

poor would gain an increasing place on the development agenda. ... In time, both policy makers and scholars came to see that development was not a purely economic phenomenon but that it also had social, political, and institutional dimensions, causes, and objectives. ...'<sup>2</sup> (footnotes omitted)

Broadly speaking, the African continent is facing a severe economic development crisis characterised by poor economic performance and very high level of poverty and inequality in many African countries, which has been prevalent for many years.<sup>3</sup> Based on United Nations classification, of the 53 member states of the African Union<sup>4</sup>, 33 fall within the category of least developing countries out of a total of 48 least developing countries in the world.<sup>5</sup> Going by the 2008 Human Development Index rankings of the United Nations Development Programme (UNDP), only 3 African countries fall within the category of High Human Development, 23 fall within the category of Medium Human Development while 25 fall within category of Low Human Development.<sup>6</sup> In view of the economic development challenge facing the continent and the fact that poverty has continued to remain high even in some of the countries that have witnessed some economic growth<sup>7</sup>, the New Partnership for Africa's Development (NEPAD), which is the development policy framework adopted by the African Union in 2001, notes that:

While growth rates are important, they are not by themselves sufficient to enable African countries to achieve the goal of poverty reduction. The

---

<sup>2</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 875.

<sup>3</sup> Bryan Mercurio, 'Growth and Development: Economic and Legal Conditions' (2007) 30 UNSWLJ 437, 438; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 83; NJ Udombana, 'The Summer Has Ended and We Are Not Saved - Towards a Transformative Agenda for Africa's Development' (2005-2006) 7 San Diego Int'l LJ 5, 11-13.

<sup>4</sup> African Union, 'African Union: Member States' <<http://www.africa-union.org/root/au/memberstates/map.htm>> accessed 3 March 2009. Note that Chad is not a member of the African Union.

<sup>5</sup> UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), 'Least Developed Countries: Country profiles' <<http://www.unohrlls.org/en/ldc/related/62/>> accessed 3 March 2009.

<sup>6</sup> United Nations Development Programme, 'Human Development Indices: A Statistical Update 2008 - HDI Rankings' <<http://hdr.undp.org/en/statistics/>> accessed 3 March 2009. Note that Somalia and Zimbabwe were not classified.

<sup>7</sup> Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 57, 61, 70, 91-92.



challenge for Africa, therefore, is to develop the capacity to sustain growth at levels required to achieve poverty reduction and sustainable development. ... The strategy has the following expected outcomes: economic growth and development and increased employment; reduction in poverty and inequality...<sup>8</sup>

Achieving economic development would require massive investment in the development of a country's productive capacity for various goods and services including utility/infrastructural services like electricity. However, whether the public or the private sector should spearhead such economic development efforts in a country is an argument that has been going on for several decades, as well as the role of law or legal reform in the development process. With a view to facilitating economic development, many developing countries, including African countries have in the past 3 decades, adopted the policy of privatising public enterprises and assets and have enacted laws to give effect to the policy, thus paving way for the legal transfer of ownership and/or control of public enterprises to private entrepreneurs.<sup>9</sup> Many of them had earlier adopted national policies and enacted laws to pave the way for the state to play a leading role in facilitating economic development.<sup>10</sup> This owed a lot to the effort in the 1960s and 1970s to utilise laws as a means of influencing or facilitating economic development, which was the key driving force behind the 'Law and Development' movement.<sup>11</sup> The movement itself was inspired by contending development theories of

---

<sup>8</sup> Organization of African Unity, 'The New Partnership for Africa's Development' (2001) <<http://www.nepad.org/2005/files/documents/inbrief.pdf>> accessed 10 January 2005 paras 64, 69. This policy framework derives its authority from the Declaration on the New Common Initiative (MAP AND OMEGA) AHG/Decl.1 (XXXVII), adopted by the Thirty-seventh Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Lusaka, Zambia, 9 – 11 July 2001. Initially titled 'The New Africa Initiative', it was renamed 'The New Partnership for Africa's Development' in October 2001. Also see I Taylor and P Nel, "'New Africa', Globalisation and the Confines of Elite Reformism: "Getting the Rhetoric Right", Getting the Strategy Wrong' (2002) 23 TWQ 163, 163, 173. Subsequent citations of the New Partnership for Africa's Development in this thesis shall refer to it as 'NEPAD 2001.'

<sup>9</sup> Note for instance EM Filippozzi, 'Brazil - Privatisation Programme and Foreign Capital' (1994) 5 ICCLR C8, C8; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 884.

<sup>10</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 877-882

<sup>11</sup> DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States [1974] Wis L Rev 1062, 1073-1074: "'Law" was seen as both a necessary element in "development," and a useful instrument to achieve it. ... "Law" was thus "potent," and because legal development would foster social development and improve human welfare it was also "good." ... law was also associated with rational, instrumental action to secure greater material well-being and other developmental goals. Law was one of the tools that could be used by planners consciously seeking to enhance human welfare.' (footnote omitted) Also see 1095; JW Salacuse, 'From

the time including the Modernisation Theory and the Dependency Theory which had differing views of the causes of underdevelopment and the nature of laws needed to advance development in a country.<sup>12</sup> In many of the developing countries that followed the path of state-led development, laws were enacted to implement nationalisation, to regulate and place various restrictions on private local and foreign enterprises, to establish new enterprises in various business sectors and generally to control the ownership and use of private property.<sup>13</sup> The economic development objectives sought to be achieved were eclectic and included job creation, provision of various goods to the citizens, extension of utility/infrastructural services to as many as possible and general improvement in living standards. Regarding the public enterprises, many of them were not very effective in achieving these objectives and faced a barrage of criticisms particularly from the standpoint that public ownership and operation of the enterprises ultimately affected the poor adversely and also adversely impacted on the investment climate in some of these countries.<sup>14</sup> The research identified several of the problems that plagued them, which were formidable obstacles that obstructed the realization of their objectives, including inefficiency, and over-reliance on the government for budgetary support.<sup>15</sup> This situation gave rise to concerns about whether the state should continue to play a direct and leading role in efforts to actualise economic development in a

---

Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 876, 882: 'Legal practitioners and scholars working in development have also been concerned primarily with the development process-specifically how law helps or hinders, fosters or hobbles, the attainment of increased productivity, better health, and higher standards of living in developing countries. ... Their efforts gave birth to a new field of legal inquiry and action, "law and development," whose aim was to determine how law might contribute to the processes of economic and social development in the Third World.' Also see PC Hunt, 'Statutory Framework for State Economic Development Programs' (1973-1974) 11 Harv J on Legis 703, 703: 'A governmental structure is needed that can plan for and guide economic development.'

<sup>12</sup> KE Davis and MJ Trebilcock, 'Legal Reforms and Development' (2001) 22 TWQ 21, 21-23.

<sup>13</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 876-882; DM Trubek 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972-1973) 82 Yale LJ 1, 36-37; KD Ewing, 'The Politics of the British Constitution' [2000] PL 405, 418; R Pritchard, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233, 233; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 199.

<sup>14</sup> MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S32; World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* - A World Bank Policy Research Report (OUP, New York 1995) 1-2, 32-35; World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (OUP, New York 2004) 29.

<sup>15</sup> See for instance K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 200; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 882.

country or whether this role should be ceded to the private sector functioning in a market economy, with the government only playing an indirect and supportive role. Privatisation favours the latter approach, however, the key question is - if public enterprises have failed to meaningfully contribute to national economic development and have been ineffective instruments in the actualisation of the social objectives of the government, will changing their legal ownership and/or control from public to private by enacting privatisation law make any real difference? This question could be re-phrased in another way - if the various laws enacted to facilitate state-led development, including state ownership of enterprises did not result in successful economic development in many countries that undertook such measures in the 1970s and 1980s, is there any reason to believe that the privatisation laws and associated regulations that have now been enacted by many of these countries will lead them down the economic development path?

In addressing the above questions, it should be noted that the achilles heel of the 'Law and Development' movement was that it appeared to put too much faith in the ability of laws and legal institutions to facilitate development, without adequately factoring in other issues besides laws that could impact on development efforts in a state, and the persistence of various development challenges in many of the countries that had undergone formal legal reforms largely undermined the legitimacy of the movement.<sup>16</sup> In some cases, these laws were instruments for pursuing negative ends and advancing the narrow economic or political interests of sub-groups within a country rather than broad-based societal interests.<sup>17</sup> In this regard, concern has been voiced that the quest to introduce new legal reforms in various developing countries in order to facilitate market reforms and advance economic development through measures like privatisation, runs the risk of not adequately factoring in the pitfalls of the earlier 'Law and Development' movement including inadequate consideration of the socio-cultural and political context

---

<sup>16</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 882. DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States [1974] Wis L Rev 1062, 1080, 1101. Also see B Metzger, 'Law and Development: An Essential Dimension of Governance' (1998) 26 Int'l Bus Law 294, 295.

<sup>17</sup> MO Chibundu, 'Law in Development: On Tapping, Gourding, and Serving Palm-Wine' (1997) 29 Case W Res J Int'l L 167, 195-197; DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States [1974] Wis L Rev 1062, 1083-1084.

of the countries enacting these laws, and accordingly being unduly ambitious about what laws and legal institutions can achieve.<sup>18</sup>

With a view to addressing the issues raised above, the research examined the case for privatisation as a national economic development tool. PP Craig notes the eclectic nature of the reasons for privatisation<sup>19</sup>, accordingly, to facilitate the examination, an analytical framework was created in the dissertation in order to clarify the basis for assessing the economic development impact of privatisation in this dissertation. The research focuses on certain benefits attributed to privatisation such as its benefit to the public sector of the implementing country, its benefit to the privatised enterprises, its contribution to overall private sector development, its benefit to the citizens and finally, its usefulness as a conduit for beneficial foreign investment inflow. Each of these benefits embodies arguments that have been advanced regarding privatisation in some scholarly writings<sup>20</sup>, and also articulated by the IFIs that have financially supported the development efforts of many developing countries.<sup>21</sup> Some national governments have

---

<sup>18</sup> KE Davis and MJ Trebilcock, 'Legal Reforms and Development' (2001) 22 TWQ 21, 25-33 pp 32-33; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 889.

<sup>19</sup> PP Craig, 'Constitutions, Property and Regulation' [1991] PL 538, 551-552: 'The reasons for this programme were eclectic, and included: the improvement of efficiency; the widening of share ownership; the reduction of governmental involvement in industry; the alleviation of the public sector borrowing requirement; and the encouragement of share ownership.' Also see C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 82, 87: 'Privatisation is often applied as a kind of 'omnibus policy' or panacea.' ... The policy is associated with a whole host of objectives, economic, political and social. ... Mozambique is a particularly good example of the multiple objectives associated with privatisation programmes.' (footnote omitted)

<sup>20</sup> See for instance W Megginson, 'Privatization' [2000] 118 Foreign Pol'y 14, 14-27; P Morgan, 'The Privatization and the Welfare State: A Case of Back to the Future?' in P Morgan (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995) 10; H Sarie-Eldin, 'Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa' in J Faundez, ME Footer and JJ Norton (eds), *Governance, Development and Globalization: A Tribute to Lawrence Tshuma* (Blackstone Press Limited, London 2000) 334 – 336; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 884.

<sup>21</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 3-4; World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 8-9. As used in this dissertation, the phrase IFIs refers to the World Bank Group and the International Monetary Fund (IMF). References to the World Bank in this thesis primarily relate to the International Bank for Reconstruction and Development (IBRD), and to some extent the International Finance Corporation (IFC).

also based their decision to embark on privatisation on some of these benefits.<sup>22</sup> They collectively constitute the yardstick for assessing the success or otherwise of the adoption and implementation of privatisation law for the purposes of this research, and premised on the analytical standpoint of the research, which is the economic development impact of privatisation, where the privatisation programme of a country fails to deliver on any of these benefits, it would undermine the argument that privatisation legal reform is instrumental to the attainment of economic development.

It should be noted that these benefits broadly focus on both the economic and social impact of privatisation - while the economic impact considers the effect of privatisation on enterprise performance, public sector financial health and effectiveness, and national economic growth, the social impact considers the distributive effect of privatisation on the citizens and its effectiveness in meeting the social concerns that initially informed the establishment of public enterprises in various countries. This is a pragmatic mixed bag that comprises aspects of the privatisation viewpoints from the right and left of the political spectrum and enables a more holistic, balanced and nuanced analysis of privatisation outcome as opposed to a simplistic or ideological analysis. As has been noted, privatisation, especially when undertaken on a large scale 'is not merely the transfer of economic control from the state to private concerns but is fundamentally a political act with profound social, economic and cultural implications.'<sup>23</sup>

The hypothesis or central argument of this research is that the replacement of the policy and legal framework for public ownership of enterprises with the new policy and legal framework for their private ownership and/or control as a result of privatisation is not sufficient in itself to deliver the above economic development benefits of privatisation in many African countries including Nigeria, when the benefits are viewed collectively. Essentially, the undertaking of privatisation legal reforms in these countries has not always led to the take over of enterprises by qualitative private investors and subsequent improvement in enterprise performance or led to a massive influx of qualitative foreign investors or aided broader development of the private sector or enhanced the financial health and effectiveness of the public sector or facilitated the realisation of social

---

<sup>22</sup> See for instance O Obasanjo (President of Nigeria), 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4-5.

<sup>23</sup> G Gluck, 'Privatisation: The Hungarian Example' (1993) 4 ICCLR 286, 287.

benefits for the citizens such as poverty and inequality reduction and qualitative job creation. Sometimes some of these goals have been achieved at the expense of others and the economic objectives of privatisation have often conflicted with the social objectives. This is the conundrum that privatisation often presents and the real challenge from the economic development perspective is to be able to harness the benefits of privatisation whilst avoiding the social pitfalls associated with it<sup>24</sup>, failing which the legal reform that ushered it in could face the sort of legitimacy questions that attended the earlier 'Law and Development' movement. Commenting on the move from the development model that ushered in state ownership and state-led development (Model 1) to the later one that ushered in privatisation and markets (Model 2), Jeswald Salacuse notes that:

The shift from Model I to Model II among developing countries is not necessarily permanent. Just as the failure of Model I led to change, the same fate may happen to Model II. While Model II may indeed bring about increased productivity, it may do so at a cost that Third World societies ultimately judge unacceptable. What are those costs? They may be considerable. First, Model II, with its emphasis upon markets, may allocate social resources to areas which society ultimately judges inappropriate. Second, it may create unacceptable divisions between rich and poor and among classes and castes in societies that are politically explosive because of their social and ethnic pluralism. Third, corruption may grow to the point that markets are distorted and the public determines Model II to have created a system that is fundamentally unfair. Fourth, it may facilitate through market transactions the exploitation of the weak by the strong, the poor by the rich. ... The important task of the law in this new era must be to create a framework that will minimize the costs of Model II while maximizing its benefits. The failure to do so may mean a drift back toward Development Model I or perhaps a search for Development Model III.<sup>25</sup>

The key issue to bear in mind from the economic development analytical standpoint is that privatisation has different stakeholders whose interests are not perfectly aligned. For instance, profit-driven private investors seek to earn profits on their investment through higher tariffs and prices failing which they are less likely to enter into

---

<sup>24</sup> K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 *J Mod Afr Stud* 197, 224-225. Also see JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 *Int'l L* 875, 889-890.

<sup>25</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 *Int'l L* 875, 889-890.

contractual agreements to make long term investments<sup>26</sup> On the other hand the citizens of the privatising country also have various expectations from privatisation, including having access to better and more affordable goods and services, jobs and a host of other benefits failing which they will be less supportive of private sector takeover of the delivery of various goods and services. With reference to water utilities privatisation in sub-Saharan Africa for instance, it has been noted that,

... governments face considerable difficulties in attracting investors and regulating private utilities. Furthermore, privatisation fails to address some of the fundamental constraints affecting water utilities in SSA, such as finance, the politicised nature of service delivery, and lack of access for the poor. ... in much of SSA it has been difficult to rouse investor interest. This is in part because of the problem of reconciling the conflict between the profit motive and the provision of a social service. ... private firms will only be interested in profitable investments, where either the government or consumers can pay enough to generate a commercial return. ... it is not clear that privatisation has improved the access of the poor to safe water.<sup>27</sup>

Given the absence of adequate social safety nets, alternative jobs, alternative product/service providers and adequate regulation in some developing countries including those in Africa, privatisation, even if it results in some economic growth which is not guaranteed, may usher in greater poverty, inequality and unemployment, social deprivation and socio-political instability, with adverse impact on national economic development.<sup>28</sup> On this, it has been noted that:

---

<sup>26</sup> I Oboarenegbe, 'What is the Justification for the Proposed Renegotiations of Deep Offshore Production-Sharing Contracts in Nigeria?' [2008] IELR 196, 201: 'Securing long-term fiscal stability is a key priority to any international investor. This strategy would enable the investor to determine the profitability for a particular project ab initio with a view to informing its shareholders about likely dividends. Investors would be reluctant to invest in countries with significant high contractual and political risks.'

<sup>27</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 507, 527-529. See also B Tsie, 'States and Markets in the Southern African Development Community (SADC): Beyond the Neo-Liberal Paradigm' (1996) 22 J S Afr Stud 75, 91: 'privatisation of public services under the guise of promoting efficiency has serious negative implications for society, especially for the poor and vulnerable who are unlikely to be able to afford privatised social services. ... It is not by coincidence therefore that the wave of privatisation in developing countries is accompanied by state expenditure cuts which invariably affect social sectors like education and health most severely ... This is not to deny the importance of fiscal prudence, efficiency and cost-effectiveness. It is only to point out that so far these goals have been pursued largely at the expense of investment in the social sector.' (footnote omitted)

<sup>28</sup> K Pfeifer, 'Parameters of Economic Reform in North Africa' (1999) 26 Rev African Polit Economy 441, 444; E Harsch, 'Burkina Faso in the Winds of Liberalisation' (1998) 25 Rev African Polit Economy 625, 640; JLP Lugalla, 'Development, Change, and Poverty in the Informal Sector during the Era of Structural Adjustments in Tanzania' (1997) 31 Can J Afr Stud 424, 435, 441; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 56.

Economic development activities ... must take adequate account of the need to ... address the social consequences of such economic pursuit on the host population. A failure to do so will certainly have adverse consequences on the investors and the host state.<sup>29</sup>

The NEPAD policy framework of the African Union referred to earlier is aimed at achieving both economic growth and the social ends of development<sup>30</sup>, and it places strong emphasis on the importance of public-private partnerships and foreign investments in achieving these objectives, of which public-private partnerships fall within the scope of privatisation as discussed in this thesis.<sup>31</sup> NEPAD projects that the attainment of economic growth rate of 7 percent per annum will be vital in reducing African poverty by half by the year 2015.<sup>32</sup> Essentially, NEPAD anticipates that privatisation and the foreign investment it is expected to attract will be key in achieving economic development on the continent. While it is virtually impossible to achieve the social ends of development like poverty and inequality reduction without economic growth, it is quite possible to attain economic growth while neglecting social development, although such economic progress as indicated by Jeswald Salacuse could be unsustainable in the long run.<sup>33</sup> Economic growth achieved under such circumstances may not be sustainable in the long run owing to the fact that it concentrates wealth in few hands and the benefits have not trickled down to the majority of the citizens.<sup>34</sup> In this regard it has been noted that in the implementation of public sector reforms, 'considerations of public policy and public interest tend to be marginalised by

---

<sup>29</sup> GS Akpan, 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' [2006] IELTR 1, 12. Also see NJ Udombana, 'The Summer Has Ended and We Are Not Saved - Towards a Transformative Agenda for Africa's Development' (2005-2006) 7 San Diego Int'l LJ 5, 57-58.

<sup>30</sup> NEPAD 2001 paras 64, 69.

<sup>31</sup> Ibid paras 100-103, 112, 150-152, 163.

<sup>32</sup> Ibid para 144.

<sup>33</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 889-890. Also see K Anan, 'Kofi Anan on Africa's Development Problems' (1998) 24 Popul Dev Rev 411, 414; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 78, 167; M Naim, 'Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?' (2000) 21 TWQ 505, 514, 524-525.

<sup>34</sup> B Tsie, 'States and Markets in the Southern African Development Community (SADC): Beyond the Neo-Liberal Paradigm' (1996) 22 J S Afr Stud 75, 92; SJ King, 'Structural Adjustment and Rural Poverty in Tunisia' [1999] (210) Middle East Report 41, 42-43.



commercial and competitive considerations.’<sup>35</sup> Commenting on the adoption of economic policies like privatisation in post-apartheid South Africa, Dennis Davis notes that:

... economic growth has been preferred over social reconstruction as a central policy objective. ... a dichotomy has begun to emerge between growth via the market-oriented policies adopted by the government and the constitutional vision of a democratic society based on a set of social democratic values.<sup>36</sup>

In some jurisdictions the social ends of development have been codified as enforceable rights under the constitution, obligating the government to accord respect to employment rights and ensure provision of certain basic goods and services crucial to a minimum standard of living such as healthcare services, housing, adequate food and water and adequate social security benefits.<sup>37</sup> In this regard, it has been noted that,

Market principles such as liberalization, privatization, and deregulation often conflict with socio-economic rights and have in a wide variety of contexts been criticized for accentuating poverty in poor countries.<sup>38</sup>

On the other hand, it should be noted that curbing private profits through regulation constitutes an encroachment on private property rights given that it places constraints on the full realisation of the benefits of private property ownership resulting from privatisation.<sup>39</sup> However in the context of privatisation, given that the private property in question used to belong to the state, regulation is vital in the public interest, particularly where a private monopoly succeeds a public one and need exists to protect consumers and promote competition.<sup>40</sup>

---

<sup>35</sup> MR Freedland, ‘Government by Contract and Public Law’ [1994] PL 86, 103.

<sup>36</sup> DM Davis, ‘Socioeconomic Rights: Do They Deliver the Goods?’ (2008) 6 ICON 687, 697-698.

<sup>37</sup> KD Ewing, ‘Social Rights and Constitutional Law’ [1999] PL 104, 105, 117-119. See also DM Davis, ‘Socioeconomic Rights: Do They Deliver the Goods?’ (2008) 6 ICON 687, 687-689.

<sup>38</sup> DM Chirwa, ‘A Full Loaf is better than Half - The Constitutional Protection of Economic Social and Cultural Rights in Malawi’ (2005) 49 JAL 207, 222-223. Also see 224-226 for a discussion of the right to development. Note further OC Okafor, ‘The Precarious Place of Labour Rights and Movements in Nigeria’s Dual Economic and Political Transition, 1999–2005’ (2007) 51 JAL 68, 68, 89, 93.

<sup>39</sup> C Peters, ‘Investment Obligations of the Energy System Operators in Germany’ [2008] IELR 37, 38.

<sup>40</sup> Ibid.

In the light of the above discussion, if privatisation is viewed from the economic development perspective utilised in this dissertation, the end result of its implementation should not just be the transfer of legal ownership and control of public enterprises to private entrepreneurs or the attainment of corporate efficiency and profitability, but rather the attainment of all the other economic development benefits of privatisation noted above. Privatisation law alone may not be sufficient to actualise economic development due to various issues that arise within the social context of its implementation. John Williamson notes that, 'The impact of privatisation depends very much on how it is done.'<sup>41</sup> For the policy and legal framework for privatisation to be effective in facilitating economic development and in order to minimise the pitfalls associated with privatisation, careful attention has to be paid to the process of putting in place the framework and subsequently implementing the programme and the research considered the views of various scholars, development experts and other commentators on this issue. Essentially, effective privatisation outcomes require the observance of certain prerequisites, which the analytical framework of the thesis broadly classifies into 2 categories namely, designing an effective policy and legal framework and secondly, ensuring proper implementation of privatisation.

On the issue of law and policymaking, the focus of the thesis is on whether the choice of privatisation was informed by conviction that it was the best reform option for the country and whether the privatisation law and other supportive laws are adequately structured to facilitate economic development.<sup>42</sup> On the issue of implementation, it has been noted that:

Economic policymaking is much more complicated than promulgating laws or regulations. While some major policies can be changed by the "stroke of a pen," most require a continuous and difficult period of implementation. Privatization and civil-service reform, for example, require high degrees of technical competence to go along with the required political will.<sup>43</sup>

---

<sup>41</sup> J Williamson, 'What should the World Bank Think about the Washington Consensus' (2000) 15 World Bank Res Observer 251, 258. Also see MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S32.

<sup>42</sup> On the key considerations in public policy-making, see D Wass, 'Checks and Balances in Public Policy Making' [1987] PL 181, 182.

<sup>43</sup> JM Wolgin, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) Amer Econ Rev 54, 56.

Besides the above noted issue of technical competence, there are some other factors that could also affect the implementation outcome of privatisation law. Accordingly, the research frames and analyses four key implementation questions namely, is the national environment conducive to embarking on privatisation and attracting private investments?; secondly, is the institutional framework for implementing and monitoring the outcome of privatisation robust?; thirdly, will the strategic approach to the implementation of privatisation lead to the realisation of set policy objectives?; and finally, is the privatisation process accountable, transparent and free from corruption?

To the extent that some developing African countries like Nigeria that have put in place the policy and legal framework for privatising public enterprises have not yet fully realised the key economic development benefits of privatisation, the position taken in the thesis is that their privatisation programmes are deficient in some respect regarding these prerequisites mentioned above. The existence, nature and extent of these deficiencies are analysed in this thesis with respect to African countries in general, Nigeria in particular and the Nigerian electricity reform programme in greater detail. It is important to note here that describing the policy, legal and implementation imperatives noted above as ‘prerequisites’ is not meant to suggest that once they are observed, then economic development is surely guaranteed. Asserting such causal link would likely give rise to the sort of problems encountered by the earlier ‘Law and Development’ movement since it is quite possible that the implementation of privatisation legal reform and the observance of the above pre-requisites may still fail to yield the expected economic development outcomes, due to a host of other issues that could be peculiar to the implementing country. The research does not lay claim to understanding and addressing all the ingredients for successful economic development that must accompany privatisation legal reform in a country, and the designation of some issues as prerequisites is necessarily subjective of which some other scholars may view them differently. What is asserted however is that where they are not observed, privatisation will be less likely to yield expected economic development outcomes. It is also important to note that one must necessarily be modest about what law alone can achieve in the privatisation context given that it is only one of a number of other equally important determinants of privatisation outcomes. As noted by Kevin Davis and Michael Trebilcock:

... despite the resurgence of interest in reforming legal institutions as a means of pursuing development, there is a great deal of room for debate about the relationship between legal reforms and development.<sup>44</sup>

### **1.1. BASIS FOR CHOICE OF REGION, COUNTRY AND SUB-SECTOR OF CASE STUDY IN THE DISSERTATION**

The choice of Africa for analysing the economic development outcome of privatisation legal reform is primarily informed by three things namely, the fact that it is facing daunting economic development challenges perhaps more than any other region in the world<sup>45</sup>; secondly, the regional development policy views privatisation as a means of facilitating economic development<sup>46</sup>; and thirdly, privatisation has been or is being implemented in various African countries under the auspices of the IFIs with a view to actualising economic development in the continent.<sup>47</sup> Currently, the continent lags far behind other continents as an investment destination due to various problems which are analysed in the thesis as part of the impediments to successful economic development outcome even after privatisation legal reforms have been undertaken, including infrastructural inadequacies, bureaucratic bottlenecks, corruption, limited access to credit and weak judiciaries.<sup>48</sup>

Nigeria, which falls within the UNDP classification of medium human development<sup>49</sup>, is a developing African country facing severe economic development challenges evidenced by a low level of industrialisation, poor social infrastructure network, very high poverty and inequality rate, and high unemployment rate, which problems partly

---

<sup>44</sup> KE Davis and MJ Trebilcock, 'Legal Reforms and Development' (2001) 22 TWQ 21, 32.

<sup>45</sup> GBN Ayittey, 'How the Multilateral Institutions Compounded Africa's Economic Crisis' (1998-1999) 30 Law & Pol'y Int'l Bus 585, 585-586.

<sup>46</sup> NEPAD 2001 paras 100-103, 112, 150-152, 163.

<sup>47</sup> RA Young, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50, 55.

<sup>48</sup> Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 59, 77-78.

<sup>49</sup> United Nations Development Programme, 'Human Development Indices: A Statistical Update 2008 - HDI Rankings' <<http://hdr.undp.org/en/statistics/>> accessed 3 March 2009.

influenced the decision to set up many of the public enterprises in the country.<sup>50</sup> The fact that these public enterprises were largely ineffective in facilitating economic development due to various problems they faced formed part of the justification for embarking on privatisation.<sup>51</sup> The electric power sector reform programme in Nigeria that places key emphasis on privatisation was selected for further analysis in this research owing to the vital role of electricity in national economic development. In many African countries in general, efficient delivery of utility/infrastructural services poses a big challenge. According to NEPAD,

Infrastructure is one of the major parameters of economic growth ... If Africa had the same basic infrastructure as developed countries, it would be in a more favourable position to focus on production and on improving productivity for international competition. The structural gap in infrastructure constitutes a very serious handicap to economic growth and poverty reduction. Improved infrastructure, including the cost and reliability of services, would benefit both Africa and the international community, which would be able to obtain African goods and services more cheaply.<sup>52</sup>

Specifically regarding Nigeria, at least half of the country currently does not have access to power supply from the national grid especially rural dwellers<sup>53</sup>, and according to the Bureau of Public Enterprises, which is the Nigerian privatisation agency, the country's per capita consumption of electricity is the lowest in the world.<sup>54</sup> For those that do have access to electricity in Nigeria, the supply is very erratic, with homes and

---

<sup>50</sup> NM Ogubunka, *Elements of Privatisation in Nigeria* (Rhema Enterprises, Lagos 2000) 14-16; MA Tokunboh, *Public Enterprises: The Nigerian Experience* (Lantern Books, Lagos 1990) 7.

<sup>51</sup> O Obasanjo (President of Nigeria) 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4-5.

<sup>52</sup> NEPAD 2001 paras 97, 98.

<sup>53</sup> Electric Power Sector Reform Implementation Committee (Nigeria), 'National Electric Power Policy' (October 2000) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/B3AE9394-8383-47E5-8199-CD1A325A265B/0/ElectricPowerPolicy.pdf>> accessed 6 September 2004 3; OU Oparaku, 'Photovoltaic Systems for Distributed Power Supply in Nigeria' (2002) 25 *Renewable Energy* 31, 31-32. See generally AB Sebitosia and P Pillay, 'Energy Services in Sub-Saharan Africa: How Conducive is the Environment?' (2005) 33 *Energy Pol'y* 2044, 2046, 2049.

<sup>54</sup> NA El-Rufai (BPE Director-General), 'The Privatisation Programme - Status Report And Plans For 2001-3' (Nigerian Investment Summit, 2001) <<http://www.bpeng.org/cgi-bin/publications/presentations/nasir-ahmad%20el-rufai%20-%20nigerian%20investment%20summit-status%20report%20plans%20for%202001-3-%20sep%202001-%20london.ppt>> accessed 21 May 2006.

businesses facing routine power blackouts and a host of other problems identified in the research.<sup>55</sup>

Having enacted a general law to pave way for privatisation of various public enterprises and a sector-specific law to pave way for wide ranging reform of the electricity sector, including privatisation of the power utility, the key question for the purposes of the dissertation is whether these laws will yeild the expected economic development dividends that informed their enactment. Using the analytical framework of the dissertation, the research identifies key obstacles that stand in the way of these laws achieving intended ends. It should be noted that the thesis primarily focuses on the second privatisation programme currently being implemented in Nigeria, which effectively commenced in 1999, although some references are also made to the earlier privatisation that took place between 1988 and 1993.<sup>56</sup> This is because the second programme, unlike the first, involves the privatisation of major public enterprises that have occupied the 'commanding heights' of the Nigerian economy and have huge developmental impact on the country and its citizens in terms of their products, services or employment capacity, including the electricity utility that forms part of the case study in the thesis. Also, the second programme, unlike the first, places strong emphasis on attracting foreign participation, which the government views as a key cornerstone of economic growth and economic development.

A further reason for choosing Africa generally as well as Nigeria specifically for the research case study is that it provides an opportunity to examine the approach of the IFIs, specifically the World Bank and the International Monetary Fund (IMF), to privatisation, a key policy reform that both institutions have promoted for close to 3 decades in many developing countries where they have had some measure of influence on economic policymaking and implementation.<sup>57</sup> Both the World Bank and the IMF

---

<sup>55</sup> J Ikeme and OJ Ebohon, 'Nigeria's Electric Power Sector Reform: What should Form the Key Objectives?' (2005) 33 *Energy Pol'y* 1213, 1215; G Tyler, 'Nigeria: Public and Private Electricity Provision as a Barrier to Manufacturing Competitiveness' (2002) 221 *Findings* (World Bank) <<http://www.worldbank.org/afr/findings/english/find221.pdf>> accessed 2 December 2005.

<sup>56</sup> OAO Alegimenlen, 'Structural Adjustment and Nigerian Development: A Third World Angle' (1996-1998) 4 & 5 *Nigerian Current Legal Problems* 28, 30-32; O Yerokun, 'The Changing Investment Climate through Law and Policy in Nigeria' in CO Okonkwo (ed), *Contemporary Issues in Nigerian Law: Essays in Honour of Judge Bola Ajibola* (Taiwo Fakoyede, Lagos 1992) 244-246.

<sup>57</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 8-9; IMF, 'Policies for Faster Growth and

have emphasized the need for poverty and inequality reduction to be the end result of the implementation of development strategies in Africa, besides the attainment of economic growth.<sup>58</sup> Unlike the European Bank for Reconstruction and Development that has an explicit mandate to promote privatisation<sup>59</sup>, such explicit mandate is not contained in the Articles of Agreement of IFI or any of the organisations that form part of the World Bank Group. In the privatisation context however, while the World Bank is principally concerned with the impact of state ownership of inefficient enterprises on development and poverty reduction, the IMF is concerned about the fiscal impact of such enterprises on the country's purse, which would ultimately affect the resources available for addressing poverty-related issues.<sup>60</sup>

Through loans, grants and reform suggestions made in the 1970s and early 1980s, the IFIs, alongside other official lenders like the Paris Club as well as private banks, encouraged the economic development initiatives of many developing countries, including African countries, leading to the establishment of many public enterprises and expansion of the supply of public services provided by the state.<sup>61</sup> As earlier indicated, some strands of development thinking at the time favoured state economic intervention and deemphasized the role of markets, and many developing countries had self-sufficiency as their industrial goal, with state industrial undertakings aiming to produce enough goods for the country's needs while the state restricted the importation of

---

Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (Issues Brief) (December 2000) No 00/09.

<sup>58</sup> I Bantekas, 'Sociological Implications Arising from World Bank Projects and their Impact on Sub-Saharan Indigenous Peoples' (2005) 1 Int JLC 143, 144; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 83-84; IMF, 'Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (Issues Brief) (December 2000) No 00/09.

<sup>59</sup> Agreement Establishing the European Bank for Reconstruction and Development 1990 art 2; BB Palmer, 'European Bank for Reconstruction and Development' (1991) 6 JIBL 204, 204, 207; SK Chatterjee, 'The European Bank for Reconstruction and Development' (1992) 7 JIBL 64, 65.

<sup>60</sup> JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 Currents Int'l Trade LJ 37, 42; MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S32; D Babai, 'The World Bank and the IMF: Rolling Back the State or Backing its Role?' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 266.

<sup>61</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 876-880; JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 Currents Int'l Trade LJ 37, 40; R Hunja, 'Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines' [1997] PPLR 217, 218; JM Wolgin, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) Amer Econ Rev 54, 54; D Babai, 'The World Bank and the IMF: Rolling Back the State or Backing its Role?' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 258, 260.

foreign goods.<sup>62</sup> Since the 1980s however, the IFIs have urged many borrowing countries to undertake stabilisation and structural adjustment policy reforms with a view to revamping their national economies, improving the prospects for long-term economic efficiency and facilitating economic development.<sup>63</sup> They have included privatisation as one of the conditionalities in their funding packages for many of these countries<sup>64</sup>, owing to the fact that they view it as being crucial for achieving lasting enterprise reform, facilitating economic growth and attaining the social objectives of economic development such as poverty and inequality reduction and enhanced employment rate in the country.<sup>65</sup> There is also a legal reform component to the funding as the IFIs would often require borrowing countries to enact relevant laws or reform existing laws to give effect to privatisation and other market reforms.<sup>66</sup> As Joseph Norton notes ‘Legal Reform Programmes are based on an assumption that sound economic development needs sound legal institutional infrastructure.’<sup>67</sup> In the case of Nigeria, both the

---

<sup>62</sup> MM Shirley, ‘The What, Why, and How of Privatization: A World Bank Perspective’ (1991-1992) 60 *Fordham L Rev* S23, S32; M Hodd, ‘Africa, the IMF and the World Bank’ (1987) 86 *Afr Aff* 331, 335-336.

<sup>63</sup> M Watts, ‘Visions of Excess: African Development in an Age of Market Idolatry’ [1991] (51) *Transition* 124, 132; RA Young, ‘Privatisation in Africa’ [1991] (51) *Rev African Polit Economy* 50, 55; F Stewart, ‘Are Adjustment Policies in Africa Consistent with Long-run Development Needs?’ (1991) 9 *Development Policy Review* 413, 414-415.

<sup>64</sup> TJ Biersteker, ‘Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions’ (1990) 34 *Int Stud Quart* 477, 485; K Reisman, ‘The World Bank And The IMF: At the Forefront of World Transformation’ (1991-1992) 60 *Fordham L Rev* S349, S350; HR Torres, ‘Reforming the International Monetary Fund - Why its Legitimacy is at Stake’ (2007) 10 *JIEL* 443, 448; K Bayliss, ‘Utility Privatisation in Sub-Saharan Africa: A Case Study of Water’ (2003) 41 *J Mod Afr Stud* 507, 508; M Watts, ‘Visions of Excess: African Development in an Age of Market Idolatry’ [1991] (51) *Transition* 124, 132; D Babai, ‘The World Bank and the IMF: Rolling Back the State or Backing its Role?’ in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 254-255; IMF, ‘IMF Conditionality’ (Factsheet) (April 2009) <<http://www.imf.org/external/np/exr/facts/conditio.htm>> accessed 30 May 2009: ‘When a member country is seeking a loan from the IMF, it agrees to implement policy measures that will enable it to resolve its balance of payments problems. These measures are known as “conditionality” and they also serve as a guarantee that the country will be able to repay the IMF.’

<sup>65</sup> JJ Sanders, ‘The World Bank and the IMF: Fostering Growth in the Global Market’ (2000) 9 *Currents Int’l Trade LJ* 37, 41-43; JW Salacuse, ‘From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World’ (1999) 33 *Int’l L* 875, 883, 884. Note that other donor agencies like the United States Agency for International Development (USAID) and the Department for International Development (DFID) (formerly known as the British Overseas Development Administration) have also played a role in promoting privatisation. See RA Young, ‘Privatisation in Africa’ [1991] (51) *Rev African Polit Economy* 50, 55-56.

<sup>66</sup> I Shihata, *The World Bank in a Changing World: Selected Essays and Lectures, Vol 2* (Kluwer Law International, The Hague 1995) 132-135.

<sup>67</sup> JJ Norton, ‘International Financial Institutions and the Movement Toward Greater Accountability and Transparency: The Case of Legal Reform Programmes and the Problem of Evaluation’ (2001) 35 *Int’l L* 1443, 1462. Also see 1456-1458.



privatisation programme in general and the electricity privatisation programme in particular have been endorsed and funded by the IFIs of which legal reforms have been undertaken within the context of the funding to pave the way for the privatisation, which is expected to yield various economic development benefits for the country.<sup>68</sup>

Barry Metzger notes that:

The enactment of new legislation and regulations is, in some respects, the easiest part of donor-assisted law reform: it is often relatively short-term work and inexpensive. Institutional reforms and the development of the necessary human resources within such institutions, however, require longer-term commitments and greater resources.<sup>69</sup>

Having implemented the privatisation programme for close to 10 years, the research analysed the extent to which these laws have catalysed expected economic development dividends and whether the reality of privatisation's adoption and implementation in the country corresponds with its economic development policy objective.<sup>70</sup> In this regard, concern has been raised that:

Notwithstanding the operative "death" of the law and development movement twenty years ago, its central tenets remain the intellectual backbone of international development policy and practice.<sup>71</sup>

It should be noted that this analysis and consequent critique of some aspects of the IFIs' approach to the adoption and implementation of privatisation in Africa generally and Nigeria in particular, was not undertaken in a separate chapter but rather formed part of

---

<sup>68</sup> World Bank (International Development Association), 'Proposed Project Restructuring and Amendment of the Credit Agreements for the Privatization Support Project (Cr 3520-Uni) and Community Based Urban Development Project (Cr 3654-Uni) in the Context of the Portfolio Restructuring and in Alignment with the Country Partnership Strategy for the Federal Republic of Nigeria' (Report) (June 2005) Report No 32425-NG 5-7, 12-13.

<sup>69</sup> B Metzger, 'Law and Development: An Essential Dimension of Governance' (1998) 26 Int'l Bus Law 294, 295.

<sup>70</sup> For a discussion of the need for, and challenges posed by the evaluation of the impact of IFI-driven legal reforms like privatisation for purposes of accountability, see JJ Norton, 'International Financial Institutions and the Movement Toward Greater Accountability and Transparency: The Case of Legal Reform Programmes and the Problem of Evaluation' (2001) 35 Int'l L 1443, 1447-1448, 1461-1473 pp 1468.

<sup>71</sup> AL Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 Yale LJ 1, 8.

the broader analysis undertaken in the chapters dealing with Africa, Nigeria and the Nigerian electricity reform programme respectively, due to the fact that the issues involved are all interwoven and accordingly not particularly amenable to compartmentalised analysis.

Finally, it should be noted that where the implementation of privatisation does not deliver expected economic development dividends or it appears that some stakeholders may be advantaged at the expense of others or where the undertaking of privatisation-related regulation does not adequately factor in the interests of the wide public, the legitimacy of privatisation and regulation could be called into question.<sup>72</sup> Equally where the implementation of privatisation gives rise to serious allegations of corruption and cronyism especially on the part of political leaders in a country, its legitimacy would also be called into question and this may give rise to clamour for reversal of concluded transactions perceived to be ‘formally legal, but morally odious.’<sup>73</sup> If these issues that trigger legitimacy concerns are not safeguarded against and adequately addressed, privatisation, as the antidote to state ownership problems would remain on shaky grounds in many implementing countries even if some economic development benefits have been achieved.<sup>74</sup>

## **1.2. RESEARCH METHODOLOGY**

As earlier stated, the hypothesis or central argument of this research is that the replacement of the policy and legal framework for public ownership of enterprises with the new policy and legal framework for their private ownership and/or control as a

---

<sup>72</sup> On the issue of legitimacy concerns, see J Black, ‘Talking about Regulation’ [1998] PL 77, 105; Harlow C and Rawlings R, *Law and Administration* (Butterworths, London 1997) 309-310. Also see P Kennedy, ‘Barriers to African Capitalism’ (1994) 32 J Mod Afr Stud 191, 233. Also see DM Trubek ‘Toward a Social Theory of Law: An Essay on the Study of Law and Development’ (1972-1973) 82 Yale LJ 1, 36; S Commander, M Dutz and N Stern, ‘Restructuring in Transition Economies: Ownership, Competition and Regulation’ (Annual World Bank Conference on Development Economics, 1999) <<http://siteresources.worldbank.org/INTABCDEWASHINGTON1999/Resources/stern.pdf>> accessed 30 June 2005 8, 10, 28.

<sup>73</sup> J Nellis, ‘The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis’ (2002) World Bank OED Working Paper <[http://www.worldbank.org/oed/transitoeconomies/docs/privatization\\_enterprise.pdf](http://www.worldbank.org/oed/transitoeconomies/docs/privatization_enterprise.pdf)> accessed 6 June 2005 51.

<sup>74</sup> See generally JW Salacuse, ‘From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World’ (1999) 33 Int’l L 875, 889-890.

result of privatisation is not sufficient in itself to deliver the economic development benefits of privatisation in many African countries including Nigeria, judged by reference to how privatisation is beneficial to the public sector and privatised enterprises, how it contributes to overall private sector development, how it benefits the citizens of the country and finally, its usefulness as a conduit for beneficial foreign investment inflow to the country.

The adoption of a socio-legal methodological approach that deploys social scientific research methods would be effective in testing the above hypothesis and conducting an inquiry into the actual impact of privatisation law and policy in a country or region and formulating and addressing various research questions regarding the nature, purpose, effectiveness and implications or impact of privatisation.<sup>75</sup> In this regard, a qualitative case study would be effective in undertaking an in-depth analysis of the Nigerian privatisation programme and resolving issues such as how and why privatisation policy was introduced in Nigeria, the extent to which the Nigerian privatisation laws and related regulations contain adequate provisions for actualising the policy goal of economic development and whether the government has been able to utilise these laws as effective tools in aiding national economic development and actualising the social objectives of economic development including the reduction of the poverty, inequality and unemployment levels in the country.<sup>76</sup> The case study would prove vital in exposing any gaps or discrepancies that exist between the law and policy framework and actual verifiable reality of implementation in the country, identifying why these gaps exist and suggesting how to bridge them.<sup>77</sup> As previously noted, the earlier 'Law and Development' movement appeared to place too much trust in the ability of laws and legal institutions to facilitate economic development without fully considering the practical limitations of laws and the social context of their implementation, which

---

<sup>75</sup> M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007) 119-181 pp 130, 177-178.

<sup>76</sup> T Hutchinson, *Researching and Writing in Law* (2<sup>nd</sup> edn Lawbook Co, Pymont 2006) 101-104.

<sup>77</sup> DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States [1974] *Wis L Rev* 1062, 1082; MM Feeley, 'Three Voices of Socio-Legal Studies' (2001) 35 *Isr L Rev* 175, 184-185; M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007) 125-138; T Hutchinson, 'Researching and Writing in Law' (2<sup>nd</sup> edn Lawbook Co, Pymont 2006) 89.

considerations would be factored in if a sociolegal approach is adopted to privatisation research. The point has been made that:

... developing nations, like those of Sub-Saharan Africa, need lawyers to draft legislation, contracts and business ventures which will enable developing nations to avoid the confusion and inefficiency that may hinder their first institutional steps to economic development.<sup>78</sup>

In this regard, it has been noted that:

If law is instrumental - if it is a means to an end - then law needs help in designing its means and evaluating its effects. Given this view, the collaboration between law and social science is both obvious and necessary ... law schools seek to train practitioners and conduct research that improves the law, while the emerging field of socio-legal studies seeks to understand law as it is embedded in the larger society.<sup>79</sup>

It was considered that a black-letter methodological approach would not be effective in dealing with many of the issues sought to be addressed in this research given that this is not intended to be a doctrinal legal research narrowly focused on a strict positivist legal analysis of privatisation legal provisions and the legal issues, rights, obligations and disputes arising from privatisation contracts, to the exclusion of other issues that may not be considered relevant to a law-centred research.<sup>80</sup> An abstract or technical analysis of privatisation rules and associated legal issues would be inadequate for examining the policy rationale for privatisation, the social context for its adoption and implementation in the country, the practical operation or implementation process of privatisation law and policy and regulatory rules by relevant government institutions and their actual impact on the citizens of the country.<sup>81</sup> From a normative viewpoint, the research

---

<sup>78</sup> OO Akinla, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 BC Third World LJ 19, 35.

<sup>79</sup> MM Feeley, 'Three Voices of Socio-Legal Studies' (2001) 35 Isr L Rev 175, 182-183, 202.

<sup>80</sup> M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007) 118, 129-132, 163.

<sup>81</sup> B Metzger, 'Law and Development: An Essential Dimension of Governance' (1998) 26 Int'l Bus Law 294, 295; DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 Legal Stud 315, 315, 319, 331; T Hutchinson, *Researching and Writing in Law* (2<sup>nd</sup> edn Lawbook Co, Pymont 2006) 87-88; M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007) 139, 152-156, 161, 166; OO Akinla, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 BC Third World LJ 19, 21: 'Although an understanding of new reforms and legislation is important, it is crucial for lawyers to appreciate the rationale behind current economic reforms.'

considered that privatisation means more than just an abstract legal concept to the citizens of a country that are affected by its implementation and that their welfare should be the central focus of such implementation. As earlier noted, a large scale privatisation programme 'is not merely the transfer of economic control from the state to private concerns but is fundamentally a political act with profound social, economic and cultural implications.'<sup>82</sup>

Further buttressing the need for a non-black letter methodological approach to this research is the observation that the way laws and regulations appear in statute books could differ from the way they are interpreted or implemented in practice.<sup>83</sup> Lech Biegunski notes that:

Public administration ... business people and legal advisers are decisive to proper law enforcement. ... Even a properly constructed and clear ... law that is supported by explanatory documents, and is properly disseminated publicly, can suffer because it is not enforced in practice. ... some legal solutions that were at an early stage, spontaneously or mechanically adopted from other systems, can be too far from the realities of an adopting country and not properly executed in practice<sup>84</sup>

In the case of anti-corruption legislation which could be effective in checking privatisation-related corruption, the enactment of such a law may not achieve the intended result if the institutional machinery for its implementation is weak or corrupt.<sup>85</sup>

Regarding competition provisions which are also vital to the realisation of privatisation dividends, it has been noted that:

---

<sup>82</sup> G Gluck, 'Privatisation: The Hungarian Example' (1993) 4 ICCLR 286, 287. On the issue of also factoring in the perspective of persons affected by law implementation, see DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 Legal Stud 315, 323, 326.

<sup>83</sup> R Pound, 'Law in Books and Law in Action' (1910) 44 Am L Rev 12, 34-35; D Parker, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] JBL 283, 302; J Black, 'Talking about Regulation' [1998] PL 77, 89; R Baldwin, *Rules and Government* (Oxford, OUP 1995) 9.

<sup>84</sup> L Biegunski, 'Adoption of European Competition Law by Countries in Transition: Problems and Solutions' (2007) 28 ECLR 501, 504, 508 and 510.

<sup>85</sup> PD Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 LJIL 749, 762-763; PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 JAL 173, 192; IO Bolodeoku, 'Corporate Political Contributions: A Comment on Nigeria's Electoral Act 2006' (2007) 18 ICCLR 107, 113.

... a strong competition policy contributes substantially to successful economic development. But the mere enactment of competition laws is not sufficient to achieve the benefits of enhanced competition.<sup>86</sup>

It has also been noted that ineffective enforcement of competition law may be reflective of poor adoption of the law and policy framework in the implementing countries and mismatch between the law and policy and the local realities in the countries, of which their social, legal and political peculiarities needs to be factored in.<sup>87</sup> In the same vein, Robert Baldwin and Martin Cave note the need for a holistic view of regulatory systems beyond just the legal provisions.<sup>88</sup> In the case of regulatory bodies that have been set up as a result of privatisation, where they are not accountable for the power they exercise, they may not necessary exercise regulatory discretion in the public interest and may be ineffective in regulating the activities of privatised enterprises and addressing citizens' grievances even if there are good regulations in the statute books.<sup>89</sup> Commenting on China for instance, Elizabeth Spahn notes that:

China has a "favorable regulatory regime," meaning if you ... bribe the relevant Chinese officials, there is no regulatory regime actually enforced. Legal rules on paper are systemically and routinely ignored with a little red envelope stuffed with cash. ... erratic and selective enforcement of laws on paper increases opportunity and market value for bribe takers.<sup>90</sup>

Specifically regarding Africa, sometimes there are political undercurrents that could adversely affect the functioning of law implementing institutions. In this regard, it has been noted that:

---

<sup>86</sup> AF Abbott, 'Competition Policy and its Convergence as Key Drivers of Economic Development' (2008-2009) 28 *Miss C L Rev* 37, 50. Also see I Dajkovic, 'Competing to Reform: An Analysis of the New Competition Law in Albania' (2004) 25 *ECLR* 734, 740.

<sup>87</sup> L Bieganski, 'Adoption of European Competition Law by Countries in Transition: Problems and Solutions' (2007) 28 *ECLR* 501, 501, 504, 506, 510.

<sup>88</sup> R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP, Oxford 1999) 336.

<sup>89</sup> DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 *Legal Stud* 315, 325; M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007) 143, 150-151.

<sup>90</sup> E Spahn, 'International Bribery: The Moral Imperialism Critiques' (2009) 18 *Minn J Int'l L* 155, 212, 215.

Not only do the holders of state power seek to validate their hold on power by means of patrimonial legitimacy, but they also consider that their prime responsibility lies more with the redistribution of resources to their clients than with the common good. Accordingly, the workings of the formal political institutions are undermined by the informal logic of clientelism.<sup>91</sup>

In the case of Nigeria, Oluwole Obayomi points out that ‘Nigeria has had good laws and policies, the implementation of which went in the opposite direction’<sup>92</sup>

It is because of this possible divergence between law in books and law in action that the analytical framework of the thesis considers both the adequacy of the law and policy framework for privatisation and the effectiveness of the implementation process. Viewed from the socio-legal perspective, privatisation law and policy and regulatory provisions are only indicative but not conclusive regarding the likely effect of privatisation in a country. Also, statutory safeguard provisions, procedural measures and policy stipulations that should ensure the proper conduct of privatisation transactions, guarantee the observance of rule of law in the privatisation process, safeguard the public interest and ensure the legitimacy of the privatisation programme, may not be effective in practice owing to a number of reasons. A case study would be able to reveal these discrepancies between what is contained in policy documents, procedural guidelines and statute books on the one hand, and what actually goes on in practice on the other hand, and give insight into the current and future impact of privatisation in the country. Adequately addressing issues like the inability or ineffectiveness of regulators in implementing regulations or lack of proper accountability for the exercise of regulatory powers may involve examining relevant legal provisions, but also looking beyond them to examine the social, political and cultural context within which regulators operate in a country, which would aid the design of effective measures for addressing the problem and ensuring that regulators remain accountable for the power they exercise.<sup>93</sup>

---

<sup>91</sup> P Chabal, ‘The Quest for Good Government and Development in Africa: Is NEPAD the Answer?’ (2002) 78 *Int'l Aff (UK)* 447, 460.

<sup>92</sup> O Obayomi, ‘Nigeria's New Investment Laws’ [1997] *JBL* 593, 603. Also see GS Akpan, ‘The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria’ [2006] *IELTR* 1, 3 and 11.

<sup>93</sup> C Graham, ‘The Regulation of Privatised Enterprises’ [1991] *PL* 15, 16-20; J Black, ‘Talking about Regulation’ [1998] *PL* 77, 103-104.

A socio-legal methodology, would be suitable for addressing the above issues because socio-legal research adopts an interdisciplinary approach that broadens the scope of legal research, making it possible to examine other perspectives to privatisation including the economic and social perspectives relevant to economic development.<sup>94</sup> On account of this broader perspective, the research is able to go beyond a critique of privatisation and regulatory law in Nigeria to examine the policy arguments of privatisation and investigate privatisation law in action or in the context of implementation, in order to get a more complete picture of the nature of privatisation and the practical effects of its adoption and implementation. The contextual variable factors examined in the research, which could affect the outcome of privatisation in a country include various peculiarities regarding the country and its citizens, the effectiveness of the institutional framework for executing the privatisation programme and undertaking post-privatisation regulation, and the motivations and extent of accountability of various public officials, regulators and political leaders involved in implementing the laws and regulations.

Due to the broader interdisciplinary approach utilised in this socio-legal research and the analytical standpoint of the dissertation, the scope and source of research materials consulted was wider than what would have been required for a strict legalistic analysis of privatisation done within the framework of black letter research.<sup>95</sup> The materials consulted in the course of seeking answers to various questions resulting from the research include some statutes, academic commentaries from legal and other disciplines, various policy documents including official government documents and various reports issued by the IFIs as well as some articles authored by their staff. Given the fact that the Nigerian privatisation programme is still on-going, the research also made extensive use of contemporaneous news reports from various journalistic sources on various privatisation transactions and the general conduct of the programme. In this regard, it has been noted that the Nigerian media has played a key role in covering the implementation of the privatisation programme.<sup>96</sup> There was also extensive use of

---

<sup>94</sup> DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 *Legal Stud* 315, 319; M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007) 133-138.

<sup>95</sup> M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007) 129-130.

<sup>96</sup> E Anaeto, 'Privatisation – What Role for the Media?' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 111.



various electronic databases for sourcing relevant articles, and the internet also proved particularly useful in accessing the websites of various Nigerian newspapers, which made it possible to follow the progress of the privatisation programme and monitor the conduct of various transactions as reported by the news media.

Given the qualitative nature of this research, it does not involve a detailed statistical sampling, presentation and analysis of privatisation transactions and some aspects of the research, including policy appraisal necessarily entail subjective value judgments hinged on the economic development perspective of the research.<sup>97</sup> Selective references are made in the dissertation to reports on various transactions and the conduct of privatisation in Africa generally and Nigeria in particular in order to highlight or illustrate specific issues relevant to the research narrative.<sup>98</sup> It is also vital in this regard to point out the fact that one key criticism of privatisation in general and African privatisation in particular is the paucity of detailed broad-based empirical data on the outcome of privatisation especially regarding its impact on the citizens of various implementing countries. As one writer notes:

A major constraint faced in trying to address privatization issues in Africa is the lack of adequate data on the quantitative impact of privatization. Several studies have been conducted but most of these cover developing countries in general with little specific emphasis on Africa. ... There appears to be very little research in identifying the direct impact of privatization on poverty in Africa and this is a crucial gap that needs to be filled through further research.<sup>99</sup>

On account of this, the research involved the collection and analysis of a large body of work from different sources noted above, covering different aspects of privatisation's adoption and implementation in Nigeria and Africa so as to gain a broad understanding of the outcome of privatisation in various countries and be able to give a reasonably

---

<sup>97</sup> T Hutchinson, *Researching and Writing in Law* (2<sup>nd</sup> edn Lawbook Co, Pymont 2006) 95: 'Qualitative research methodologies acknowledge that there is not one overriding reality, but that reality is situational and personal, and may vary between individuals and between situations. The outcomes can often not be reduced to valid statistical pictures or be generalised. Thus, quantitative methods are often directed towards 'number crunching and the outcomes are statistics, whereas qualitative methods rarely have exact outcomes that can be generalised to other situations, although they may make use of statistics.'

<sup>98</sup> T Hutchinson, *Researching and Writing in Law* (2<sup>nd</sup> edn Lawbook Co, Pymont 2006) 102-103.

<sup>99</sup> F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 4.

accurate assessment of whether the economic development objective of privatisation has been or is likely to be realised in the country and continent respectively.

### **1.3. DEFINING THE SCOPE AND LIMITS OF THE DISSERTATION AND QUALIFYING THE ARGUMENTS**

It is necessary, on account of the broad scope of the research to define its boundaries and delimit what the dissertation intends to accomplish so as to keep the research within manageable proportions and also avoid the danger of unchecked generalisation.<sup>100</sup> In the first place, as earlier noted, the research views privatisation from an economic development perspective premised on its potential for facilitating certain key benefits collectively considered (i.e. privatisation's benefit to the public sector, its benefit to the privatised enterprises, its contribution to overall private sector development, its benefit to the citizens and finally, its usefulness as a conduit for beneficial foreign investment inflow). Analysing privatisation from other other perspectives could lead to other conclusions and judgments beyond the scope of this thesis<sup>101</sup>, and indeed, some privatisation programmes have been subject to conflicting evaluations depending on what the evaluator considers important.<sup>102</sup> Where one, for instance, focuses on a strict positivist legal analysis of privatisation law and the legal rights arising from privatisation contracts, or undertakes an economic analysis that is limited to assessing whether privatisation leads to greater efficiency and profitability in privatised enterprises, or focuses on public sector fiscal gains from privatisation, or assesses privatisation success solely based on a numerical count of the enterprises that were privatised within a given timeframe and the timeliness of completing various transactions, the respective conclusions are likely to differ.

Secondly, the framework for analysing the economic development impact of privatisation does not cover every single aspect of economic development in a country, but focuses on only some of these so as to keep the research within manageable

---

<sup>100</sup> T Hutchinson, *Researching and Writing in Law* (2<sup>nd</sup> edn Lawbook Co, Pyrmont 2006) 95, 102-104.

<sup>101</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 88.

<sup>102</sup> M Szeftel, 'Globalisation & African Responses' (2000) 27 Rev African Polit Economy 353, 354; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 359.

proportions. For instance environmental issues often come up in discussions about sustainable economic development<sup>103</sup>, however, the chapters on Nigeria limit the discussion on environmental issues in the privatisation context to how such issues could increase the host community hostility risk in some parts of Nigeria and adversely impact on the national investment climate, as well as how they could trigger unforeseen legal liabilities for a privatisation investor.<sup>104</sup> In the same vein, the critique of some of the provisions relating to privatisation and regulation in Nigeria focuses on those aspects deemed relevant from the economic development standpoint, rather than a detailed critique of the entire statutory provisions, which would detract from the focus of the thesis.

Thirdly, it is also instructive to note that the research does not view privatisation as the only policy that facilitates economic development in a country. Indeed as has been noted, when states undertake privatisation, it is often part of a broader reform programme designed to enhance the way enterprises perform or the way services are delivered in the country.<sup>105</sup> IFI funding packages for various countries usually include a number of other economic policy prescriptions and many states that implement privatisation may also implement a number of other related market reforms also aimed at facilitating economic development. Accordingly in some country contexts, it may be difficult to single out privatisation as the primary causal factor of economic development success or failure.<sup>106</sup> The more manageable task undertaken in the thesis is to ascertain whether the adoption and implementation of privatisation has made a positive contribution to the attainment of economic development, or is likely to do so

---

<sup>103</sup> JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 *Currents Int'l Trade LJ* 37, 40; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 *Int'l L* 875, 876, 890; SI Nchi, 'The African Environment and Sustainable Development' (1996) 1 *JPPL* 119, 119-129.

<sup>104</sup> GS Akpan, 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' [2006] *IELTR* 1, 8, 11; J Garbett, 'Contaminated Land - Liability for Historic Gas Contamination' [2007] *IELTR* 122, 122-124.

<sup>105</sup> JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 *Currents Int'l Trade LJ* 37, 42; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 *AJEP* 61, 82; K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 509.

<sup>106</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 81: 'it is typically extremely hard to disentangle with any precision the effects of privatisation from the effects of general policy reform, specific circumstances, economic structure and external events. It follows that it is missing the point to isolate privatisation and to make sweeping claims for its success or failure as a discrete policy tool.'

premised on its ability to yield certain key benefits that have been attributed to it. The fact that privatisation could co-exist with other reform measures in a country buttresses the point earlier made about the need to recognise the practical limitations of privatisation law in itself and also factor in the contextual factors in the country of implementation that could affect its outcome positively or negatively.

Fourthly, the analysis of privatisation in this research focuses primarily on for-profit provision, even though some authors include various forms of non-profit provision of goods and services in privatisation discussion. The research focus is partly because of the limits of space and also partly because policy documents of Nigeria as well as the IFIs place some emphasis on attracting privatisation investors by enhancing the prospects for reasonable investment earnings.

Finally, it should be noted that the critique of privatisation in this thesis should not be equated with querying whether privatisation is a useful reform measure or whether the private sector has a crucial role to play in actualising national economic development. However, in the same way some of the failings of state ownership in Africa and beyond have been extensively documented, it is important to identify some of the adoption and implementation issues that could undermine the effectiveness of privatisation in yielding some of the key benefits attributed to it.

#### **1.4. STRUCTURE OF THE DISSERTATION**

The work is divided into 6 chapters, of which this introduction constitutes the first chapter, the aim of which is to delineate the area of research and make it easier to follow the arguments advanced throughout the work. Chapter 2 examines the meaning of privatisation and the reasons why it has been adopted and implemented by various countries, including an examination of the key economic development benefits of privatisation. It ends by examining the prerequisites for effective privatisation outcome, which the analytical framework of the thesis as noted earlier, categorises into two, namely designing an effective policy and legal framework and secondly, ensuring proper implementation of privatisation. The intention of the analysis here is to flag up key issues and considerations in adopting and implementing privatisation, and the views of various scholars on these issues are explored, of which some of the views stem from perception of the outcome of privatisation in other jurisdictions. Examining these

prerequisites provides a platform for evaluating the adoption and implementation of privatisation in Africa generally and Nigeria in particular. For clarity, the link between the key economic development benefits of privatisation noted for the purposes of this research and the 2 key prerequisites used in the analytical framework should be explained. Basically, in the dissertation, the two categories of pre-requisites are used to analyse the extent to which these benefits have been or are likely to be realised. The analysis however does not involve a separate examination of each benefit given that the issues involved are often interwoven and would not be easily amenable to compartmentalised analysis. For instance, where privatisation results in a private monopoly taking over from a public one, it would likely undermine the contribution of privatisation to overall private sector development and at the same time adversely affect privatisation's benefit to the citizens especially where there is inadequate regulation. Thus within each sub-category of analysis, various issues that could affect the realisation of various benefits would be analysed of which the concluding chapter (Chapter 6) of the work will shed more light on how these issues have affected the realisation of the benefits.

Chapter 3 situates privatisation in the African context and critically analyses the African privatisation agenda, again by reference to the 2 categories of prerequisites noted above. This is also the approach taken in Chapters 4 and 5 dealing with the Nigerian privatisation programme and the Nigerian electricity reform programme respectively. As earlier noted, the critique of some aspects of the IFIs' approach in the adoption and implementation of privatisation in Africa and Nigeria was not undertaken in a separate chapter but rather formed part of the broader analysis undertaken in Chapters 3-5 in order to properly situate it in the specific contexts that gave rise to specific issues in the continent and country respectively.

In Chapter 6, the various threads of analysis in the preceding chapters are pulled together and the key ideas that have been distilled from the implementation of privatisation in Nigeria and Africa will be explained. Suggestions are also made for future research.

The term 'public enterprise' as used in this work is not limited to state industrial undertakings, but also includes public utilities/ infrastructural services. The term 'citizen' as used in this work, except where the context indicates otherwise, broadly

refers to the inhabitants of a country and not strictly those who are nationals of the country, sometimes other related terms like ‘consumers’ or ‘customers’ are also used. As earlier noted, the term ‘International Financial Institutions’ and the acronym ‘IFIs’ as used in this work, refer to both the World Bank and the International Monetary Fund (IMF), however, individual references to the World Bank or the IMF may also be used where appropriate. Privatisation is sometimes spelt as ‘privatization’, in the work owing to the American origin of some of the referred materials. The terms ‘electricity supply’ and ‘power supply’ are both used in this work and have the same meaning. Finally, the acronyms ‘NEPA’ and ‘PHCN’, which stand for the old and new names of the Nigerian public power utility respectively, are both used from time to time in Chapter 5 depending on the context of the discussion.

## CHAPTER TWO

### EXAMINING THE CASE FOR PRIVATISATION: ITS MEANING, OBJECTIVES AND PROCESS OF IMPLEMENTATION

This chapter examines the meaning of privatisation so as to explain how the term is used in this research given that the term is open to a number of different interpretations by different scholars. The quest to initiate legal reforms to pave way for privatisation is hinged on a number of key benefits expected to result from this, and given the economic development focus of the research, the chapter examines the key benefits that are collectively used in assessing the economic development impact of privatisation in this research. Following this, the chapter concludes by examining the prerequisites for effective privatisation outcome, of which the analytical framework of the dissertation is used to examine various issues that often arise in the privatisation context which could have impact on the realisation of the above benefits of privatisation legal reform, and which would be factored in analysing the outcome of privatisation in Africa generally and Nigeria specifically. .

#### 2.1. THE MEANING OF PRIVATISATION

It has been noted that:

The countries that have announced their intention of launching some kind of privatization program...allow for the possibility of private ownership of the means of production and for the operation of markets as an essential feature of the economy's functioning.<sup>107</sup>

The term, 'privatisation' is an omnibus word that is not often used in the same sense by different authorities and commentators on the subject and different classifications and categorisations of privatisation have been utilised by different authors.<sup>108</sup> It is

---

<sup>107</sup> R Vernon, 'Introduction: The Promise and the Challenge' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 6. Also see J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 53.

<sup>108</sup> Note for instance the distinction drawn by Hans-Joachim Priess between material and formal privatisation. See H Priess, 'Privatisations and the E.C. Public Procurement Rules' [1998] PPLR 1, 1-2. Also see C Veljanovski, *Selling the State: Privatisation in Britain* (Weidenfeld and Nicholson, London 1987) 1-2; LJ Lundqvist, 'Privatization: Towards a Concept for Comparative Policy Analysis' (1988) 8 Jnl Publ Pol 1, 4-7, 10-12.

sometimes construed very narrowly to mean just the sale and legal transfer of the ownership of public enterprises to private entrepreneurs, and sometimes more broadly to include the legal transfer of just the control of public enterprises and services but not outright ownership. Jeswald Salacuse describes privatisation as the ‘... transfer of assets from the public sector to the private sector, from the domain of public ordering to that of private ordering’, which appears to fit more into the narrower view of the term.<sup>109</sup> On the other hand, Paul Starr defines the term as ‘(1) Any shift of activities or functions from the state to the private sector; and more specifically, (2) any shift of the production of goods and services from public to private’<sup>110</sup>, which would fit more into the broader view of the term noted above. This is also the case with the definition by Stuart Butler who sees privatisation as ‘The shifting of a function, either in whole or in part, from the public sector to the private sector.’<sup>111</sup>

While the narrow perspective envisages a permanent transfer of full legal title via sale, the broader perspective could also include the dilution of the ownership structure of some enterprises by selling some stake to private investors or the general public, a temporary ceding of control through means such as management contracts, concessions, leases and other forms of partial privatisation, of which the government could still retain some ownership and/or control of the enterprise.<sup>112</sup> Public procurement arrangements including public-private partnerships (PPPs) and private finance initiatives (PFIs) could also come within the broader perspective, of which the phrase ‘Private Sector

---

<sup>109</sup> JW Salacuse, ‘From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World’ (1999) 33 Int’l L 875, 884. Also see N Boubakri, J Cosset and O Guedhami, ‘Privatisation in Developing Countries: Performance and Ownership Effects’ (2008) 26 Development Policy Review 275, 275; FB Shu Acquaye, ‘Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon’ (1998-1999) 7 Tilburg Foreign L Rev 119, 122.

<sup>110</sup> P Starr, ‘The Meaning of Privatisation’ (1988) 6(1) Yale L & Pol’y Rev 6, 14.

<sup>111</sup> S Butler, ‘Privatization for Public Purposes’ in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University Of Wisconsin Press, Wisconsin 1991) 17.

<sup>112</sup> K Reisman, ‘The World Bank And The IMF: At the Forefront of World Transformation’ (1991-1992) 60 Fordham L Rev S349, S357; J Adell, ‘Spain: Privatisation’ (1995) 6 ICCLR C107, 107-108; JMP Nelson, ‘Modernisation and Privatisation in Ecuador’ (1994) 5 ICCLR 289, 291; WD Stuber, ‘Privatisation in Brazil’ (1991) 9 IBL 429, 430; Stroeter Trench and Veirano, ‘Brazilian Privatisation Plan’ (1991) 9 IBL 408, 409; H Priess, ‘Privatisations and the E.C. Public Procurement Rules’ [1998] PPLR 1, 2; KP Buschardt and WK Sievers, ‘Privatisation in Poland’ (1994) 5 ICCLR 128, 128-130; WG Frenkel, ‘New Developments in Russian Privatisation Law’ (1993) 4 ICCLR 28, 28; K Bayliss, ‘Utility Privatisation in Sub-Saharan Africa: A Case Study of Water’ (2003) 41 J Mod Afr Stud 507, 510; F Pamacheche and B Koma, ‘Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation’ (2007) 1(2) African Integration Review 1.



Participation' is sometimes utilised in describing these types of contractual arrangements.<sup>113</sup>

Further, while the narrow perspective of privatisation is sometimes limited to public enterprises that produce goods<sup>114</sup>, the broader perspective often includes enterprises that render services as seen in the definition by Paul Starr above.<sup>115</sup> It should be noted however that this distinction between the narrow and broader perspectives is by no means rigid because many scholars utilise definitions that cannot be adequately slotted into any of these pigeon holes.<sup>116</sup> Nevertheless, the broader perspective is utilised in this research, of which the primary focus is not so much on the type of title granted to the private entrepreneur, but rather on the resultant effect of putting in place a policy and legal framework for privatisation in terms of whether it contributes to the attainment of economic development in the implementing country.

It should be noted that some views of privatisation are so broad as to encompass deregulation/liberalisation as well as corporatisation and commercialisation of a public enterprise.<sup>117</sup> For instance, Kay and Thompson regard privatisation as:

A term, which is used to cover several distinct, and possibly alternative, means of changing the relationships between the government and the private sector. Among the most important of these are denationalisation (the sale of publicly owned assets), deregulation (the introduction of competition into statutory monopolies) and contracting out (the

---

<sup>113</sup> M Freedland, 'Public Law and Private Finance - Placing the Private Finance Initiative in a Public Frame' [1998] PL 288, 289-290; P Badcoe, 'Public Private Partnerships in Local Government: The Legal, Financial and Policy Framework' [1999] PPLR 279, 279-280; J Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40, 43; S Arrowsmith, 'Deregulation of Utilities Procurement in the Changing Economy: Towards a Principled Approach?' (1997) 18 ECLR 420, 421-422; G Haley, 'PFI Contractors: Some Emerging Principles' (1999) 15 Const LJ 220, 220; K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 529.

<sup>114</sup> Note for instance J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 53: 'Most countries would be better off with governments focusing on providing essential public services rather than running enterprises that would arguably perform better in the private sector, and so privatisation often makes sense.'

<sup>115</sup> Also see GL Priest, 'The Aims of Privatisation' (1988) 6(1) Yale L & Pol'y Rev 1, 1: 'Privatization refers to the shift from government provision of functions and services to provision by the private sector.'

<sup>116</sup> Note for instance MR Freedland, 'Government by Contract and Public Law' [1994] PL 86, 87.

<sup>117</sup> RW Bauman 'Foreword' (2000) 63(4) Law & Contemp Probs 1, 2; C Graham and T Prosser, 'Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques (1987)50 MLR 16, 17: '... "privatisation" is in current usage a portmanteau term also covering the removal of restrictions on competition (liberalisation) ...'

franchising to private firms of the production of state financed goods and services).<sup>118</sup>

In the same vein, Ralph Young notes that:

... privatisation can also be understood in broader terms – as referring to a process by which the state's role within the economy is circumscribed while at the same time the scope for the operation of private capital is deliberately extended. Such a shift in the balance between the state and capital might be effected, for example, through the relaxation of state monopolies where these exist, through reducing the impact of governmental regulations upon the operation of the market economy, or through the requirement that public enterprises perform according to private sector criteria of efficiency and profitability.<sup>119</sup>

As used in this thesis however, the term privatisation is not extended to the above situations where the government merely liberalises or deregulates particular business or service sectors to allow private entrepreneurs to participate in them, but does not enter into contracts with them or transfer ownership or control of public enterprises or services to them. It also does not extend to situations where the government merely commercialises the operations of a public enterprise, sometimes preceded by a change in its corporate structure, but still retains its full ownership and control. It should be noted however that sometimes the privatisation enabling law also contains express provisions for commercialisation of some enterprises either as the ultimate reform objective or as a prelude to eventual privatisation.<sup>120</sup>

---

<sup>118</sup> JA Kay and DJ Thompson, 'Privatisation: A Policy In Search of a Rationale' in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 239. Also see R Vernon, 'Introduction: The Promise And The Challenge' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 2; V Akpotaire, 'The Legal Regime for Privatisation in Nigeria and the Crisis of Confidence' (2004) 25 BLR 200, 200; P Morgan, 'The Privatization and the Welfare State: A Case of Back to the Future?' in P Morgan (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995) 4.

<sup>119</sup> Note for instance RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 50-51.

<sup>120</sup> M Du Vall and J Barta, 'Privatisation of State Enterprises in Poland' (1991) 2 *ICCLR* 310, 311-312.

## 2.2. REASONS FOR EMBARKING ON PRIVATISATION: EXAMINATION OF THE KEY ECONOMIC DEVELOPMENT BENEFITS OF PRIVATISATION

Privatisation law provides a legal basis for changing of the relationship between the state and the private sector, with the private sector assuming a greater role in the economic affairs of a country, of which some of the problems that have been associated with public ownership and control in some countries have been influential in this shift.<sup>121</sup> From the economic development perspective, the argument in favour of replacing legal framework for state ownership and control of some enterprises with a new legal framework for private ownership and control of the same enterprises is that privatisation would yield a number of benefits that would facilitate economic development in the implementing country, while addressing some of the problems associated with state ownership and control. However Paul Craig notes the eclectic nature of the reasons for privatisation<sup>122</sup>, and these reasons which are wide ranging can be gleaned from different laws, policy documents, official documents of the IFIs and scholarly materials. To facilitate our analysis however, some key benefits were identified in Chapter 1 as having been attributed to privatisation including the benefit of privatisation to the public sector; secondly, its benefit to the privatised enterprises; thirdly, its contribution to overall private sector development; fourthly, its benefit to the citizens of the country; and finally, its usefulness as a conduit for beneficial foreign investment inflow. From the analytical standpoint of this research, if the implementation of privatisation law results in the actualisation of all of these benefits, it would be considered that the underlying policy objective of aiding economic development has been attained. While the laws and policy documents of some countries expressly note privatisation objectives that tally with these benefits<sup>123</sup>, in some other countries, the

---

<sup>121</sup> Note for instance G Johnson, 'Why Privatise?' in JL Upper and GB Baldwin (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) 28-29; Kikeri S and Nellis J, 'An Assessment of Privatization' (2004) 19 World Bank Res Observer 87, 87.

<sup>122</sup> PP Craig, 'Constitutions, Property and Regulation' [1991] PL 538, 551-552: 'The reasons for this programme were eclectic, and included: the improvement of efficiency; the widening of share ownership; the reduction of governmental involvement in industry; the alleviation of the public sector borrowing requirement; and the encouragement of share ownership.' Also see C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 82, 87: 'Privatisation is often applied as a kind of 'omnibus policy' or panacea.' ... The policy is associated with a whole host of objectives, economic, political and social. ... Mozambique is a particularly good example of the multiple objectives associated with privatisation programmes.' (footnote omitted).

<sup>123</sup> Note for instance Privatisation Act No 2 of 2005 (Kenya) s 18.

expected benefits of privatisation may not be fully set out from the beginning, but could be gleaned afterwards or in the course of implementing it.<sup>124</sup>

### 2.2.1. BENEFIT TO THE PUBLIC SECTOR

The argument here is that in many countries, the government is weighed down by too many tasks and privatisation will play a crucial role in reducing the government's role in the economy and limiting the size and reach of the public sector, paving way for a smaller, leaner and more effective government that will be able to devote greater attention to deprived social sectors like education, health, housing, transportation, water, sanitation and rural infrastructure.<sup>125</sup> In the new operational environment for privatised enterprises, direct public ownership and management would be replaced with regulatory oversight, especially for the utility/infrastructure enterprises.<sup>126</sup> The fiscal gains that accrue from the privatisation programme will help in reducing the government's budget deficits and provide it with much needed resources for use in addressing these social issues and also repaying its debts to various creditors, rather than continued reliance on increasing the general tax burden on the citizens.<sup>127</sup> These fiscal gains would likely come from three key sources namely money saved from no longer investing in or

---

<sup>124</sup> C Robinson, 'Privatisation: Analysing the Benefits' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 51; C Veljanovski, *Selling the State: Privatisation in Britain* (Weidenfeld and Nicholson, London 1987) 7-8.

<sup>125</sup> JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 *Currents Int'l Trade LJ* 37, 42; MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 *Fordham L Rev* S23, S25; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 *AJEP* 61, 62; EM Filippozzi and D Noronha Goyos, 'The Brazilian Constitutional Review and the Privatisation Programme - An Overview' (1994) 5 *ICCLR* 243, 244, 245; JMP Nelson, 'Modernisation and Privatisation in Ecuador' (1994) 5 *ICCLR* 289, 292; N Lawson, 'The Retreat of the State in Economic Management' in A Seldon and others (eds), *The Retreat of the State* (Canterbury Press, Norwich 1998) 22; A Seldon, 'The Retreat of the State in Social Welfare', in A Seldon and others (eds), *The Retreat of the State* (Canterbury Press, Norwich 1998) 45- 46; WT Gormley Jr, 'The Privatization Controversy' in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University Of Wisconsin Press, Wisconsin 1991) 5.

<sup>126</sup> G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Jnl Publ Pol* 139, 143.

<sup>127</sup> Stroeter Trench and Veirano, 'Brazilian Privatisation Plan' (1991) 9 *IBL* 408, 408; R Pillitteri and S Greco, 'Italy: Privatisation - First Companies Named' 2 *ICCLR* C138, C138; H Priess, 'Privatisations and the E.C. Public Procurement Rules' [1998] *PPLR* 1, 1; P Cook and C Kirkpatrick, 'Assessing the impact of Privatization in Developing Countries' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 211; DN Plank, 'Aid, Debt, and the End of Sovereignty: Mozambique and its Donors' (1993) 31 *J Mod Afr Stud* 407, 425.

subsidising the public enterprises and paying the wages and pensions of the workers<sup>128</sup>; secondly, money saved through reduced public sector corruption owing to the fact that public enterprises that have been cesspits of corruption will now be under private ownership and/or control<sup>129</sup>; and thirdly, revenue realised from privatisation transactions<sup>130</sup> and post-privatisation tax revenue that could accrue from the privatised enterprises.<sup>131</sup>

### **2.2.2. BENEFIT TO THE ENTERPRISES**

The argument here is that privatisation would pave way for profit-driven private investors to takeover and significantly improve the performance of privatised enterprises. Under public ownership, public sector managers do not have necessary motivation to improve enterprise performance because any resulting cost savings or profits would go to the state while the managers would simply continue to earn their normal salaries.<sup>132</sup> Further, they do not usually fear losing their jobs where the enterprises are sustaining growing losses, owing to the fact that public enterprises, unlike private ones, do not face the threat of corporate takeover<sup>133</sup>, and also the government would usually bail public enterprises out with budgetary allocations and subsidies of which the resulting moral hazard could make such managers to be even less cost conscious.<sup>134</sup> The use of public enterprises to advance the personal and political

---

<sup>128</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 86; F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 9.

<sup>129</sup> R Theobald, 'Lancing the Swollen African State: Will it Alleviate the Problem of Corruption?' (1994) 32 J Mod Afr Stud 701, 705; R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 519.

<sup>130</sup> C Davidovich, 'The Selling of Argentina: Is the Path to the First World Privatised?' (1996-1997) 28 Law & Pol'y Int'l Bus 151, 163; DV del Carril, 'Argentina's Privatisation Programme: A Stage Completed' (1994) 22 Int'l Bus Law 68, 68-69; W Baer and M Birch, 'Privatization and the Changing Role of the State in Latin America' (1992-1993) 25 NYU J Int'l L & Pol 1, 17.

<sup>131</sup> R Burgess and N Stern, 'Taxation and Development' (1993) 31 J Econ Lit 762, 784.

<sup>132</sup> MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S27.

<sup>133</sup> MM Shirley and P Walsh, 'Public Versus Private Ownership: The Current State of the Debate' (2000) World Bank Policy Research Working Paper No. 2420 <[http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/09/15/000094946\\_00090605460293/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/09/15/000094946_00090605460293/Rendered/PDF/multi_page.pdf)> accessed 15 June 2007 34.

<sup>134</sup> MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S26; M Pirie, 'Reasons for Privatization', in P Morgan (ed), *Privatization and the*

interests of political leaders in some countries has often undermined their efficient performance, and this political interference in their functioning has often led to the enterprises being used for corrupt wealth acquisition and dispensing political favours such as giving jobs and contracts to political allies and other interest groups, and their products being sold to the general public at non-economic prices.<sup>135</sup>

Privatisation would benefit the enterprises in a number of ways. It would galvanise private sector investments by competent local and foreign investors and irreversibly place the enterprises on the path of reform.<sup>136</sup> Given the new ownership structure, improvements in enterprise performance would be more sustainable than was the case under public ownership when backsliding on such reforms could occur.<sup>137</sup> Privatised enterprises would aim to be more cost conscious and efficient, given that they can no longer lean on the government for financial support, have fear of bankruptcy or takeover and rely on the capital market for funding.<sup>138</sup> Owing to the fact that they own property rights in these enterprises and accordingly can retain the profits generated from their operations, privatisation investors would be motivated to make new capital investments in these enterprises including infrastructural investments, infuse new technology in them aimed at modernising their operations and ensure better billing and collection for utility/infrastructural services.<sup>139</sup>

---

*Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995) 21; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 *Int'l L* 875, 884.

<sup>135</sup> A Shleifer and RW Vishny, 'Politicians and Firms' (1994) 109 *QJ Econ* 995, 995-996; P Starr, 'The Meaning of Privatisation' (1988) 6(1) *Yale L & Pol'y Rev* 6, 23-24; R Cass, 'Privatization: Politics, Law and Theory' (1987-1988) 71 *Marq L Rev* 449, 473-474.

<sup>136</sup> P Badcoe, 'Public Private Partnerships in Local Government: The Legal, Financial and Policy Framework' [1999] *PPLR* 279, 288; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 *AJEP* 61, 62, 64.

<sup>137</sup> S Kikeri and J Nellis, 'An Assessment of Privatization' (2004) 19 *World Bank Res Observer* 87, 88, 95.

<sup>138</sup> M Bishop, J Kay and C Mayer, 'Introduction: Privatisation in Performance' in M Bishop, J Kay and C Mayer (eds), *Privatization and Economic Performance* (OUP, Oxford 1994) 4, 5; J Adell, 'Spain: Privatisation' (1995) 6 *ICCLR* C107, C109.

<sup>139</sup> SH Hanke, 'Privatization: Theory, Evidence, and Implementation' (1985) 35(4) *Proceedings of the Academy of Political Science* 101, 102; JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 *Currents Int'l Trade LJ* 37, 42; MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 *Fordham L Rev* S23, S27; IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 7, 33.

Privatisation is expected to lead to improvement in enterprise management and given the need to attract customer patronage in a competitive product market, privatised enterprises would strive to improve product quality and deliver services more efficiently.<sup>140</sup> Permanently changing the ownership structure of public enterprises would make reforms irreversible because the government would no longer be able to interfere in their operations as was the case prior to privatisation, which often had negative results.<sup>141</sup> Freedom from bureaucratic control combined with the infusion of the profit incentive of private entrepreneurs into privatised enterprises would lead to the right-pricing of privatized goods and services<sup>142</sup>, foster greater operational flexibility and innovativeness and play a key role in ensuring that the enterprises would now be subjected to the discipline of the market rather than the whims of politicians.<sup>143</sup>

Depoliticising decision making in these enterprises would foster better corporate governance and pave way for economic forces to be the key influencing factor in corporate decisions<sup>144</sup>, and privatisation would also play a role in whittling down the power and influence of public sector labour unions.<sup>145</sup>

These privatisation benefits would result in greater enterprise productivity, and would have positive impact on national economic growth and poverty reduction.

---

<sup>140</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 884; MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S27; J Vickers and G Yarrow, 'Economic Perspectives on Privatization' (1991) 5(2) J Econ Perspect 111, 117.

<sup>141</sup> C Graham, 'Company Law: "All that Glitters..." - Golden Shares and Privatised Enterprises' (1988] 9 Comp Law 23, 23. M Pirie, 'Reasons for Privatization', in P Morgan (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995) 23.

<sup>142</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 3, 7, 65.

<sup>143</sup> R Pillitteri and S Greco, 'Italy: Privatisation - First Companies Named' 2 ICCLR C138, C138.

<sup>144</sup> C Robinson, 'Privatisation: Analysing the Benefits' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 47-48; M Boycko, A Shleifer and RW Vishny, 'A Theory of Privatisation' (1996) 106 Econ J 309, 318..

<sup>145</sup> P Starr, 'The Meaning of Privatisation' (1988) 6(1) Yale L & Pol'y Rev 6, 31; A Shleifer, State Versus Private Ownership, (1998) 12(4) J Econ Perspect 133, 142; G Yarrow and others, 'Privatization in Theory and Practice' (1986) 1 Econ Policy 323, 323.

### **2.2.3. CONTRIBUTION TO OVERALL PRIVATE SECTOR DEVELOPMENT**

The argument here is that privatisation is a key part of the package for achieving or enhancing a market-driven private sector-led economy with limited government interference. Implementing privatisation and consequently reducing the government's role in the economy would send strong signals to private investors that the government is serious about pursuing market-oriented reforms and bringing them on board as economic development partners.<sup>146</sup> Privatisation would be a strong catalyst for further developing the private sector<sup>147</sup>, deregulating the economy, strengthening and expanding the domestic capital markets<sup>148</sup> and introducing competition to the economy in place of public sector monopoly.<sup>149</sup> Its boost to the private sector would further position the sector to be the engine of economic growth in the country, with profit-driven private firms increasingly playing a key role in job creation, provision of remuneration and pensions to workers and provision of various goods and services to the citizens.<sup>150</sup>

### **2.2.4. BENEFIT TO THE CITIZENS**

The argument here, which follows the ones above, is that in the new economic terrain ushered in by privatisation, the citizens would increasingly become shareholders and employees of private companies as well as consumers of privately produced goods and services and their various economic expectations would be channelled more to the

---

<sup>146</sup> J Laslett and M Franzosi, 'Legal Aspects of Privatisation in Italy' (1994) 5 ICCLR 425, 429; S Kikeri and J Nellis, 'An Assessment of Privatization' (2004) 19 World Bank Res Observer 87, 103.

<sup>147</sup> K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 217; G Gluck, 'Privatisation: the Hungarian example' (1993) 4 ICCLR 286, 287: 'The stated aim of this programme was to create a large number of economically independent private entrepreneurs who would constitute the Hungarian middle class. Thus, although this programme did not expressly exclude foreign purchasers, it was designed to attract Hungarian investors.'

<sup>148</sup> Stroeter Trench and Veirano, 'Brazilian Privatisation Plan' (1991) 9 IBL 408, 408-409; R Pillitteri and S Greco, 'Italy: Privatisation - First Companies Named' 2 ICCLR C138, C138; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 217; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 168.

<sup>149</sup> J Fahey and J Davies, 'Country Brief: Australia' [2008] IELR 136,138.

<sup>150</sup> P Starr, 'The Meaning of Privatisation' (1988) 6(1) Yale L & Pol'y Rev 6, 30-31; D Gordon, 'Privatization in Eastern Europe: The Polish Experience' (1993-1994) 25 Law & Pol'y Int'l Bus 517, 517-518.



private sector than the government.<sup>151</sup> Profit-driven privatised enterprises that have become more efficient in a bid to stay competitive and increase their profit margins would be better positioned to provide goods and services of improved quality to these citizens thereby giving them greater value for money, extend essential public utilities/infrastructural services to as many people as possible, including vital infrastructural support to business undertakings in the country, and create qualitative employment opportunities, all of which would contribute to overall economic development.<sup>152</sup> Sale of privatisation shares to the citizens, including workers would lead to the broadening of the ownership base of privatised enterprises and create popular capitalism in the country.<sup>153</sup> As shareholders, the citizens would be able to exert some influence on managerial performance given that they could offload their shares and further reduce overall share value if market information regarding the firm reveals comparatively poor performance<sup>154</sup>

As consumers, the citizens would be able to choose from among competing products owing to the product market competition ushered in by privatisation.<sup>155</sup> In the case of privatised utility/infrastructural services, post-privatisation regulation aided by appropriate sanctions for breach and the challenge of operating in a competitive market would ensure that product prices would remain affordable and quality never compromised.<sup>156</sup> As workers, the citizens would enjoy more employment opportunities,

---

<sup>151</sup> P Morgan, 'The Privatization and the Welfare State: A Case of Back to the Future?' in P Morgan (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995) 7; P Starr, 'The Case for Skepticism', in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University of Wisconsin Press, Wisconsin 1991) 27.

<sup>152</sup> C Veljanovski, *Selling the State: Privatisation in Britain* (Weidenfeld and Nicholson, London 1987) 8; IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 128-129; F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) *African Integration Review* 1, 9-11; WL Megginson, RC Nash and M Van Randenborgh, 'The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis' (1994) 49 *J Fin* 403, 403, 448.

<sup>153</sup> R Pillitteri and S Greco, 'Italy: Privatisation - First Companies Named' 2 *ICCLR* C138, C139; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 *AJEP* 61, 62; J Vickers and G Yarrow, 'Privatization in Britain' in PW MacAvoy and others (eds), *Privatization and State-Owned Enterprises: Lessons from the United States, Great Britain and Canada* (Kluwer Academic Publishers, Boston 1989) 213, 221-222.

<sup>154</sup> P Starr, 'The Meaning of Privatisation' (1988) 6(1) *Yale L & Pol'y Rev* 6, 22.

<sup>155</sup> J Hatch, 'Privatisation and the Consumer' in VV Ramanadham (ed), *Privatisation in the UK* (Routledge, London 1988) 60.

<sup>156</sup> R Barnard and J Cooper, 'Is Ofgem Still Fit for Purpose?' [2008] *IELR* 158, 158: 'regulation of the

improved working conditions in privatised enterprises, and the opportunity to buy privatisation shares, while those that are retrenched as a result of privatisation would benefit from compensation packages (i.e. severance pay and other forms of income support) and job retraining programmes.<sup>157</sup>

### **2.2.5. CONDUIT FOR BENEFICIAL FOREIGN INVESTMENT INFLOW**

From being initially hostile to foreign investments, many countries especially developing countries now see great merit in phasing out various legal control initially used to restrict such investments.<sup>158</sup> In the privatisation context, the argument is that in a global economy where foreign investments play a key role in boosting national economies, privatisation offers a good opportunity to foreign investors that partake in privatisation transactions to bring much-needed resources to developing countries, sometimes under the framework of bilateral investment treaties, which would greatly facilitate economic growth and economic development, boost the image of the recipient countries as investment destinations and help in integrating their national economies with the global economy.<sup>159</sup> Such privatisation investors could attract new investment capital, technology and expertise to privatising countries.

Finally, it should be reiterated that given the eclectic nature of the reasons for privatisation, all the above benefits may not necessarily be seen in the privatisation programmes of all countries implementing privatisation and even where they are, the same emphasis may not be placed on all of them.

---

utility industries has generally delivered good value for consumers and had a positive impact on competitiveness, productivity, and growth in the economy at large.'

<sup>157</sup> S Kikeri and J Nellis, 'An Assessment of Privatization' (2004) 19 World Bank Res Observer 87, 112-113; F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 9-10.

<sup>158</sup> JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 879-880, 885-886.

<sup>159</sup> BM Cremades, 'Promoting and Protecting International Investments' (2000) 3 Int ALR 53, 53-55; R Pritchard, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233, 233-234, 236; F MacMillan, 'Making Corporate Power Global' (1999) 5 Int TLR 3, 6-7; G Hufbauer and S Stephenson, 'Services Trade: Past Liberalization and Future Challenges' (2007) 10 JIEL 605, 606; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 63, 64; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 363-364.

### 2.3. ANALYSIS OF THE PREREQUISITES FOR EFFECTIVE PRIVATISATION OUTCOME

According to the IMF:

*Appropriately designed and regulated* divestiture should improve efficiency, reduce burdens on the budget, eliminate political interference in decision-making, and provide incentives for more innovation and dynamism.<sup>160</sup> (emphasis added)

Having examined the various benefits that have come to be associated with privatisation, the next issue to consider is how they could be achieved because there are considerable caveats that could affect their realisation in any given country. The point was made in Chapter 1 that the privatisation process is very important, and the prerequisites for effective privatisation outcome were identified, namely, designing an effective policy and legal framework and ensuring proper implementation of privatisation. Essentially, to maximise the chances of realising the above economic development benefits of privatisation and minimise the gap between privatisation law and the economic development reality in an implementing country, careful attention must be paid to how privatisation is adopted and implemented in the country.<sup>161</sup>

Accordingly, these prerequisites provide a viable framework for analysing various issues that could affect the outcome of privatisation in a country and create a gap between set objectives and outcomes if not adequately addressed, and the framework is also used in examining the views and arguments of various authorities on these issues. Subsequent chapters on Africa and Nigeria will analyse how these issues have manifested or been addressed in the continent and country respectively.

It is important to note that in the same way privatisation has different meanings to different people, who also have different views regarding the benefits of privatisation, there would also be different views as to how to attain the ends of privatisation.

---

<sup>160</sup> IMF, 'Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (Issues Brief) (December 2000) No 00/09.

<sup>161</sup> J Williamson, 'What should the World Bank Think about the Washington Consensus' (2000) 15 World Bank Res Observer 251, 258; MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S32; S Kikeri and J Nellis, 'An Assessment of Privatization' (2004) 19 World Bank Res Observer 87, 105, 113.

Accordingly, as noted in Chapter 1, the designation of some issues as prerequisites is necessarily subjective and some other scholars may view these issues differently.

### **2.3.1. DESIGNING AN EFFECTIVE POLICY AND LEGAL FRAMEWORK**

#### **2.3.1.1. THE POLICY FRAMEWORK OF PRIVATISATION**

The reason for embarking on privatisation often plays a key role in determining its eventual effectiveness. Essentially, what factors influenced the decision to jettison the policy of state ownership in favour of the policy of privatisation?<sup>162</sup> If the aim of privatisation is to facilitate economic development in a country, it is important to ascertain whether the privatisation policy adequately reflects this policy objective and resolves its inherent conflicts. Commenting on privatisation, Douglas Wass notes that the key issues include:

... whether the evidence and arguments for the policy ... were fully exposed to public examination, whether the objectives ... were clearly stated, whether alternative options for achieving those objectives were analysed and displayed, and whether the superiority of the policy ... over all alternatives was clearly brought out.<sup>163</sup>

He further points out that some of the arguments advanced in favour of privatisation such as the attainment of greater efficiency, reduction of political interference and bureaucratic bottlenecks and the enhancement of market control of enterprises constitute *a priori* justification of privatisation that may not stand up to close scrutiny.<sup>164</sup> In this regard, privatisation should not simply be viewed as a generic solution to public enterprises problems without full examination and understanding of these problems, and national policymakers should also critically appraise and have clear conviction about the appropriateness of the privatisation reform option for their respective countries and

---

<sup>162</sup> D Wass, 'Checks and Balances in Public Policy Making' [1987] PL 181, 182: 'The impetus for a policy review, or a policy change, can come from several different sources. The pressure may be external to government, for example from an interest group or from a political party in opposition. It may come from within the government itself, perhaps as a result of a recognition that the policy is not working and that an examination of alternative policies should be made. Sometimes the need for a review may arise from some wholly exogenous factor, for example some natural disaster for which existing policy makes no provision.' Also see C Graham, 'The Process of Utility Reform' (2000) 11 Util LR 71, 71-72.

<sup>163</sup> D Wass, 'Checks and Balances in Public Policy Making' [1987] PL 181, 186.

<sup>164</sup> Ibid.

clearly articulate the aims and objectives of the programme from the onset, which creates a benchmark for assessing whether or not the implementation of the programme has been successful.<sup>165</sup> This buttresses the need for genuine reform ownership by a country seeking to implement key reforms like privatisation that has far reaching legal, economic, social, political and other implications for the implementing country.<sup>166</sup> In deciding that privatisation is the most appropriate reform option, policymakers may well decide that certain public functions are not conducive to privatisation or private delivery and need to be undertaken by the government itself.<sup>167</sup> Also, it is necessary to consider alternative policy options for achieving reform objectives regarding particular enterprises.<sup>168</sup> Alternative reform measures include corporatisation and operational autonomy for some enterprises<sup>169</sup>, setting operational and financial targets<sup>170</sup>, devising ways of compensating efficient managers and employees<sup>171</sup>, subjecting them to market discipline through deregulation of monopoly public sectors to pave way for competition from private entrepreneurs<sup>172</sup>, decentralising their operations<sup>173</sup>, and introducing

---

<sup>165</sup> JA Kay and DJ Thompson, 'Privatisation: A Policy in Search of a Rationale' in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 240.

<sup>166</sup> JM Wolgin, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) *Amer Econ Rev* 54, 57; J Stiglitz, *More Instruments And Broader Goals: Moving Toward The Post-Washington Consensus* (UNU/WIDER, Helsinki 1998) 34; Privatization in the Context of Economic Restructuring, Economic Growth and Sustainable Development (adopted 22 December 1992) UNGA Res 47/171; G Gluck, 'Privatisation: the Hungarian example' (1993) 4 *ICCLR* 286, 287.

<sup>167</sup> J Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] *PL* 40, 51.

<sup>168</sup> D Wass, 'Checks and Balances in Public Policy Making' [1987] *PL* 181, 187: 'only if all the practicable policy options are presented, together with a full analysis of their implications, and supported where possible by empirical evidence (sometimes drawn from other countries' experience) can a valid and rational choice be made.' Also see P Starr, 'The Case for Skepticism', in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University of Wisconsin Press, Wisconsin 1991) 34; T Prosser, 'Nationalised Industries as Instruments of Financial Policy: The Treasury Consultation Proposals' [1986] *PL* 18, 22-27.

<sup>169</sup> F Stewart, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?' (1991) 9 *Development Policy Review* 413, 422; P Starr, 'The Meaning of Privatisation' (1988) 6(1) *Yale L & Pol'y Rev* 6, 36, 37; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 10.

<sup>170</sup> T Prosser, 'Nationalised Industries as Instruments of Financial Policy: The Treasury Consultation Proposals' [1986] *PL* 18, 23-24.

<sup>171</sup> F Stewart, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?' (1991) 9 *Development Policy Review* 413, 422; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 7-9.

<sup>172</sup> R Geddes, 'Case Studies of Anticompetitive SOE Behavior' in R Geddes (ed), *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Hoover Institution Press, California 2004) 27; F Stewart, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?'

consumer oversight<sup>174</sup> and legislative oversight.<sup>175</sup> Regarding the potential effectiveness of other reform measures, the point has been made that in some countries, some public sector undertakings have performed as good if not better than private sector undertakings in the same industry.<sup>176</sup> The good performance of some public utilities in some parts of Africa has also been noted.<sup>177</sup> In the European Union energy sector, the focus has been on unbundling, achieving liberalisation and competition and enhancing consumer choice rather than privatisation, which is for individual countries to decide whether to pursue.<sup>178</sup> Christopher Cramer points out that:

Typically, the mainstream literature on privatisation assumes a stark contrast between the public and private sectors. Yet often - and most likely in varying degrees between countries and over time - the two 'sectors' are affected by the same culture of interaction and decision making. ... In this context, it may be naive to expect that the key to unleashing production potential is simply cutting the 'umbilical cord' between the state and the private sector. ...<sup>179</sup>

---

(1991) 9 *Development Policy Review* 413, 422; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 9-10.

<sup>173</sup> World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 11.

<sup>174</sup> T Prosser, 'Nationalised Industries as Instruments of Financial Policy: The Treasury Consultation Proposals' [1986] PL 18, 21-22; MR Freedland, 'Government by Contract and Public Law' [1994] PL 86, 102.

<sup>175</sup> World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 7; LP Baradat, *Political Ideologies: Their Origins and Impact* (Prentice Hall Inc, New Jersey 1979) 64 – 65.

<sup>176</sup> Emmons III WM, 'Implications of Ownership, Regulation, and Market Structure for Performance: Evidence from the U.S. Electric Utility Industry Before and After the New Deal' (1997) 79 *Rev Econ Statist* 279, 279, 286-288; JA Kay and DJ Thompson, 'Privatisation: A Policy In Search of a Rationale' in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 246.

<sup>177</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 515-516, 529.

<sup>178</sup> Council Directive (EC) 2003/54 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/92/EC [2003] OJ L176/37; Council Directive (EC) 2003/55 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 98/30/EC [2003] OJ L176/57; C Markus, 'Stranded Costs of Former Electricity Monopolies under E.U. law: Part 1' [2000] *IELTR* 144, 149; AM Logue, 'Liberalisation of the Energy Market in the European Community' (1992) 3 *ICCLR* 248, 248-251.

<sup>179</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 83.

Another key policy consideration is whether the privatisation policy, in the event of its adoption, factors in the peculiar needs and circumstances of the country, given that various countries have different economic, social, political, cultural or other peculiarities, including different public enterprise or state ownership problems.<sup>180</sup> Different privatisation, competition and regulatory models have been adopted by different countries<sup>181</sup>, and there are also different corporate governance models.<sup>182</sup> For this reason and also on account of the need for national ownership of the policy, excessive reliance on foreign advice and assistance in designing the policy and legal framework of the programme or designating specific enterprises for privatisation may give cause for concern given that such advice may not fully factor in local conditions in the implementing country or adequately reflect key public interest considerations in the programme.<sup>183</sup>

A further issue that deserves consideration is the extent to which the privatisation policy of a country has broad-based local support in the country of implementation, which could affect its legitimacy and long-term sustainability.<sup>184</sup> Such support could depend on whether there is a mechanism for effective stakeholder consultation and participation in the decision-making process in the country right from the design stage of the policy, including representatives of various local business sectors, trade unions, community organisations and other civil society groups.<sup>185</sup> This is a key part of the process of locally adapting privatisation to suit the peculiarities of an implementing

---

<sup>180</sup> See generally G Gluck, 'Privatisation: the Hungarian example' (1993) 4 ICCLR 286, 287.

<sup>181</sup> B Sas, 'The RPI-X Formula: Economic Regulation of the Electricity Industry in the United Kingdom' (1992) 3 ICCLR 16, 16; C Tite, 'Port Privatisation: Managing Change within the Right Legal Framework' (1995) 6 ICCLR 166, 166; AF Abbott, 'Competition Policy and its Convergence as Key Drivers of Economic Development' (2008-2009) 28 *Miss C L Rev* 37, 50; T Cohen, 'Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation' (2003) 47 *JAL* 65, 66, 71-72, 86-87.

<sup>182</sup> ML De Espinosa Abarca, 'The Need for Substantive Regulation on Investor Protection and Corporate Governance in Europe: Does Europe Need a Sarbanes-Oxley?' (2004) 19 *JIBLR* 419, 419-420, 422; DA Guobadia, 'The Rules of Good Corporate Governance and the Methods of Efficient Implementation: A Nigerian Perspective' (2001) 22 *Comp Law* 119, 126.

<sup>183</sup> LA Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations' (2000) 34 *Int'l Law* 1055, 1064-1065. Also see J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 237.

<sup>184</sup> J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 87.

<sup>185</sup> F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) *African Integration Review* 1, 19; Entrepreneurship and Privatization for Economic Growth and Sustainable Development (adopted 21 December 1993) UNGA RES 48/180.

country and is important because major national reforms like privatisation often give rise to winners and losers, and from the economic development perspective, the economic gains that could result from it could be undermined where these dividends are not equitably distributed.<sup>186</sup> Whereas private entrepreneurs may have a lot to gain from privatisation in terms of access to the future profit streams of various enterprises, the exercise could also impose huge adjustment costs on other stakeholders. Consultation and participation would provide avenues for understanding and reconciling the respective concerns of various stakeholders, and it may be unwise not to address such concerns while designing or implementing the programme given that it could pave way for avoidable crisis that could dampen the investment climate in the country.<sup>187</sup>

According to Douglass Wass:

... the process of open debate and discussion, of participation, would actually promote public acceptance of change and with it, change itself. Change that cannot survive public scrutiny is not worth having and is unlikely to endure. If reform and change are to last, then in a mature democracy the public must be convinced that they are desirable and rational. So at the end I rest my case on the test of the wider public good. It is after all the only test that can be applied to public reform.<sup>188</sup>

Some of the suggestions that have been made for ensuring an adequately crated policy include parliamentary deliberations on proposed policies, policy examination by officially recognised independent organisations with representative membership, and well publicised public hearings to hear the views of affected stakeholders, all of which could play key roles in identifying and addressing weaknesses in the policy and ensuring that the policy adequately reflects the underlying economic development

---

<sup>186</sup> ML Weitzman, 'How not to Privatize' in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 138; P Starr, 'The Meaning of Privatisation' (1988) 6(1) Yale L & Pol'y Rev 6, 9; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 4, 13; G Ortiz, 'Latin America and the Washington Consensus: Overcoming Reform Fatigue' (2003) 40(3) F & D 14, 16; C Price, 'Privatisation in Less Developed Countries' in PM Jackson and CM Price (eds), *Privatisation and Regulation: A Review of the Issues* (Longman, London 1994) 250-251; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 36.

<sup>187</sup> ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 86, 115; P Starr, 'The Case for Skepticism', in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University of Wisconsin Press, Wisconsin 1991) 32-33; WT Gormley, Jr, 'The Privatization Controversy' in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University Of Wisconsin Press, Wisconsin 1991) 8.

<sup>188</sup> D Wass, 'Checks and Balances in Public Policy Making' [1987] PL 181, 200-201. See also, K Anan, 'Kofi Anan on Africa's Development Problems' (1998) 24 Popul Dev Rev 411, 415; B Dauda, 'Industrial Policy and the Nigerian Bureaucracy, 1900-1988' (1993) 21 African Econ Hist 73, 74-75.



objective.<sup>189</sup> However, even the best crafted policy could still be deviated from in practice of which a key consideration would be whether there could be an independent mechanism for monitoring the implementation of the policy, receiving feedback in this regard from various stakeholders and reporting on any observed deviations.<sup>190</sup>

### **2.3.1.2. THE LEGAL FRAMEWORK OF PRIVATISATION**

It has been noted that ‘privatization must in particular be accompanied by legal and regulatory reform.’<sup>191</sup> It is necessary to consider whether the legal and regulatory framework put in place by the government is adequate to operationalise the policy, ensure that its objectives are met, safeguard against various implementation flaws that could impede the realisation of these objectives and define various rights, obligations and remedies relating to the privatisation programme. A defective legal and regulatory framework could compromise the long term sustainability of the privatisation programme, and the more stable it is, the lesser the need to provide extra guarantees to wary investors. Based on the suggestions that have been made on laws and regulations that are required in the privatisation context, two broad sets of laws and regulations appear necessary to provide a stable platform for implementation of the policy goals of privatisation.<sup>192</sup> The first set is required to pave way for the privatisation programme and serves to legalise the privatisation process in order to protect investors, define the

---

<sup>189</sup> D Wass, ‘Checks and Balances in Public Policy Making’ [1987] PL 181, 193-198; ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 86.

<sup>190</sup> T Cohen, ‘Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation’ (2003) 47 JAL 65, 72; B Dauda, ‘Industrial Policy and the Nigerian Bureaucracy, 1900-1988’ (1993) 21 African Econ Hist 73, 75; D Wass, ‘Checks and Balances in Public Policy Making’ [1987] PL 181, 198-200 pp 199.

<sup>191</sup> I Shihata, *The World Bank in a Changing World: Selected Essays and Lectures, Vol 2* (Kluwer Law International, The Hague 1995) 529.

<sup>192</sup> Ibid 529-530. Here, Ibrahim Shihata identified 5 categories in the privatisation legal framework, but these can be regrouped into the 2 sets of laws and regulations utilised in this work. Also see R Pritchard, ‘The Transformation in Foreign Investment Law - more than a Pendulum Swing?’ (1997) 8 ICCLR 233, 236: ‘Law plays a critical role in providing the legal infrastructure to underpin investment activity. The essential elements of what is required are: a constitutional guarantee of the rule of law; an efficient body of business laws; readily enforceable contract laws; easy access to the courts for the resolution of disputes concerning business relationships.’ See generally H Sarie-Eldin, ‘Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa’ in J Faundez, ME Footer and JJ Norton (eds), *Governance, Development and Globalization: A Tribute to Lawrence Tshuma* (Blackstone Press Limited, London 2000) 336, 342.

proprietary or other investment rights being granted to any privatisation investor and give legal backing to the institutions that will implement the policy.<sup>193</sup> In enacting laws to pave way for the privatisation programme and define and protect investors rights, it should be noted that privatisation could have constitutional and administrative law implications.<sup>194</sup> Part of the legal reform process would necessarily entail ensuring that there is no conflict between the privatisation enabling law and other existing laws in the country including the constitution of the country<sup>195</sup>, because investors are usually wary about legal and regulatory uncertainties that could later lead to the nullification of various completed transactions premised on illegality or unconstitutionality. Equally of concern is whether the investor will face the risk of inconsistent laws at the federal and state or local government levels in a country that operates a federal system of government, for instance tax laws.<sup>196</sup>

Even where proprietary rights are well defined, investors could remain wary where the privatisation law and other related laws do not contain sufficient safeguards to ensure a transparently implemented privatisation programme. Equally, such safeguard are vital for the government which seek to maintain the integrity of the privatisation process, maintain investor confidence and also maintain the citizens' trust that privatisation is legitimate and in the public interest and . Safeguard measures include provisions for

---

<sup>193</sup> LA Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations' (2000) 34 Int'l Law 1055, 1056 – 1057: 'A legal system that guarantees freedom of contract, protects property and proprietary rights, provides for an adequate regulation of secured transactions, and is further seen to give practical protection and remedies in the case of non-payment of a debt, a jurisdiction where the judicial system is fast and efficient, and where security is guaranteed is attractive both to local and international investors) If the investor is not persuaded that the law gives real protection and remedies, then it becomes irrelevant and he will not invest.' Also see C Tite, 'Port Privatisation: Managing Change within the Right Legal Framework' (1995) 6 ICCLR 166, 166; WG Frenkel, 'New Developments in Russian Privatisation Law' (1993) 4 ICCLR 28, 28-29; J Grozdanovic, 'Czechoslovakia: Privatisation' (1991) 2 ICCLR C155, C155-C156; P Badcoe, 'Public Private Partnerships in Local Government: The Legal, Financial and Policy Framework' [1999] PPLR 279, 286-287, 292, 298-301; J Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40, 49-50; T Prosser, 'Nationalised Industries as Instruments of Financial Policy: The Treasury Consultation Proposals' [1986] PL 18, 25-26; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 205-206.

<sup>194</sup> P Craig, 'Public Law, Political Theory and Legal Theory' [2000] PL 211, 238; MR Freedland, 'Government by Contract and Public Law' [1994] PL 86, 91-96; R Malherbe, 'Privatisation and the Constitution: Some Exploratory Observations' (2001) J S Afr L 1, 2-5, 12-13.

<sup>195</sup> MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S29.

<sup>196</sup> O Arowolo, 'Eti-Osa Local Government v Jegede: A Fillip for Responsible Tax Administration in Nigeria' (2008) 19 ICCLR 25, 25, 27-28; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 190, 267.

proper valuation of the enterprises<sup>197</sup>, transparent accounting and management of privatisation proceeds<sup>198</sup>, public offering of shares on local and international capital markets where high standards of transparency and openness are maintained<sup>199</sup>, conducting privatisation auctions and public procurement using competitive bidding with safeguards measures aimed at preventing, detecting and punishing corruption, including collusion<sup>200</sup> and stipulation of adequate criminal and civil penalties for corruption and disregard of procedural requirements for transparency.<sup>201</sup>

The second set of laws and regulations would be those required to regulate the conduct of privatised companies in the market, ensure that the post-privatisation business environment is conducive to investment and productivity and also ensure that the policy objectives of the privatisation programme are still being met after the conclusion of the programme. Essentially, the privatisation enabling law and the successful conduct of privatisation transactions may not be sufficient to resolve the problems of poorly performing public enterprises or deliver the economic development benefits of privatisation. Other supporting laws and regulations would also be required in a market economy to deliver the objectives of the privatisation programme and existing commercial/business laws may need to be reformed or strengthened in the light of the

---

<sup>197</sup> Stroeter Trench and Veirano, 'Brazilian Privatisation Plan' (1991) 9 IBL 408, 409: 'State-owned companies to be sold must be appraised by two independent and reputable accounting firms. If deemed necessary, the governmental commission organised to supervise the Privatisation Plan can require a third appraisal'; WD Stuber, 'Privatisation in Brazil' (1991) 9 IBL 429, 430 KP Buschardt and WK Sievers, 'Privatisation in Poland' (1994) 5 ICCLR 128, 129; M Du Vall and J Barta, 'Privatisation of State Enterprises in Poland' (1991) 2 ICCLR 310, 311; PP Craig, 'Constitutions, Property and Regulation' [1991] PL 538, 553-554.

<sup>198</sup> EM Filippozzi and D Noronha Goyos, 'The Brazilian Constitutional Review and the Privatisation Programme - An Overview' (1994) 5 ICCLR 243, 244.

<sup>199</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 168.

<sup>200</sup> C Munro, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' [2006] PPLR 352, 352-353, 359-361; RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' [2009] PPLR 67, 68. Also see 69, 77-80, 100-101; P Badcoe, 'Public Private Partnerships in Local Government: The Legal, Financial and Policy Framework' [1999] PPLR 279, 281, 283; P Klemperer, 'Bidding Markets' (2007) 3 JCL & E 1, 14-41; R Hunja, 'Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines' [1997] PPLR 217, 220-221; D Wallace, 'The Changing World of National Procurement Systems: Global Reformation' [1995] PPLR 57, 59-60.

<sup>201</sup> WD Stuber, 'Privatisation in Brazil' (1991) 9 IBL 429, 430; D Hall, 'Privatisation, Multinationals and Corruption' (1999) 9 Development in Practice 539, 554 (bribery punished by banning future participation in public bids); *R v Best*, Times 6 October 1987 (CA), *R v Griffiths* (Ronald Paul) [1989] 11 Cr App R (S) 216 (CA) (Conviction for fraudulently making multiple applications for privatisation shares on the stock exchange); S Williams, 'The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa' (2007) 51 JAL 1, 1.

new business environment ushered in by privatisation.<sup>202</sup> In the light of problems that have often arisen in the privatisation context, a key consideration would be whether there are adequate laws for preventing poor corporate practices like insider trading, transfer pricing, price fixing, fraudulent accounting and tax evasion, preventing asset stripping of privatised enterprises, protecting minority shareholders and ultimately promoting investor confidence<sup>203</sup> Administrative laws may need to be updated to reflect the shift of the state towards contracting and market regulation.<sup>204</sup>

The twin issues of regulation and competition have considerable impact on the outcome of privatisation as an economic development tool and whether or not enterprises become more efficient after privatisation and lead to the actualisation of the privatisation's states objectives will largely depend on how these issues are addressed, especially regarding utility/infrastructural enterprises.<sup>205</sup> Thus regulatory and competition laws are complementary and are very crucial in the privatisation context and are mechanics for accountability in the post-privatisation era.<sup>206</sup> Regarding regulation, it has been noted that:

The functions of the regulatory framework include the harmonization of a number of different objectives concerning the profitability of the operator, the continuity and quality of the general interest services provided, compliance with commitments entered into, the implementation of the necessary infrastructure investment, the management of externalities and environmental concerns (pollution of

---

<sup>202</sup> Note for instance C Tite, 'Port Privatisation: Managing Change within the Right Legal Framework' (1995) 6 ICCLR 166, 167; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875, 887; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 224.

<sup>203</sup> JC Coffee, Jr, 'Privatization and Corporate Governance: The Lessons from Securities Market Failure' (1999-2000) 25 J Corp L 1, 2-3, 33-38; B Black, R Kraakman and A Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong?' (1999-2000) 52 Stan L Rev 1731, 1752-1754. Also note the issue of providing for minority shareholders to have some say in the appointment of some members of the board of directors given that other investors with bigger stakes could edge them out of the running of the company. See J Laslett and M Franzosi, 'Legal Aspects of Privatisation in Italy' (1994) 5 ICCLR 425, 427-428.

<sup>204</sup> MR Freedland, 'Government by Contract and Public Law' [1994] PL 86, 99-100.

<sup>205</sup> PP Craig, 'Constitutions, Property and Regulation' [1991] PL 538, 552.

<sup>206</sup> D Parker, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] JBL 283, 283, 297-298; MB Hassan, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] IELTR 231; RJ Taylor, 'UK Competition Law and Procedures - An Overview' (1988) 9 ECLR 446, 451-453.

water sources, over pumping of ground water, etc.) and the need for flexibility to allow adjustments to be made as and when required.<sup>207</sup>

Given that privatisation could result in the government relinquishing its direct control over public enterprises<sup>208</sup>, regulation essentially operates to fill the void. Effectively harmonising the interests of investors and consumers and the different policy objectives of privatisation poses perhaps the greatest challenge to the realisation of the economic development objectives of privatisation. As noted above, privatisation often gives rise to winners and losers and the challenge facing the government is to be able to craft a regulatory policy and regulatory laws that ensure that privatisation is not a zero sum game in the implementing country. In this regard, both investors and consumers want adequate legal protection from uncertainty and arbitrariness, of which the principles of good regulation have been identified as ‘transparency, accountability, proportionality, consistency and targeting.’<sup>209</sup>

On the one hand, investors need reasonable returns on investment otherwise they will not be inclined to invest and there is also concern about the extent and impact of regulatory burdens and associated compliance costs on privatised enterprises.<sup>210</sup> A good legal and regulatory framework should clarify the rights and obligations of investors in the privatised service sectors, including investment obligations, which could have impact on their decision on whether to invest in the first place.

On the other hand, consumers need good quality services that are efficiently delivered and for which the cost is affordable, of which the legal and regulatory framework should also assure them that privatisation is not something to be feared given that there is a mechanism for holding private investors accountable and ensuring that the

---

<sup>207</sup> ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999), 36. Also see, 27. See further C Harlow and R Rawlings, *Law and Administration* (Butterworths, London 1997) 317-318.

<sup>208</sup> C Chinkin, ‘A Critique of the Public/Private Dimension’ (1999) 10 EJIL 387, 390.

<sup>209</sup> Better Regulation Task Force, UK, ‘Economic Regulators’ (Report) (July 2001) <<http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/econreg.pdf>> accessed 20 July 2006 5. Also see D Parker, ‘Privatization and Regulation of Public Utilities: Problems and Challenges for Developing Economies’ in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 551.

<sup>210</sup> P Gully-Hart, ‘The Risk of Being Sued by those Damaged by Regulatory or Enforcement Action: Over-Regulation of Financial Services?’ (2005) 12 JFC 246, 246.

privatisation programme yields the expected economic development dividends for the country and its citizens.<sup>211</sup>

Realising the economic development objectives of privatisation is hinged on implementing privatisation within a regulatory framework that recognises and addresses these challenges, keeping in mind the point noted in Chapter 1 that privatisation poses a challenge regarding how to accomplish its economic and social ends which are often in conflict. How possible is it to reconcile the competing interests of different stakeholders especially in a very poor country where a majority of the population may not be able to afford tariffs that barely cover the cost of service provision? Addressing this question underscores the need for factoring in the peculiar needs of the country and various public interest considerations in designing the laws, regulations and contractual arrangements that guide privatisation both generally and specifically relating to particular sectors<sup>212</sup> Given the need for citizens of a country to have access to certain basic provisions if economic development is to have real meaning to them, it may be necessary to include enforceable social clauses or covenants in privatisation contracts to safeguard the public interest and ensure the continued provision of ‘certain services to less advantaged economic groups after the divestiture.’<sup>213</sup> Some countries have also sought to define certain economic development imperatives of the state such as provision of social security, supply of basic utility/infrastructural services and basic labour entitlements, as citizens’ rights and accord them constitutional protection, enabling citizens to have enforceable rights against the state.<sup>214</sup> These rights could be utilised where the implementation of privatisation results in huge sections of the population being excluded from the supply of certain privately provided goods and services. However the bottomline remains that privatisation seeks to attract private

---

<sup>211</sup> Note for instance the Utilities Act 2000 (UK). See MB Hassan, ‘The Utilities Act 2000: Impact on the Electricity Industry’ [2000] IELTR 231, 231.

<sup>212</sup> S Butler, ‘Privatization for Public Purposes’ in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University Of Wisconsin Press, Wisconsin 1991) 20; ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 37.

<sup>213</sup> S Butler, ‘Privatization for Public Purposes’ in WT Gormley Jr (ed), *Privatization and its Alternatives* (The University Of Wisconsin Press, Wisconsin 1991) 20.

<sup>214</sup> DM Chirwa, ‘A Full Loaf is better than Half - The Constitutional Protection of Economic Social and Cultural Rights in Malawi’ (2005) 49 JAL 207, 222-226; DM Davis, ‘Socioeconomic Rights: Do They Deliver the Goods?’ (2008) 6 ICON 687, 687-689; KD Ewing, ‘Social Rights and Constitutional Law’ [1999] PL 104, 105, 117-119.

investors and as indicated above, where they are not sure of reasonable returns on their investments, they may decide not to invest, which may not be in the interest of the citizens given that the existing public provision may be very unsatisfactory. Equally, using the constitution or other laws to advance social policy may conflict with the privatisation law or contractual arrangements between the government and private investors. It is also possible that the government, in seeking to constrain private investors, may be driven more by the politics of the day and the need to sustain political electability rather than sound regulatory principles.<sup>215</sup>

It bears pointing out however that although the preceding discussion is indicative of a government that is interested in advancing social welfare, this may not always be the case and the government's interest may not always be perfectly aligned with the immediate needs of consumers, given that it could gain financially in terms of tax revenue where privatised enterprises post very high earnings and profits at the expense of lower charges or tariffs for consumers, and conflict of interests may also see government officials not acting in the public interest. Accordingly a key consideration is the extent to which regulatory laws provide for some measure of independence for sector regulators.<sup>216</sup> This would be important for effectively and impartially reconciling the private economic interest of privatised enterprises with the need to safeguard the public interest, ensure that consumers get a fair deal, ensure that investors' returns and management remuneration does not come at the expense of meeting performance standards and delivering value for money to consumers<sup>217</sup> and ensure that other broader policy objectives of the government are met.

Another key consideration in assessing the design of privatisation and regulatory laws is the issue of penalties for breach of contract or licence conditions and avenues for redress. In this regard, it would be prudent for the privatisation laws and regulations to clearly specify events and circumstances that could lead to contractual modification or

---

<sup>215</sup> A Adefulu, 'How Can Nigeria Develop a Domestic Market for its Gas?' [2000] IELTR 99, 101.

<sup>216</sup> M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] JBL 244, 247-248; T Cohen, 'Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation' (2003) 47 JAL 65, 70-71; C Graham, 'Taking Politics out of Regulation and Competition' (1999) 10 Util LR 87, 87.

<sup>217</sup> Note for instance the Competition and Service (Utilities) Act 1992 (UK). See A McHarg, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] PL 385, 391; MB Hassan, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] IELTR 231, 231, 234.

termination and clearly stipulate penalties and compensation for breach of clearly defined licence conditions and contractual obligations.<sup>218</sup> For the government, this avoids unnecessary acrimony between it and the investor and could have a deterrent effect on potential breaches of regulatory provisions and licence conditions.<sup>219</sup> For investors, this ensures regulatory certainty owing to the fact that they can adequately assess the regulatory risks in a particular country, and are also afforded some measure of protection against arbitrary government action especially where there is provision for independent review by way of an appeal process or judicial review of such regulatory decisions.<sup>220</sup> For the consumers, this provides some assurance that their interests are safeguarded, that breaches of the law will not go unpunished and that the private investors will remain accountable.<sup>221</sup> The reasonableness of financial penalties also deserves special consideration if it is intended that they should actually deter regulatory breaches given that regulated enterprises may consider it more cost effective from a business point of view to pay minor fines rather than comply with certain regulations.<sup>222</sup> The deterrent effect of penalties would also be enhanced where those affected by regulatory breaches can also claim compensation or sue for damages.<sup>223</sup>

As earlier noted, regulatory and competition laws are complementary in the privatised sector, of which regulators are sometimes granted powers to promote competition in the provision of various utility/infrastructural services.<sup>224</sup> Regarding competition, it has been noted that:

---

<sup>218</sup> G Haley, 'PFI Contractors: Some Emerging Principles' (1999) 15 Const LJ 220, 224-225.

<sup>219</sup> C Tite, 'Port Privatisation: Managing Change within the Right Legal Framework' (1995) 6 ICCLR 166, 168; MB Hassan, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] IELTR 231, 234.

<sup>220</sup> MB Hassan, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] IELTR 231, 234; D Parker, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] JBL 283, 301.

<sup>221</sup> A McHarg, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] PL 385, 389.

<sup>222</sup> *Ibid* 391; D Parker, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] JBL 283, 289.

<sup>223</sup> D Parker, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] JBL 283, 301.

<sup>224</sup> Chapter 2 para 2.3.2.2; A McHarg, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] PL 385, 386.



Successful competition policy ... has given developing countries and former state-controlled economies tools to prevent newly privatized firms from engaging in anticompetitive abuses that harm consumers and undermine innovation and economic growth. It has prevented substantial consumer injury due to harmful single firm conduct lacking in efficiency justifications. ... properly conceived and implemented competition law enforcement can bring significant benefits - enhanced efficiency, lower prices, greater product choice, more innovation, etc. - to developed and developing countries alike. ...<sup>225</sup>

The task of reconciling the interests of various privatisation stakeholders is less daunting where competition complements regulation in a privatising country, particularly with regard to the utility/infrastructural service sectors, with regulatory bodies and competition authorities both working to protect consumers and ensure proper functioning of market competition.<sup>226</sup> Private monopolies potentially close rather than open the market for particular products, do not have to respond to market signals and tend to be inefficient, and often give rise to vested interests that have every incentive to subsequently frustrate further market expansion.<sup>227</sup> They are also difficult to discipline, for instance, revocation of their licence where this is justifiable would mean the termination of the supply of a vital product or service for all the citizens/ consumers who rely on it given that there are no alternative suppliers in the market.<sup>228</sup> The more competitive the market is, the lesser the need for price regulation and conversely, the

---

<sup>225</sup> AF Abbott, 'Competition Policy and its Convergence as Key Drivers of Economic Development' (2008-2009) 28 *Miss C L Rev* 37, 38 and 40. Also see I Shihata, *The World Bank in a Changing World: Selected Essays and Lectures, Vol 2* (Kluwer Law International, The Hague 1995) 529; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 84; M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] *JBL* 244, 244-245.

<sup>226</sup> J Cooper, 'A New Approach to Regulation? The Utilities Bill and the New Regulatory Duties' (2000) 11 *Util LR* 23, 25-26; D Parker, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] *JBL* 283, 297-299, 301; M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] *JBL* 244, 259-260. Also see B Doherty, 'Competition Law and Sector-Specific Regulation' (2001) 7 *CTLR* 225, 229: 'some writers have doubted whether there is any real difference between "competition" and "sector-specific regulation." ... However, there are some sector-specific rules which cannot be replicated by competition law alone, and there is no indication that the need for these will disappear. As examples of rules which competition law cannot replace ... universal service, affordable pricing, data protection, safety and environmental rules, rules on pluralism and diversity and protection of minors ...' (footnotes omitted).

<sup>227</sup> A McHarg, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] *PL* 385, 393; RJ Taylor, 'UK Competition Law and Procedures - An Overview' (1988) 9 *ECLR* 446, 451; T Sharpe, 'Predation' (1987) 8 *ECLR* 53, 55-56; G Hufbauer and S Stephenson, 'Services Trade: Past Liberalization and Future Challenges' (2007) 10 *JIEL* 605, 617-618; AF Abbott, 'Competition Policy and its Convergence as Key Drivers of Economic Development' (2008-2009) 28 *Miss C L Rev* 37, 48.

<sup>228</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 522.

lesser the degree of competition in the market, the more the need for such regulation.<sup>229</sup> This is because in a fully competitive market place, a privatised enterprise would need to be both productively and allocatively efficient in order to thrive and supply reasonably priced products and services of comparably good quality in order to attract and retain customers who have the choice of switching to alternative providers that offer better services or more competitive rates<sup>230</sup> Effective competition is therefore an important corporate governance tool in the privatisation context, particularly where regulatory mechanisms have not yet matured, and helps to reduce the task of regulation.<sup>231</sup>

### **2.3.2. ENSURING PROPER IMPLEMENTATION OF PRIVATISATION**

As earlier indicated, attaining the economic development policy objective of a privatisation programme and minimising its pitfalls or negative outcomes requires making sure that there is a clear nexus between the policy and legal framework of privatisation and its actual implementation in a country. As the saying goes, anything worth doing is worth doing well and the steps taken to implement privatisation are as important as the substantive legal provisions that authorise the programme. Four key questions were earlier noted in Chapter 1 as the reference points for analysing and accounting for potential implementation gaps namely, is the national environment conducive to embarking on privatisation and attracting private investments?; secondly, is the institutional framework for implementing and monitoring the outcome of privatisation robust?; thirdly, will the strategic approach to the implementation of privatisation lead to the realisation of set policy objectives?; and finally, is the privatisation process accountable, transparent and free from corruption? The essence of these issues will be discussed below.

---

<sup>229</sup> M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] JBL 244, 254-255, 267-268; B Doherty, 'Competition Law and Sector-Specific Regulation' (2001) 7 CTLR 225, 230.

<sup>230</sup> M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] JBL 244, 245.

<sup>231</sup> Also see S Estrin, 'Competition and Corporate Governance in Transition' (2002) 16(1) J Econ Perspect 101, 113.

### **2.3.2.1. IS THE NATIONAL ENVIRONMENT CONDUCTIVE TO EMBARKING ON PRIVATISATION AND ATTRACTING PRIVATE INVESTMENTS?**

The key aim of privatisation is for private entrepreneurs to take over the ownership and/or control of public enterprises, however, the decision to make such long term direct investment in a country is not likely to be made in a vacuum, but would factor in various underlying problems or risks in the country that could affect successful participation in the privatisation programme or the profitability of such investments going forward.<sup>232</sup> The fact that a country has enacted a foreign investment law, outlawed expropriation without adequate compensation, entered into bilateral and regional investment treaties with other countries, is willing to submit to international arbitration of investment disputes and is able to provide incentives like tax rebates may greatly improve its profile as an investment destination.<sup>233</sup> However, the makeup of the national investment climate is much broader than laws and treaties can provide for and treaty commitments alone may still not persuade a reluctant investor to make a long term privatisation investment commitment, where the country for some other reasons, does not have comparative advantage over other competing investment destinations or still poses significant investment risks.<sup>234</sup> For instance, it has been noted that

Investors wishing to invest always look for a favourable trade and investment regimes, good infrastructure, property rights, economic and political stability and an educated and committed workforce.<sup>235</sup>

---

<sup>232</sup> C Chatterjee, 'The Reality of Risks in Private Foreign Investment' (1996) 7 ICCLR 22, 22-24.

<sup>233</sup> BM Cremades, 'Promoting and Protecting International Investments' (2000) 3 Int ALR 53, 55-57; R Pritchard, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233, 236; GP Campbell, 'Foreign Investment and Company Laws of Selected Central Eastern European and Central Asian Republics' (1994) 5 ICCLR 366, 366; M Davies, 'Foreign Investment Trends in Central and Eastern Europe' (1992) 7 JIBL 163, 163-166; G Hufbauer and S Stephenson, 'Services Trade: Past Liberalization and Future Challenges' (2007) 10 JIEL 605, 618-619.

<sup>234</sup> R Pritchard, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233, 234-235; B Black, R Kraakman and A Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong? (1999-2000) 52 Stan L Rev 1731, 1757-1762; G Gluck, 'Privatisation: the Hungarian example' (1993) 4 ICCLR 286, 286: '...legislation gave generous tax incentives to foreign enterprises ... Furthermore, foreigners perceived Hungary as having a relatively stable political environment, a highly educated and motivated work force, and a homogeneous population relatively free of the ethnic tensions which prevailed in the region.'

<sup>235</sup> J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 83.

As noted in Chapter 1, various issues arising from the social, political and cultural context of implementation could qualify or limit the ability of privatisation legal reforms to facilitate economic development. The dissertation focuses on three of such issues namely socio-political concerns resulting from the implementation of privatisation, general socio-political instability in the country and pre-existing systemic problems affecting the private business sector in a country. This is merely illustrative and many countries are bound to have a host of other issues arising from the peculiarities of each country. The bottomline is that where these issues are not effectively addressed, they could dampen the national investment climate, significantly drive up investment risk in the country and undermine the certainty and predictability that entrepreneurs often seek, which could affect participation in the privatisation programme especially in a competitive global economy where investors could choose other investment destinations. Ultimately, this could prevent the country from reaping the full economic development dividends of privatisation.

On the issue of socio-political concerns resulting from the implementation of privatisation there are a host of issues stemming from the implementation of privatisation that could undermine investor confidence. For instance the point was earlier made about the need for adequate consultation of various stakeholders given that privatisation often gives rise to winners and losers.<sup>236</sup> Where the implementation proceeds without adequate consultation and planning in advance for effacing or ameliorating the adjustment costs imposed on various stakeholders, the stakeholders that perceive that they have been given short shrift and not fully factored into the privatisation equation, including consumers or workers, could resort to riots, strikes, urban violence or general civil disobedience in order to register their displeasure, as has been witnessed in many countries.<sup>237</sup> These protests frequently stem from privatisation-

---

<sup>236</sup> ML Weitzman, 'How not to Privatize' in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 138; P Starr, 'The Meaning of Privatisation' (1988) 6(1) Yale L & Pol'y Rev 6, 9; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 4, 13; G Ortiz, 'Latin America and the Washington Consensus: Overcoming Reform Fatigue' (2003) 40(3) F & D 14, 16; C Price, 'Privatisation in Less Developed Countries' in PM Jackson and CM Price (eds), *Privatisation and Regulation: A Review of the Issues* (Longman, London 1994) 250-251; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 36.

<sup>237</sup> M Ellis-Jones, 'States of Unrest III: Resistance to IMF and World Bank Policies in Poor Countries' (World Development Movement Report) (April 2003) <<http://www.wdm.org.uk/resources/reports/debt/statesofunrest319042003.pdf>> accessed 30 May 2006 16-45.

related job cuts without adequate provision for severance benefits or price hikes either before or after privatisation including the charges for basic utilities.<sup>238</sup> As seen in the World Development Movement report, some governments resort to violent crackdown on protesters rather than initiating dialogue to peacefully address these grievances, of which a World Bank report states that:

Leaders must have the means to implement change and to withstand opposition to reform ... the leadership must be able to withstand opposition to reform from potential losers, these may be SOE employees, especially when such groups are organized, numerous, and ready to engage in demonstrations, work stoppages in strategic industries, and other actions that might be costly to the government.<sup>239</sup>

These issues could undermine the legitimacy and long-term sustainability of the entire privatisation programme and negatively impact on the investment climate in a country particularly where the government adopts a belligerent posture, and in the case of countries where there are pre-existing ethnic or other social divisions, any form of societal violence or unrest could be hijacked and utilised for venting pre-existing anger on perceived enemies.<sup>240</sup> Some countries have sought to avoid clashes with various trade unions and rather devise ways of winning their support for the privatisation programme for instance making provisions for workers to be issued free or preferentially priced shares and requiring prospective investors to present a social plan that explains how they will deal with issues pertaining to workers' employment and welfare, which would be factored into the investor' selection process.<sup>241</sup> Equally, some governments have sought to win the support of the citizens through free or preferentially priced shares<sup>242</sup>, and where regulatory structures are already in place and

---

<sup>238</sup> Also see C Graham and S Sukhtankar, 'Does Economic Crisis Reduce Support for Markets and Democracy in Latin America? Some Evidence from Surveys of Public Opinion and Well Being' (2004) 36 J Lat Am Stud 349, 362.

<sup>239</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* - A World Bank Policy Research Report (OUP, New York 1995) 10, 11, 12.

<sup>240</sup> J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 77 and 119, 219 and 240.

<sup>241</sup> SM Butler, 'Changing the Political Dynamics of Government' (1987) 36(3) Proceedings of the Academy of Political Science 4, 11; KP Buschardt and WK Sievers, 'Privatisation in Poland' (1994) 5 ICCLR 128, 129; DE Reid, 'Employee Share Participation: Clauses 38-42' [1991] BTR 147, 150; A Echard and P Billot, 'Privatisation in France in 1993' (1993) 4 ICCLR 406, 407.

<sup>242</sup> KP Buschardt and WK Sievers, 'Privatisation in Poland' (1994) 5 ICCLR 128, 130; M Du Vall and J Barta, 'Privatisation of State Enterprises in Poland' (1991) 2 ICCLR 310, 311-312; J Grozdanovic, 'Czechoslovakia: Privatisation' (1991) 2 ICCLR C155, C156; ; A Echard and P Billot, 'Privatisation in

there is also adequate allocation of subsidies especially to key sectors that provide essential services coupled with a functional social security system, this could serve to reassure the citizens that private delivery of various goods and services is not a threat to their welfare. As shareholders, the citizens would also have the opportunity of earning dividends on their investments and also be able to have a voice in how the privatised companies are run.<sup>243</sup>

Regarding general socio-political instability in the country, this could stem from a wide range of sources include very high levels of crime and random violence as well clashes by ethnic, religious or other groups in a country. On the issue of pre-existing systemic problems affecting the private business sector in a country. This includes issues like inadequate utility/infrastructural services and an unpredictable law and policy environment where taxes and regulations could suddenly change<sup>244</sup> and bureaucratic bottlenecks and corruption that adversely affect the securing of vital approvals or authorisations from government departments.<sup>245</sup> It is arguable that the more pervasive these problems are, the lesser the likelihood that the country will attract qualitative investors to the privatisation programme given that they drive up transaction costs and increase investment risk<sup>246</sup>, adversely impact on productivity and profitability and could possibly cripple a newly privatised enterprise from the onset. Such pre-existing problems may not only make a country less investment-friendly but could also severely undermine the capacity of privatisation to be a catalyst for private sector development, either by dissuading serious investors from coming into the country or subsequently frustrating their privatisation investments.

---

France in 1993' (1993) 4 ICCLR 406, 407-408.

<sup>243</sup> Editorial, 'Shareholder Power and Active Citizenship' (1989) 10 Comp Law 201, 201.

<sup>244</sup> R Pritchard, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233, 235.

<sup>245</sup> B Black, R Kraakman and A Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong? (1999-2000) 52 Stan L Rev 1731, 1759.

<sup>246</sup> R Pritchard, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233, 235.

### **2.3.2.2. IS THE INSTITUTIONAL FRAMEWORK FOR IMPLEMENTING AND MONITORING THE OUTCOME OF PRIVATISATION ROBUST?**

According to Kevin Davis and Michael Trebilcock:

... as far as legal reforms are concerned, developing countries should not focus exclusively on enacting or adopting appropriate substantive bodies of law or regulation designed to vindicate the particular conception of development that motivates them. Rather, the empirical evidence suggests that it is appropriate to emphasise reforms that enhance the quality of institutions charged with the responsibility for enacting laws and regulations, and institutions charged with the subsequent administration and/or enforcement of those laws or regulations.<sup>247</sup>

Specifically, privatisation is quite institutionally demanding, given the need for a strong mechanism for implementing various laws and regulations enacted to pave the way for it.<sup>248</sup> Key public institutions are required for implementing privatisation, undertaking post-privatisation monitoring or regulation and supervising the functioning of the market economy.<sup>249</sup> John Nellis points out that:

In an institutional vacuum, the chances are high that no one in or around a privatized firm (workers, managers, creditors, investment fund, shareholders, or civil servants managing the state's residual share) will be interested in or capable of maintaining the long-run health of its assets.<sup>250</sup>

Thus a key consideration in assessing whether privatisation law will facilitate economic development is whether the implementing country has a robust institutional framework for undertaking privatisation and various privatisation-related tasks and ensuring that the policy objectives of the programme are met. These institutions compliment and implement the laws and regulations guiding the programme and essentially transform the privatisation policy from an abstract concept on the drawing board to actual reality

---

<sup>247</sup> KE Davis and MJ Trebilcock, 'Legal Reforms and Development' (2001) 22 TWQ 21, 33

<sup>248</sup> JM Wolgin, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) Amer Econ Rev 54, 56.

<sup>249</sup> See for instance I Dajkovic, 'Competing to Reform: An Analysis of the New Competition Law in Albania' (2004) 25 ECLR 734, 738.

<sup>250</sup> J Nellis, 'Time to Rethink Privatization in Transition Economies?' (1999) 36(2) F & D 16, 18. Also see G Ortiz, 'Latin America and the Washington Consensus: Overcoming Reform Fatigue' (2003) 40(3) F & D 14, 16.

in the country.<sup>251</sup> Given that these institutions are required to implement the privatisation policy, it is vital that institutional reform should precede policy reform in the privatisation context. Some of the institutions that are deemed vital include an administrative body that will actually implement the privatisation law<sup>252</sup>, statutory bodies that will implement various laws enacted for the supervision of the stock exchange and checking of corporate governance lapses<sup>253</sup>, a competition authority that will implement the competition law and supervise market competition and finally regulatory bodies for the different state sectors that will be ceded to the private sector, whose task it is to implement the regulatory laws that have been enacted.<sup>254</sup> Even as the government aims to downsize the public sector as a result of privatisation, these public institutions are still deemed vital, given the importance of the tasks they are expected to undertake. The extent to which they are adequately staffed and funded and attuned to the peculiarities of the social context in which they are expected to function will play a key role in determining their effectiveness.<sup>255</sup>

Regarding the administrative body that will actually implement the privatisation programme, an inadequate administrative capacity could lead to botched transactions that undermine investor confidence, and excessive political interference in its functioning could adversely impact on its effectiveness. Although some sort of oversight may be required to keep it in check and ensure that the privatisation objectives are not being deviated from, this could also pave the way for the sort of political meddling that was identified as a key factor in the failure of many public enterprises in many countries. Although in some countries, the implementation of privatisation is not centralised under one department, such centralisation could be helpful as it could serve

---

<sup>251</sup> ML De Espinosa Abarca, 'The Need for Substantive Regulation on Investor Protection and Corporate Governance in Europe: Does Europe Need a Sarbanes-Oxley?' (2004) 19 JIBLR 419, 427.

<sup>252</sup> Note for instance J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 360-361.

<sup>253</sup> It has been noted that privatisation does not automatically pave way for improved corporate governance. Asset stripping, marginalisation of minority shareholders and a host of other corporate governance problems can and do occur in many private/privatised enterprises and need to be checked. See J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 271.

<sup>254</sup> W Megginson, 'Privatization' [2000] 118 Foreign Pol'y 14, 22.

<sup>255</sup> L Bieganski, 'Adoption of European Competition Law by Countries in Transition: Problems and Solutions' (2007) 28 ECLR 501, 501, 508; G Ortiz, 'Latin America and the Washington Consensus: Overcoming Reform Fatigue' (2003) 40(3) F & D 14, 16.



as a time-saving one-stop shop for all potential investors and makes for greater clarity in the privatisation procedural requirements.

The extent to which the institutional structure for monitoring corporate governance especially in the capital market is robust, could determine whether corporate governance lapses are likely to flourish in privatised enterprises including fraud and asset stripping after privatisation which not only defeats the economic development objective of privatisation but would inflict significant losses on minority shareholders and adversely impact on the secondary market for the shares of privatised enterprises.<sup>256</sup> It has been noted that:

Whether the capital market is able to attract foreign capital is to a large extent dependent on a number of matters rooted in ethical standards. Presenting a true and fair view, refraining from taking undue or unfair advantage, transparency, professionalism and the like are matters that go to determine whether there exists an enabling environment for a market that is internationally competitive.<sup>257</sup>

As earlier noted however, national approaches to corporate governance regulation differ<sup>258</sup>, and a key issue to consider is the extent to which the specific corporate governance model chosen by a particular implementing country is suitable for its business environment. Although prospective investors may be concerned about regulatory compliance requirements that unduly consume business time and money, unduly scaling back such requirements could also dampen investor confidence, discourage small investors from investing and adversely affect capital market development.<sup>259</sup> The government would need to strike the right balance based on the peculiarities of the national business environment.

Regarding competition, a key issue is the extent to which competition authorities are actually effective in implementing competition policy and law, of which it has been noted that:

---

<sup>256</sup> ML De Espinosa Abarca, 'The Need for Substantive Regulation on Investor Protection and Corporate Governance in Europe: Does Europe Need a Sarbanes-Oxley?' (2004) 19 JIBLR 419, 425-426, 429-431.

<sup>257</sup> O Ajayi, 'Checking Unethical Market Practices in Nigeria' (1995) 6 ICCLR 169, 178.

<sup>258</sup> ML De Espinosa Abarca, 'The Need for Substantive Regulation on Investor Protection and Corporate Governance in Europe: Does Europe Need a Sarbanes-Oxley?' (2004) 19 JIBLR 419, 419-420, 422.

<sup>259</sup> Ibid 426-429.

The widespread adoption of competition laws presents a series of challenges. New agencies may not have the tools and resources to do their jobs. Even if they do, the country's economic and legal infrastructure may be inadequate to enable sound implementation of competition law and policy. The laws may not always be enforced in a manner that promotes efficiency and consumer welfare. Different countries' laws may be construed in a conflicting manner, even as applied to a single transaction. The sheer transaction costs of dealing with a multiplicity of regimes may seriously detract from or even outweigh the laws' purported benefits.<sup>260</sup>

What is clear from the above is that laws alone are not enough to deliver the benefits of competition. Without an adequately staffed and funded competition authority that clearly understands the policy objectives of the privatisation programme and actually enforces competition provisions, the competition policy and law will fail to yield expected dividends.<sup>261</sup> Where possible, they would need to monitor the privatisation process from the onset especially regarding state monopoly enterprises to ensure that key sectors do not end up under pervasive private monopolistic or oligopolistic control due to the earlier noted problems associated with that.<sup>262</sup> Obtaining vital market information needed for effectively regulating such enterprises and assessing their performance would be a challenge where this occurs.<sup>263</sup> Competition authorities have a continuing role beyond the conclusion of privatisation, given the need to ensure that a level playing field always exists for current market participants and future market entrants, and also prevent market collusion and cartel behaviour, which vices could still thrive in competitive business sectors.

---

<sup>260</sup> AF Abbott, 'Competition Policy and its Convergence as Key Drivers of Economic Development' (2008-2009) 28 *Miss C L Rev* 37, 42.

<sup>261</sup> I Dajkovic, 'Competing to Reform: An Analysis of the New Competition Law in Albania' (2004) 25 *ECLR* 734, 735; L Bieganski, 'Adoption of European Competition Law by Countries in Transition: Problems and Solutions' (2007) 28 *ECLR* 501, 507.

<sup>262</sup> RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' [2009] *PPLR* 67, 93-94; AF Abbott, 'Competition Policy and its Convergence as Key Drivers of Economic Development' (2008-2009) 28 *Miss C L Rev* 37, 48-49. While the competition authority was legally authorised to oversee the implementation of privatisation in countries like Poland and Ukraine, discussion about the enactment of competition legislation in Argentina commenced several years after the commencement of the privatisation exercise when many firms already had substantial market power. See M Du Vall and J Barta, 'Privatisation of State Enterprises in Poland' (1991) 2 *ICCLR* 310, 313; A Voroniuk, 'Ukraine: Monetary Thresholds of Concentration: Creation of Competitive Environment during Privatisation' (1995) 16 *ECLR* R54, R54-R55; P De Rosso, 'Argentina: Competition Law – Regulation' (1997) 8 *ICCLR* C171.

<sup>263</sup> C Graham, 'The Regulation of Privatised Enterprises' [1991] *PL* 15, 15.

Regarding the privatised utility sectors, the need for effective regulatory bodies that would implement the regulatory laws should not be underestimated particularly those sectors that had been functioning as public monopolies.<sup>264</sup> The sector regulatory bodies complement the competition authority<sup>265</sup>, and just like the latter, an important consideration is whether they are fully functional prior to rather than after privatisation to ensure that various obligations imposed on private utility providers under regulatory laws are enforced from the onset aimed at achieving both efficiency and equity.<sup>266</sup> Given the need for such full functionality and effectiveness, key issues to consider include whether sector regulatory bodies are properly staffed and whether they have the right incentive structures and safeguard measures to discourage corruption<sup>267</sup>, promote transparency and accountability and forestall regulatory capture, which could undermine regulatory legitimacy.<sup>268</sup> Essentially, the interaction between regulators and regulated enterprises in the course of interpreting and implementing regulations could produce unintended negative results.<sup>269</sup> Regulatory capture by vested interests could result in unnecessary regulatory forbearance or selective enforcement of regulatory requirements, which would undermine the attainment of privatisation objectives to the detriment of consumers.<sup>270</sup> Given the possibility that these vices could occur, some

---

<sup>264</sup> W Megginson, 'Privatization' [2000] 118 Foreign Pol'y 14, 22; IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 17-18, 79. H Sarie-Eldin, 'Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa)' in J Faundez, ME Footer and JJ Norton (eds), *Governance, Development and Globalization: A Tribute to Lawrence Tshuma* (Blackstone Press Limited, London 2000) 341.

<sup>265</sup> A Robertson, 'The Reform of UK Competition Law - Again?' (1996) 17 ECLR 210, 217-218.

<sup>266</sup> It has been noted that for private investors 'There is little point in wishing for no regulation in industries that are natural monopolies. ... a system in place is probably safer than the uncertainty of some future agency.' See LT Wells and ES Gleason, 'Is Foreign Infrastructure Still Risky?' (1995) 73(5) Harv Bus Rev 44, 55. Also see ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 34.

<sup>267</sup> A Salifu, 'Can Corruption and Economic Crime be Controlled in Developing Economies - and if so, is the Cost Worth it?' (2008) 11 JMLC 273, 277.

<sup>268</sup> For a definition and further explanation of the concept of regulatory capture, see T Cohen, 'Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation' (2003) 47 JAL 65, 73. Also see 74-76; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 8-9.

<sup>269</sup> J Black, 'Talking about Regulation' [1998] PL 77, 92-95; C Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] PL 329, 343.

<sup>270</sup> J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 204 – 205.

mechanism for post privatisation monitoring of regulatory bodies would appear vital.<sup>271</sup> Regulators are often political appointees rather than elected officials, and the regulatory laws as earlier noted often aim to grant them some level of independence given that they are not civil servants *stricto sensu*. This creates a situation where, although they may be entrusted with considerable regulatory powers the exercise of which would considerably affect the outcome of privatisation, they are neither directly accountable to the electorate nor under the direct control of the government.<sup>272</sup> As much as possible, authority should be matched with responsibility and accountability and a monitoring mechanism could expose gaps between regulatory provisions and the actual functioning of regulators and could reveal that they are ineffective or have possibly been compromised. As noted by John Williamson ‘bad institutions can sabotage good policies.’<sup>273</sup> Some suggested accountability mechanisms include legal provision for effective parliamentary oversight<sup>274</sup> and requirement for transparency in the exercise of regulatory powers by publishing relevant information for the public to use in assessing their performance and the performance of regulated enterprises.<sup>275</sup> Such disclosure requirements could also apply to the regulated enterprises.<sup>276</sup>

There are at least 3 other institutions that have been deemed important for effective privatisation outcomes and these are effective tax authorities, statutory consumer watchdogs, an independent and effective judiciary. In the case of the tax authorities, without a viable tax system to ensure the proper assessment and collection of taxes from privatised enterprises, it would be difficult to realise the post-privatisation tax revenue

---

<sup>271</sup> J Auby, ‘Comparative Approaches to the Rise of Contract in the Public Sphere’ [2007] PL 40, 53-54.

<sup>272</sup> JF Garner, ‘After Privatisation: Quis Custodiet Ipsos Custodes?’ [1990] PL 329, 330.

<sup>273</sup> J Williamson, ‘What should the World Bank Think about the Washington Consensus’ (2000) 15 World Bank Res Observer 251, 261.

<sup>274</sup> N Buttle, ‘Privatisation and Ethics’ in D Braddon and D Foster (eds), *Privatization: Social Science Themes and Perspectives* (Dartmouth, Aldershot 1996) 36; JF Garner, ‘After Privatisation: Quis Custodiet Ipsos Custodes?’ [1990] PL 329, 335; C Graham, ‘The Regulation of Privatised Enterprises’ [1991] PL 15, 18-19.

<sup>275</sup> C Graham, ‘The Regulation of Privatised Enterprises’ [1991] PL 15, 17-18; A McHarg, ‘The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter’ [1992] PL 385, 389-390. Also see ME Beesley and SC Littlechild, ‘The Regulation of Privatised Monopolies in the United Kingdom’ in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 219-220.

<sup>276</sup> C Willett, ‘The Citizen's Charter’ [1992] JBL 188, 189. Also see C Harlow and R Rawlings, *Law and Administration* (Butterworths, London 1997) 302.

that should accrue from the privatised enterprises, which is vital for addressing various social goals of the programme.<sup>277</sup> In Russia for instance, despite concerns raised that privatisation would lead to the depletion of revenue that accrued to the state from various enterprises<sup>278</sup>, the state nevertheless pressed on with the programme even though it did not yet have an efficient tax system for collecting taxes from privatised enterprises.<sup>279</sup> According to Martin Weitzman:

The inevitable inequality that arises as true capitalist development proceeds should be dealt with by ...a broadly-based, well-designed, and well-administered progressive tax system, accompanied by a reasonable safety net program...It is important to have in place an operational reporting system for all forms of income, a good data base, good auditing system, competent and honest tax administrators ...<sup>280</sup>

Further, the IMF notes that,

Governments need to improve tax administration and enforcement in combination with steps to eliminate tax exemptions, resist pressures from special interest groups, and eliminate corrupt practices. By broadening the tax base, these steps should make it possible to raise revenue to support important expenditures, while lowering marginal tax rates.<sup>281</sup>

Regarding the consumer watchdogs, they are part of the accountability devices in the privatised era, tasked with safeguarding the public interest by monitoring the performance of regulated enterprises, receiving complaints from the public and liaising with regulatory bodies and the government to ensure the effective discharge of assigned responsibilities by the enterprises and regulatory bodies.<sup>282</sup> Such monitoring could be

---

<sup>277</sup> TJ Biersteker, 'Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions' (1990) 34 *Int Stud Quart* 477, 485, 490.

<sup>278</sup> WG Frenkel, 'Analysis of the Russian Regulations on Holding Companies: State Monopoly During Market Reform and Privatisation' (1993) 4 *ICCLR* 226, 226.

<sup>279</sup> A Concanon, 'Investment in the Russian Federation' (1997) 12 *JIBL* 214, 218. Also see J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 144-145, 159.

<sup>280</sup> ML Weitzman, 'How not to Privatize' in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 141, 142.

<sup>281</sup> IMF, 'Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (Issues Brief) (December 2000) No 00/09.

<sup>282</sup> C Graham, 'The Regulation of Privatised Enterprises' [1991] *PL* 15, 18; MB Hassan, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] *IELTR* 231, 231; M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] *JBL* 244, 245, 247; T Prosser, 'Nationalised Industries as Instruments of Financial

vital for detecting post-privatisation malfeasance such as regulatory capture and corruption especially regarding utility/infrastructural services. Given that effective monitoring is hinged on access to information, a key consideration is whether privatisation and regulatory laws make provisions for statutory consumer organisations to have access to relevant information on the undertaking of regulatory functions and private operator's attainment of performance standards and compliance with licence conditions, which information could be presented to the wider public.<sup>283</sup> Audit and inspection requirements will also lead to greater access to vital information.<sup>284</sup> Freedom of information laws and other similar transparency legislation including whistleblower protection legislation could also play a key role in ensuring that government decisions and decisionmaking process are scrutinised by the public and that the interaction between regulatory bodies and regulated enterprises is not strictly behind closed doors.<sup>285</sup> Consumer bodies could also be empowered to directly pursue various channels of redress on behalf of consumers where the regulatory bodies fail to act.<sup>286</sup> The existence of such consumer bodies may not displace the need for consumers to have direct access to the courts given that these bodies could, for whatever reason also be ineffective in monitoring compliance and fail to intervene in deserving cases.<sup>287</sup> This raises the issue of whether other public interest or non-governmental representative organisations could also be given legal authority to undertake some monitoring functions and pursue legal action on behalf of aggrieved persons.<sup>288</sup>

Regarding the judiciary, courts may have a key role in providing an avenue for litigating various issues relating to the privatisation exercise or the subsequent functioning of privatized firms, including issues raised by minority shareholders, customers,

---

Policy: The Treasury Consultation Proposals' [1986] PL 18, 21-22.

<sup>283</sup> C Willett, 'The Citizen's Charter' [1992] JBL 188, 191-192; MB Hassan, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] IELTR 231, 231; J Black, 'Talking about Regulation' [1998] PL 77, 100.

<sup>284</sup> C Willett, 'The Citizen's Charter' [1992] JBL 188, 192-193.

<sup>285</sup> D Longley and N Lewis, 'Ethics and the Public Service' [1994] PL 596, 607; D Wass, 'Checks and Balances in Public Policy Making' [1987] PL 181, 190-191.

<sup>286</sup> C Willett, 'The Citizen's Charter' [1992] JBL 188, 189.

<sup>287</sup> JF Garner, 'After Privatisation: Quis Custodiet Ipsos Custodes?' [1990] PL 329, 335.

<sup>288</sup> D Oliver, 'Law, Politics and Public Accountability. The Search for a New Equilibrium' [1994] PL 238, 252; MR Freedland, 'Government by Contract and Public Law' [1994] PL 86, 99; H Woolf, 'Public Law - Private Law: Why the Divide? - A Personal View' [1986] PL 220, 231.

employees and investors. The extent to which the judicial system in a country is robust enough to play such a role, thereby safeguarding the public interest and maintaining the integrity of the privatisation process, may need to be factored into an analysis of the outcome of privatisation legal reforms.<sup>289</sup> In the first place, the confidence of the citizens as well as investors on judicial remedies and their view of courts as impartial arbiters of disputes may depend on whether the judicial system in a country is perceived to be independent<sup>290</sup> and in some countries, judicial corruption could be a problem<sup>291</sup> Further, on the issue of regulation of privatized enterprises, there is no guarantee that the legal authority granted to private entrepreneurs to manage some enterprises or deliver some services will always be used as intended or that relevant regulatory bodies will act in the public interest and hold them accountable or that regulatory decisions will always be in the public interest. Where regulatory bodies fail in the discharge their responsibilities to supervise privatised enterprises and the relevant political or administrative mechanisms of the state do not provide a remedy to aggrieved persons, the judiciary could be the last bastion of hope.<sup>292</sup> It has been noted that, ‘the requirements of legality, fairness and rationality in judicial review protect applicants from exercises of power that would be adverse to their interests--their security in the status quo, their status in society, their autonomy, dignity and respect.’<sup>293</sup> However, it should be noted that in jurisdictions that allow for judicial review, there are some procedural hurdles that may need to be scaled before a litigant can get redress both generally as well as in the privatisation context and the range of available remedies may also be limited.<sup>294</sup> Thus a key consideration in assessing judicial remedies is the extent

---

<sup>289</sup> Note for instance G Gluck, ‘Privatisation: the Hungarian example’ (1993) 4 ICCLR 286, 289.

<sup>290</sup> R Brazier, ‘Government and the Law: Ministerial Responsibility for Legal Affairs’ [1989] PL 64, 74-76.

<sup>291</sup> E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 Minn J Int’l L 155, 214; A Salifu, ‘Can Corruption and Economic Crime be Controlled in Developing Economies - and if so, is the Cost Worth it?’ (2008) 11 JMLC 273, 278, 280-281.

<sup>292</sup> A McHarg, ‘Regulation as a Private Law Function?’ [1995] PL 539, 550; G Borrie, ‘The Regulation of Public and Private Power’ [1989] PL 552, 558-563; C Graham, ‘The Regulation of Privatised Enterprises’ [1991] PL 15, 19.

<sup>293</sup> D Oliver, ‘Common Values in Public and Private Law and the Public/Private Divide’ [1997] PL 630, 631.

<sup>294</sup> Potential hurdles and limitations include the the fact that users of privatised services may be viewed as beneficiaries of, but not parties to the contractual arrangement between the regulatory body and the privatised enterprise; issue of sufficient interest’ or locus standi; the fact that privatised enterprises may no longer fall within the framework of public law that regulates the administrative actions of public bodies even though they may be exercising public functions under a contractual arrangement with the state and the fact that the scope of judicial review does not usually permit the courts to evaluate and make

to which they are actually accessible, and whether there are other viable avenues for seeking judicial remedies in the light of the technical hurdles and limitations of judicial review, including statutory specification of specific circumstances that give rise to specific remedies or claim for damages<sup>295</sup>, or measures such as constitutional guarantees of certain basic rights and entitlements for the citizens, which can pursue independently.<sup>296</sup>

Generally, the potential for judicial oversight in the public interest as well as entitlement to claim damages may help in making both the regulatory bodies and the regulated enterprises to be more accountable, committed to discharging their responsibilities and living up to their obligations.<sup>297</sup> However, given the limited scope of judicial review, the discretionary nature of the remedy that could be obtained<sup>298</sup> and the general stress and huge cost of pursuing legal action, it may be necessary for the state to establish administrative mechanisms to ensure that regulatory bodies and regulated enterprises remain accountable for the powers and responsibilities assigned to them under law and contract, thus reducing the need for aggrieved persons to seek judicial intervention.<sup>299</sup>

---

a finding on the facts. See J Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40, 53-55; MR Freedland, 'Government by Contract and Public Law' [1994] PL 86, 99-100; Lord Woolf, 'Droit Public - English Style' [1995] PL 57, 63-64; J Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40, 55-56; MR Freedland, 'Government by Contract and Public Law' [1994] PL 86, 101-102; M Tether and G Mead, 'Status of Privatised Utilities in the UK after Griffin v South West Water Services' (1994) 5 ICCLR 363, 363-364; H Woolf, 'Public Law - Private Law: Why the Divide? - A Personal View' [1986] PL 220, 224-225, 226-230, 231; G Borrie, 'The Regulation of Public and Private Power' [1989] PL 552, 553-554; GS Morris and S Fredman, 'The Costs of Exclusivity: Public and Private Re-Examined' [1994] PL 69, 79, 84-85; JF Garner, 'After Privatisation: Quis Custodiet Ipsos Custodes?' [1990] PL 329, 334-337; D Oliver, 'Law, Politics and Public Accountability. The Search for a New Equilibrium' [1994] PL 238, 250-251; Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374 (HL) 410 (Lord Diplock).

<sup>295</sup> E Pitt, 'Licences under the UK Telecommunications Act 1984 - the Fair Trading Condition' (1997) 18 ECLR 329, 331;

<sup>296</sup> DM Chirwa, 'A Full Loaf is better than Half - The Constitutional Protection of Economic Social and Cultural Rights in Malawi' (2005) 49 JAL 207, 222-226; DM Davis, 'Socioeconomic Rights: Do They Deliver the Goods?' (2008) 6 ICON 687, 687-689; KD Ewing, 'Social Rights and Constitutional Law' [1999] PL 104, 105, 117-119.

<sup>297</sup> G Borrie, 'The Regulation of Public and Private Power' [1989] PL 552, 561, 565.

<sup>298</sup> Lord Woolf, 'Droit Public - English Style' [1995] PL 57, 61.

<sup>299</sup> One solution for instance is for the appointment of ombudsmen to deal with public complaints. See J Hatchard, 'Developing Governmental Accountability: The Role of the Ombudsman' [1992] Third World Legal Stud 215, 215-217, 219-221, 222; G Borrie, 'The Regulation of Public and Private Power' [1989] PL 552, 564-565; J Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40, 55; D Oliver, 'Law, Politics and Public Accountability. The Search for a New Equilibrium' [1994] PL 238, 243-244. Note also the suggestion for a Director of Civil Proceedings to be established, whose role somewhat resembles that of an ombudsman and an amicus combined and who can commence action



This of course is not an easy challenge since the government has to walk a thin line between respecting the continued independence of regulatory bodies and the contractual rights of privatized enterprises on the one hand and ensuring that they continue to remain accountable for the power they exercise on the other. To the extent that litigation may sometimes be inevitable, it is important to consider whether the state has a system for providing public financial support to individuals that have clearly meritorious cases.<sup>300</sup> Apart from citizens or consumers that may need to seek judicial intervention as discussed above, investors may also need to resort to the courts where they are not satisfied by a measure adopted by a regulatory body which could adversely affect their operations or profits.<sup>301</sup> Like consumers, they may also wish to utilize non-judicial avenues for redress in their dealings with regulatory bodies given the need to preserve their long term business relationship with regulators, which regulatory statutes could provide in addition to the judicial option.<sup>302</sup>

#### **2.3.2.3. WILL THE STRATEGIC APPROACH TO THE IMPLEMENTATION OF PRIVATISATION LEAD TO THE REALISATION OF ITS SET POLICY OBJECTIVES?**

Carrying out a successful privatisation programme is by no means an easy task and a key step in realising the policy objectives of the programme requires the government to strategise well with regard to various transactions and maintain a bird's eye view of the overall execution of the programme to ensure that implementation outcomes are in consonance with these objectives. Essentially even if privatisation legal reforms are flawless, adopting a poor strategy could still undermine the potential benefits that could be derived from these reforms. The research focus on 5 strategic issues that could affect privatisation outcomes namely the pace and sequencing of privatisation, the strategy for engaging foreign investors, the approach to socio-cultural issues in privatisation, weighing the cost of implementing privatisation against the expected benefits and finally, balancing the economic and social issues in privatisation in the interest of the

---

in the public interest on behalf of members of the public in deserving cases. See H Woolf, 'Public Law - Private Law: Why the Divide? - A Personal View' [1986] PL 220, 236-237.

<sup>300</sup> G Borrie, 'The Regulation of Public and Private Power' [1989] PL 552, 566.

<sup>301</sup> E Pitt, 'Licences under the UK Telecommunications Act 1984 - the Fair Trading Condition' (1997) 18 ECLR 329, 330.

<sup>302</sup> Ibid 331.

citizens. It is not however suggested that these are the only issues of strategic importance, but they have been addressed by many scholars concerned about the poor outcome of privatisation and other market reforms.

First, proper pacing and sequencing has been recognised as an important component of policy and legal reforms including privatisation.<sup>303</sup> Privatisation transactions are frequently complex and the failure of any transaction could have serious implications, especially transactions involving very large enterprises. It may be difficult to ensure transparency and wide diffusion of privatisation benefits and avoid costly and sometimes irreversible mistakes where the government fails to proceed with caution and carefully and gradually execute the privatisation programme.<sup>304</sup> For instance, in the case of the Russian privatisation programme which was executed under the guidance of the IFIs, speedy implementation, arbitrary target setting and poor sequencing left insufficient time for proper institution building and the resulting negative outcomes that have been noted include undervaluation of assets, massive corruption, oppression of minority shareholders, asset stripping after privatisation and citizens' impoverishment in the immediate aftermath of the exercise, which undermined the legitimacy of the programme.<sup>305</sup> It should be noted however that some have expressed the view that unduly slowing down the privatisation process could also be a disincentive to investors and may reduce earnings from privatisation sales, and that speed may also sometimes be politically expedient depending on the peculiarities of national politics in a particular country.<sup>306</sup> Accordingly, different countries may need longer or shorter periods of time

---

<sup>303</sup> H Bienen, 'The Politics of Trade Liberalization in Africa' (1990) 38 *Econ Devel Cult Change* 713, 729; Dewatripont M and Roland G, 'The Design of Reform Packages under Uncertainty' (1995) 85(5) *Amer Econ Rev* 1207, 1207, 1218; RE Goodhue, GC Rausser and LK Simon, 'Privatization, Market Liberalization, and Learning in Transition Economies' (1998) 80 *Amer J Agr Econ* 724, 724-725, 735..

<sup>304</sup> G Roland, 'On the Speed and Sequencing of Privatisation and Restructuring' (1994) 104 *Econ J* 1158, 1161-11643; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 *AJEP* 61, 78; J Williamson, 'What should the World Bank Think about the Washington Consensus' (2000) 15 *World Bank Res Observer* 251, 256; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 159.

<sup>305</sup> N Lazarev, 'On Certain Issues of the Modern Corporate Governance Reform in Russia' (2006) 17 *ICCLR* 143, 144, 147; D Doeh, 'Oil, Law and Politics in Russia' [2005] *IELTR* 205, 206-207; WG Frenkel, 'New Developments in Russian Privatisation Law' (1993) 4 *ICCLR* 28, 30; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 133-165 pp 139, 155-156; A Concanon, 'Investment in the Russian Federation' (1997) 12 *JIBL* 214, 214-215; J Nellis, 'Time to Rethink Privatization in Transition Economies?' (1999) 36(2) *F & D* 16, 16-17; P Rutland, 'Mission Impossible? The IMF and the Failure of the Market Transition in Russia' (1999) 25 *Rev Int'l Stud* 183, 191-192, 194..

<sup>306</sup> D Doeh, 'Oil, Law and Politics in Russia' [2005] *IELTR* 205, 207; F Lopez-de-Silanes, 'Determinants of Privatization Prices' (1997) 112 *QJ Econ* 965, 965, 108..

to adequately prepare for and undertake the privatisation of public enterprises and different enterprises may also require longer or shorter privatisation timeframes depending on their size and other differentiating factors. Institutional capabilities may also differ amongst different countries. A developed country for instance may be better positioned to speedily implement privatisation than a developing country<sup>307</sup>

Sequencing is very important where other economic development reform measures like regulatory reform, taxation reform, competition reform and trade liberalization are also being implemented, so that they can all complement each other and collectively promote economic development. For instance, where import liberalisation is not carefully sequenced and paced, it could pose serious problems to private and privatised enterprises that produce goods that are also imported into a country.<sup>308</sup> While imported goods could introduce competitive discipline in product markets<sup>309</sup>, they could also drive locally produced goods out of the market and trigger the loss of local manufacturing jobs where newly privatised companies are not yet on sound footing to compete for market share owing to various operational challenges. In the case of competition and regulatory reform, where the relevant institutions are not set up prior to privatisation key economic development benefits for the citizens could be jeopardised.<sup>310</sup> Such improper sequencing may make it more difficult to discipline or dislodge private monopolies, which, in a bid to protect their vested interests, would be opposed to both competition and regulation and may employ various tactics to frustrate both measures and keep off potential market participants.<sup>311</sup> The stock market and market regulatory institutions need sufficient time to mature in order to be effective in

---

<sup>307</sup> Note for instance A Valli, 'Italy – Privatisation' (1994) 5 ICCLR C141, C141, C142.

<sup>308</sup> J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 16 – 17, 60.

<sup>309</sup> S Estrin, 'Competition and Corporate Governance in Transition' (2002) 16(1) J Econ Perspect 101, 116.

<sup>310</sup> ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 115.

<sup>311</sup> H Sarie-Eldin, 'Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa)' in J Faundez, ME Footer and JJ Norton (eds), *Governance, Development and Globalization: A Tribute to Lawrence Tshuma* (Blackstone Press Limited, London 2000) 343; D Babai, 'The World Bank and the IMF: Rolling Back the State or Backing its Role?' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 252; JE Stiglitz, 'Quis Custodiet Ipsos Custodes? – Corporate Governance Failures in the Transition' (Annual World Bank Conference on Development Economics in Europe, 1999) <<http://www.worldbank.org/research/inequality/sais/lecture1/stiglitz.pdf>> accessed 6 June 2005 7.

discharging their responsibilities and the recruitment and/or training of competent regulators for the daunting task of regulating key industrial sectors could take a lot of time.<sup>312</sup> A key consideration would be whether it would be prudent for a country that intends to embark on privatisation, and has already undertaken relevant legal reforms as a result, to halt the implementation even if temporarily in order to avoid or rectify sequencing problems. For instance where market conditions are not favourable or the stock market is not yet deep or developed enough to accommodate the privatisation stocks that will be sold, the government may need to exercise patience to avoid selling public enterprises at massive discounts.<sup>313</sup> Speedy privatisation in a weak institutional environment could put off qualitative investors given that procedural safeguards aimed at boosting investor confidence may be ignored in the rush to complete the programme.<sup>314</sup> Sufficient time should also be given for the completion of all relevant pre-privatisation consultations with various stakeholders and resolution of their concerns, including the setting up of adequate social safety nets and it would be inadvisable for the government to short circuit the consultation process or make insufficient arrangements for social safety nets in its haste to complete the programme.

Secondly, regarding the strategy for engaging foreign investors, as earlier noted, part of the logic of privatisation is that it is an avenue for attracting foreign investors that will bring new investment capital, technology and expertise to privatising countries.<sup>315</sup> Accordingly, many privatisation laws permit the participation of both local and foreign investors.<sup>316</sup> Achieving these ends and deriving optimum benefits from foreign investments depends however on constructive engagement of foreign investors given

---

<sup>312</sup> J Nellis, 'Time to Rethink Privatization in Transition Economies?' (1999) 36(2) F & D 16, 18; JE Stiglitz, 'Quis Custodiet Ipsos Custodes? – Corporate Governance Failures in the Transition' (Annual World Bank Conference on Development Economics in Europe, 1999) <<http://www.worldbank.org/research/inequality/sais/lecture1/stiglitz.pdf>> accessed 6 June 2005 6.

<sup>313</sup> Note for instance HE Cauvin, 'Privatization Snag in South Africa: Another Delay in Telkom Offering is Seen as a Sign of the Times' *The New York Times* (New York 2 November 2001) <<http://www.nytimes.com/2001/11/02/business/privatization-snag-in-south-africa.html>> accessed 30 June 2006.

<sup>314</sup> J Nellis, 'The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis' (2002) World Bank OED Working Paper <[http://www.worldbank.org/oed/transitoeconomies/docs/privatization\\_enterprise.pdf](http://www.worldbank.org/oed/transitoeconomies/docs/privatization_enterprise.pdf)> accessed 6 June 2005 47.

<sup>315</sup> Chapter 2 para 2.2.5.

<sup>316</sup> See for instance GP Campbell, 'Foreign Investment and Company Laws of Selected Central Eastern European and Central Asian Republics' (1994) 5 ICCLR 366, 366-367.

that the relationship is meant to be a symbiotic one in which these investors are also seeking to make as much profit as possible. It has been noted that:

Foreign investment can perform a number of different functions in a national economy, and its functions will be determined largely by the context in which it operates: these functions will not be the same in a developed country as in an underdeveloped country.<sup>317</sup>

It has also been noted that:

... in the “third world” and developing countries ... multinational corporations have been traditionally welcome, through the passing of legislation that has benefited their entrance by mechanisms such as tax reductions. ...In addition, these countries often have poor national legal standards in terms of labour, environmental and social legislation ....<sup>318</sup>  
(footnotes omitted)

Before handing over any enterprise to any investor, including foreign investors, it would appear prudent to establish criteria for assessing whether the potential investor possesses the technical, managerial and financial resources that the country is seeking and whether its business plan is in consonance with the wider social objectives of the privatisation programme, rather than focusing solely on who offers the highest bid unless the state is primarily interested in immediate revenue.<sup>319</sup> and citizens’ welfare. Regarding water concessions for instance, it has been noted that:

A concession contract will often contain minimum investment obligations, relating to the proportion of the population covered, the number of network connections, the types of connections that are to be made, as well as the geographic coverage of the network. ...<sup>320</sup> (footnote omitted)

---

<sup>317</sup> FC Beveridge, ‘Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria’ (1991) 40 ICLQ 302, 304.

<sup>318</sup> S Fazio, ‘Corporate Governance, Accountability and Emerging Economies’ (2008) 29 Comp Law 105, 108.

<sup>319</sup> G Gluck, ‘Privatisation: the Hungarian example’ (1993) 4 ICCLR 286, 289-290; R Pritchard, ‘The Transformation in Foreign Investment Law - more than a Pendulum Swing?’ (1997) 8 ICCLR 233, 234; F MacMillan, ‘Making Corporate Power Global’ (1999) 5 Int TLR 3, 8: ‘The competitive advantages gained by multinationals as a result of their tendency to isolate and fragment their markets along national lines ... are often gained at the expense of things one purports to care about, such as consumers, workers, the environment, cultural policy and so forth. This effect can only be increased as these corporate groups become global and the rival powers of the nation states decline.’

<sup>320</sup> A Lang, ‘The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry’ (2004) 7 JIEL 801, 809.

Another relevant point is that if privatisation is to lead to the realisation of the objective of broad-based private sector development, it would be important to consider whether foreign investors may have unfair advantage over local investors operating in the same business sector or product market, sometimes aided by incentives and other special measures. This could crowd out local firms, with potentially adverse impact on net employment of which it has been noted that the employment creating potential of foreign investment is tied primarily to greenfield investments rather than acquisition of existing enterprises.<sup>321</sup> In this regard, a key consideration would be whether it is necessary to introduce special safeguard measures for local investors' participation in privatisation.<sup>322</sup> These were some of the concerns that earlier informed the indigenisation of enterprises in some developing countries<sup>323</sup>, and could easily ignite nationalistic passions.<sup>324</sup> How a country addressed this issue will largely depend on the extent to which the country requires foreign investment as a vital component of economic growth and development, and the extent of development of the indigenous private sector. For instance, in Brazil, domestic investors were accorded special constitutional protection, while foreign investments were initially restricted.<sup>325</sup> Some European countries that have undertaken privatisation introduced measures such as golden or special shares as a device for exercising control in the national interest over investment in designated privatised enterprises, particularly by foreigners.<sup>326</sup> In many of

---

<sup>321</sup> Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 212.

<sup>322</sup> C Bovis, 'An Impact Assessment of the European Public Procurement Law and Policy' [1999] JBL 126, 127.

<sup>323</sup> FC Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302, 305-306, 329.

<sup>324</sup> P Starr, 'The Meaning of Privatisation' (1988) 6(1) Yale L & Pol'y Rev 6, 32-33; R Pritchard, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233, 234.

<sup>325</sup> Constitution of Brazil 1988 art 171 (now repealed); EM Filippozzi and D Noronha Goyos, 'The Brazilian Constitutional Review and the Privatisation Programme - An Overview' (1994) 5 ICCLR 243, 243, 246. Note that prior to the constitutional restriction on foreign investments, foreign investors had initially been accorded various privileges in the 1970s. See S Fazio, 'Corporate Governance, Accountability and Emerging Economies' (2008) 29 Comp Law 105, 110.

<sup>326</sup> C Graham, 'Company Law: "All that Glitters..." - Golden Shares and Privatised Enterprises' (1988) 9 Comp Law 23, 23-25; T Prosser and C Graham, 'Golden Shares: Industrial Policy by Stealth?' [1988] PL 413, 413-415, 419-430; GK Morse, 'Government's "Golden Share" in BP not a Matter for the City Panel' [1988] JBL 165, 165-166; A Echard and P Billot, 'Privatisation in France in 1993' (1993) 4 ICCLR 406, 407, 409.

the transition countries of Central and Eastern Europe, initial restrictions placed on foreign investment were relaxed over time.<sup>327</sup> Some other countries have also adopted restrictive measures for enterprises and sectors they considered strategic in the national interest<sup>328</sup>, while some did not place such restriction on foreign capital.<sup>329</sup> Again, while some countries have successfully used special incentives like tax breaks to attract foreign investments to their privatisation programmes<sup>330</sup>, some opted not to do so.<sup>331</sup> Whether or not various developing countries implementing privatisation need to adoption measures like golden shares should require careful reflection and conviction about the utility of such measures, also keeping in mind the issues of whether shielding local companies from external competition could promote national inefficiency and whether golden share devices could create fear in prospective investors about government intervention in their investments. Also, granting of tax and other special incentives should require careful consideration of whether the quid pro quo is consistent with the policy goals of privatisation and for how long such measures that could potentially distort competition will be deployed.<sup>332</sup>

Regarding the third strategic issue of approach to socio-cultural issues in privatisation, issues pertaining to culture and ethnicity could affect the outcome of development efforts in a state<sup>333</sup>, and implementing a privatisation programme in a multicultural country requires the exercise of caution, especially where the country has a history of conflicts based on ethnicity, religion or other cultural issues and citizens regard themselves with a lot of suspicion.<sup>334</sup> It has been noted that ‘deep-seated differences and

---

<sup>327</sup> M Davies, ‘Foreign Investment Trends in Central and Eastern Europe’ (1992) 7 JIBL 163, 163-164.

<sup>328</sup> Stroeter Trench and Veirano, ‘Brazilian Privatisation Plan’ (1991) 9 IBL 408, 409; WD Stuber, ‘Privatisation in Brazil’ (1991) 9 IBL 429, 431.

<sup>329</sup> JMP Nelson, ‘Modernisation and Privatisation in Ecuador’ (1994) 5 ICCLR 289, 291.

<sup>330</sup> G Gluck, ‘Privatisation: the Hungarian example’ (1993) 4 ICCLR 286, 286.

<sup>331</sup> JMP Nelson, ‘Modernisation and Privatisation in Ecuador’ (1994) 5 ICCLR 289, 292.

<sup>332</sup> M Davies, ‘Foreign Investment Trends in Central and Eastern Europe’ (1992) 7 JIBL 163, 163-164, 166.

<sup>333</sup> RC Blake, ‘The World Bank’s Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development’ (2000) 3 Yale Hum Rts & Dev LJ 158, 166.

<sup>334</sup> G Gluck, ‘Privatisation: the Hungarian example’ (1993) 4 ICCLR 286, 286: ‘... foreigners perceived Hungary as having ... a homogeneous population relatively free of the ethnic tensions which prevailed in the region.’

mutual suspicions among groups can ... delay reform.’<sup>335</sup> Further, Amy Chuah notes that the omission of ethnic considerations in current attempts to actualise economic development through legal reforms like privatisation, which was also a key flaw in the earlier ‘Law and Development’ movement, could pave way for sociopolitical crisis that could undermine the entire reform agenda going forward.<sup>336</sup> Thus a key consideration in assessing whether privatisation legal reform will be sustainable in the long run is whether it is culturally sensitive and whether the government has taken steps to obtain the political support of key demographic groups in the country, some of whom may feel alienated or feel that privatisation is being implemented to economically empower some favoured groups by transferring national assets to them. If these groups perceive the privatisation programme to be illegitimate, this may trigger a socio-political crisis.<sup>337</sup> As Martin Weitzman observes, privatisation should meet the equitability requirement in order to be considered fair.<sup>338</sup> The government may need to make special provisions for economically disadvantaged or marginalized groups in the country to be able to fully partake in the divestiture process.

The fourth strategic issue is the issue of weighing the cost of implementing privatisation against its expected benefits. Given that the privatisation programme is aimed at yielding some economic benefits for the government, which could be used for addressing various social problems facing the citizens, it is imperative that the government should undertake proper cost-benefit analysis both before and during the programme to ensure that the financial cost of executing it, including transaction costs for various deals, severance payments to workers and the cost of setting up adequate regulatory structures does not far outweigh the economic benefits to be derived from it.<sup>339</sup> Specifically on the issue of conducting a regulatory impact assessment (RIA) prior to embarking on a major legal and regulatory reform, it has been noted that:

---

<sup>335</sup> World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 14. Also see P Starr, ‘The Meaning of Privatisation’ (1988) 6(1) *Yale L & Pol’y Rev* 6, 33-34.

<sup>336</sup> AL Chua, ‘Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development’ (1998) 108 *Yale LJ* 1, 19, 20, 21.

<sup>337</sup> J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 119.

<sup>338</sup> ML Weitzman, ‘How not to Privatize’ in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 138.

<sup>339</sup> JE Stiglitz, ‘Quis Custodiet Ipsos Custodes? – Corporate Governance Failures in the Transition’ (Annual World Bank Conference on Development Economics in Europe, 1999) <<http://www.worldbank.org/research/inequality/sais/lecture1/stiglitz.pdf>> accessed 6 June 2005 25-26.



Sometimes, the vast size of transition costs may call into question the value of an entire reform. ... It is thus the possibility of transition costs associated with a legal reform that usually informs the desirability of conducting a cost-benefit analysis of any proposed legislation that provides a framework for the reform. ...economic analysis, as an initial step to regulatory decision, is crucial for at least two reasons. ... First, 'since regulation uses a sizeable amount of resources, it is reasonable to ask whether the benefits of regulation are worth the costs'. ... Secondly, 'efficiency of the regulatory evaluation process itself is a key determinant of whether policy makers implement efficient regulations'. ... Principally, the focus of a RIA is to determine the possible costs of compliance with a regulation in relation to its benefits, to see what adjustments are needed to reduce the costs, and to consider alternative arrangements in case a regulation in its proposed form is determined to be too costly'<sup>340</sup> (footnotes omitted)

In contracting with private entrepreneurs for the provision of public services, a vital consideration is whether there is proper risk allocation premised on which the earnings of private contractors are commensurate with their exposure to risk and ability to deliver greater efficiency.<sup>341</sup> Sometimes there is a mismatch of risk and profits in privatisation contracts for a number of reasons including conflicting government policy objectives in promoting privatisation as a better alternative to public provision on the one hand and simultaneously highlighting and safeguarding against its financial pitfalls on the other.<sup>342</sup> Also, primary or exclusive reliance on costly budget-draining incentives, subsidies and guarantees to attract investors could seriously drain government coffers, of which it appears prudent for a country to focus more on resolve underlying problems plaguing the business sector in the country and strive to ensure a stable investment cimate, which would be a more sustainable way of attracting investors.<sup>343</sup>

---

<sup>340</sup> IO Bolodeoku, 'Centralization of Tax Administration in Nigeria: The Legal and Efficiency Considerations' (2008) 37 CLWR 175, 186.

<sup>341</sup> G Haley, 'PFI Contractors: Some Emerging Principles' (1999) 15 Const LJ 220, 225-226; Al Khalifa HR, 'Negotiating and Arbitrating against Government Entities' (2003) 19 Const LJ 258, 258.

<sup>342</sup> M Freedland, 'Public Law and Private Finance - Placing the Private Finance Initiative in a Public Frame' [1998] PL 288, 299-300, 304-307.

<sup>343</sup> H Sarie-Eldin, 'Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa)' in J Faundez, ME Footer and JJ Norton (eds), *Governance, Development and Globalization: A Tribute to Lawrence Tshuma* (Blackstone Press Limited, London 2000) 338.

The final strategic consideration is the issue of balancing the economic and social issues in privatisation in the interest of the citizens, not just in the laws as earlier indicated by also in the actual implementation of privatisation,<sup>344</sup> Viewing privatisation from the economic development perspective as done in this thesis, even as the government strives to achieve better enterprise management and efficiency by enacting laws that pave way for the ownership or control of public enterprises to be transferred to private entrepreneurs, this should not be viewed as an end in itself but rather as a means of actualising the full spectrum of the economic development ends of privatisation which would include facilitating job creation, actualising the widespread availability of affordable utility/infrastructural services and ultimately achieving poverty reduction/eradication, as noted in Chapter 1. Also as previously indicated, this would mean always seeking to strike an appropriate balance between the efficiency and equity goals of the programme, failing which the legitimacy of the programme could be called into question by the citizens. The citizens comprise a range of different stakeholder groups of which the thesis focuses on consumers and workers. Regarding consumers, strategic considerations in privatisation that could affect their welfare include whether enterprises are privatised as monopolies and whether adequate subsidies will be deployed to make certain basic utility/infrastructural services available to those that cannot meet the new commercial rates charged by private providers. On the issue of monopolies, privatisation laws have sometimes provided the legal framework for monopolistic or oligopolistic market conditions as was the case for instance with some of the utility enterprises in the United Kingdom (i.e. the telecommunications, gas, water and electricity sectors)<sup>345</sup>, despite the earlier noted benefits that could come from market competition. This is also the case with privatisation contractual agreements that provide for monopoly exclusivity periods<sup>346</sup>, which could adverse impact on network expansion, unduly limit the full benefits of privatisation for the citizens and also create the risk of legal action against the government for damages/compensation for contractual breach

---

<sup>344</sup> P Morgan, 'The Privatization and the Welfare State: A Case of Back to the Future?' in P Morgan (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995) 16; ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 104 and 115.

<sup>345</sup> M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] JBL 244, 246; PP Craig, 'Constitutions, Property and Regulation' [1991] PL 538, 538, 552; Harlow C and Rawlings R, *Law and Administration* (Butterworths, London 1997) 314..

<sup>346</sup> JMP Nelson, 'Modernisation and Privatisation in Ecuador' (1994) 5 ICCLR 289, 292.

where it later seeks to introduce competition in the interest of the citizens. A key consideration would be whether regulatory bodies together with the competition authorities are able to effectively prevent the abuse of such substantial market powers by private entrepreneurs, and strive to actualise full market competition as soon as possible given that regulation does not replace the need for competition.<sup>347</sup> Ineffective regulation under such circumstances could adversely impact on the projected efficiency gains of privatisation as well as consumers' welfare.<sup>348</sup> But even before getting to the point of regulation, there are some strategies that could provide a semblance of competition even with monopoly provision, such as competitive bidding by private entrepreneurs prior to obtaining a franchise to render monopoly services<sup>349</sup> and regional decentralisation of utility services to create benchmark competition<sup>350</sup>

Preventing market abuse in the face of very limited consumer choice may entail imposing various licence conditions on private operators, undertaking price regulation that effectively limits private profits in the interest of consumers who would be protected from excessive rates as a result, and utilising relevant powers to investigate anti-competitive conduct and promote competition.<sup>351</sup> Equally important is the ability of regulators to monitor service quality, aimed at protecting consumers that do not yet have effective choice of alternative suppliers owing to the fact that privatised firms may seek to reduce service quality as a way of making up for reduced charges and associated profits stemming from price regulation. Some countries have also sought to protect consumers by codifying certain obligations of privatised enterprises towards them and making provisions for consumers to be able to sue on these obligations or claim

---

<sup>347</sup> A McHarg, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] PL 385, 387-388, 393.

<sup>348</sup> B Sas, 'The RPI-X Formula: Economic Regulation of the Electricity Industry in the United Kingdom' (1992) 3 ICCLR 16, 16.

<sup>349</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 149; P Klemperer, 'Bidding Markets' (2007) 3 JCL & E 1, 10-11.

<sup>350</sup> A Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry' (2004) 7 JIEL 801, 826.

<sup>351</sup> D Parker, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] JBL 283, 287-288, 292-293; 298-300; MB Hassan, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] IELTR 231, 232-233; PP Craig, 'Constitutions, Property and Regulation' [1991] PL 538, 553; M Harker and C Waddams Price, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] JBL 244, 246, 256; MH Ryan, 'Telecommunications: Regulation' (1996) 2 CTLR T138, T138-T139; A McHarg, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] PL 385, 393-394..

compensation in the event of a breach given that regulatory bodies may not always function as effectively as designed due to whole host of reasons.<sup>352</sup> Similarly as earlier noted, some countries have made provisions for constitutional protection of certain basic rights of the citizens, although what may be more important is whether these constitutional protections actually aid consumers in practice.<sup>353</sup>

Another consumer protection strategy as noted earlier, is the deployment of adequate subsidies to make certain basic utility/infrastructural services available to those that cannot afford new commercial rates charged by private providers, who would face lack of connection to these services or disconnection if already connected, of which countries with huge population of poor and indigent people could witness massive exclusion of such people from basic services, further entrenching inequality if adequate measures are not taken. There are different forms of such subsidies of which the direct recipients could be the consumers themselves or the private service provider.<sup>354</sup> Regulations may also be required to regulate the issue of disconnection for non-payment.<sup>355</sup>

Workers constitute the second group of citizens stakeholders discussed in the thesis. Privatisation often triggers concerns about job security, the adequacy of remuneration paid by privatised enterprises, and the existence or adequacy of severance packages for those laid off.<sup>356</sup> Privatisation contractual stipulations could be used as tools for advancing key aspects of the social development objectives that informed the

---

<sup>352</sup> C Willett, 'The Citizen's Charter' [1992] JBL 188, 188-191.

<sup>353</sup> DM Chirwa, 'A Full Loaf is better than Half - The Constitutional Protection of Economic Social and Cultural Rights in Malawi' (2005) 49 JAL 207, 222-226; DM Davis, 'Socioeconomic Rights: Do They Deliver the Goods?' (2008) 6 ICON 687, 687-689; KD Ewing, 'Social Rights and Constitutional Law' [1999] PL 104, 105, 117-119.

<sup>354</sup> A Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry' (2004) 7 JIEL 801, 808-809.

<sup>355</sup> Ibid 809: '... accessibility is also affected by regulation concerning the procedure according to which non-paying consumers can be disconnected. This is often a key area for many private operators, and a variety of solutions exist. They range from a complete prohibition on the disconnection of any customer, to the establishment of minimum grace periods, to the use of 'trickle-flow' meters, among other methods.'

<sup>356</sup> D Hall, E Lobina and R de la Motte, 'Public Resistance to Privatisation in Water and Energy' (2005) 15 Development in Practice 286, 292; N Simutanyi, 'The Politics of Structural Adjustment in Zambia' (1996) 17 TWQ 825, 836-837. Also see Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 228.

programme, including minimum wage requirements for contract staff.<sup>357</sup> In the United Kingdom for instance, privatisation (PPP/PFI) contractors may be legally required to retain the employment and employment terms of existing workers that used to perform the privatised function.<sup>358</sup> In Poland, prospective privatisation investors were required to present a social plan to the government which was aimed at safeguarding the interests of employees of various enterprises, and covers issues like ‘employment levels, pay scale, financing of preferential shares for employees.’<sup>359</sup>, and the plan formed part of the consideration for short-listing investors.

#### **2.3.2.4. IS THE PRIVATISATION PROCESS ACCOUNTABLE, TRANSPARENT AND FREE FROM CORRUPTION?**

The political will to enact and implement sound economic policy measures has been identified as a key factor in successful economic development<sup>360</sup>, and this includes the political will to curb corruption, which is tied to the broader issues of quality of governance in a country and the accountability of the institutions of governance.<sup>361</sup> Corruption could adversely affect economic development and has defied many attempts to curb it through national laws and international conventions<sup>362</sup>, of which it has been noted that the problem of widespread corruption ‘is not for lack of law on paper.’<sup>363</sup>

---

<sup>357</sup> J Auby, ‘Comparative Approaches to the Rise of Contract in the Public Sphere’ [2007] PL 40, 45.

<sup>358</sup> F Sutcliffe, ‘Transfer of Undertakings: Are the Defences Down?’ (1993) 14 Comp Law 220, 221-222; S Lamont, ‘The New TUPE Regulations: A Review of the Potential Impact on PPP/PFI Schemes’ [2006] PPLR NA133, 133-138; R Davies, ‘Contracting Out and the Retention of Employment Model in the National Health Service’ (2004) 33 ILJ 95, 95-96.

<sup>359</sup> KP Buschardt and WK Sievers, ‘Privatisation in Poland’ (1994) 5 ICCLR 128, 129. Also see G Gluck, ‘Privatisation: the Hungarian example’ (1993) 4 ICCLR 286, 289-290; EM Filippozzi and D Noronha Goyos, ‘The Brazilian Constitutional Review and the Privatisation Programme - An Overview’ (1994) 5 ICCLR 243, 246.

<sup>360</sup> K Anan, ‘Kofi Anan on Africa's Development Problems’ (1998) 24 Popul Dev Rev 411, 415.

<sup>361</sup> AY Shehu, ‘Combating Corruption in Nigeria - Bliss or Bluster?’ (2004) 12 JFC 69, 80. Also see 71, 74, 75; K Anan, ‘Kofi Anan on Africa's Development Problems’ (1998) 24 Popul Dev Rev 411, 412-413.

<sup>362</sup> Azfar O, Lee Y and Swamy A, ‘The Causes and Consequences of Corruption’ (2001) 573 Annals Am Acad Pol & Soc Sci 42, 46, 53; E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 Minn J Int'l L 155, 157-158; R Hunja, ‘Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines’ [1997] PPLR 217, 219; R Flanary and D Watt, ‘The State of Corruption: A Case Study of Uganda’ (1999) 20 TWQ 515, 521.

<sup>363</sup> E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 Minn J Int'l L 155, 157.

Such laws and regulations could be ‘deliberately ignored, set aside or by-passed to facilitate corrupt practices.’<sup>364</sup>

Privatisation has often been presented as one of the key reforms that will help in reducing corruption in a country<sup>365</sup>, but it has also been associated with corruption itself<sup>366</sup>, thus a vital consideration in the implementation of privatisation is whether it could undermine economic development to the extent that corruption affects its implementation. Although some have opined that corruption could be economically beneficial to both investors and the countries where they invest, viewed from a broader perspective, systemic corruption of public officials by investors, which creates room for regulatory lapses could undermine the quality of goods and services produced by investors, and adversely impact on the welfare of the citizens including workers.<sup>367</sup> The prevalence of corruption could also dissuade foreign investors from investing in a country as it may make difficult to accurately assess investment risk.<sup>368</sup>

Even the best crafted privatisation policy and law may still fail to yield expected economic development dividends where the political leaders do not have the political will to curb corruption and cronyism or have vested interest in encouraging such practices. This could have implications for the effectiveness of regulatory bodies set up to undertake post-privatisation regulation, giving that regulation have sometimes been associated with corruption.<sup>369</sup> Public officers are sometimes faced with ethics issues in the discharge of their public duties, and where effective mechanisms are not in place for

---

<sup>364</sup> AY Shehu, ‘Combating Corruption in Nigeria - Bliss or Bluster?’ (2004) 12 JFC 69, 71 (quoting Olusegun Obasanjo).

<sup>365</sup> E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 Minn J Int’l L 155, 179-180.

<sup>366</sup> J Williams, ‘Foreign Corrupt Practices: A Comparative Review of Law and Enforcement’ [2008] IELR 261, 269; A Salifu, ‘Can Corruption and Economic Crime be Controlled in Developing Economies - and if so, is the Cost Worth it?’ (2008) 11 JMLC 273, 277; G Gluck, ‘Privatisation: the Hungarian example’ (1993) 4 ICCLR 286, 289

<sup>367</sup> E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 Minn J Int’l L 155, 209-215, 218; Azfar O, Lee Y and Swamy A, ‘The Causes and Consequences of Corruption’ (2001) 573 Annals Am Acad Pol & Soc Sci 42, 45..

<sup>368</sup> S Rose-Ackerman, ‘The Role of the World Bank in Controlling Corruption’ (1997-1998) 29 Law & Pol’y Int’l Bus 93, 95.

<sup>369</sup> Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 259.

holding them accountable and safeguarding the interest of the public, the projected benefits of privatisation may ultimately not be realised.<sup>370</sup> Julia Black has emphasized:

... the need for regulation to be responsive not just to wider interests in its formation and to the regulated in its operation, but to the claims of society as a whole in the integrity of its function.<sup>371</sup>

Key considerations in assessing the effectiveness of the accountability mechanisms regarding privatisation include the nature of punishment stipulated for privatisation-related corruption<sup>372</sup>, the extent to which the institutions for preventing, investigating and punishing corruption in a country such as anti-corruption bodies and the courts discharge their responsibilities in practice<sup>373</sup>, and whether investors who feel adversely affected by privatisation-related corruption have any mechanism for challenging non-transparent transactions.<sup>374</sup>

#### **2.4. EVALUATION AND CONCLUDING REMARKS**

This chapter looked at the meaning of privatisation and case for its use as a policy tool for facilitating economic development in a country, and concluded by examining various prerequisites for an effective and successful privatisation programme. As in a production process, the quality of the input affects the quality of the output and how privatisation is designed and implemented in a country would likely affect its outcome. This however should not be taken to mean that compliance with these pre-requisites would automatically ensure the success of any privatisation programme but rather, not factoring them in would increase the likelihood that privatisation policy and law would not yield expected economic development dividends in a country. Where the law and policy framework is not carefully designed, all the 5 benefits of economic development used in this thesis may be undermined. Regarding the implementation, where the

---

<sup>370</sup> D Longley and N Lewis, 'Ethics and the Public Service' [1994] PL 596, 602-608.

<sup>371</sup> J Black, 'Talking about Regulation' [1998] PL 77, 103-104.

<sup>372</sup> For instance investors that engage in corruption could be banned from transacting with the government for a specified period of time. See D Hall, 'Privatisation, Multinationals and Corruption' (1999) 9 *Development In Practice* 539, 554.

<sup>373</sup> G Gluck, 'Privatisation: The Hungarian Example' (1993) 4 *ICCLR* 286, 289.

<sup>374</sup> D Wallace, 'The Changing World of National Procurement Systems: Global Reformation' [1995] *PPLR* 57, 61-62.

national environment is not conducive for private investments, qualitative investors may not come, which means that the benefits for the citizens cannot be realised, the tax revenue for the government will not come, and the goal of overall private sector development may not be achieved. Where the institutional structure for implementing and monitoring the outcome of privatisation is not robust, all the benefits could be undermined. Where poor strategy is adopted, some benefits may be realised at the expense of others for instance, private investors may benefit at the expense of the consumers and foreign investors may benefit at the expense of local investors and overall private sector development. Finally, where corruption permeates the privatisation programme, all the benefits could be undermined.

The next chapter examines how the African privatisation agenda has been implemented and analyses its potential for facilitating economic development in the continent.



## CHAPTER THREE

### CRITICAL APPRAISAL OF THE ADOPTION AND IMPLEMENTATION OF PRIVATISATION IN AFRICA AND THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS IN THE PROCESS

It has been noted that:

Africa continues to face difficult socio-economic conditions and a number of challenges, among them, low level of human development, low levels of productivity, poor infrastructure and investment climate, will need to be addressed if the continent is to effectively integrate into the global economy, and achieve accelerated economic growth and sustainable development, and reduce poverty as desired. Achievement of poverty reduction targets requires sound macroeconomic policies, increased national savings, mobilization of resources for productive investment and employment creation as well as rationalizing expenditures so that priority areas such as infrastructure and education are given adequate attention. ... the effective implementation of privatization programmes in Sub-Saharan Africa could be key to increasing the region's competitiveness, increased growth, higher income levels and hence, reduced poverty.<sup>375</sup>

In the face of serious economic development challenges, many African countries have adopted the policy of privatising public enterprises and have put in place the legal, regulatory and institutional framework for implementing the legal transfer of the ownership and/or control of public enterprises to private entrepreneurs, and are currently at different stages of implementing the programme, of which they have sought to derive various economic development benefits associated with privatisation.<sup>376</sup> At the regional level, NEPAD, the development policy framework of the African Union emphasizes the need for private sector participation in the economy through means such

---

<sup>375</sup> F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 2 and 17.

<sup>376</sup> Note for instance the Public Enterprises Reform and Divestiture Act 1993 (Uganda); the Privatisation Act No 2 of 2005 (Kenya); BL Ngenda, 'Privatisation in Zambia' (1993) 21 Int'l Bus Law 298, 298-301; MO Chibundu, 'Law and the Political Economy of Privatization in sub-Saharan Africa' (1997) 21 Md J Int'l L & Trade 1, 29-33; BM McKinney, 'Privatisation: Oman and Egypt' (1997) 25 Int'l Bus Law 126, 127-128.

as public-private partnerships and the need to increase foreign investment flow to key sectors in the continent, including utility/infrastructural services.<sup>377</sup>

It has been a massive turn around for many African countries that for many years following political independence sought to directly intervene in their economies and placed the state at the centre of efforts to bring about and shape the direction of national economic development. This was actualised through various means including the pursuit of policies aimed at indigenising the economy, nationalising foreign-owned enterprises and setting up new public enterprises, based on various political, economic and social considerations.<sup>378</sup> Despite the factors that led to legal reforms that paved way for the implementation of statist development policies, expansion of the state sector and setting up of new public enterprises, by the early to mid 1980s, key indicators revealed that many African countries were experiencing an economic development crisis, with stunted economic growth and high incidence of poverty, and many public enterprises were plague by various problems including severe political interference and pervasive bureaucratic constraints, severe inefficiency, poor staffing, poor capitalisation, over dependence on the government for subsidies, high indebtedness and corruption.<sup>379</sup>

For many of these countries, the adoption and implementation of privatisation has been part of a structural reform strategy aimed at dealing with the economic downturn, partly attributable to the poor performance and huge indebtedness of public enterprises facing the above-noted multifaceted and deep-rooted problems.<sup>380</sup> The key question for the

---

<sup>377</sup> NEPAD 2001 paras 100-103, 112, 150-152, 163.

<sup>378</sup> OA Osunbor, 'A Decade of Indigenisation in Nigeria: The Quest for Economic Self-Determination' in JA Omotola (ed), *Essays in Honour of Judge TO Elias* (Faculty of Law, University of Lagos, Lagos, 1987) 197-199, 206-209; RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 53; EJ Wilson III, 'Strategies of State Control of the Economy: Nationalization and Indigenization in Africa' (1990) 22 *Comp Pol* 401, 402-404, 411-412; JM Wolgin, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) *Amer Econ Rev* 54, 54; PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 *J Mod Afr Stud* 109, 113-114; P Kennedy, 'Barriers to African Capitalism' (1994) 32 *J Mod Afr Stud* 191, 202.

<sup>379</sup> BL Ngenda, 'Comparative Models of Privatization: A Commentary on the African Experience' (1995-1996) 21 *Brook J Int'l L* 179, 179-180; RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 53-54; OO Akinla, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 *BC Third World LJ* 19, 21; Y Haile-Mariam and B Mengistu, 'Public Enterprises and the Privatisation Thesis in the Third World' (1988) 10 *TWQ* 1565, 1572.

<sup>380</sup> M Hodd, 'Africa, the IMF and the World Bank' (1987) 86 *Afr Aff* 331, 332-334; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 *Afr Aff* 523, 523; JM Wolgin, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) *Amer Econ Rev* 54, 54; RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 53-54.

purposes of this research is whether the new law and policy regime of private ownership and control of public enterprises has paved the way for the realisation of the economic development benefits often ascribed to privatisation, and if not, why?

In Chapter 2, the key economic development benefits of privatisation as noted in this dissertation were examined namely, its benefit to the public sector, benefit to the enterprises, contribution to overall private sector development, benefit to the citizens and usefulness as a conduit for beneficial foreign investment inflow, and they form the basis for analysing the extent to which privatisation has benefited various African countries that have adopted the reform policy.<sup>381</sup> Some of the benefits that have been attributed to privatisation in some African countries tally with these benefits.<sup>382</sup>

A de facto examination of the implementation process shows that it has sometimes been credited with being beneficial to the public sector by helping to shrink its size in some countries to make it more manageable for the government, aiding the reduction of the government's financial commitment to various enterprises thus playing a role in improving the fiscal condition of the state and enhancing macroeconomic stability, and also generating immediate earnings as well as tax revenue.<sup>383</sup> In some cases, privatisation has also been credited with helping to attract new local and foreign private investments to some privatised enterprises, playing a role in improving quality of service delivery, improving the management, capacity utilisation, productivity, staffing and staff welfare of some privatised enterprises<sup>384</sup>, and helping to facilitate broader economic reforms beneficial to the private sector in general, including strengthening of the capital market

---

<sup>381</sup> Chapter 2 para 2.2. See generally C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 86-87; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 224-225.

<sup>382</sup> Note for instance the expected benefits of privatisation outlined in the Privatisation Act No 2 of 2005 (Kenya) s 18, which include benefits that tally with the key economic development benefits of privatisation noted in the thesis. Also see s. 29 of the Act, which allows foreigners to participate in the programme.

<sup>383</sup> RA Young, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50, 57; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 209, 211-212, 216; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 359.

<sup>384</sup> B Mercurio, 'Growth and Development: Economic and Legal Conditions' (2007) 30 UNSWLJ 437, 468; SR Nicolas, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 Law & Pol'y Int'l Bus 721, 744-745; LM Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19 ICCLR 213, 222.

and broadening of the product market thereby providing consumers a choice of competing products.<sup>385</sup>

The first thing that should be pointed out about the above benefits credited to privatisation in some African countries is that the favourable verdict may not be extrapolated to all African countries that have implemented or are implementing privatisation, and while they may have been achieved in some of the countries, evidence indicates that many others that are also privatising still face significant economic development challenges which will be seen as the chapter progresses. Secondly, while it may be possible to point to some enterprises in some African countries where privatisation has been effective in bringing about much needed efficiency improvements, they may not be sufficiently representative of the overall situation with privatised enterprises in these countries; accordingly, there is need for closer scrutiny before a more representative verdict could be given.

Thirdly, even where evidence suggests that most of the privatised enterprises in a country are now working efficiently or that the government has made some financial gains through privatisation, based on the analytical standpoint of the dissertation, the key question remains whether all the key economic development benefits of privatisation earlier noted, have been or are being realised in the implementing country. A limited consideration of the attainment of greater enterprise efficiency or the state's realisation of some financial gains, which is the case with some of the favourable verdicts of privatisation in African countries, focuses on some but not all the benefits and therefore does not shed complete light on the full economic development effect of privatisation in a country, the verdict on which is often nuanced given that economic benefits are sometimes achieved at the expense of social ones.<sup>386</sup> As earlier noted, the the key economic development benefits of privatisation as framed in this thesis

---

<sup>385</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 58; K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 521; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 *J Mod Afr Stud* 197, 214-220; F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) *African Integration Review* 1, 8, 13, 16.

<sup>386</sup> See for instance J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 *Rev African Polit Economy* 357, 359, 361-364; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 *J Mod Afr Stud* 197, 220, 224-225; J Marshall, 'Structural Adjustment and Social Policy in Mozambique' [1990] (47) *Rev African Polit Economy* 28, 37-38. See generally GBN Ayithey, 'How the Multilateral Institutions Compounded Africa's Economic Crisis' (1998-1999) 30 *Law & Pol'y Int'l Bus* 585, 592-593.

comprise both the economic and social impact of privatisation, of which the economic impact primarily focuses on the effect of privatisation on the efficiency, productivity and profitability of privatised enterprises and also its effect on national economic growth resulting in part from the state's financial gains from the programme. On the other hand, the social impact primarily views privatisation from the perspective of the citizens of the country, including consumers and workers and considers how privatisation affects their welfare and whether privatisation legal reforms have paved the way for successfully addressing various social concerns that initially informed the establishment of many public enterprises.

In Chapter 2, the prerequisites for effective privatisation outcome were examined, namely, designing an effective policy and legal framework and secondly, ensuring proper implementation of privatisation.<sup>387</sup> A critical appraisal of the design and implementation of privatisation in Africa will be undertaken below to ascertain the extent to which these prerequisites have been conformed with, and hence determine whether privatisation has contributed or is likely to contribute to economic development in the implementing countries.

### **3.1. DESIGNING AN EFFECTIVE POLICY AND LEGAL FRAMEWORK**

#### **3.1.1. THE PRIVATISATION POLICY FRAMEWORK IN AFRICA**

There is some concern that some of the negative outcomes associated with privatisation in Africa are traceable to the way the policy was adopted by many African countries. Essentially, as noted in Chapter 2, the motive for adopting privatisation as a national policy has considerable impact on whether the declared policy objectives could be realised.<sup>388</sup> Many of these countries, as noted above had earlier pursued policies that placed the state at the centre of economic development efforts, and for a long time, both individually and under the auspices of African regional bodies like the Organisation of African Unity (the predecessor to the African Union), they expressed misgivings about the virtues of globalisation and opening up of national economies, and the dismantling

---

<sup>387</sup> Chapter 2 para 2.3.

<sup>388</sup> Chapter 2 para 2.3.1.1.

of barriers to foreign goods and investments.<sup>389</sup> The key issue for the purposes of the research is what later led to the major policy shift towards privatisation and the decision to replace the policy and legal framework of public ownership of enterprises with a new policy and legal framework for the private ownership and/or control of the same enterprises. Was it a pragmatic reaction to the failure of these enterprises to deliver expected economic development dividends to these countries and thus, hinged on conviction that privatisation would be more effective in actualising these ends or were there other issues or motives at stake?

An analysis of the factors that might have influenced policy makers and political leaders in African countries to ultimately decide to endorse the privatisation reform path reveals at last 3 viewpoints, first, the genuine conviction of national political leaders about the merits of privatisation; secondly, the financial pressure exerted by the IFIs on poor African countries using SAP loan conditionalities; and thirdly, the ulterior vested interest of political leaders that regard privatisation as an opportunity for graft. The discussion below will shed further light on these viewpoints.

According to the first viewpoint, which could be termed the conviction viewpoint, some national governments in Africa warmed up to the idea of undertaking privatisation primarily because of their pragmatic approach to the reform measure and genuine conviction that it was meritorious. In some African countries for instance, there were domestic constituents including heads of state, opposition political parties, domestic entrepreneurs, and government officials that trained in the West or previously worked for the IFIs, who agreed with and promoted the virtues of the free market, linkage with the global economy and privatisation.<sup>390</sup> Essentially, they viewed these reforms as the right strategy for sorting out national economic problems and uplift their citizens, of which increasing domestic complaints about economic hardship was also a political

---

<sup>389</sup> Organization of African Unity, 'Lagos Plan of Action for the Economic Development of Africa 1980-2000' <[http://knowledge.uneca.org/member-states/observatory-on-regional-integration/regional-economic-commissions-in-africa/african-union/african-economic-community/Lagos\\_Plan\\_Of\\_Action.pdf](http://knowledge.uneca.org/member-states/observatory-on-regional-integration/regional-economic-commissions-in-africa/african-union/african-economic-community/Lagos_Plan_Of_Action.pdf)> accessed 20 May 2006 paras 1-15, 50-75.

<sup>390</sup> MO Chibundu, 'Law and the Political Economy of Privatization in sub-Saharan Africa' (1997) 21 *Md J Int'l L & Trade* 1, 22; EJ Wilson III, 'Strategies of State Control of the Economy: Nationalization and Indigenization in Africa' (1990) 22 *Comp Pol* 401, 416; JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 *J Mod Afr Stud* 113, 127; M Hodd, 'Africa, the IMF and the World Bank' (1987) 86 *Afr Aff* 331, 340-342; H Bienen, 'The Politics of Trade Liberalization in Africa' (1990) 38 *Econ Devel Cult Change* 713, 720; RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 61-62.

concern for the government.<sup>391</sup> Specifically regarding privatisation, there were some African countries that had conducted inquiries into the problems facing public enterprises and considered or tried other ways of dealing with these problems including rehabilitating and making new capital investments in them, enacting legislation to pave way for detaching them from the civil service to give them some level of autonomy or setting up an oversight mechanism for them, sometimes without achieving much success thus making them to seek reform advice from the IFIs, and become more receptive to the idea of privatisation.<sup>392</sup> Many African countries were initially critical of the 1981 World Bank study ('The Berg Report') that largely blamed extensive state intervention for Africa's economic problems<sup>393</sup>, but some later embraced some of the arguments in the report.<sup>394</sup> While the Lagos Plan of Action for the Economic Development of Africa 1980-2000 earlier adopted by African countries under the auspices of the Organisation of African Unity largely portrayed the state as a key facilitator of economic development in Africa, the NEPAD policy framework, which is more in line with the Berg Report, recognises the failings and limitations of the state in many African countries and rather emphasises the need for private entrepreneurs to partner with the state in actualising economic development.<sup>395</sup> Thus, the fact that privatisation is stipulated in loan documentation as a loan conditionality does not necessarily undermine the fact that the political leaders in the country could be genuinely convinced about its effectiveness as a reform tool and hence could claim ownership of the reforms, or that some domestic constituents including the local

---

<sup>391</sup> JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 J Mod Afr Stud 113, 117; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 524-526; BL Ngenda, 'Comparative Models of Privatization: A Commentary on the African Experience' (1995-1996) 21 Brook J Int'l L 179, 180.

<sup>392</sup> K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 203-205; K Amuwo, 'Military-Inspired Anti-Bureaucratic Corruption Campaigns: An Appraisal of Niger's Experience' (1986) 24 J Mod Afr Stud 285, 292-293.

<sup>393</sup> World Bank, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (World Bank, Washington DC 1981). See also MO Chibundu, 'Law in Development: On Tapping, Gourding, and Serving Palm-Wine' (1997) 29 Case W Res J Int'l L 167, 199-201; C Clapham, 'Governmentality and Economic Policy in Sub-Saharan Africa' 17 TWQ 809, 811-812; R Sandbrook, 'Bringing Politics Back in? The World Bank and Adjustment in Africa' (1995) 29 Can J Afr Stud 278, 278; J Ravenhill, 'Adjustment with Growth: A Fragile Consensus' (1988) 26 J Mod Afr Stud 179, 179-183; M Watts, 'Visions of Excess: African Development in an Age of Market Idolatry' [1991] (51) Transition 124, 133.

<sup>394</sup> JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 J Mod Afr Stud 113, 124, 134.

<sup>395</sup> NEPAD paras 22, 25, 52.

business class and consumers perceive it as being potentially beneficial to their interests.<sup>396</sup>

According to the second viewpoint however, which could be termed the coercion viewpoint, the decision of many African countries to adopt and implement privatisation owes more to financial coercion by the IFIs rather than genuine conviction about its merits.<sup>397</sup> Viewed from this perspective, privatisation is principally an externally-driven policy prescription and many developing countries including those in Africa, in the face of dire economic circumstances and mounting debts, undertook to privatise primarily because the IFIs and other creditors had made it clear that further financial assistance including debt relief was conditional on implementing privatisation and other Structural Adjustment Programme reforms, and alternative funding sources were not available.<sup>398</sup> According to this viewpoint, due to the fact that the IFIs regarded privatisation as a means of promoting private entrepreneurship and achieving some of the benefits examined in Chapter 2, they have often exerted all sorts of pressure on countries needing their financial assistance, to secure their commitment to privatise, including delaying debt relief, not approving loans or not releasing tranches of funds already approved, of which many of these countries did not have viable alternative funding sources to turn to.<sup>399</sup> Thus regardless of the potential merits of privatisation the decision to privatise was basically a Hobson's choice for many African countries and their

---

<sup>396</sup> JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 *J Mod Afr Stud* 113, 128, 134-135; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 *Afr Aff* 523, 524-526; J Ravenhill, 'Adjustment with Growth: A Fragile Consensus' (1988) 26 *J Mod Afr Stud* 179, 201. See generally OO Akinla, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 *BC Third World LJ* 19, 32-33.

<sup>397</sup> NJ Udombana, 'The Summer Has Ended and We Are Not Saved - Towards a Transformative Agenda for Africa's Development' (2005-2006) 7 *San Diego Int'l LJ* 5, 43; DN Plank, 'Aid, Debt, and the End of Sovereignty: Mozambique and its Donors' (1993) 31 *J Mod Afr Stud* 407, 414-415; JM Wolgin, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) *Amer Econ Rev* 54, 55; P Chabal, 'The Quest for Good Government and Development in Africa: Is NEPAD the Answer?' (2002) 78 *Int'l Aff (UK)* 447, 457.

<sup>398</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 51, 61; JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 *J Mod Afr Stud* 113, 113; PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 *J Mod Afr Stud* 109, 126; J Loxley, 'Structural Adjustment in Africa: Reflections on Ghana and Zambia' [1990] (47) *Rev African Polit Economy* 8, 8; M Watts, 'Visions of Excess: African Development in an Age of Market Idolatry' [1991] (51) *Transition* 124, 133-134.

<sup>399</sup> M Ellis-Jones, 'States of Unrest III: Resistance to IMF and World Bank Policies in Poor Countries' (World Development Movement Report) (April 2003) <<http://www.wdm.org.uk/resources/reports/debt/statesofunrest319042003.pdf>> accessed 30 May 2006 16-45; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 14, 42-43.



growing financial difficulties appeared to be the key deciding factor, and the poorer the country, the greater its dependence on the IFIs for financial support and the greater the likelihood that it would have to privatise.<sup>400</sup> Privatisation under such circumstances would lack genuine national ownership which as noted in Chapter 2 is vital for reform success.<sup>401</sup> In this regard, it should be noted that the IMF emphasises the importance of national ownership of, and responsibility for economic and financial policies and notes that conditionality will be ‘formulated through a mutually acceptable process led by the member.’<sup>402</sup> The IMF has also indicated its commitment to ‘respecting country ownership by basing the IMF's financial support on country strategies, and recognizing the benefits of country ownership by showing more flexibility with regard to the content of programs.’<sup>403</sup> However, the point has been made that lending documents such as the Letter of Intent and the Poverty Reduction Strategy Paper (PRSP), which in principle should be prepared by the borrowing country and should reflect home-grown policy measures that it intends to implement with the aid of borrowed funds, are usually prepared within very narrow confines to tally with IFI pre-endorsed policies, failing which lending would not be forthcoming.<sup>404</sup> In this regard, the IMF notes that:

A member's request to use Fund resources will be approved only if the Fund is satisfied that the member's program is consistent with the Fund's provisions and policies and that it will be carried out, and in particular that the member is sufficiently committed to implement the program.<sup>405</sup>

---

<sup>400</sup> DN Plank, ‘Aid, Debt, and the End of Sovereignty: Mozambique and its Donors’ (1993) 31 *J Mod Afr Stud* 407, 418; N Brune, G Garrett and B Kogut, ‘The International Monetary Fund and the Global Spread of Privatization’ (2004) 51 *IMF Staff Papers* 195, 197; D Babai, ‘The World Bank and the IMF: Rolling Back the State or Backing its Role?’ in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 269, 270.

<sup>401</sup> Chapter 2 para 2.3.1.1.

<sup>402</sup> IMF, ‘Guidelines on Conditionality’ (September 2002) <<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>> accessed 20 March 2004 8.

<sup>403</sup> IMF, ‘Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF’ (Issues Brief) (December 2000) No. 00/09.

<sup>404</sup> D Holtom, ‘The Challenge of Consensus Building: Tanzania's PRSP 1998–2001’ (2007) 45 *J Mod Afr Stud* 233, 240-247; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 41, 43.

<sup>405</sup> IMF, ‘Guidelines on Conditionality’ (September 2002) <<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>> accessed 20 March 2004 2.

Such external veto power over nationally implemented policies detracts from the national ownership of such policies and could render national ownership nominal.<sup>406</sup>

This second viewpoint of privatisation however needs to be weighed against the fact that the NEPAD policy framework endorses privatisation by way of public private partnerships, emphasises the need for close collaboration and partnership with the IFIs and expresses support for the use of Poverty Reduction Strategy Papers.<sup>407</sup> It is also arguable that if a country decides to seek financial aid from a lender, of which it is not obligated to do so, a prudent lender should stipulate conditions to ensure that the money will not be misused and will ultimately be repaid.<sup>408</sup>

The third viewpoint on why African countries decided to pursue the privatisation reform path, which could be termed the vested interest viewpoint, is that some of the national political leaders in African countries, rather than being primarily driven by conviction about the economic development benefits associated with privatisation, or being driven by the financial coercion of the IFIs to implement privatisation, may have endorsed the policy reform because of the rent seeking and patronage opportunities it often presents. In the same vein, privatisation has also been viewed as a strategy sometimes utilised to illegitimately transfer national wealth to privileged ethnic, religious or other groups in a country or maintaining political patronage networks.<sup>409</sup> Privatisation under these circumstances may primarily be driven by the incentive to advance the vested interest of those implementing it.<sup>410</sup> These issues will be elaborated on later in the chapter.

The above three viewpoints it should be noted, are not in clearly distinct or rigid compartments and it is possible that different combinations of elements of conviction,

---

<sup>406</sup> T Mckinley, 'MDG-Based PRSPs Need More Ambitious Economic Policies' (2005) United Nations Development Programme Policy Discussion Paper <<http://www.undp.org/poverty/publications.htm>> accessed 24 October 2005 7-8.

<sup>407</sup> NEPAD 2001 paras 8, 103, 112, 115-116, 148-149, 151-152, 183-184. Also see P Young, 'Privatization around the World' (1987) 36(3) Proceedings of the Academy of Political Science 190, 201.

<sup>408</sup> JW Head, 'For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks' (2003-2004) 52 U Kan L Rev 241, 280; JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 J Mod Afr Stud 113, 114.

<sup>409</sup> JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 J Mod Afr Stud 113, 114-115.

<sup>410</sup> J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 144.

coercion and/or vested interest could be distilled to varying degrees from the privatisation programmes of some African countries.<sup>411</sup> This is the most probable case with Nigeria, the subject of the research case study in the next chapter. The position taken in the dissertation is that for the adoption and implementation of privatisation policy and law to be effective in revamping the operations of public enterprises facing multifaceted and deep-rooted problems and tackling the economic development challenges facing many African countries, the decision to do so has to be well thought out and primarily borne out of genuine conviction about its merits. However, where the decision to privatise owes primarily to the second and third viewpoints rather than the first one above, it is less likely to be well thought out. Where the policymaking or lawmaking process is seriously constrained or shaped by external financial pressure or the internal illicit calculations of self interested political leaders, it is likely that there could be absence of critical appraisal of the potential benefits and drawbacks of the privatisation reform measure, and privatisation adopted under these circumstances is unlikely to be an effective economic development policy tool. This is not to suggest that privatisation must necessarily succeed once it is driven by conviction, because as will be seen later, various implementation problems could still frustrate the expected positive outcomes of privatisation in a country, thus conviction merely increases the probability of success of privatisation but does not guarantee it.

A vital point made in Chapter 2 on the issue of policy making is that the concept of privatisation should be adapted to suit the needs and circumstances of various implementing owing to the fact that they each have peculiar economic, social, political or other features, including different public enterprise or state ownership problems.<sup>412</sup> Whether there is such adaptation would be a key factor in considering whether privatisation in a particular country is well thought out and primarily borne out of genuine conviction about its merits. The IFIs have also emphasized the need for recognition of national differences in the formulation of solutions to national economic

---

<sup>411</sup> P Chabal, 'The Quest for Good Government and Development in Africa: Is NEPAD the Answer?' (2002) 78 *Int'l Aff (UK)* 447, 457-459; JD Fearon, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 *J Mod Afr Stud* 113, 127; DN Plank, 'Aid, Debt, and the End of Sovereignty: Mozambique and its Donors' (1993) 31 *J Mod Afr Stud* 407, 419; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 *Rev African Polit Economy* 357, 363-364; M Szeftel, 'Globalisation & African Responses' (2000) 27 *Rev African Polit Economy* 353, 354.

<sup>412</sup> Chapter 2 para 2.3.1.1.

problems.<sup>413</sup> With regard to the adoption of market-oriented reforms like privatisation and the broader issue of limiting the role of the state in the economy, there has been some criticism that they have promoted a cookie-cutter approach to these issues, and not fully factoring in national peculiarities, which could affect the effectiveness of proposed solutions.<sup>414</sup> Privatisation it should be noted was one of the economic policies identified as being endorsed under the Washington Consensus, a term that has been used to describe the set of market-oriented economic policies said to be broadly accepted and recommended by Washington-based institutions like the IFIs and the United States Treasury as being vital for actualising economic reform in countries facing downturn in their national economies.<sup>415</sup> In this regard, some have portrayed IFI-endorsed reforms like privatisation as being primarily borne out of the ideological leanings of the IFIs<sup>416</sup>, and noted that they are selective in the presentation of evidence used to backup their preferred policy measures.<sup>417</sup> Despite the fact that African countries may have some common features, they do have their peculiarities, which are variable factors that could have impact on the effectiveness of a generic one-size-fits-all privatisation remedy in a particular country, including differences ‘... with respect to size, rates of growth, share

---

<sup>413</sup> World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 1–3; IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) xii; IMF, ‘Guidelines on Conditionality’ (September 2002) <<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>> accessed 20 March 2004 2.

<sup>414</sup> B Campbell, ‘Governance, Institutional Reform & the State: International Financial Institutions & Political Transition in Africa’ (2001) 28 *Rev African Polit Economy* 155, 159; S Kikeri and J Nellis, ‘Privatization in Competitive Sectors: The Record to Date’, (2002) World Bank Policy Research Working Paper No 2860 <[http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/08/02/000094946\\_02072209183311/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/08/02/000094946_02072209183311/Rendered/PDF/multi0page.pdf)> accessed 20 April 2006 20.

<sup>415</sup> JJ Sanders, ‘The World Bank and the IMF: Fostering Growth in the Global Market’ (2000) 9 *Currents Int’l Trade LJ* 37, 41. A detailed analysis of the merits of the arguments for or against the various Washington Consensus reform measures is not undertaken in this thesis, given that the thesis does not dispute the merits of privatisation per se, but rather seeks to analyse different issues that could affect the realisation of its benefits. For further reading on the Washington consensus, see J Sender, ‘Africa’s Economic Performance: Limitations of the Current Consensus’ (1999) 13(3) *J Econ Perspect* 89, 101-108; M Naim, ‘Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?’ (2000) 21 *TWQ* 505, 505-523; J Williamson, ‘What should the World Bank Think about the Washington Consensus’ (2000) 15 *World Bank Res Observer* 251, 252-259; R Bush and M Szeftel, ‘The Struggle for Resources in Africa’ [1991] (51) *Rev African Polit Economy* 3, 7.

<sup>416</sup> JM Ngugi, ‘The World Bank and the Ideology of Reform and Development in International Economic Development Discourse’ (2006) 14 *Cardozo J Int’l & Comp L* 313, 325-326, 328.

<sup>417</sup> See generally J Loxley and D Seddon, ‘Stranglehold on Africa’ (1994) 21 *Rev African Polit Economy* 485, 489: ‘The Bank is undoubtedly selective, not only in the way in which it deploys its statistical evidence in support of its own analysis, but also in its choice of “successes” and “failures” as examples to support arguments about the effectiveness of structural adjustment programmes.’

of GDP in trade, structure of trade, nature of political competition, institutional grids, ethnic heterogeneity, and colonial inheritance.’<sup>418</sup> Trevor Manuel notes that some of the Washington Consensus policy reforms are ‘culturally and historically sensitive’ and that ‘privatization and deregulation simply do not apply to African countries in the same way that they may in Latin American countries.’<sup>419</sup> Not factoring in various national peculiarities in crafting privatisation policy and legal framework would risk designing an ineffective and inflexible remedy that is not in sync with the peculiar problems facing specific enterprises in respective countries and the peculiarities of the political, economic, social and cultural environment in which they operate, thereby creating an enabling environment for various privatisation implementation problems to germinate, some of which will be examined later using the analytical framework of the thesis. Such implementation problems could create a gap between privatisation legal reforms and the economic development objective of privatisation. Noting the divergence between the set policy goals of IFI pre-determined “‘correct” development policies’ like privatisation and the realities of implementation, Christopher Clapham makes the case for a development learning process that involves:

... adapting societies, states and the international settings in which they operate in ways which ultimately serve the welfare of the people who live in them. ... The means by which the universalities of successful economic transformation can be meshed into the specificities of African political structures and social values remain to be elucidated.<sup>420</sup>

It should be noted however that there is a limit to which the IFIs could be blamed for generic policy recommendations, given the earlier noted point that some African countries that have adopted privatisation may not have been coerced into doing so and accordingly, bear primary responsibility for reflecting national peculiarities in the design of the policy, including determining how privatisation fits in with other policy reforms that may be required in the country including governance reform, tax reform,

---

<sup>418</sup> H Bienen, ‘The Politics of Trade Liberalization in Africa’ (1990) 38 *Econ Devel Cult Change* 713, 716. Also see BL Ngenda, ‘Comparative Models of Privatization: A Commentary on the African Experience’ (1995-1996) 21 *Brook J Int'l L* 179, 179; J Kraus, ‘Capital, Power and Business Associations in the African Political Economy: A Tale of Two Countries, Ghana and Nigeria’ (2002) 40 *J Mod Afr Stud* 395, 395-397.

<sup>419</sup> TA Manuel, ‘Africa and the Washington Consensus - Finding the Right Path’ (2003) 40(3) *F & D* 18, 18.

<sup>420</sup> C Clapham, ‘Governmentality and Economic Policy in Sub-Saharan Africa’ 17 *TWQ* 809, 823. Also see 812-813, 818, 822.

financial sector and capital market reform, trade policy reform and business and investment law reform.

The last point to discuss on the issue of privatisation policymaking is that a defacto assessment of the implementation of privatisation in Africa indicates that some of the implementing countries did not appear to have a mechanism for effective stakeholder consultation and participation especially regarding the citizens, including workers. Erastus Wamugo notes that ‘In most sub-Saharan countries ... privatisation was undertaken without adequate debate.’<sup>421</sup> As noted in Chapter 2, this is a key part the process of adapting privatisation to suit a countries peculiarities, and accordingly, increasing the likelihood of realising its economic development benefits.<sup>422</sup> The issue will be analysed further when examining the issue of whether the national environment in some Africa countries is conducive to embarking on privatisation and attracting private investments.

### **3.1.2. THE PRIVATISATION LEGAL FRAMEWORK IN AFRICA**

Regarding the legal framework for privatisation, Chapter 2 discussed the fact that there are two broad categories of laws required in an implementing country, the first set being required to pave way for the privatisation programme, while the second set is required to regulate the conduct of privatised enterprises in the market.<sup>423</sup> While a broader critique of the privatisation legal framework will be undertaken in the chapters that specifically focus on Nigeria, some legal issues should be generally noted with regard to Africa, although the discussion will not go into specific analysis of specific laws, but will rather seek to outline the nature of these issues. Regarding the first set of laws and regulations, there is some evidence of inadequate legal reforms in some African countries prior to the commencement of privatisation. Accordingly, in some countries, the body of laws do not provide clarity on the issue of ownership rights to landed property, with the result that the state and its citizens sometimes have confusing coexisting rights in land under the land tenure system, which has created room for legal

---

<sup>421</sup> E Wamugo, ‘Privatisation and Regulation in Sub-Saharan Africa: Issues for Consideration’ (2001) 29 Int’l Bus Law 263, 263.

<sup>422</sup> Chapter 2 para 2.3.1.1.

<sup>423</sup> Chapter 2 para 23.1.2.

challenge regarding the rights acquired by private investors in such property.<sup>424</sup> The need to ensure the consistency of privatisation with the constitution was noted in Chapter 2.<sup>425</sup> In this regard, the commencement of privatisation has sometimes triggered legal challenge in the courts on the basis that this was inconsistent with constitutional provisions that vested direct public ownership of public enterprises in the people, thus making it unlawful and unconstitutional to transfer them to private entrepreneurs.<sup>426</sup> Sometimes, privatisation has proceeded without any enabling legislation, raising both legal and transparency concerns, with the government sometimes proceeding to hastily enact such laws afterwards and give them retroactive effect.<sup>427</sup> Such hasty drafting of privatisation laws raises concerns about whether these laws adequately factored in the peculiarities of the social context in which the privatisation programme would be implemented, including the adequacy of the institutions tasked with law implementation and the political environment in which they operate.<sup>428</sup> Hasty legal drafting has also been blamed for significant transparency loopholes, for instance leaving the methods of privatisation open-ended, not adequately providing for how enterprises will be valued or how privatisation bids will be conducted or how the privatisation process will be supervised, which paved way for opaque transactions and for malfeasance to infiltrate the privatisation process<sup>429</sup> But even where such supervisory mechanism is provided by relevant laws, this could create bureaucratic bottlenecks as well as room for political meddling in the privatisation process, which as earlier noted was also one of the issues

---

<sup>424</sup> MO Chibundu, 'Law and the Political Economy of Privatization in sub-Saharan Africa' (1997) 21 *Md J Int'l L & Trade* 1, 45-46; FN Botchway, 'Privatisation and State Control – the Case of Asanti Goldfields Company' (2004) 22 *J Energy & Nat Resources L* 201, 215-216.

<sup>425</sup> Chapter 2 para 2.3.1.2. Also see M Sah and T Daintith, 'Privatisation and the Economic Neutrality of the Constitution' (1993) PL 465, 471-479.

<sup>426</sup> BM McKinney, 'Privatisation: Oman and Egypt' (1997) 25 *Int'l Bus Law* 126, 128-129. See generally, JL Upper, 'Introduction I: Restructuring and Privatisation of State-Owned Enterprises' in JL Upper and GB Baldwin (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) xvii.

<sup>427</sup> FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 124-126; BM McKinney, 'Privatisation: Oman and Egypt' (1997) 25 *Int'l Bus Law* 126, 133.

<sup>428</sup> FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 125, 131.

<sup>429</sup> SR Nicolas, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 *Law & Pol'y Int'l Bus* 721, 735, 737; FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 126-127. Also see the Public Enterprises Reform and Divestiture Act 1993 (Uganda) 2<sup>nd</sup> sch para 7; the Privatisation Act No 2 of 2005 (Kenya) s 25.

that plagued many public enterprises now being sought to be privatised.<sup>430</sup> Such bottlenecks have also been noted where the legal framework for privatisation provided a diffused structure for undertaking privatisation transactions with different government departments having different responsibilities in the process, which could be confusing to a prospective investor and may also raise accountability concerns.<sup>431</sup> The above lapses should give considerable concern to a prospective investor that is about to make a long term investment in a country since the legal foundations of the investment could be subject to challenge and inadequate safeguard provisions could result in unplanned financial losses. The fact that some privatisation laws failed to provide a dispute settlement mechanism would heighten such concerns, because even if the privatisation contract between the government and a successful investor provides such a mechanism, disputes may arise prior to this point, of which an unsuccessful investor may not have clear channels of redress, including an expeditious way of resolving issues in countries with inefficient judicial systems.<sup>432</sup>

Regarding the second set of laws that deal with various issues regarding the conduct of privatised enterprises in the market, some African countries undertaking privatisation have various laws governing commercial activities that could hinder the attainment of the objectives of privatisation legal reform. Gerald Tanyi notes that:

... these laws must be completely reviewed and, where necessary, revised in order to bring them in line with modern trends. Of particular relevance are the general company law, competition law, securities regulation, environmental law, foreign investment law, and labor legislation.<sup>433</sup>

Similarly Nsongurua Udombana has noted that:

---

<sup>430</sup> FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 128-129.

<sup>431</sup> SR Nicolas, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 *Law & Pol'y Int'l Bus* 721, 734-737.

<sup>432</sup> FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 127-128. Also note the Public Enterprises (Privatisation and Commercialisation) Decree No. 28 of 1999 (Nigeria), which does not provide a clear mechanism for resolving disputes between investors and the government. The dispute settlement mechanism under the Act (the Public Enterprises Arbitration Panel, ss 27-29) is limited to disputes between the privatisation agency and commercialised enterprises that are still under government ownership.

<sup>433</sup> GB Tanyi, *Designing Privatization Strategies for Africa: Law, Economics, and Practice* (Praeger, Westport 1997) 52.



African states must take mutually reinforcing actions to accelerate growth and end years of aid dependency. As a starting point, they should streamline and strengthen their domestic legal frameworks for doing business, mindful that legal uncertainties discourage investors and that a weak legal system undercuts efforts to develop a modern, market-oriented economy. Many of the laws regulating business transactions in Africa are not just outdated but antediluvian.<sup>434</sup>

Provisions regulating corporate governance sometimes pose implementation difficulties, fail to provide adequate protection to minority shareholders, and have loopholes and inadequacies that undermine the accountability of directors or reduces the scope of liability for dereliction of duty.<sup>435</sup> Inadequate secured transaction laws or efficient institutional mechanism for enforcement could heighten the concerns of prospective investors about adequate access to credit on reasonable terms to facilitate their operations.<sup>436</sup> Inadequate legal reforms have also paved way for inconsistent laws to exist in the statute books, for instance the Kenyan competition law that exists side by side with prior legislation that restricts market entry, which has not yet been repealed, with both laws effectively working at cross purposes.<sup>437</sup> Some of the countries that have implemented or are implementing privatisation do not even have competition laws in place, which paves way for the implementation of privatisation to lead to private monopolies dominating key sectors.<sup>438</sup> Regarding regulatory laws for utility/infrastructure services, sometimes their enactment and the creation of an enforcement mechanism was pursued after privatisation had already been undertaken.<sup>439</sup>

---

<sup>434</sup> NJ Udombana, 'The Summer Has Ended and We Are Not Saved - Towards a Transformative Agenda for Africa's Development' (2005-2006) 7 San Diego Int'l LJ 5, 55.

<sup>435</sup> LM Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19 ICCLR 213, 213-217, 223, 226-227.

<sup>436</sup> P Machoka, 'The Need for Efficient and Effective Secured Transactions Regimes in Sub-Saharan Africa: The Case for Kenya' (2005) 20 JIBLR 395, 395, 399-401.

<sup>437</sup> FO Boadu and T Olofinbiyi, 'Regulating the Market: Competition Law and Policy in Kenya and Zambia' (2003) 26 World Competition 75, 95.

<sup>438</sup> N Dimgba, 'The Regulation of Competition through Merger Control: the Case under the Investment and Securities Act 2007' (Nigerian Bar Association (NBA) Section on Business Law Conference, 2009) <<http://www.globalcompetitionforum.org/regions/africa/Nigeria/The%20Regulation%20of%20Competition%20through%20Merger%20Control%20and%20the%20ISA%202007.pdf>> accessed 30 April 2009.

<sup>439</sup> K Pakendorf, 'South Africa: Electricity and Natural Gas' [2000] IELTR 202, 202 (gas distribution privatisation undertaken before consideration of sector regulatory law and regulatory authority).

This could give rise to legal action at the instance of the investor since earlier licence conditions could conflict with later regulatory provisions. As noted by Francois Serres:

Regulatory reforms and privatization processes should be therefore closely co-ordinated. Investors might react negatively in case the operating rules of a sector are changed after privatization.<sup>440</sup>

Being wary of this potential problem which make it difficult to completely assess regulatory risk in a particular jurisdiction, some investors may decide not to invest at all. A final point to be made is that sometimes inadequacies in laws are noted at the point where the rubber meets the road, of which it has been noted that market regulatory laws often adopted within the context of IFI reforms, sometimes replicate similar laws in some developed countries without adequately factoring in the socio-cultural context in which the laws will be implemented in the African country.<sup>441</sup>

### **3.2. ENSURING PROPER IMPLEMENTATION OF PRIVATISATION**

Where privatisation does not lead to desired outcomes and a gap appears to exist between the privatisation law and policy objectives on the one hand, and the actual implementation reality or practice of privatisation on the other, it is necessary to find out why. An appraisal of the privatisation outcomes in some African countries shows that while some blame for poor outcomes could be attributed to some flaws in the design of the policy or legal framework as discussed above, there are also some other problems that have been observed in the course of actually implementing the programme in various countries, which could thwart even the best crafted policies, laws and regulations. Thus the design and implementation problems are mutually reinforcing, reduce the probability that privatisation would advance economic development in these African countries and therefore should be avoided in the public interest or remedied where they have already arisen.

Based on the analytical framework of the dissertation, 4 key implementation questions will be posed and analysed regarding the implementation of privatisation in various

---

<sup>440</sup> F Serres, 'Public/Private Partnership for the Development of Public Infrastructure in Africa: The Possible Role of a Regulating Authority and the Guarantees of Fairness' (2000) *Bus L Int'l* 337, 338.

<sup>441</sup> LM Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19 *ICCLR* 213, 225.

African countries namely, is the national environment conducive to embarking on privatisation and attracting private investments?; secondly, is the institutional framework for implementing and monitoring the outcome of privatisation robust?; thirdly, will the strategic approach to the implementation of privatisation lead to the realisation of set policy objectives?; and finally, is the privatisation process accountable, transparent and free from corruption?

### **3.2.1. IS THE NATIONAL ENVIRONMENT CONDUCTIVE TO EMBARKING ON PRIVATISATION AND ATTRACTING PRIVATE INVESTMENTS?**

In many African countries, the implementation of privatisation has not led to the expected massive influx of qualitative foreign investors seeking to buy up their public enterprises, despite the enactment of various laws and the conclusion of investment treaties aimed at promoting and protecting foreign investments, and Africa as a whole has only gained marginally from global privatisation investments of which the spread is uneven within the continent.<sup>442</sup> Sometimes the stipulation of various investment incentives<sup>443</sup>, have still not persuaded investors to invest. This could be attributed to the fact that some enterprises slated for privatisation are so run down and enmeshed in various problems that investors may have decided to stay clear. However, it has been noted that ‘the domestic policies of the State are only one factor among many affecting its relationship with foreign investment.’<sup>444</sup> It would appear that various factors in the underlying investment climate in these countries adversely impact on the capacity of the private sector to thrive and accordingly increase investment risk, making potential investors wary about making the long term commitment that foreign direct investment necessitates.<sup>445</sup> NEPAD notes the need to address a host of policy, legal and

---

<sup>442</sup> K Anan, ‘Kofi Anan on Africa's Development Problems’ (1998) 24 *Popul Dev Rev* 411, 414; S Onyeiwu and H Shrestha, ‘Determinants of Foreign Direct Investment in Africa’ (2004) 20 *Journal of Developing Societies* 89, 90; F Pamacheche and B Koma, ‘Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation’ (2007) 1(2) *African Integration Review* 1, 7-8; Economic Commission for Africa, *Economic Report on Africa 2003: Accelerating the Pace of Development* (Economic Commission for Africa, Addis Ababa 2003) 35; J Selvam, A Meenakshisundararajan and T Iyappan, ‘Privatisation and Capital Accumulation: ‘Empirical Evidences from Ethiopia’ (2005) 12 *AJEP* 61, 74-78, 80.

<sup>443</sup> Note for instance, OO Akinla, ‘Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment’ (1987) 7 *BC Third World LJ* 19, 30.

<sup>444</sup> FC Beveridge, ‘Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria’ (1991) 40 *ICLQ* 302, 333.

institutional issues that drive up investment risk in Africa.<sup>446</sup> As noted in Chapter 2, the research focuses on three key issues that could adversely impact on the underlying investment climate and create a gap between legal reforms and expected outcomes namely, socio-political concerns resulting from the implementation of privatisation, general socio-political instability in the country and pre-existing systemic problems affecting the private business sector in a country.<sup>447</sup>

Regarding the issue of socio-political crisis resulting from the implementation of privatisation, in some African countries, the governments have often relied on brute force to deal with some of the fallouts of the privatisation process such as protests by citizens regarding the increased cost of privatised goods and services or protests by workers fearful about job cuts or non-payment of severance benefits.<sup>448</sup> The combination of such protests and government counter measures to deal with them, would likely contribute to the general socio-political instability existing in some of these countries, of which some have noted the human rights dimension to such issues.<sup>449</sup> The unwillingness or inability of some governments to plan ahead and develop or utilise clear channels of consultation in resolving adverse privatisation fallouts, and the pervasiveness of local opposition to reforms could undermine the investment security that investors seek, given that citizens including workers and potential customers could

---

<sup>445</sup> Note for instance K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 508; A Bhattacharya, PJ Montiel and S Sharma, 'How Can Sub-Saharan Africa Attract More Private Capital Inflows?' (1997) 34(2) F & D 3, 5-6.

<sup>446</sup> NEPAD 2001 para 151: 'The first priority is to address investors' perception of Africa as a high-risk continent, especially with regard to security of property rights, regulatory frameworks and markets. Several key elements of the *New Partnership for Africa's Development* will help to lower these risks gradually, and include initiatives relating to peace and security, political and economic governance, infrastructure and poverty reduction. Interim measures for risk mitigation will be put in place, including credit guarantee schemes and strong regulatory and legislative Frameworks.' Also see paras 102, 185.

<sup>447</sup> Chapter 2 para 2.3.2.1.

<sup>448</sup> B Tsie, 'States and Markets in the Southern African Development Community (SADC): Beyond the Neo-Liberal Paradigm' (1996) 22 J S Afr Stud 75, 91; F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 11-12; M Ellis-Jones, 'States of Unrest III: Resistance to IMF and World Bank Policies in Poor Countries' (World Development Movement Report) (April 2003) <<http://www.wdm.org.uk/resources/reports/debt/statesofunrest319042003.pdf>> accessed 30 May 2006 16-45 pp 36-37, 45.

<sup>449</sup> SC Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 Yale Hum Rts & Dev LJ 177, 198-199

transfer their aggression to them.<sup>450</sup> In the instances where the adoption of privatisation may owe more to coercion than conviction, it is possible that there could be limited room for adequate consultation with various stakeholders in the country, given that the government is itself operating within a highly constrained policy environment, thus creating an enabling environment for protests. Even when privatisation is primarily driven by conviction, this does not necessarily mean that the government will consider it necessary to have adequate consultative processes. In either case it could still be a coterie of top government officials that take key decisions on the implementation of privatisation and other market reforms, with little or no input from, or consultation with various stakeholders who would ultimately be affected by the implementation of privatisation, which would detract from the broad national ownership of the privatisation policy.<sup>451</sup> Although the IFIs have called for citizens' consultation and participation in the formulation and implementation of economic reform measures as well as measures designed to cushion their adverse effects, as a way of further ensuring the national ownership of such policies<sup>452</sup>, as earlier noted, they have also indicated that governments should have the political will to overcome stakeholder opposition to reform efforts, of which such stakeholders including trade unions and citizens groups are often portrayed as reform opponents who have vested interest in continued state dominance of national economies.<sup>453</sup> Some governments could take this to mean that consultation is a mere formality that they do not need to take too seriously, and the widespread protests by various stakeholders against the implementation of privatisation and other economic reform measures in many African countries is indicative of ineffective consultation and limited participation in reform planning, undermines reform legitimacy and potentially paves way for avoidable conflict between these stakeholders

---

<sup>450</sup> OO Akinla, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 BC Third World LJ 19, 31.

<sup>451</sup> R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 531.

<sup>452</sup> RC Blake, 'The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development' (2000) 3 Yale Hum Rts & Dev LJ 158, 173-174; IMF, 'Guidelines on Conditionality' (September 2002) <<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>> accessed 20 March 2004 1, 9; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 10, 11, 14.

<sup>453</sup> Chapter 2 para 2.3.2.1; World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 10, 11, 12. Also see ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 109.

and privatisation investors.<sup>454</sup> It should be noted however that some African countries appear to have undertaken serious negotiations with key stakeholder groups like trade unions and also utilised measures like share purchase schemes and job security provisions to win their support.<sup>455</sup>

On the issue of general socio-political instability in a country, in some African countries, there are very high levels of violence and crime and there have been occurrences of military coups, civil conflicts, wars and ethnic clashes.<sup>456</sup>

Regarding the issue of systemic problems affecting the private business sector, various African countries to varying degrees are beset with a host of problems that significantly drive up transaction costs, hinder the productivity and profitability of private enterprises, increase business risks and generally make them less competitive as investment destinations. These include the absence of qualitative utility/infrastructure services such as stable power supply and an effective transport network<sup>457</sup>, the existence

---

<sup>454</sup> JW Head, 'For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks' (2003-2004) 52 U Kan L Rev 241, 261. K Pfeifer, 'Parameters of Economic Reform in North Africa' (1999) 26 Rev African Polit Economy 441, 450; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 535-536; RC Blake, 'The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development' (2000) 3 Yale Hum Rts & Dev LJ 158, 180-181.

<sup>455</sup> K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 209; SR Nicolas, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 Law & Pol'y Int'l Bus 721,739.

<sup>456</sup> SR Nicolas, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 Law & Pol'y Int'l Bus 721, 741-742; AL Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 Yale LJ 1, 40-41; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 217; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 224; S Onyeiwu and H Shrestha, 'Determinants of Foreign Direct Investment in Africa' (2004) 20 Journal of Developing Societies 89, 90; RW Stone, 'The Political Economy of IMF Lending in Africa' (2004) 98 Am Polit Sci Rev 577, 580; M Watts, 'Visions of Excess: African Development in an Age of Market Idolatry' [1991] (51) Transition 124, 129; GG Chigaga, 'Foreign Investment in Africa: 1' (1988) 16 Int'l Bus Law 185, 186; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 79: 'The war with Eritrea in 1998 has ... caused a lot of damage to the Ethiopian investment climate, impinging investors' attitudes towards investing. The war, though now diluted, coupled with a sort of uncertainty in the economic and regulatory policies have been persisting as strong obstacles that still work against the privatisation and investment of the country' Also see 64, 78, 82-83.

<sup>457</sup> DA Brautigam, 'What Can Africa Learn from Taiwan? Political Economy, Industrial Policy, and Adjustment' (1994) 32 J Mod Afr Stud 111, 124-125; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 224; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 64, 80; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of*

of an unpredictable law and policy environment including tax, trade liberalisation and regulatory laws and policies<sup>458</sup>, the prevalence of governance institutions and legal system riddled with inefficiency and corruption, including bureaucratic delays and corruption associated with excessive regulation<sup>459</sup>, the absence of readily available and reliable information on the enterprises slated for privatisation and the current business environment in the country<sup>460</sup>, lack of robust capital markets<sup>461</sup>, and high interest rates.<sup>462</sup>

Not only could these problems have deterrent effect on foreign investors, but their adverse impact on locally-based entrepreneurs already operating in some privatising African countries could have affected their ability to make effective bids for the acquisition of privatised enterprises. It is not suggested that these are the only problems that affect businesses in Africa but it should be noted that some of them have been identified as contributory factors to the collapse of some privatised enterprises soon after privatisation.<sup>463</sup>

---

*Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 217, 251-252, 254.

<sup>458</sup> T Cohen, 'Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation' (2003) 47 JAL 65, 86; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 146, 225; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 80-81; PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 J Mod Afr Stud 109, 130; GG Chigaga, 'Foreign Investment in Africa: 1' (1988) 16 Int'l Bus Law 185; 186. Also see L George, 'Expropriation' [2002] IELTR 46, 46; P Vellas, 'International Project Finance: Lenders' Protection against Expropriation and Force Majeure Risks' (2004) 19 JIBLR 432, 432.

<sup>459</sup> PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 J Mod Afr Stud 109, 131; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 224; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 80; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 245, 253, 255, 258-259.

<sup>460</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 86; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 528. Also see RA Young, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50, 59.

<sup>461</sup> J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 64; RA Young, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50, 58.

<sup>462</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 99.

<sup>463</sup> Ibid.

### 3.2.2. IS THE INSTITUTIONAL FRAMEWORK FOR IMPLEMENTING AND MONITORING THE OUTCOME OF PRIVATISATION ROBUST?

As earlier noted, a key consideration in assessing whether privatisation law will facilitate economic development is whether the implementing country has a robust institutional framework for undertaking privatisation and various privatisation-related tasks and ensuring that the policy objectives of the programme are met.<sup>464</sup> In addition to possibly failing to deliver on privatisations' benefits for the citizens, weak institutions also increase regulatory risk for investors.<sup>465</sup> NEPAD recognises that 'state capacity-building is a critical aspect of creating conditions for development'<sup>466</sup>, and it lists various key areas that should be the focus of reforms aimed at improving the institutional capacity of African states namely:

... administrative and civil services; strengthening parliamentary oversight; promoting participatory decision-making; adopting effective measures to combat corruption and embezzlement; undertaking judicial reforms.<sup>467</sup>

By implication, African countries suffer institutional weaknesses in these areas at a time when they are trying to implement or have already implemented a reform as institutionally demanding as privatisation.<sup>468</sup> In this regard, the IFIs recognise the institutional weaknesses in many developing countries and note that:

... achieving the public interest objectives of privatization will take longer than has elapsed since such reforms were introduced in most developing and transition economies.<sup>469</sup>

---

<sup>464</sup> Chapter 2 para 2.3.2.2.

<sup>465</sup> D Parker, 'Privatization and Regulation of Public Utilities: Problems and Challenges for Developing Economies' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 550, 552-553.

<sup>466</sup> NEPAD 2001 para 86.

<sup>467</sup> *Ibid* para 83.

<sup>468</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 508; C Clapham, 'Governmentality and Economic Policy in Sub-Saharan Africa' 17 *TWQ* 809, 822-823; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 *Afr Aff* 523, 528; PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 *J Mod Afr Stud* 109, 130.

<sup>469</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 7. Also see J Ravenhill, 'Adjustment with



Although the IFIs have undertaken capacity building programmes in some of these countries, this should have taken place long before they attempted the huge task of privatisation and some countries have simply tried to muddle through the privatisation process without a robust institutional framework.<sup>470</sup> However, key privatisation tasks such as vetting of potential investors to ensure that they are technically and financially capable of running privatised enterprises, organising transparent and competitive bidding and undertaking detailed technical and financial audit of enterprises slated for privatisation to ensure their accurate ; are too vital to be muddled through.<sup>471</sup> In some African countries, winning privatisation bidders ultimately fail to pay for their acquisitions or could not efficiently manage the enterprises they bought, indicative of an inadequate shortlisting process for bidders and vetting of the financial and technical records by the authority charged with conducting privatisation.<sup>472</sup>

Sometimes, despite clear legal provisions on the conduct of privatisation bids, allegations emerged that the bidding process had been compromised in some way or the other or that legal provisions designed to ensure transparency, accountability and checks and balances had been disregarded.<sup>473</sup> Many enterprises have also been sold through private sales and other similar arrangements as opposed to public offers, in part due to the earlier noted problem of lack of robust capital markets, and this has also undermined

---

Growth: A Fragile Consensus' (1988) 26 J Mod Afr Stud 179, 204; R Sandbrook, 'Bringing Politics Back in? The World Bank and Adjustment in Africa' (1995) 29 Can J Afr Stud 278, 278.

<sup>470</sup> JW Head, 'For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks' (2003-2004) 52 U Kan L Rev 241, 255; IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) xiii.

<sup>471</sup> R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 530. Note that even in a developed country like the United Kingdom, accurate valuation of enterprises was noted to be a problem, with allegations of underpricing, of which developing African countries are bound to face even greater problems in this area. See T Prosser and M Moran, 'Privatization and Regulatory Change: The Case of Great Britain' in M Moran and T Prosser (eds), *Privatisation and Regulatory Change in Europe* (Open University Press, Buckingham 1994) 41-43; C Veljanovski, *Selling the State: Privatisation in Britain* (Weidenfeld and Nicholson, London 1987) 15..

<sup>472</sup> R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 520; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 213; F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 8-9.

<sup>473</sup> J Kraus, 'Capital, Power and Business Associations in the African Political Economy: A Tale of Two Countries, Ghana and Nigeria' (2002) 40 J Mod Afr Stud 395, 428.

the earlier noted privatisation benefit of broadening of the ownership base of privatised enterprises and creating popular capitalism in a country.<sup>474</sup>

Many African countries have tax systems that suffer from institutional weaknesses, which limits the extent to which tax revenue could be used to facilitate economic development.<sup>475</sup> Thus in African countries where privatisation has been implemented when they do not yet have an effective system to ensure proper tax collection, remittance and accounting, this could provide ample opportunity for investors to successfully avoid or evade tax or collude with tax officials, leaving the government with insufficient tax revenue to pursue other social objectives that enhance national economic development.<sup>476</sup> The pervasive problems of corruption and tax evasion have continued to manifest even in the African countries that have undertaken legal reforms of their tax regimes.<sup>477</sup> Sometimes the government could grant special tax favours to cronies.<sup>478</sup> The uncertainties posed by a defective tax system could also be a disincentive to privatisation since prospective investors could face multiple taxes and arbitrary tax hikes after commencing operations.<sup>479</sup>

The judicial system also suffers from institutional weaknesses in some African countries, including corruption, which would be of concern to any prospective

---

<sup>474</sup> Chapter 2 para 2.2.4; FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 124; BL Ngenda, 'Comparative Models of Privatization: A Commentary on the African Experience' (1995-1996) 21 *Brook J Int'l L* 179, 181-182.

<sup>475</sup> A Kagina, P Gordhan and D Hartnett, 'The Case for African Tax' [2008] (951) *Tax Journal* 13, 13; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 245, 247-249.

<sup>476</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 223; R Theobald, 'Lancing the Swollen African State: Will it Alleviate the Problem of Corruption?' (1994) 32 *J Mod Afr Stud* 701, 702. Also see NEPAD para 145 on the need for better tax collection in Africa.

<sup>477</sup> J Kangave, 'Improving Tax Administration: A Case Study of the Uganda Revenue Authority' (2005) 49 *JAL* 145, 158; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 245, 247-248.

<sup>478</sup> PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 *J Mod Afr Stud* 109, 131.

<sup>479</sup> J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 *AJEP* 61, 80- 81; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 245, 247-248.

investor.<sup>480</sup> Even where the investment agreement provides for arbitration, the fact remains that there are many other business relationships that the investor may need to enter in the course of doing business, which may not all be subject to the investment arbitration clause, including supply and employment contracts and recovering debts from defaulting customers, or initiating action against regulators for improper exercise of regulatory power.<sup>481</sup> As noted in a report:

Contracts are of value only if they can be properly enforced. If contract enforcement is not possible, businesses will be reluctant to enter a contract with businesses they do not know, reducing the scope of economic activities. They will operate only on a cash-and carry basis—or even ask for advance payment. ... Enforcing contracts in Sub-Saharan Africa is among the most difficult in the world, with an average of 35 procedures and 434 days required to enforce a contract.<sup>482</sup>

Despite the emphasis in NEPAD for African countries to have policy, legal and institutional structures in place for competition and market regulation<sup>483</sup>, many African countries still do not have adequate institutional structures in place for undertaking these responsibilities, without which it will be difficult to ensure enterprise and market efficiency, adequate private investments in privatised enterprises and reasonable pricing of privatised goods and services.<sup>484</sup> As noted in Chapter 2, these institutions are very vital for supervising the free market and deriving optimum benefits for the state, its citizens and private investors, and are necessary compliments of any shift from public to

---

<sup>480</sup> DA Guobadia, 'The Rules of Good Corporate Governance and the Methods of Efficient Implementation: A Nigerian Perspective' (2001) 22 Comp Law 119, 125; P Machoka, 'The Need for Efficient and Effective Secured Transactions Regimes in Sub-Saharan Africa: The Case for Kenya' (2005) 20 JIBLR 395, 399; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 223; PD Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 LJIL 749, 763; J Selvam, A Meenakshisundararajan and T Iyappan, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 AJEP 61, 79.

<sup>481</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 523, 526; PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 J Mod Afr Stud 109, 129.

<sup>482</sup> Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 261.

<sup>483</sup> NEPAD 2001 para 102, 103, 151.

<sup>484</sup> J Laffont, *Regulation and Development* (CUP, Cambridge 2005) 99-100; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 85, 102; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 223.

private ownership and/or control.<sup>485</sup> Regarding competition authorities that have been set up in some sub-Saharan African countries, it has been noted that:

Undoubtedly, the operation of formal competition laws and institutions poses unique difficulties for countries in SSA. ... financial and human resource constraints facing countries raise concerns about the sustainability, effectiveness, and credibility of competition monitoring institutions. ... These problems are exacerbated by the weak legal information processing and dissemination infrastructures that exist in several countries.<sup>486</sup> (footnotes omitted)

Simply achieving private ownership without strong competition and other complimentary regulatory/supervisory institutions will likely leave many stakeholders in various African countries with the short end of the stick.<sup>487</sup> In the case of regulatory bodies, where the government has cut its investments in public enterprises as a result of privatisation and the new private investors, owing to ineffective regulation, do not make necessary investments to improve productivity, the consumers would be at the receiving end as the private investors could simply raise the costs of their goods and services to boost profits. In this regard, it should be noted that some independent regulatory bodies have been set up after, rather than before privatisation in some African countries.<sup>488</sup> Regarding corporate governance, many corporate scandals involving high profile companies like Enron in recent years show that private companies may be as prone to failure as public enterprises, and could also adversely impact on economic growth and investor confidence in absence of adequate regulation.<sup>489</sup> If these scandals could occur in developed Western countries, they are even more likely to occur in African countries where the market regulatory infrastructure is not yet robust, of which it has been noted that 'Lack of appropriate institutions means that potential participants in the financial

---

<sup>485</sup> Chapter 2 para 2.3.2.2.

<sup>486</sup> FO Boadu and T Olofinbiyi, 'Regulating the Market: Competition Law and Policy in Kenya and Zambia' (2003) 26 *World Competition* 75, 76. Also see 75, 83, 94.

<sup>487</sup> Also see C Kirkpatrick, 'The UK Privatisation Model: Is it Transferrable to Developing Countries' in VV Ramanadham (ed), *Privatisation in the UK* (Routledge, London 1988) 240-241.

<sup>488</sup> K Bayliss, 'Tanzania: From Nationalization to Privatization - and Back?' in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008) 176-178. Also see PM Jackson and CM Price, 'Privatisation and Regulation: A Review of the Issues' in PM Jackson and CM Price (eds), *Privatisation and Regulation: A Review of the Issues* (Longman, London 1994) 13-14.

<sup>489</sup> S Fazio, 'Corporate Governance, Accountability and Emerging Economies' (2008) 29 *Comp Law* 105, 109.

markets lack information and are exposed to undue risks. As a result, markets fail to grow and/or deepen.<sup>490</sup>

On a more general note, the point has been made that there is some inconsistency in the IFIs indicating that African states are institutionally incapable of spearheading development efforts but at the same time expecting them to be institutionally robust enough to undertake privatisation and complex functions like market regulation.<sup>491</sup>

### **3.2.3. WILL THE STRATEGIC APPROACH TO THE IMPLEMENTATION OF PRIVATISATION LEAD TO THE REALISATION OF SET POLICY OBJECTIVES?**

It has been noted that ‘African states have not always adopted the right policy mix and strategies for sustainable economic development.’<sup>492</sup> Regarding privatisation, the strategic approach to many privatisation transactions by many African countries, sometimes at the behest of the IFIs has sometimes been at odds with the economic development objectives of the programme and the public interest, giving rise to some avoidable problems in the privatisation process. These strategic flaws have imposed various economic and social costs on these countries and their citizens, resulted in some transaction stalemates and helped to create room for inefficient post-privatisation performance. The following strategic issues will be analysed:

- **The pace and sequencing of privatisation**
- **The strategy for engaging foreign investors**
- **The approach to socio-cultural issues in privatisation**
- **Weighing the cost of implementing privatisation against the expected benefits**
- **Balancing the economic and social issues in privatisation in the interest of the citizens**

---

<sup>490</sup> PO Pedersen and D McCormick, ‘African Business Systems in a Globalising World’ (1999) 37 J Mod Afr Stud 109, 132.

<sup>491</sup> J Sender, ‘Africa’s Economic Performance: Limitations of the Current Consensus’ (1999) 13(3) J Econ Perspect 89, 106.

<sup>492</sup> NJ Udombana, ‘The Summer Has Ended and We Are Not Saved - Towards a Transformative Agenda for Africa’s Development’ (2005-2006) 7 San Diego Int’l LJ 5, 51.

### 3.2.3.1. THE PACE AND SEQUENCING OF PRIVATISATION

Speed and targets have sometimes been unduly emphasized in the IFIs approach to privatisation, both generally and with respect to Africa in a bid to quickly cede the ownership and/or control of public enterprises to private entrepreneurs.<sup>493</sup> The IFIs acknowledge the difficulty in undertaking public sector reforms and have emphasised the need to carefully manage the privatisation process and also implement key institutional reforms like regulatory reform and introduction of competition prior to privatisation.<sup>494</sup> However, regarding their financial support to privatising countries, a World Bank report notes that ‘... big cuts in financing can be triggered by a failure to meet governance standards or structural benchmarks (such as the privatization of a given company by a certain date)’<sup>495</sup> Another World Bank report notes that:

... aid intended to promote SOE reform can be counterproductive in several situations. ... some reluctant governments were slow to privatize, then rushed into bad bargains to meet deadlines set by external assistance agreements.<sup>496</sup>

The key issue then is that speed and careful management of privatisation appear to be inconsistent strategies. Some African countries have sought to speed up the privatisation process to keep within set timeframes and continue to have access to donor funding<sup>497</sup>, but in such haste, could exercise poor judgement in deciding what needs to be privatised, why it needs to be privatised and how it will be privatised. In pressing for speed and targets, the IFIs appear to assess privatisation success in numerical terms i.e. the number of transactions concluded in a given time frame, rather than in economic

---

<sup>493</sup> E Harsch, ‘Burkina Faso in the Winds of Liberalisation’ (1998) 25 Rev African Polit Economy 625, 631; J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 54.

<sup>494</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 133-134, 145; IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 7-8; World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997) 6, 15.

<sup>495</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 225.

<sup>496</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 17.

<sup>497</sup> F Pamacheche and B Koma, ‘Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation’ (2007) 1(2) African Integration Review 1, 17.

development terms which factors in the verifiable impact of privatisation on the lives of the citizens of the country.<sup>498</sup>

Considering the earlier noted issues of lack of conducive environment for implementing privatisation and lack of adequate implementation capacity in some of African countries<sup>499</sup>, speeding to conclude the programme regardless, would likely be a recipe for poor implementation outcomes. Sometimes, speed makes it more challenging to ensure appropriate sequencing and pacing of privatisation and other market reforms. For instance, although a World Bank report acknowledges the need to precede liberalisation with improved regulation in African countries<sup>500</sup>, liberalisation undertaken within the context of IFI funded programmes has sometimes been blamed for facilitating de-industrialisation in Africa of which the inflow of some foreign goods to some local markets would also threaten newly privatized enterprises still struggling to gain a foothold in the same markets now flooded with competitive foreign goods, and may result in job losses.<sup>501</sup> This is not a criticism of trade liberalisation per se but of its proper planning and timing in the light of the various problems earlier noted which have adversely affected the investment climate and local industrial capacity in many African countries.<sup>502</sup> It should however be noted that even where governments have sought to control the inflow of foreign goods to local markets, corrupt licensing regimes have

---

<sup>498</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 59: 'The timetables to which governments find themselves committed may be unrealistic; in the Ghana case a World Bank requirement that 18 of the 32 public enterprises originally listed for privatisation (in June 1988) be divested by the end of 1989 meant that the government had to liquidate twelve because investor interest had failed to materialise'; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 79-81, 87-88, 90; J Hanlon, 'Do Donors Promote Corruption?: The Case of Mozambique' (2004) 25 *TWQ* 747, 752.

<sup>499</sup> Chapter 3 paras 3.2.1, 3.2.2.

<sup>500</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 134, 145.

<sup>501</sup> F Stewart, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?' (1991) 9 *Development Policy Review* 413, 423-424, 429; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 98-100. Sometimes the problem is the premature relaxation of export controls on local raw materials on the insistence of the IFIs, effectively depriving newly privatised firms access to vital production inputs. See J Hanlon, 'Power without Responsibility: The World Bank & Mozambican Cashew Nuts' (2000) 27 *Rev African Polit Economy* 29, 35-39; G Harrison, 'Bringing Political Struggle Back in: African Politics, Power & Resistance' (2001) 28 *Rev African Polit Economy* 387, 398.

<sup>502</sup> Chapter 3 para 3.2.1; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 98-100; DA Brautigam, 'What Can Africa Learn from Taiwan? Political Economy, Industrial Policy, and Adjustment' (1994) 32 *J Mod Afr Stud* 111, 132, 137.

sometimes undermined the effectiveness of such measures coupled with unchecked smuggling across the borders.<sup>503</sup>

Speed makes it more difficult to ensure adequate consultation with relevant stakeholders and adequate provision of safety nets for consumers and workers in order to avert privatisation-related protests<sup>504</sup>, and also ensure proper timing of sales where there is limited investor interest which could mean that state assets may eventually be sold for a pittance or liquidated in a bid to meet set deadlines.<sup>505</sup> Proper valuation may also be difficult under such circumstances.<sup>506</sup> Hasty adoption of market regulatory laws based on foreign precedents has been blamed for some law implementation problems which could affect the interests of minority stakeholders<sup>507</sup>, while speedy drafting of privatisation law has been blamed for transparency loopholes that pave way for opaque deals and privatisation-related corruption.<sup>508</sup> Transparency safeguards may also be dispensed with in order to keep to preset implementation timelines.<sup>509</sup> In this regard, despite the benefits of greater transparency associated with undertaking privatisation through the stock market<sup>510</sup>, other less transparent methods of privatisation may be utilised to avoid the stress of complying with listing requirements. Given the scope for

---

<sup>503</sup> H Bienen, 'The Politics of Trade Liberalization in Africa' (1990) 38 *Econ Devel Cult Change* 713, 725-726, 728.

<sup>504</sup> M Ellis-Jones, 'States of Unrest III: Resistance to IMF and World Bank Policies in Poor Countries' (World Development Movement Report) (April 2003) <<http://www.wdm.org.uk/resources/reports/debt/statesofunrest319042003.pdf>> accessed 30 May 2006 16-45 pp 36-37, 45.

<sup>505</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 59; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 80, 86-87.

<sup>506</sup> FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 135.

<sup>507</sup> LM Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19 *ICCLR* 213, 225, 227.

<sup>508</sup> FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 126-127.

<sup>509</sup> J Hanlon, 'Do Donors Promote Corruption?: The Case of Mozambique' (2004) 25 *TWQ* 747, 748-752; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 80.

<sup>510</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 168.



such malfeasance, some have made the case that 'Political reform must precede economic reform'<sup>511</sup>

On the issue of regulation and competition especially regarding utilities, speedy implementation of privatisation has meant that they have often not been accorded top priority in the run up to privatisation. In this regard, it should be noted that arguments emanating from the World Bank appear to be both in favour of<sup>512</sup>, and against<sup>513</sup> the privatisation of monopoly enterprises, but the implementation approach appears to be to frontload privatisation and then address regulatory inadequacies as 'second generation reforms' in order to '... achieving the public interest objectives of privatization'.<sup>514</sup> A World Bank report notes the sequencing problem many African countries have run into regarding competition given the limited number of prospective investors, which has sometimes resulted in contracts that provide for monopoly exclusivity periods<sup>515</sup>, thus limiting the benefits of privatisation for the citizens given the problem of weak regulatory structures and also adversely impacting on broad based private sector development. As noted in another World Bank report 'Inflexibilities built into privatization agreements are often a severe impediment to solving post-privatization regulatory problems.'<sup>516</sup> Independent regulation as earlier noted has post-dated privatisation in some countries, making it difficult to effectively control monopolies.<sup>517</sup>

---

<sup>511</sup> GBN Ayittey, 'How the Multilateral Institutions Compounded Africa's Economic Crisis' (1998-1999) 30 *Law & Pol'y Int'l Bus* 585, 594. Also see 589.

<sup>512</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 9, 241; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 147, 149.

<sup>513</sup> F Bourguignon (World Bank Chief Economist), 'Comments' (Reforming Infrastructure - Privatization, Regulation and Competition Press Conference, 2004) <<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20212636~menuPK:34476~pagePK:34370~piPK:34424~theSitePK:4607,00.html>> accessed 27 October 2005.

<sup>514</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 7, 22-27. Also see P Pineau, 'Electricity Sector Reform in Cameroon: Is Privatization the Solution?' (2002) 30 *Energy Pol'y* 999, 1010-1011.

<sup>515</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32.

<sup>516</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 7, 24.

<sup>517</sup> K Bayliss, 'Tanzania: From Nationalization to Privatization - and Back?' in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008) 176-178.

In concluding the discussion, it should be noted that some arguments have been advanced on the merits of speedy implementation of privatisation premised on the potential benefits of the privatised era compared with the pre-existing era, the attendant costs associated with delayed transition, the need to gain and sustain public support for enterprise reforms and capitalism, the need to limit the opportunity for asset stripping of enterprises by current managers, the need to afford little time for vested interests to effectively mobilise to frustrate the exercise, and also the view that countries that cannot effectively manage public enterprises can still gain from privatisation even if there is poor regulation.<sup>518</sup> What this means is that ultimately, the pace of privatisation is a question of capacity, the specific local implementation conditions in any given African country and weighing the potential benefits and associated hazards. Thus while making the case for speedy privatisation in South Africa, Stephanie Nicolas points out key institutional strengths of the country that would make such a strategy workable<sup>519</sup>, which is not the reality for some other African countries. A final point is that given the earlier noted argument regarding the conviction and vested interest viewpoints of privatisation<sup>520</sup>, there is a limit to which IFIs alone can be blamed for speedy implementation, and various African countries may also be primarily responsible for such emphasis on speed.

### **3.2.3.2. THE STRATEGY FOR ENGAGING FOREIGN INVESTORS**

The strategic approach to foreign investments in some African countries raises concerns about whether it is in consonance with key economic development objectives of privatisation. To some extent some of the concerns would be applicable to private investments generally whether foreign or domestic, but the fact is that many large

---

<sup>518</sup> RA Cass, 'The Optimal Pace of Privatization' (1995) 13 BU Int'l LJ 413, 432-434; G Ortiz, 'Latin America and the Washington Consensus: Overcoming Reform Fatigue' (2003) 40(3) F & D 14, 15; J Nellis, 'The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis' (2002) World Bank OED Working Paper <[http://www.worldbank.org/oed/transitioneconomies/docs/privatization\\_enterprise.pdf](http://www.worldbank.org/oed/transitioneconomies/docs/privatization_enterprise.pdf)> accessed 6 June 2005 9; MM Shirley and P Walsh, 'Public Versus Private Ownership: The Current State Of The Debate' (2000) World Bank Policy Research Working Paper No. 2420 <[http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/09/15/000094946\\_00090605460\\_293/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/09/15/000094946_00090605460_293/Rendered/PDF/multi_page.pdf)> accessed 15 June 2007 14.

<sup>519</sup> SR Nicolas, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 Law & Pol'y Int'l Bus 721, 758-759.

<sup>520</sup> Chapter 3 para 3.1.1.

transactions with huge development impact have involved foreign investors<sup>521</sup>, of which it is necessary to see whether the implementation of privatisation factors in an appropriate strategy for deriving optimum benefits from these investments. In enacting laws to promote foreign investments and in allowing foreign participation in privatisation, it is intended that such investments will be a source of much needed resources and expertise in the host countries.<sup>522</sup> A key issue to consider is the issue of risk allocation.<sup>523</sup> Some African countries, in the face of limited investor interest which could be attributable to some of the earlier discussed systemic issues affecting businesses in Africa, have sought to attract foreign investments using various forms of incentives and bearing all sorts of risks relating to these investments. Commenting on infrastructure privatisation in Africa, a World Bank report has also noted that

... despite the increasing participation of private firms in infrastructure, the public sector still bears a significant part of market risks. Most contracts—power, water, railways—are of the *affermage* (lease contract) type, with investment still the responsibility of the state.<sup>524</sup>

While continued investment in public utilities is very vital<sup>525</sup>, if the public sector still bears responsibility for investment costs, this could undermine the budgetary savings argument for privatisation as well as the argument about foreign investors bringing in much needed capital to a privatising country. In the same vein, some African countries have entered into dollar-denominated power purchase agreements with Independent Power Producers (IPPs) for the generation of electricity, which create binding obligations to purchase all the electricity at predetermined rates for several years (up to 25 years in some cases) regardless of whether or not they actually require the electricity, effectively ensuring that the IPPs have a guaranteed market and profits for the entire concession period, do not need to compete for customers and are insulated from demand

---

<sup>521</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32; K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 510-511.

<sup>522</sup> SR Nicolas, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 *Law & Pol'y Int'l Bus* 721, 760.

<sup>523</sup> P Muchlinski, "'Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 *ICLQ* 527, 534.

<sup>524</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32.

<sup>525</sup> C Peters, 'Investment Obligations of the Energy System Operators in Germany' [2008] *IELR* 37, 38-39.

risk.<sup>526</sup> With African countries disproportionately bearing market risks, still responsible for investments after privatisation, and responsible for making long term preset contractual payments to investors, the costs of utility/infrastructure services could remain high as the government seeks to recoup its expenses from consumers.<sup>527</sup> The monopoly element in some of these contractual arrangements could also undermine future market expansion and broad-based private sector development in key sectors in these countries, especially given the earlier noted weak regulatory structures in some African countries.<sup>528</sup>

A second key consideration regarding foreign participation in privatisation is how this affects local participation in privatisation, which is a sensitive issue that could fan the embers of nationalism in a privatising country if not handled well, and could trigger protests that undermine the overall investment climate in a country.<sup>529</sup> In many African countries, privatisation has been implemented at a time when the nationals of the privatising country including indigenous capitalists were too financially incapacitated and weighed down by various systemic problems to fully partake in the exercise, with foreign entrepreneurs being the only viable bidders for some key enterprises.<sup>530</sup> The

---

<sup>526</sup> UNECA/UNEP, *Making Africa's Power Sector Sustainable: An Analysis of Power Sector Reforms in Africa* (UNECA, Addis Ababa 2007) 10; K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 525; JR Branston, 'The Price of Independents: An Analysis of the Independent Power Sector in England and Wales' (2002) 30 *Energy Pol'y* 1313, 1317; J Girod and J Percebois, 'Reforms in Sub-Saharan Africa's Power Industries' (1998) 26 *Energy Pol'y* 21, 29; P Hardstaff, 'Traacherous Conditions: How the IMF and World Bank Policies tied to Debt Relief are Undermining Development' (World Development Movement Report) (May 2003) <<http://www.wdm.org.uk/resources/reports/debt/traacherousconditions07052003.pdf>> accessed 20 May 2006 18. Also see K Bayliss, 'Privatization and Poverty: The Distributional Impact of Utility Privatization' (2002) 73 *Ann Public Coop Econ* 603, 609-610; SL Teichler and I Levitine, 'Long Term Power Purchase Agreements in a Restructured Electricity Industry' (2005) 40 *Wake Forest L Rev* 677, 703-704.

<sup>527</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 512, 517, 525.

<sup>528</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32.

<sup>529</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 51, 52, 60; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 *Afr Aff* 523, 529; E Harsch, 'Burkina Faso in the Winds of Liberalisation' (1998) 25 *Rev African Polit Economy* 625.

<sup>530</sup> G Harrison, 'Clean-Ups, Conditionality & Adjustment: Why Institutions Matter in Mozambique' (1999) 26 *Rev African Polit Economy* 323, 326; E Harsch, 'Burkina Faso in the Winds of Liberalisation' (1998) 25 *Rev African Polit Economy* 625, 630; E Harsch, 'Accumulators and Democrats: Challenging State Corruption in Africa' (1993) 31 *J Mod Afr Stud* 31, 42; E Harsch, 'The Global Coalition for Africa: Towards a Broader Dialogue?' (1996) 23 *Rev African Polit Economy* 67, 73; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 *Afr Aff* 523, 531; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 *J Mod Afr Stud* 197, 209.

scope for indigenous participation is further diminished by the earlier noted absence of viable capital markets, which has reduced the scope for public offer of privatisation securities on the stock exchange that would have permitted the citizens to acquire minority stake in privatised enterprises thus actualising the privatisation objective of broadening the ownership base of privatised enterprises and promoting popular capitalism. Rather, private sales, asset sales and various contractual arrangements including leases noted above have been utilised a lot.<sup>531</sup> Some African countries have however been able to utilise stock market floatations to give their nationals a chance to participate in the privatisation process, although poverty and low domestic savings sometimes continue to pose stumbling blocks to effective participation.<sup>532</sup>

A further consideration is the nature of competition that exists between foreign and local investors in African countries. It has been noted that 'With a few exceptions, African countries have always provided elaborate and generous incentives to the foreign investor, sometimes to the disadvantage of the local investor.'<sup>533</sup> Essentially tax laws and other market support laws sometimes accord significant advantages to foreign investors over local investors.<sup>534</sup> Where incentives, including tax breaks are deployed as a way of attracting foreign investments could ultimately give rise to investment enclaves in some African countries where only foreign investors exist, which could effectively skew free market competition - on the one hand, all other foreign investors in certain sectors could make their investments conditional on the receipt of such incentives in order to compete on equal footing and on the other hand, foreign firms that benefit from incentives would be placed in a more advantageous position than their local competitors that are struggling to survive due to the earlier noted unfavourable investment climate in many African countries.<sup>535</sup> This argument is essentially a reversal

---

<sup>531</sup> FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 *Tilburg Foreign L Rev* 119, 124.

<sup>532</sup> K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 *J Mod Afr Stud* 197, 218-219.; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 *Rev African Polit Economy* 357, 362-363.

<sup>533</sup> GG Chigaga, 'Foreign Investment in Africa: 1' (1988) 16 *Int'l Bus Law* 185, 185.

<sup>534</sup> LM Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19 *ICCLR* 213, 227.

<sup>535</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 84: 'If competition is 'uneven', with advantages skewed towards foreign investors, this may conflict with the objective of using privatisation to foster the growth of a national private sector entrepreneurial class. Arguably, this is the case with the Mozambican cashew-processing sector.' Also see E Spahn,

of the state aid issue seen in Europe where the focus of state aid control by the European Commission generally and within the context of privatisation is to prevent local enterprises in Member States from having competitive advantage over foreign competitors where they benefit from various forms of subsidies.<sup>536</sup> In the African context however, where foreign competitors are aided by incentives to take over public enterprises and where there is also absence of effective competition authorities to supervise the market place, they could easily force smaller local competitors out of the market, which could further exacerbate the unemployment problem in some of these implementing countries. In this regard, the World Bank has noted that ‘competition can only be effective if government transfers and subsidies are eliminated.’<sup>537</sup> Considering the fact that some of the multinationals operating in Africa have been convicted of paying bribes to secure privatisation contracts<sup>538</sup>, it is possible that some of these incentives are the products of corrupt deals with public officials in these countries. By way of analogy, it has been noted that the ability of foreign companies to pay larger bribes to public officials in China has led to their being accorded more favourable treatment and ultimately be more competitive than their local competitors.<sup>539</sup>

In addition to undermining competition, incentives could also undermine the need for investors to be efficient in order to be profitable, of which efficiency improvement features as one of the justifications for undertaking privatisation. The World Bank notes that:

---

‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 *Minn J Int'l L* 155, 221-222; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 248.

<sup>536</sup> A Evans, ‘Privatisation and State Aid Control in E.C. Law’ (1997) 18 *ECLR* 259, 259-261; GB Abbamonte, ‘Market Economy Investor Principle: A Legal Analysis of an Economic Problem’ (1996) 17 *ECLR* 258, 259; I Harden, ‘The Approach of English Law to State Aids to Enterprise’ (1990) 11 *ECLR* 100, 100.

<sup>537</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 22. Also see 81.

<sup>538</sup> B Fine and K Bayliss, ‘Rethinking the Rethink: The World Bank and Privatization’ in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008) 74. Also see J Williams, ‘Foreign Corrupt Practices: A Comparative Review of Law and Enforcement’ [2008] *IELR* 261, 261.

<sup>539</sup> E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 *Minn J Int'l L* 155, 221-222.

One advantage of privatization is that it taps the efficiencies generated by incentives associated with private profitmaking. But if guarantees cover most or all of the risks, private investors will have little incentive to run the enterprise better than bureaucrats did before privatization.<sup>540</sup>

It should also be noted that where foreign investors are able to successfully bribe local officials, the latter may not be keen on enforcing relevant regulations aimed at ensuring such efficiency, especially within the context of utility/infrastructural services, an issue that will be explored further later.

In summary, the above strategic approach to privatisation, even if it makes some contribution to economic growth, is less likely to be in the best interest of the citizens, including local investors or facilitate broad-based private sector development, which are some of the key economic development considerations of privatisation earlier noted.<sup>541</sup>

A final point to consider is the issue of IFI involvement in foreign investment promotion in Africa, regarding which some have criticised them for appearing to promote foreign investments at the expense of indigenous control of key economic sectors, and using their financial leverage to secure commitments in this regard.<sup>542</sup> Also, the fact that the World Bank that gives investment advice within the context of policy-based lending is a co-investor in some of the private investments in developing countries potentially presents a conflict of interest since regulatory restriction of profits or sanctions for inefficient performance would affect its earnings.<sup>543</sup> However, a more accurate portrayal of the issue of IFIs and foreign investments in Africa should be more nuanced. In the first place, unlike the earlier African development policy initiative, the Lagos Plan for Action, that largely saw globalisation as threat to Africa's development, NEPAD expresses the desire for Africa to embrace globalisation and international

---

<sup>540</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* - A World Bank Policy Research Report (OUP, New York 1995) 251.

<sup>541</sup> Chapter 2 para 2.2.

<sup>542</sup> CK Abrokwa, 'Africa 2000: What Development Strategy?' (1999) 29 *J Black Stud* 646, 659; I Bantekas, 'Sociological Implications Arising from World Bank Projects and their Impact on Sub-Saharan Indigenous Peoples' (2005) 1 *Int JLC* 143, 143; F Stewart, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?' (1991) 9 *Development Policy Review* 413, 422; P Pineau, 'Electricity Sector Reform in Cameroon: Is Privatization the Solution?' (2002) 30 *Energy Pol'y* 999, 999, 1002-1004, 1009-1011.

<sup>543</sup> D Hall, 'Privatisation, Multinationals and Corruption' (1999) 9 *Development In Practice* 539, 547.

competition.<sup>544</sup> It embraces both domestic and foreign investment. On the one hand it expresses the need to promote foreign investments and on the other it stresses the need for the creation of conducive environment for foreign as well as domestic investors.<sup>545</sup> It particularly emphasizes the role of foreign investment in developing the continent and also the need to sustain close collaboration and partnership with the IFIs.<sup>546</sup> NEPAD also notes the need to adopt incentivising measures like credit guarantee schemes, insurance schemes and other financial devices that mitigate investment risk for foreign investors in Africa.<sup>547</sup> Regarding the issue of the World Bank co-investing in some private investments, such arrangements are authorised by the Articles of Agreement of World Bank Group members and also endorsed by NEPAD as a way of attracting private investments.<sup>548</sup> It should also be noted that some African countries appear to have embraced foreign investments because they perceive this to be in their economic interest.<sup>549</sup> Also to be considered is the fact that some of the foreign investors that have invested in Africa have done so through business arrangements with politically influential people in these countries<sup>550</sup>, although in some instances the IFIs have been accused of complicity in such potentially illegitimate arrangements.<sup>551</sup>

In the light of the above points, it would not be entirely correct to portray the IFIs as somehow compelling all African countries to accept foreign investors against their will. However, whether or not African countries have acted out of compulsion or some other reasons, the bottomline is that a poor strategic approach to foreign investments within

---

<sup>544</sup> NEPAD para 95. See also I Taylor and P Nel, “New Africa”, *Globalisation and the Confines of Elite Reformism: 'Getting the Rhetoric Right', Getting the Strategy Wrong'* (2002) 23 TWQ 163, 171.

<sup>545</sup> NEPAD paras 145, 163.

<sup>546</sup> *Ibid* paras 183-184. See also I Taylor and P Nel, “New Africa”, *Globalisation and the Confines of Elite Reformism: 'Getting the Rhetoric Right', Getting the Strategy Wrong'* (2002) 23 TWQ 163, 174.

<sup>547</sup> NEPAD 2001 paras 151, 185.

<sup>548</sup> IBRD Articles of Agreement art I(ii); IFC Articles of Agreement art I(i); NEPAD 2001 para 185.

<sup>549</sup> K Appiah-Kubi, ‘State-Owned Enterprises and Privatisation in Ghana’ (2001) 39 *J Mod Afr Stud* 197, 208, 218-219.

<sup>550</sup> E Harsch, ‘Burkina Faso in the Winds of Liberalisation’ (1998) 25 *Rev African Polit Economy* 625, 635; C Clapham, ‘Governmentality and Economic Policy in Sub-Saharan Africa’ 17 TWQ 809, 813.

<sup>551</sup> J Hanlon, ‘Do Donors Promote Corruption?: The Case of Mozambique’ (2004) 25 TWQ 747, 751.



the context of privatisation exercise may fail to actualise key economic development objectives of the country.

### **3.2.3.3. THE APPROACH TO SOCIO-CULTURAL ISSUES IN PRIVATISATION**

The multiplicity of ethnic groups in many African countries poses a key problem in planning for and successfully executing privatisation programmes. It has been noted that forging such diverse socio-cultural groups in a country into one nation 'requires more than geographic proximity or political and economic necessity.'<sup>552</sup> Some of these countries have already experienced civil wars, communal tensions, riots or military coups and sometimes the citizens still regard fellow citizens with suspicion and real or imagined fears of economic and/or political domination still persist.<sup>553</sup>

As noted in Chapter 2, issues pertaining to ethnicity, including other cultural differences like race and religion could create a gap between market-related legal reforms like privatisation and expected outcomes.<sup>554</sup> In some African countries, such issues have shaped national politics and affected how political leaders view the state, especially its use as a means of facilitating patron-client networking and advancing narrow interests, with resulting conflicts over appropriation of state resources by competing groups which has adverse impact on broad-based national development efforts.<sup>555</sup> In this regard, it has been noted that 'divestment does not so much free markets as extend political struggles for control of key elements of the national economy from the state

---

<sup>552</sup> LP Baradat, *Political Ideologies: Their Origins and Impact* (Prentice Hall Inc, New Jersey 1979) 280.

<sup>553</sup> W Easterly, 'Can Institutions Resolve Ethnic Conflict?' (2001) 49 *Econ Devel Cult Change* 687, 688-690; H Bienen, 'The Politics of Trade Liberalization in Africa' (1990) 38 *Econ Devel Cult Change* 713, 719; K Anan, 'Kofi Anan on Africa's Development Problems' (1998) 24 *Popul Dev Rev* 411, 412-413, 414; D Abubakar, 'Ethnic Identity, Democratization, and the Future of the African State: Lessons from Nigeria' (2001) 29 (1/2) *African Issues* 31, 32-35; U Ukiwo, 'Politics, Ethno-Religious Conflicts and Democratic Consolidation in Nigeria' (2003) 41 *J Mod Afr Stud* 115, 117.

<sup>554</sup> Chapter 2 para 2.3.2.3; AL Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 *Yale LJ* 1, 19, 20, 21. Also see P Starr, 'The Meaning of Privatisation' (1988) 6(1) *Yale L & Pol'y Rev* 6, 33.

<sup>555</sup> BJ Berman, 'Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism' (1998) 97 *Afr Aff* 305, 305, 339; M Watts, 'Visions of Excess: African Development in an Age of Market Idolatry' [1991] (51) *Transition* 124, 128-129; C Clapham, 'Governmentality and Economic Policy in Sub-Saharan Africa' 17 *TWQ* 809, 815.

into the private sector.’<sup>556</sup> Opposition to privatisation has sometimes been influenced by these concerns and some governments have been perceived to press for privatisation, delay or shape the implementation of privatisation as the case may be, premised on how it could advantage or disadvantage specific sociocultural groups in the country.<sup>557</sup>

There are at least three possible implications where cultural considerations affect the implementation of privatisation in Africa. In the first place, privatisation could suffer from a legitimacy deficit, which could pave way for heightened tensions among different cultural groups in some African countries that already regard themselves with some suspicion. This may contribute to sociopolitical crisis in these countries<sup>558</sup>, further dampening the investment climate, and where the balance of political power shifts among these groups in the future, the stage may be set for probes and nationalisations. Secondly, competence may not be the key selection criterion for privatisation investors under these circumstances, in which case the expected efficiency improvements may not materialise. Thirdly, privatisation law implemented under these circumstances could provide a legal basis for further widening the inequality gap in some African countries to the extent that it is used as a strategy for consolidating economic power in some sub-groups in these countries, at the expense of others, of which such a zero sum calculation would be at the expense of broad-based national economic development.<sup>559</sup>

In summation, there are no easy ways for resolving cultural issues stemming from privatisation in some African countries. Some countries have used the strategy of stock

---

<sup>556</sup> BJ Berman, ‘Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism’ (1998) 97 *Afr Aff* 305, 336

<sup>557</sup> RC Sullivan, ‘Privatisation in Ethiopia, Malawi and Uganda’ in VV Ramanadham (ed), *Privatisation in Developing Countries* (Routledge, London 1989) 354, 355; E Schwella, ‘Privatization in South Africa’ in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 308; J Herbst, ‘The Politics of Privatisation in Africa’ in JL Upper and GB Baldwin (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) 200-201; RA Young, ‘Privatisation in Africa’ [1991] (51) *Rev African Polit Economy* 50, 60; D Eyoh, ‘From Economic Crisis to Political Liberalization: Pitfalls of the New Political Sociology for Africa’ (1996) 39(3) *Afr Stud Rev* 43, 61-62; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 146; FB Shu Acquaye, ‘Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon’ (1998-1999) 7 *Tilburg Foreign L Rev* 119, 133.

<sup>558</sup> C Price, ‘Privatisation in Less Developed Countries’ in PM Jackson and CM Price (eds), *Privatisation and Regulation: A Review of the Issues* (Longman, London 1994) 251.

<sup>559</sup> BJ Berman, ‘Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism’ (1998) 97 *Afr Aff* 305, 339.

market flotation of privatisation shares, with limits on the maximum stake that can be acquired by any individual, as a means of ensuring the even spread of property rights among citizens in the country<sup>560</sup>, but as earlier noted, privatisation has often been conducted through private sales and other similar arrangements in some African countries which are not as transparent, in part due to the weaknesses in the capital markets in these countries. But even then, poverty and low domestic savings could limit cultural groups that are already economically challenged from effectively participating in stock exchange listings, unless special provisions are made for them.<sup>561</sup>

A final point to be made on this issue is that speedy implementation of privatisation, which was discussed earlier, may not adequately factor in the time that may be need for creating a suitable framework for addressing these sensitive issues that may undermine the attainment of the ends of privatisation and threaten its long term sustainability.

#### **3.2.3.4. WEIGHING THE COST OF IMPLEMENTING PRIVATISATION AGAINST THE EXPECTED BENEFITS**

Many African countries that embarked on privatisation, in part due to the projected fiscal benefits attributed to it, including revenue from privatisation sales and savings from non-subsidisation of public enterprises, have been confronted with the mounting costs associated with its implementation, and unless these costs are kept in check, privatisation is not likely to play a role in restoring fiscal balance to their ailing economies or generating revenue for undertaking various social development programmes of the government, but may likely result in a net revenue loss for some countries.<sup>562</sup>

These privatisation-related expenses include the cost of organising privatisation bids, paying severance benefits to retrenched workers and settling the internal and external

---

<sup>560</sup> RA Young, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50, 60.

<sup>561</sup> See generally, K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 218-219.; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 362-363.

<sup>562</sup> D Babai, 'The World Bank and the IMF: Rolling Back the State or Backing its Role?' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 267; ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 114.

debts owed by the enterprises slated for privatisation<sup>563</sup>, maintaining loss-making public enterprises or operations after the profitable ones have been sold off<sup>564</sup>, and setting up and maintaining the various market regulatory institutions earlier mentioned.<sup>565</sup> Defaults in payment coupled with the fact that some enterprises have been sold on credit despite massive public investment in them, further contribute to the financial losses associated with privatisation, of which it has been noted that where these losses are intended to be a form of subsidy to promote private sector development being one of the economic development benefits of privatisation in this thesis, there should be careful structuring and administration of such matters, rather than the issue being handled in an arbitrary way or used for political patronage purposes.<sup>566</sup>

Sometimes instead of reaping tax revenue from profitable privatised enterprises, the reverse is the case given the earlier noted issues about the provision of various privatisation-related incentives to investors either in the form of direct financial support in the case of private subsidies and contractual payments to infrastructure service providers or forgone income in the case of tax breaks and duty exemptions.<sup>567</sup> Undue emphasis on incentives where the underlying investment climate is not conducive to

---

<sup>563</sup> W Adda, 'Privatisation in Ghana' in VV Ramanadham (ed), *Privatisation in Developing Countries* (Routledge, London 1989) 320; P Bennel, 'Privatization in sub-Saharan Africa' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 315; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 532; K Pfeifer, 'Parameters of Economic Reform in North Africa' (1999) 26 Rev African Polit Economy 441, 444; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 209, 213; H Sarie-Eldin, 'Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa)' in J Faundez, ME Footer and JJ Norton (eds), *Governance, Development and Globalization: A Tribute to Lawrence Tshuma* (Blackstone Press Limited, London 2000) 336.

<sup>564</sup> K Bayliss, 'Privatization and Poverty: The Distributional Impact of Utility Privatization' (2002) 73 Ann Public Coop Econ 603, 609; K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 518. Also see D Foster and D Braddon, 'An Inter-Disciplinary Approach to the Analysis of Privatisation and Marketisation' in D Braddon and D Foster (eds), *Privatization: Social Science Themes and Perspectives* (Dartmouth, Aldershot 1996) 292-293.

<sup>565</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 85.

<sup>566</sup> Ibid 79, 94-96.

<sup>567</sup> RA Young, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50, 59; GG Chigaga, 'Foreign Investment in Africa: 1' (1988) 16 Int'l Bus Law 185, 185; Hani Sarie EL-Din, 'Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa)', op cit, at pp. 337 – 338. Also see FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 Tilburg Foreign L Rev 119, 134.

long term investments will seriously drain public resources.<sup>568</sup> Regarding the issue of contractual payments, the point was earlier made about African countries entering into dollar-denominated long-term contracts with private providers of utility/infrastructural services<sup>569</sup>, of which defaults under similar contracts in other countries stemming from unexpected economic downturn have triggered massive contractual claims that could sink a country deep into debt, a case in point being Argentina.<sup>570</sup>

Regarding the issue of taxes, as earlier noted, some African countries do not have effective systems for ensuring proper tax collection, remittance and accounting, making it difficult to realise post-privatisation tax revenue.<sup>571</sup> The private operator could evade taxes or maximise earnings through corporate governance sharp practices including transfer pricing and false accounting<sup>572</sup>, and there may also be little or nothing to tax where there is continuation of inefficient operations and losses after privatisation.

The key point being made here is not that privatisation is costly to implement, of which some expenses may be unavoidable, rather, the point is that the expenses could inhibit the use of privatisation as a means of delivering the economic development benefit of enhanced revenue for the government. Besides, many African countries have had to borrowed extensively from the IFIs to finance the implementation of privatisation,

---

<sup>568</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 528; RA Young, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50, 59.

<sup>569</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 525.

<sup>570</sup> Argentina could not keep up with dollar denominated payments to foreign privatisation investors, including electricity and gas investors and ultimately faced more than 40 claims before the International Centre for the Settlement of Investment Disputes (ICSID) after it passed emergency legislations and unilaterally changed contractual payments to local currency and froze utility tariffs. Some of the cases have been successful. See D Foster, 'Umbrella Clauses - A Retreat from the Philippines?' (2006) 9 Int ALR 100, 103-104, 106-108; D Foster, "'Necessity Knows No Law!' - LG&E v Argentina' (2006) 9 Int ALR 149, 151-155; H Seriki, 'Umbrella Clauses and Investment Treaty Arbitration: All Encompassing or a Respite for Sovereign States and State Entities?' [2007] JBL 570, 570-571, 577-578; *CMS Gas Transmission Company v The Argentine Republic*, Award dated May 12, 2005, ICSID Case No ARB/01/8; *LG&E Energy Corp v The Argentine Republic*, Decision on Liability dated October 3, 2006, ICSID Case No.ARB/02/1; ICSID Case No.ARB/03/15, *El Paso Energy International Co Ltd v The Argentine Republic*, Decision on Jurisdiction dated April 27, 2006. Also see P Vellas, 'Price Regulation in Energy Project Finance: The Need for Comprehensive State Intervention' [2005] IELTR 61, 61-62..

<sup>571</sup> R Theobald, 'Lancing the Swollen African State: Will it Alleviate the Problem of Corruption?' (1994) 32 J Mod Afr Stud 701, 702. See generally J Stiglitz, *Globalization and its Discontents* (Norton and Company, New York 2003) 144-145.

<sup>572</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 522, 524.

including the cost of paying off massive debts in enterprises slated for privatisation, and consequently are saddled with the huge cost of repaying these loans that have added to their debt profiles.<sup>573</sup> Indeed sometimes a significant part of privatisation earnings are used for external debt servicing or repayment, leaving limited funds for social development initiatives.<sup>574</sup>

### **3.2.3.5. BALANCING THE ECONOMIC AND SOCIAL ISSUES IN PRIVATISATION IN THE INTEREST OF THE CITIZENS**

It was noted in Chapter 1 that privatisation often presents a conundrum regarding how to achieve its economic and social objectives both of which are essential for the realisation of the full spectrum of economic development benefits relating to privatisation. As discussed in Chapter 2, privatisation has been associated with a range of benefits for citizens in implementing countries, and within the categorisation of citizens, the research primarily focuses on how privatisation impacts on consumers and workers. Thus, the focus of the discussion here is not simply whether enterprise efficiency and profitability have been attained through privatisation, or whether privatisation has contributed to economic growth, but rather the distributional impact of privatisation on the citizens. Given the earlier noted point about some conflicts within the economic development objective of privatisation, is there a strategy for safeguarding the public interest, ensuring that privatisation's benefits are broadly distributed and ensuring that privatisation does not result in greater poverty and inequality for the citizens of a country?<sup>575</sup>

In the African context, there is some concern that some African countries may not be able to deliver some privatisation benefits to their citizens. In this regard, it should be noted that in various African countries, the social objectives of extending affordable goods and services to as many citizens as possible, providing jobs for them and

---

<sup>573</sup> M Alexander, 'Privatisation in Africa' in VV Ramanadham (ed), *Privatisation in Developing Countries* (Routledge, London 1989) 327, 349, 350; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 *J Mod Afr Stud* 197, 213, 220.

<sup>574</sup> W Megginson, 'Privatization' [2000] 118 *Foreign Pol'y* 14, 20.

<sup>575</sup> J Hanlon, 'Debate Intensifies over Adjustment & Press Freedom in Mozambique' (2002) 29 *Rev African Polit Economy* 113, 116; J Hanlon, 'Do Donors Promote Corruption?: The Case of Mozambique' (2004) 25 *TWQ* 747, 748, 760. Also see P Cook and C Kirkpatrick, 'The Distributional Impact of Privatization in Developing Countries: Who gets what, and why' in VV Ramanadham (ed) *Privatization and Equity* (Routledge, London 1995) 36-37, 44-47.

reducing poverty and inequality formed part of the justification for establishing public enterprises in the first place.<sup>576</sup>

On the one hand many public enterprises largely proved to be inefficient in discharging these responsibilities but on the other hand profit-driven private firms, whether or not they are efficient, may still not be able to meet the needs of majority of the citizens in these countries if social concerns are not effectively addressed. As noted earlier, key social indicators show that poverty, inequality and unemployment have remained quite prevalent, and economic development elusive, in many privatising African countries<sup>577</sup>, and while these problems may not all be attributable to privatisation, the implementation of privatisation legal reforms does not seem to have effectively contributed to their solution yet. As noted earlier, a World Bank report considers that:

... achieving the public interest objectives of privatization will take longer than has elapsed since such reforms were introduced in most developing and transition economies.<sup>578</sup>

Some aspects of the social concerns relating to privatisation have already been analysed under various headings, and the analysis here pulls these different concerns together, of which their cumulative effect is that the citizens may have to wait very long for the realisation of privatisation-related benefits. Thus regarding the issue of robustness of the institutional framework for implementing privatisation and monitoring its outcome, the point was made that some African countries do not have adequate institutional structures in place for undertaking regulatory functions<sup>579</sup>, with the result that regulators have often been unable to set and ensure compliance with performance standards, prevent unjustified price increases by monopoly utility providers or impose sanctions

---

<sup>576</sup> Note for instance W Adda, 'Privatisation in Ghana' in VV Ramanadham (ed), *Privatisation in Developing Countries* (Routledge, London 1989) 304.

<sup>577</sup> F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) *African Integration Review* 1, 2 and 17; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 57, 61, 70, 91-92.

<sup>578</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 7. Also see J Ravenhill, 'Adjustment with Growth: A Fragile Consensus' (1988) 26 *J Mod Afr Stud* 179, 204; R Sandbrook, 'Bringing Politics Back in? The World Bank and Adjustment in Africa' (1995) 29 *Can J Afr Stud* 278, 278.

<sup>579</sup> K Bayliss, 'Tanzania: From Nationalization to Privatization - and Back?' in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008) 176-178.

where appropriate.<sup>580</sup> It was noted in the discussion on the pace and sequencing of privatisation that poor sequencing has often led to monopoly contractual arrangements for utilities<sup>581</sup>, of which the above noted inadequacies of regulatory authorities, coupled with the weaknesses of competition authorities<sup>582</sup>, could limit key benefits for consumers.

In the discussion on the cost implications of privatisation, the point was made that privatisation-related expenditure often leaves African countries with limited funds for pursuing social development programmes that could be beneficial to the citizens<sup>583</sup> The point was also made that various incentives including guarantees granted within the context of privatisation in Africa could undermine the need for private investors to be efficient.

Evidence points to serious equity or distributional losses for some consumers in some African countries, especially regarding utility/infrastructural services for poor people who constitute a significant proportion of the population in various African countries.

Privatisation, including pre-privatisation sectoral reforms, often results in the upward review of tariffs with a view to assuring private service providers that their investments would be profitable of which the increased charges have sometimes resulted in fewer people having access, and for those that do, a significant amount of household income could be devoted to paying for utility/infrastructural services, further driving them into poverty.<sup>584</sup> Where the private provider operates a monopoly, there would be no

---

<sup>580</sup> K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507, 522-525, 527; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 223; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 85, 102.

<sup>581</sup> World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32.

<sup>582</sup> FO Boadu and T Olofinbiyi, 'Regulating the Market: Competition Law and Policy in Kenya and Zambia' (2003) 26 World Competition 75, 76. Also see 75, 83, 94.

<sup>583</sup> R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 532; D Babai, 'The World Bank and the IMF: Rolling Back the State or Backing its Role?' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 267; ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 114; P Pineau, 'Electricity Sector Reform in Cameroon: Is Privatization the Solution?' (2002) 30 Energy Pol'y 999, 1008-1009.

<sup>584</sup> K Bayliss, 'Water and Electricity in Sub-Saharan Africa' in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water*



alternative supplier to turn to. Poor rural dwellers sometimes bear the brunt most, owing to the fact that profit-driven private companies may not extend services to them in the first place or may even terminate services which were previously available in order to focus on the more affluent urban dwellers.<sup>585</sup> Although some African countries have put in place some mechanism for controlling prices, tariffs usually seek to cover the cost of provision, with some margin for profits, and such controlled prices are still unaffordable in many African countries that do not have effective systems of social security that provide poor and unemployed people with reasonable resources to pay for basic supplies, of which it should also be noted that subsidies have sometimes been phased out within the context of fiscal reforms.<sup>586</sup>

Ultimately, while the citizens of various African countries may have been ill served by inefficient public enterprises, privatisation as currently implemented may not offer real hope to many of them even if service quality has improved.

The impact of privatisation on workers in Africa will be considered next. Employees of public enterprises billed for privatisation in Africa are often concerned about the fate that awaits them as a result of the exercise because the implementation of privatisation in Africa has often been accompanied by significant downsizing often referred to as right-sizing, undertaken in a bid to contain costs, increase efficiency and competitiveness and maximise stock market value.<sup>587</sup> Statistical calculation of jobs lost

---

(Palgrave Macmillan, Hampshire 2008) 109-115, 118-120; K Bayliss, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 *J Mod Afr Stud* 507, 517, 520-521; UNECA/UNEP, *Making Africa's Power Sector Sustainable: An Analysis of Power Sector Reforms in Africa* (UNECA, Addis Ababa 2007) 67-68; ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999) 44.

<sup>585</sup> SJ King, 'Structural Adjustment and Rural Poverty in Tunisia' [1999] (210) *Middle East Report* 41, 42.

<sup>586</sup> K Bayliss, 'Water and Electricity in Sub-Saharan Africa' in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008) 109, 119; B Tsie, 'States and Markets in the Southern African Development Community (SADC): Beyond the Neo-Liberal Paradigm' (1996) 22 *J S Afr Stud* 75, 91-92. See generally T Butare and E Kaseke, 'Social security in Africa: Inherited Burdens, Future Priorities' (2003) 56 (3-4) *Int'l Soc Sec Rev* 3, 3-9; C Bailey and J Turner, 'Social Security in Africa: A Brief Review' (2002) 14 *Journal of Aging & Social Policy* 105, 105-114.

<sup>587</sup> BL Ngenda, 'Comparative Models of Privatization: A Commentary on the African Experience' (1995-1996) 21 *Brook J Int'l L* 179, 182; FN Botchway, 'Privatisation and State Control – the Case of Asanti Goldfields Company' (2004) 22 *J Energy & Nat Resources L* 201, 214; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 93; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 *Afr Aff* 523, 531; E Harsch, 'Burkina Faso in the Winds of Liberalisation' (1998) 25 *Rev African Polit Economy* 625, 639.

or gained as a result of privatisation would also need to factor in workers laid off as part of enterprise restructuring prior to privatisation, which has been done in some African countries as part of the process of preparing some enterprises for privatisation.<sup>588</sup> Without factoring in such pre-sale lay offs, one may have the impression that no jobs were lost as a result of privatisation since the new owners may not have actually sack anyone and in fact may have employed a few people after taking over the enterprise.

There are a number of problems associated with privatisation-related downsizing. The severance pay for the sacked of workers, apart from the fact that it is often too meagre, is sometimes not forthcoming, which poses a major problem given that many poor countries also do not have social security systems that ensure regular payment of unemployment benefits to those that are out of work.<sup>589</sup> The fact that privatisation primarily involves the takeover of existing enterprises and operations in a country rather than the establishment of new greenfield investments, coupled with the lack of effective competition especially regarding utilities, limits the ability of laid off workers to seek alternative employment with other competing enterprises.<sup>590</sup> Sometimes foreign investors in Africa prefer to employ workers from their home jurisdictions rather than employ local staff, further limiting the options available to the later.<sup>591</sup> The point was also made earlier that despite the potential benefits of market reform policies like trade liberalisation, it has sometimes been blamed for contributing to enterprise closures and

---

<sup>588</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 91; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 217.

<sup>589</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 95, 100; R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523, 532; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 221; BL Ngenda, 'Comparative Models of Privatization: A Commentary on the African Experience' (1995-1996) 21 Brook J Int'l L 179, 182; Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 101. See generally T Butare and E Kaseke, 'Social security in Africa: Inherited burdens, future priorities' (2003) 56 (3-4) Int'l Soc Sec Rev 3, 3-9; C Bailey and J Turner, 'Social Security in Africa: A Brief Review' (2002) 14 Journal of Aging & Social Policy 105, 105-114.

<sup>590</sup> Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 212.

<sup>591</sup> Note for instance J Ogbodo and T Daka, 'Reps Probe Foreign Firms over Discrimination in Employment' *The Guardian* (Lagos 3 June 2009) <<http://odili.net/news/source/2009/jun/3/12.html>> accessed 3 June 2009.

resulting job losses in Africa, generally as well as with respect to privatised enterprises especially when improperly timed.<sup>592</sup>

It should be noted that some legal and contractual provisions in some African countries could be of some use in tackling some of adverse fallouts of privatisation that undermine key economic development benefits for citizens, including consumers and workers. Some of them such as South Africa, Malawi and Nigeria, have codified some of the social ends of development as enforceable constitutional rights.<sup>593</sup> Properly utilised and creatively interpreted, it could be an avenue for compelling the government for instance to provide adequate severance benefits and social security for workers sacked as a result of privatisation, provide adequate subsidies to ensure that most citizens are still able to afford basic utility/infrastructural services and compel regulatory bodies or regulated enterprises to ensure the provision of privatised goods and services of adequate quality.<sup>594</sup> However, just like privatisation law, sometimes implementation issues, including legal interpretation of the scope of the rights could limit the effectiveness of such rights and guarantees<sup>595</sup>, coupled with other factors like cost of litigation and judicial inefficiency or corruption. Dennis Davis notes regarding South Africa for instance that:

The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.<sup>596</sup>

---

<sup>592</sup> F Stewart, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?' (1991) 9 *Development Policy Review* 413, 423-424, 429; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 98-100. Sometimes the problem is the premature relaxation of export controls on local raw materials on the insistence of the IFIs, effectively depriving newly privatised firms access to vital production inputs. See J Hanlon, 'Power without Responsibility: The World Bank & Mozambican Cashew Nuts' (2000) 27 *Rev African Polit Economy* 29, 35-39; G Harrison, 'Bringing Political Struggle Back in: African Politics, Power & Resistance' (2001) 28 *Rev African Polit Economy* 387, 398.

<sup>593</sup> DM Chirwa, 'A Full Loaf is better than Half - The Constitutional Protection of Economic Social and Cultural Rights in Malawi' (2005) 49 *JAL* 207, 222-226; DM Davis, 'Socioeconomic Rights: Do They Deliver the Goods?' (2008) 6 *ICON* 687, 687-689; KD Ewing, 'Social Rights and Constitutional Law' [1999] *PL* 104, 105, 117-119; BO Okere, 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' (1983) 32 *ICLQ* 214, 221-222.

<sup>594</sup> See generally DM Davis, 'Socioeconomic Rights: Do They Deliver the Goods?' (2008) 6 *ICON* 687, 703-705.

<sup>595</sup> *Ibid* 692-697, 700-702, 705-706.

<sup>596</sup> *Ibid* 708.

Besides the constitutional guarantees, in some African countries, the governments did a trade-off between receiving low prices for privatised enterprises with securing contractual undertaking from the new investors to retain the whole workforce and make necessary investments in the enterprises.<sup>597</sup> Also to be noted is that some African countries put in place schemes for assisting workers to buy shares, however mechanisms like share voucher or loan schemes which would have promoted popular capitalism and provided some measure of compensation for rising prices do not appear to have been utilised, of which poverty and limited domestic savings, as earlier noted are key hindrances to effective participation.<sup>598</sup>

A final issue to be analysed is how the IFIs have approached issues pertaining to the welfare of consumers and workers in the privatisation process. The IFIs have often made the case that in order to attract investors especially those that will invest in utility/infrastructural services, 'cost-reflective tariffs' would need to be charged, which would allow investors to earn reasonable profits on their investments.<sup>599</sup> They have also emphasised the need for countries to scale back subsidies to public enterprises and harden their budgets, noting that the subsidy savings should rather be channelled to social sectors like education and health<sup>600</sup>, and also noting that 'cutting off access to subsidies, privileges, and soft credit is crucial to making privatization a true economic change and not just a transfer of title.'<sup>601</sup> They have also argued that it is often necessary to reduce the staff strength of enterprises slated for privatisation to position them for greater

---

<sup>597</sup> F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 12.

<sup>598</sup> K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 209, 218-219; F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 6; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 362-363; FB Shu Acquaye, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case Of Cameroon' (1998-1999) 7 Tilburg Foreign L Rev 119, 128, 133.

<sup>599</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 3. Also see 7, 65.

<sup>600</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 5, 25; K Bayliss, 'Privatization and Poverty: The Distributional Impact of Utility Privatization' (2002) 73 Ann Public Coop Econ 603, 614.

<sup>601</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 242.

efficiency and make them attractive to prospective investors, and have also made the case for greater labour market and wage flexibility to enhance efficient job creation.<sup>602</sup>

In the light of the above, the IFIs have often been perceived to have adopted a narrow economic perspective on privatisation within the context of aid and development assistance, which does not sufficiently factor in some of the social concerns discussed above.<sup>603</sup> This also links up with the earlier discussed concern about undue focus on speedy implementation of privatisation and target setting as opposed to adopting a broad economic development perspective on privatisation.<sup>604</sup>

Regarding the perception of social insensitivity, it should be noted that the poor performance of many public enterprises in Africa was partly attributed to excessive employment and tariffs kept low due to political interference in the operation of the enterprises.<sup>605</sup> Given that the status quo appeared unsustainable, it would make sense to put enterprises in the best position to attract foreign investment in a competitive global market. The IFIs have also played a role in the setting up of some social safety net mechanisms and job creation schemes in some African countries<sup>606</sup> Where they do not

---

<sup>602</sup> MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 *Fordham L Rev* S23, S31; World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (OUP, New York 2004) 11-12; HR Torres, 'Reforming the International Monetary Fund - Why its Legitimacy is at Stake' (2007) 10 *JIEL* 443, 457. Also see Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 246.

<sup>603</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 88; I Belot, 'The Role of the IMF and the World Bank in Rebuilding the CIS' (1995) 9 *Temp Int'l & Comp LJ* 83; JW Head, 'For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks' (2003-2004) 52 *U Kan L Rev* 241, 261. Also see Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 112: 'The potential short-term adverse employment effects of ... privatization policies, as well as the actions to mitigate these adverse effects, are ... poorly reflected in the PRSPs.' (footnote omitted)

<sup>604</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 59; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 *J S Afr Stud* 79, 79-81, 87-88, 90; J Hanlon, 'Do Donors Promote Corruption?: The Case of Mozambique' (2004) 25 *TWQ* 747, 752. World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995) 17; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 225.

<sup>605</sup> J Herbst, 'The Politics of Privatisation in Africa' in JL Upper and GB Baldwin (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) 193-195.

<sup>606</sup> MA Geo-Jaja and G Mangum, 'Structural Adjustment as an Inadvertent Enemy of Human Development in Africa' (2001) 32 *J Black Stud* 30, 39; K Pfeifer, 'Parameters of Economic Reform in North Africa' (1999) 26 *Rev African Polit Economy* 441, 444.

work well or appear ineffective, it may owe more to the poor local administration for which the IFIs may not necessarily be blamed. Equally, the poor functioning of regulatory bodies that are expected to protect consumer's interest may also owe more to local implementation issues.<sup>607</sup> Also, the sustenance of social safety nets including consumer subsidies and the creating of alternative employment opportunities may rest more on the overall improvement of the economy, premised on which the private sector will be positioned to create new jobs and the state would have more resources to address social issues.<sup>608</sup> But there is a catch 22 situation here – privatisation is expected to facilitate such economic improvement, yet if there are flaws in its implementation as noted regarding Africa, it will be less able to do so failing which it will be difficult to address the negative fallouts of privatisation. Also to note is that the implementation problems of privatisation are also likely to affect overall private sector development. The next and final section in the chapter, which explored the issue of corruption shows that a government that does not act in the best interest of the citizens may not be in a position to address their social concerns as discussed above.

#### **3.2.4. IS THE PRIVATISATION PROCESS ACCOUNTABLE, TRANSPARENT AND FREE FROM CORRUPTION?**

Endemic official corruption is one of the key problems that has undermined economic development in many African countries, and often involves not just political leaders but also their relatives and political allies.<sup>609</sup> Corruption, especially deep rooted official corruption is antithetical to economic development since state resources that should be utilised for various social ends that would benefit the wider population illicitly ends up

---

<sup>607</sup> See generally T Cohen, 'Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation' (2003) 47 JAL 65, 81-82.

<sup>608</sup> See generally Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005) 104.

<sup>609</sup> I Carr, 'Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?' [2007] JBL 111, 112-113; M Szeftel, 'Clientelism, Corruption & Catastrophe' (2000) 27 Rev African Polit Economy 427, 427; M Szeftel, 'Between Governance & Underdevelopment: Accumulation & Africa's "Catastrophic Corruption"' (2000) 27 Rev African Polit Economy 287, 288; PD Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 LJIL 749, 750-757.

in much fewer pockets.<sup>610</sup> NEPAD recognises that corruption has been one of the contributory factors to Africa's underdevelopment and makes its eradication, a top priority in Africa.<sup>611</sup> One of the reasons frequently given as justification for privatisation is its expected role in curbing corruption in implementing countries including the use of public enterprises for political patronage and various other forms of corruption.<sup>612</sup> However, the fact that the privatisation programmes of some countries, including African countries have been beset with various allegations of corruption, cronyism and nepotism, raises doubt about whether privatisation is an effective corruption remedy in these countries or whether it has become part of the problem by paving way for new forms of corruption.<sup>613</sup>

Some of the forms of privatisation corruption that have been identified include the illicit purchase of privatised enterprises by political leaders or their cronies or relatives at giveaway prices with questionable funds<sup>614</sup>, and granting licences, concessions and regulatory approvals to cronies or in exchange for bribes.<sup>615</sup> Through these forms of corruption, the government could illicitly control the access to, and composition of the emerging private sector in many African countries, shape its direction and promote crony capitalism at the expense of the real reforms that should have informed the

---

<sup>610</sup> PD Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 LJIL 749, 757-761; G Nzongola-Ntalaja, 'The African Crisis: The Way Out' (1989) 32(1) Afr Stud Rev 115.

<sup>611</sup> NEPAD 2001 paras 22, 25, 52, 83, 185.

<sup>612</sup> R Theobald, 'Lancing the Swollen African State: Will it Alleviate the Problem of Corruption?' (1994) 32 J Mod Afr Stud 701, 705; R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 519.

<sup>613</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 89, 96; R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 520, 522; M Szeftel, 'Misunderstanding African Politics: Corruption & the Governance Agenda' (1998) 25 Rev African Polit Economy 221, 221-222, 233; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 223-224.

<sup>614</sup> R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 520; M Szeftel, 'Misunderstanding African Politics: Corruption & the Governance Agenda' (1998) 25 Rev African Polit Economy 221, 233; J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 364; I Thioub, M Diop and C Boone, 'Economic Liberalization in Senegal: Shifting Politics of Indigenous Business Interests' (1998) 41(2) Afr Stud Rev 63, 74; E Harsch, 'Accumulators and Democrats: Challenging State Corruption in Africa' (1993) 31 J Mod Afr Stud 31, 42.

<sup>615</sup> M Szeftel, 'Clientelism, Corruption & Catastrophe' (2000) 27 Rev African Polit Economy 427, 438; M Szeftel, 'Between Governance & Underdevelopment: Accumulation & Africa's "Catastrophic Corruption"' (2000) 27 Rev African Polit Economy 287, 302; C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 102.

privatisation exercise.<sup>616</sup> This could give rise to a new class of private entrepreneurs ill-suited to pilot the affairs of the privatised enterprises and ensure efficient performance given that they were not primarily selected on the basis of competence but rather emerged through compromised privatisation processes.<sup>617</sup> Such illegitimate beneficiaries of the privatisation process are sometimes more interested in stripping the assets of enterprises to the detriment of minority shareholders, rather than in investing in them and improving their performance, particularly where the institutional framework for regulating the market is weak.<sup>618</sup> Thus although privatisation could facilitate broad based private sector development, this objective is less likely to be realised where cronyism permeates the implementation process.<sup>619</sup>

Where the award of privatisation procurement contracts is influenced by corruption and cronyism, the likelihood is that these contracts may not be satisfactorily executed given that the integrity of the contracting process has already been compromised, and tainted public officials may have no incentive to insist on adequate contractual performance given their complicity.<sup>620</sup> In the case of utility/infrastructure enterprises, where political leaders in a country own or have interest in the private service providers that take over the supply of public services or granted these concessions in exchange for bribes, they may not be concerned about ensuring the reasonable pricing of tariffs or punishing regulatory breaches, and where privatisation is influenced by corruption, various regulatory institutions could be captured by vested interests rendering them ineffective

---

<sup>616</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 98; E Harsch, 'Burkina Faso in the Winds of Liberalisation' (1998) 25 Rev African Polit Economy 625, 630.

<sup>617</sup> JE Stiglitz, 'Quis Custodiet Ipsos Custodes? – Corporate Governance Failures in the Transition' (Annual World Bank Conference on Development Economics in Europe, 1999) <<http://www.worldbank.org/research/inequality/sais/lecture1/stiglitz.pdf>> accessed 6 June 2005 13.

<sup>618</sup> S Commander, M Dutz and N Stern, 'Restructuring in Transition Economies: Ownership, Competition and Regulation' (Annual World Bank Conference on Development Economics, 1999) <<http://siteresources.worldbank.org/INTABCDEWASHINGTON1999/Resources/stern.pdf>> accessed 30 June 2005 9, 28-29; JE Stiglitz, 'Quis Custodiet Ipsos Custodes? – Corporate Governance Failures in the Transition' (Annual World Bank Conference on Development Economics in Europe, 1999) <<http://www.worldbank.org/research/inequality/sais/lecture1/stiglitz.pdf>> accessed 6 June 2005 13.

<sup>619</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 103.

<sup>620</sup> NS Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13 JFC 2006 92, 93; O Arowolo, 'Nigeria's Downstream Sector Deregulation Crisis: What are the Unresolved Issues?' [2005] IELTR 10, 16.



to discharge their assigned regulatory tasks.<sup>621</sup> The scope for regulatory capture and other forms of corruption is enhanced where the remuneration of public officers is poor, as is the case with many African countries.<sup>622</sup>

It would appear that 2 key factors have encouraged these forms of corruption namely, the inadequacy of the methods or procedures adopted for implementing privatisation in some countries and secondly, the disregard of procedural safeguard measures enshrined in various privatisation rules and regulations to guarantee the transparency and integrity of the privatisation programme even when they are clear and unambiguous.<sup>623</sup> Sometimes the design of anti-corruptions laws makes adequate enforcement difficult especially where they provide ample loopholes for offenders and also the ability of anti-corruption institutions to enforce relevant laws could be affected by their lack of independence.<sup>624</sup> Rigged bidding processes are sometimes facilitated by loopholes created in the privatisation legal framework for special interests.<sup>625</sup> Methods of privatisation such as private placements and negotiated sales, which are not as transparent as capital market privatisation have been utilised in some African countries<sup>626</sup>, in part due to the earlier noted problem of absence of robust stock

---

<sup>621</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 101.

<sup>622</sup> P Collier, 'Living down the Past: Redesigning Nigerian Institutions for Economic Growth' (1996) 95 Afr Aff 325, 328-329; M Szeftel, 'Misunderstanding African Politics: Corruption & the Governance Agenda' (1998) 25 Rev African Polit Economy 221, 233; B Tsie, 'States and Markets in the Southern African Development Community (SADC): Beyond the Neo-Liberal Paradigm' (1996) 22 J S Afr Stud 75, 91. A distinction has been drawn between the petty corruption that occurs within government bureaucracy primarily involving civil servants and grand corruption which often involves abuse of power for private ends by the political leadership in the country, both of which are quite prevalent in Africa. See R Theobald, 'Lancing the Swollen African State: Will it Alleviate the Problem of Corruption?' (1994) 32 J Mod Afr Stud 701, 701.

<sup>623</sup> J Craig, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357, 361-362; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 223-224. Note that in Uganda for instance, despite the fact that the privatisation law criminalised privatisation-related corruption and made clear provisions for proper valuation of enterprises and transparent conduct of privatisation (the Public Enterprises Reform and Divestiture Act 1993 ss 36-39; 2<sup>nd</sup> Sch para 8-10), serious corruption, including flawed bidding processes has nevertheless been noted in the implementation of the programme. See R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 520, 522.

<sup>624</sup> R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 525-526, 531.

<sup>625</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 98; E Harsch, 'Burkina Faso in the Winds of Liberalisation' (1998) 25 Rev African Polit Economy 625, 630-631.

<sup>626</sup> Note for instance the Public Enterprises Reform and Divestiture Act 1993 2<sup>nd</sup> Sch para 7.

markets<sup>627</sup>, and this has also created room for allegations of corruption to infiltrate the implementation of privatisation.<sup>628</sup> It bears noting however that since they have also been used in some other countries without triggering corruption concerns, the problem may lie less with the method of privatisation and more with the personal motivations of those implementing the programme and the effectiveness of the legal and institutional constraints within which they operate.<sup>629</sup>

The IFIs recognise the adverse impact that corruption could have on development and the need for greater transparency in the privatisation context<sup>630</sup>, and have taken various steps aimed at curbing corruption especially regarding projects in which they are involved. Recommendations that have been made include undertaking necessary legal reforms, reforming the civil service, strengthening various government agencies, setting up anti-corruption bodies, reforming the tax system and undertaking necessary judicial reforms.<sup>631</sup> Nevertheless, they have been criticised for treating corruption in a simplistic way, as something that could be cured by enhancing the administrative and technocratic quality of governance in a country through capacity building initiatives, enacting more laws and setting up formal institutional structures to deal with corruption, and placing greater reliance on market forces, while reducing the role of the state in the economy.<sup>632</sup> In some of the African countries where corruption is rampant however, some of these

---

<sup>627</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 58. Also see C Graham, 'Methods of Privatisation' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 96-97.

<sup>628</sup> R Tangri, 'The Politics of State Divestiture in Ghana' (1991) 90 *Afr Aff* 523, 533; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 *J Mod Afr Stud* 197, 223-224. On the various methods of privatisation, see generally J Adell, 'Spain: Privatisation' (1995) 6 *ICCLR* C107, C107-C108.

<sup>629</sup> A Echard and P Billot, 'Privatisation in France in 1993' (1993) 4 *ICCLR* 406, 408-409.

<sup>630</sup> E Spahn, 'International Bribery: The Moral Imperialism Critiques' (2009) 18 *Minn J Int'l L* 155, 180; IMF, 'Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (Issues Brief) (December 2000) No 00/09.

<sup>631</sup> G Harrison, 'Clean-Ups, Conditionality & Adjustment: Why Institutions Matter in Mozambique' (1999) 26 *Rev African Polit Economy* 323, 324; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 32; R Hunja, 'Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines' [1997] *PPLR* 217, 219-221; M Szeftel, 'Between Governance & Underdevelopment: Accumulation & Africa's "Catastrophic Corruption"' (2000) 27 *Rev African Polit Economy* 287, 290-291.

<sup>632</sup> M Szeftel, 'Between Governance & Underdevelopment: Accumulation & Africa's "Catastrophic Corruption"' (2000) 27 *Rev African Polit Economy* 287, 304; R Sandbrook, 'Bringing Politics Back in? The World Bank and Adjustment in Africa' (1995) 29 *Can J Afr Stud* 278, 280; IMF, 'Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (Issues Brief) (December 2000) No 00/09.

formal reforms have been carried out to varying degrees, but perpetrators are still able to escape sanction.<sup>633</sup>

It has been noted that ‘... the erratic deployment of reform campaigns in cultures with high levels of corruption and weak legal regimes operates to reinforce control by the group in power ...’<sup>634</sup> One of the features observed in some African countries is the seeming blurring of the dividing line between the public and private domains, which has often made political leaders to treat public office as private estates to be exploited, including theft of public funds, thus undermining the public interest.<sup>635</sup> Where corruption is endemic, the mere existence of anti-corruption laws and institutions may be ineffective to deal with the problem, particularly where it is deeply rooted in national political and cultural systems and structures.<sup>636</sup> It has been noted that the IFI approach to reforms like privatisation and institution-building does not fully factor in this specific political feature of corruption in African states<sup>637</sup>, of which the point has been made that

---

<sup>633</sup> SK Akivaga, ‘Anti-Corruption Politics in Post-KANU Era’ in L Chweya, JK Tuta and SK Akivaga, ‘Control of Corruption in Kenya: Legal-Political Dimensions 2001-2004 (Claripress, Nairobi 2005) 243, 250-252, 258-261, 279; JP Olivier de Sardan, ‘A Moral Economy of Corruption in Africa?’ (1999) 37 *J Mod Afr Stud* 25, 30; G Harrison, ‘Clean-Ups, Conditionality & Adjustment: Why Institutions Matter in Mozambique’ (1999) 26 *Rev African Polit Economy* 323, 325-328; E Harsch, ‘Accumulators and Democrats: Challenging State Corruption in Africa’ (1993) 31 *J Mod Afr Stud* 31, 32-33; R Flanary and D Watt, ‘The State of Corruption: A Case Study of Uganda’ (1999) 20 *TWQ* 515, 515, 518, 522-529; PD Ocheje, ‘Refocusing International Law on the Quest for Accountability in Africa: The Case against the “Other” Impunity’ (2002) 15 *LJIL* 749, 762-763, 768; M Szeftel, ‘Misunderstanding African Politics: Corruption & the Governance Agenda’ (1998) 25 *Rev African Polit Economy* 221, 232; M Szeftel, ‘Clientelism, Corruption & Catastrophe’ (2000) 27 *Rev African Polit Economy* 427, 429, 439.

<sup>634</sup> E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 *Minn J Int'l L* 155, 222.

<sup>635</sup> MC Newbury, ‘Dead and Buried or Just Underground? The Privatization of the State in Zaire’ (1984) 18 *Can J Afr Stud* 112, 112; GBN Ayittey, ‘How the Multilateral Institutions Compounded Africa’s Economic Crisis’ (1998-1999) 30 *Law & Pol’y Int’l Bus* 585, 589; JP Olivier de Sardan, ‘A Moral Economy of Corruption in Africa?’ (1999) 37 *J Mod Afr Stud* 25, 31. Also see PD Ocheje, ‘Refocusing International Law on the Quest for Accountability in Africa: The Case against the “Other” Impunity’ (2002) 15 *LJIL* 749, 758; C Clapham, ‘Governmentality and Economic Policy in Sub-Saharan Africa’ 17 *TWQ* 809, 822-823; G Nzongola-Ntalaja, ‘The African Crisis: The Way Out’ (1989) 32(1) *Afr Stud Rev* 115, 124; JD Fearon, ‘International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa’ (1988) 26 *J Mod Afr Stud* 113, 117, 136; D Olowu, ‘Bureaucratic Morality in Africa’ (1988) 9 *IPSR* 215, 217; M Szeftel, ‘Between Governance & Underdevelopment: Accumulation & Africa’s “Catastrophic Corruption”’ (2000) 27 *Rev African Polit Economy* 287, 303; M Watts, ‘Visions of Excess: African Development in an Age of Market Idolatry’ [1991] (51) *Transition* 124, 130.

<sup>636</sup> A Salifu, ‘Can Corruption and Economic Crime be Controlled in Developing Economies - and if so, is the Cost Worth it?’ (2008) 11 *JMLC* 273, 278-279; M Szeftel, ‘Clientelism, Corruption & Catastrophe’ (2000) 27 *Rev African Polit Economy* 427, 428, 437-438.

<sup>637</sup> M Szeftel, ‘Misunderstanding African Politics: Corruption & the Governance Agenda’ (1998) 25 *Rev African Polit Economy* 221, 234-238; C Clapham, ‘Governmentality and Economic Policy in Sub-Saharan Africa’ 17 *TWQ* 809, 813, 822-823; BJ Berman, ‘Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism’ (1998) 97 *Afr Aff* 305, 336.

any effective anti-corruption measure should factor in such specific national circumstances.<sup>638</sup> Indeed the IFIs have been accused of showing tolerance for corruption where a state has shown willingness to embrace market forces and overlooking it under the guise of maintaining investor confidence where private investors get embroiled in corruption allegations resulting from their privatisation investments.<sup>639</sup> As earlier noted, the World Bank is a co-investor in some of these private ventures, a fact that may compromise its objectivity in giving privatisation advice to privatising countries, or dealing with privatisation-related corruption, and it has been accused of partnering in some cases with private investors that have already been found guilty of corrupt practices.<sup>640</sup>

It would not be right to solely focus on the failings of the IFIs on the issue of corruption. there is a limit to what an international organisation can do where there is no political will to address the problem within a country or the political leaders do not have the incentive to enforce transparency requirements in privatisation laws and regulations.<sup>641</sup>

It should also be noted that although NEPAD recognises the adverse effect of corruption on development, the African Union Convention on Preventing and Combating Corruption does not stipulate sanctions for corruption.<sup>642</sup> This substantially weakens its effectiveness in actually checking corruption in the continent.<sup>643</sup> Even at that, more than a third of the members have not yet ratified it.<sup>644</sup>

---

<sup>638</sup> A Salifu, 'Can Corruption and Economic Crime be Controlled in Developing Economies - and if so, is the Cost Worth it?' (2008) 11 JMLC 273, 281.

<sup>639</sup> D Hall, 'Privatisation, Multinationals and Corruption' (1999) 9 Development In Practice 539, 551-553; J Hanlon, 'Do Donors Promote Corruption?: The Case of Mozambique' (2004) 25 TWQ 747, 748-749, 751-753, 755-756, 760. Also see E Spahn, 'International Bribery: The Moral Imperialism Critiques' (2009) 18 Minn J Int'l L 155, 164.

<sup>640</sup> D Hall, 'Privatisation, Multinationals and Corruption' (1999) 9 Development In Practice 539, 547.

<sup>641</sup> K Amuwo, 'Military-Inspired Anti-Bureaucratic Corruption Campaigns: An Appraisal of Niger's Experience' (1986) 24 J Mod Afr Stud 285, 300-301; R Flanary and D Watt, 'The State of Corruption: A Case Study of Uganda' (1999) 20 TWQ 515, 531, 534;

<sup>642</sup> African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006).

<sup>643</sup> African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006); I Carr, 'Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?' [2007] JBL 111, 124.

<sup>644</sup> African Union, 'List of Countries which have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption' <<http://www.africa->

In summation, where privatisation is synonymous with corruption, besides the fact that it is unlikely to promote economic development, it would also lose legitimacy from the perspective of the citizens. While some investors may still seek to invest in a corrupt environment, some others may also decide to stay clear given the general legal, regulatory and other uncertainties involved in operating in such an environment plus the possibility of future probes.<sup>645</sup>

### **3.3. EVALUATION AND CONCLUDING REMARKS**

A critical appraisal of the case for privatisation in Africa was undertaken in this chapter, which also examined the design and implementation problems that militate against the realisation of the full economic development benefits that should flow from legally changing the ownership and/or control structure of public enterprises from public to private. These problems indicate that the various prerequisites for effective privatisation outcomes discussed in Chapter 2 were not adequately factored in while designing or implementing the programme in various African countries. Owing to the fact that issues pertaining to the policy and legal framework of privatisation, its institutional structure and implementation strategy and the motivations of political leaders that undertake its implementation are variable factors that could differ from country to country, various implementing Africa countries are likely to realise the benefits or experience the pitfalls of privatisation to varying degrees. In the next chapter, problems associated with the adoption and implementation of privatisation in Nigeria will be examined, which will also shed further light on the way the IFIs have influenced the privatisation policy and process in the African continent.

---

[union.org/root/AU/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf](http://www.union.org/root/AU/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf)> accessed 2 May 2009.

<sup>645</sup> PD Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 LJIL 749, 759; J Nellis, 'The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis' (2002) World Bank OED Working Paper <[http://www.worldbank.org/oed/transitions/economies/docs/privatization\\_enterprise.pdf](http://www.worldbank.org/oed/transitions/economies/docs/privatization_enterprise.pdf)> accessed 6 June 2005 51.



## CHAPTER FOUR

### CRITICAL APPRAISAL OF THE ADOPTION AND IMPLEMENTATION OF PRIVATISATION IN NIGERIA

Having critically appraised the case for privatisation as an economic development policy tool for Africa, this chapter narrows the focus to Nigeria, one of the African countries that adopted this reform option, and has consequently, put in place the legal, regulatory and institutional framework for implementing the legal transfer of the ownership and/or control of public enterprises to private entrepreneurs. Nigeria is among the 25 countries in the Low Human Development category of UNDP's Human Development Index rankings<sup>646</sup>, and according to a report, 'Nigeria is one of the world's poorest countries, with more than 60% of its population in deep poverty.'<sup>647</sup>

Like many other African countries did after gaining political independence, Nigeria pursued a statist development strategy that included the formulation of national economic development plans and enacting of laws to implement policy measures like indigenisation and nationalisation of foreign enterprises, setting up of new public enterprises, import substitution industrialisation as well as continued state ownership and operation of various public utility/infrastructural enterprises that pre-dated the 1960 political independence.<sup>648</sup> In the case of indigenisation, the aim was to curb the dominance of foreign entrepreneurs and personnel in key sectors of the national economy.<sup>649</sup> The World Bank endorsed the expansion in public sector investments even

---

<sup>646</sup> United Nations Development Programme <<http://hdr.undp.org/en/statistics/>> accessed 3 March 2009.

<sup>647</sup> Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 177.

<sup>648</sup> Nigerian Enterprises Promotion Decree No 4 of 1972; Nigerian Enterprises Promotion Decree No 3 of 1977; O Ojo, 'Self Reliance as a Development Strategy' in C Ake (ed) *Political Economy of Nigeria* (Longman, London 1985) 152, 164; MA Tokunboh, *Public Enterprises: The Nigerian Experience* (Lantern Books, Lagos 1990) 30-34.

<sup>649</sup> O Yerokun, 'The Changing Investment Climate through Law and Policy in Nigeria' in CO Okonkwo (ed), *Contemporary Issues in Nigerian Law: Essays in Honour of Judge Bola Ajibola* (Taiwo Fakoyede, Lagos 1992) 220-230; TJ Biersteker, *Multinationals, the State, and Control of the Nigerian Economy* (Princeton University Press, Princeton 1987) 52-59, 159; FC Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302, 308, 315-317; PT Muchlinski, *Multinational Enterprises and the Law* (2<sup>nd</sup> edn OUP, Oxford 2007) 185-186; OO Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89, 93; F Iyayi, 'The Primitive Accumulation of Capital in a Neo-Colony: The Nigerian Case' [1986] (35) Rev African Polit Economy 27, 33-34.

as it recognised the need for private investments.<sup>650</sup> These measures largely failed to deliver the expected economic development to the country and its citizens and various enterprises were plagued with a host of problems including poor definition of their goals, excessive political interference, excessive and inefficient staffing, insufficient funding for operations and excessive dependence on the government for financial support, overall inefficient performance and poor productivity stemming in part from the monopoly operation of some enterprises, maladministration, corruption and cronyism and lack of accountability.<sup>651</sup> In subsequently adopting and implementing privatisation, the country now seeks to give greater economic role to the private sector and foreign investments, of which privatisation has been described as the ‘centrepiece’ of its structural reforms.<sup>652</sup> The conception of privatisation guiding national policymakers, utilised in practice and reflected in the privatisation law fits within the broader perspective of privatisation articulated in Chapter 2 i.e it encompasses the outright and permanent sale of some enterprises, partial privatisation of some enterprises and various contractual arrangements for ceding control of public enterprises

---

<sup>650</sup> W Tims, *Nigeria: Options for Long-Term Development - Report of a Mission Sent to Nigeria by the World Bank* (Johns Hopkins University Press, Baltimore 1974) 6: ‘Nigeria may well have the resources to double per capita income within the next 12-15 years. A large proportion of the additions to national income over the next decade will accrue to the government and the achievement of the economy’s growth potential will depend to a large extent on the government’s ability to maintain a rate of growth of public consumption in line with reasonable needs and on its capacity to expand public sector investment over a broad range of sectors and geographical areas. The rapid growth suggested will almost certainly require a continued infusion of technical, organization and managerial skills from abroad to help increase the level of public and private investment in the short run and ensure the continued growth of such investment in the long run.’ Also see 40, 134, 165-166. See further R Mowoe, ‘The World Bank and the IMF in External Debt Management’ in IA Ayua and B Owasanoye (eds), *External Debt and Financial Management in Nigeria* (NIALS, Lagos 1997) 64.

<sup>651</sup> T Forrest, ‘The Political Economy of Civil Rule and the Economic Crisis in Nigeria (1979-84)’ [1986] (35) *Rev African Polit Economy* 4, 8, 16; B Agoro, ‘The Nigerian Oil Industry Privatisation Process: An Alternative’ [2000] *IELTR* 225, 227; B Dauda, ‘Industrial Policy and the Nigerian Bureaucracy, 1900-1988’ (1993) 21 *African Econ Hist* 73, 78, 85-88, 90; PD Ocheje, ‘Law and Social Change: A Socio-Legal Analysis of Nigeria’s Corrupt Practices and Other Related Offences Act, 2000’ (2001) 45 *JAL* 173, 175-76, 189; ES Nwauche, ‘Legal Mechanisms in the Deregulation of the Nigerian Economy: The Privatisation and Commercialisation Decree 1988’ (1992) 1(1) *The Journal of Jurisprudence and Contemporary Issues* 21, 27; A Kekere-Ekun, ‘Implementation Record of Nigerian Privatisation Programme’ *Thisday* (Lagos 28 October 2001) <<http://www.thisdayonline.com/archive/2001/10/28/index.html>> accessed 12 December 2004).

<sup>652</sup> IMF, ‘Nigeria: 2001 Article IV Consultation—Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion’ (Report) (August 2001) IMF Country Report No 01/131 24; O Obasanjo (President of Nigeria), ‘Statement on the Occasion of the Inauguration of the National Council on Privatisation’ in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4-6.



to private investors, and also encompasses public enterprises that produce goods as well as those that produce services such as utilities.<sup>653</sup>

An analysis of the stated objectives of the Nigerian privatisation programme shows that its implementation is expected to contribute to the actualisation of various benefits that tally with the key economic development benefits of privatisation noted in this thesis, namely benefit to the public sector, benefit to the privatised enterprises, contribution to overall private sector development, benefit to the citizens of the country, and finally, its usefulness as a conduit for beneficial foreign investment inflow.<sup>654</sup> Given that privatisation has now been implemented for many years in the country, the key question for the purposes of the research is whether the economic development objectives behind the new policy and legal framework for private ownership and/or control of public enterprises have been achieved or are in the process of being achieved, and accordingly, whether privatisation has played the expected contributory role to economic development in the country. If they have not yet been achieved, why not?

Akin to the broader verdict on African privatisation, the case study of the Nigerian privatisation programme, which involved a critical analysis of the outcome of privatisation in the country, reveals a mixed bag of results. According to a report, Nigeria has realised some financial benefits being the proceeds of some privatisation transactions, and there has been a reduction in public subsidies as well as some efficiency improvements.<sup>655</sup> A news report cites the Bureau of Public Enterprises (BPE), the implementing body for privatisation in Nigeria as stating that ‘from the standpoint of performance of privatised enterprises, the Nigerian privatisation

---

<sup>653</sup> Public Enterprises (Privatisation and Commercialisation) Decree No. 28 of 1999 1<sup>st</sup> Sch pt I and pt II; National Council on Privatisation, ‘Guidelines on Privatisation of Government Enterprises’ in National Council on Privatisation, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 44 (para 6(a) and (b)). Further references to the above decree shall be to the ‘Public Enterprises Decree 1999’, while further references to the above guidelines shall be to the ‘Guidelines on Privatisation of Government Enterprises.’ Also see A Kekere-Ekun, ‘Privatisation, Liberalisation: Who Benefits?’ *Thisday* (Lagos 13 December 2004) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 13 December 2004.

<sup>654</sup> Guidelines on Privatisation of Government Enterprises para 2; Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 167; O Ajayi, ‘Internationalisation of a Domestic Capital Market: The Nigerian Experience’ (1993) 8 JIBL 70, 70, 72; IO Bolodeoku, ‘The Search for Global Capital: What has Privatisation Got to do with it, What are the Challenges for Nigeria’ (2003) 23 JPPL 93, 93-94, 104-105.

<sup>655</sup> IMF, ‘Nigeria: 2007 Article IV Consultation—Staff Report; Staff Supplement and Statement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Nigeria’ (Report) (February 2008) IMF Country Report No 08/64 17, 18, 25-27.

programme has been hugely successful so far', referring to some enterprises where there has been increased turnover and productivity and employment of new staff.<sup>656</sup> Some others have also credited privatisation with some efficiency and profitability improvements and also noted that some of the listed companies in which the government sold off the remainder of its shares are doing well on the stock market.<sup>657</sup>

However, despite these noted benefits of privatisation to the country, it cannot be said that the full spectrum of economic development benefits of privatisation have now been conclusively realised. While the instances of progress cannot be overlooked, they cannot form the basis for a comprehensive verdict that the privatisation programme has definitely succeeded, and in the same way a gap existed between the economic development rationale for setting up many public enterprises and the actual reality of their existence, some gaps have also been noted between the stated economic development rationale for embarking on the Nigerian privatisation programme and the actual reality observed from the implementation of the programme so far, owing to various factors. Especially regarding the second privatisation programme that commenced in 1999, some published articles as well as contemporaneous news reports on key transactions have noted key instances of failed or problematic transactions that detracted from the realisation of set privatisation objectives, despite the fact that the country has detailed laws, regulations, policies, procedural guidelines aimed at advancing the objectives of privatisation and minimising implementation pitfalls.<sup>658</sup> Some aspects of the implementation process also reveal unresolved conflict between the economic and social goals of privatisation. In Chapter 3, various design and implementation concerns were analysed regarding the implementation of privatisation in Africa and using the same analytical framework, this chapter will analyse how these

---

<sup>656</sup> F Alli, 'Privatised Firms are doing very well - BPE' *Vanguard* (Lagos 21 February 2008) <<http://www.vanguardngr.com>> accessed 22 February 2008.

<sup>657</sup> F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) *African Integration Review* 1, 15; DO Adeyemo and A Salami, 'A Review of Privatization and Public Enterprises Reform in Nigeria' (2008) 4 *CMR* 401, 408, 418.

<sup>658</sup> Note for instance L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 *CTLR* 229, 233; A Osae-Brown and A Olawunmi, 'FG Bends Backwards for Rusal over ALSCON' *Businessday* (Lagos 17 February 2006) <<http://www.nigeriamasterweb.com/paperfirms.html>> accessed 17 February 2006; A Folasade-Koyi, 'BPE Misled by Bad Experts, Advisers, says Chigbue' *Daily Independent* (Lagos 1 June 2005) <<http://www.dailyindependentng.com/>> accessed 1 June 2005; F Abugu, 'Report Disqualifies All NITEL Bidders' *The Guardian* (Lagos 22 May 2005) <<http://www.guardiannewsngr.com/news/article02>> accessed 22 May 2005.

concerns have manifested in the adoption and implementation of privatisation in Nigeria and bridging the gap between privatisation law and policy and the actual practice of privatisation will depend on how these concerns are addressed. The importance of the case study is underscored by the fact that the privatisation programme is still on-going including the reform of the electricity sector discussed in the next chapter, and lessons learnt from past mistakes could lead to vital reforms in the way the government pursues the programme going forward.

#### **4.1. DESIGNING AN EFFECTIVE POLICY AND LEGAL FRAMEWORK**

##### **4.1.1. THE PRIVATISATION POLICY FRAMEWORK IN NIGERIA**

As noted earlier, the way the privatisation policy is adopted in a country plays a crucial role in determining its effectiveness in achieving stated objectives, and flaws in the adoption of the policy could lead to various implementation problems or negative outcomes. The focus here is on whether the decision of the Nigerian government to embark on privatisation was simply a pragmatic reaction by the government to the failure of Nigerian public enterprises as some have noted<sup>659</sup> or whether other issues or motives were at stake. Was the privatisation policy measure borne out of clear conviction about its merits over other reform alternatives, as a tool for reforming public enterprises and facilitating the various economic development ends of privatisation? In Chapter 3, 3 viewpoints were examined on why African countries that earlier pursued public ownership of enterprises eventually decided to adopt the privatisation reform option, namely the conviction, coercion and vested interest viewpoints.<sup>660</sup> Based on the reasoning in Chapter 3, the effectiveness of the privatisation legal framework in delivering expected economic dividends in Nigeria would depend on the extent to which it is anchored on a well thoughtout policy adopted by national policy makers genuinely convinced about the merits of privatisation. The Nigerian case study revealed elements of the 3 view points in the adoption of privatisation in the country of which it is not clear that conviction was the primary deciding factor.

---

<sup>659</sup> V Akpotaire, 'The Legal Regime for Privatisation in Nigeria and the Crisis of Confidence' (2004) 25 BLR 200,202.

<sup>660</sup> Chapter 3 para 3.1.1.

Generally speaking, it has been noted that the economic policy making process in Nigeria appears to suffer from some systemic problems, often leading to lack of clear policy articulation and considerable volatility in economic reform policies adopted by governments in the country.<sup>661</sup> Abdullahi Shehu further points out that 'generally, there has been no consistency in government policy making and implementation in Nigeria'.<sup>662</sup> Commenting on Nigeria's poor economic performance over the years, Paul Collier attributes the country's economic policy flaws to the fact that 'the political institutions which govern economic policy have been ill-suited to their task'.<sup>663</sup> Bola Dauda notes that Nigeria's 'industrial policies, which are products of weak political and administrative structures, are characterized by inertia and confusion',<sup>664</sup> and further notes with respect to the era of statist development strategy as follows:

If policy has a declared objective, it is simple to measure the outcome by relating such output to the objectives. In Nigeria, however, industrial policy objectives were encapsulated in vague phrases or slogans such as self-reliance, even development and regional balancing, diversification and expansion of the economy, import substitution, export drive, increase in income from manufacturing activity, and creation of employment opportunities. From the ... review of the evolution of industrial policies, it is clear that these objectives were motivated by national self-interest and for that reason they were symbolic phrases which had deeper political meaning and functionality in the political quest for legitimacy than in real industrial policy terms.<sup>665</sup>

Specifically regarding privatisation, the position of the Nigerian government is that the decision to embark on privatisation was premised on conviction that this was the most

---

<sup>661</sup> B Dauda, 'Industrial Policy and the Nigerian Bureaucracy, 1900-1988' (1993) 21 *African Econ Hist* 73, 75, 79-80, 85.

<sup>662</sup> AY Shehu, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 *JFC* 69, 76. On the adverse impact of sudden policy reversal, note for instance the factory closures and bank crisis that resulted from sudden reversal of the export ban on raw cocoa. See on this J Kraus, 'Capital, Power and Business Associations in the African Political Economy: A Tale of Two Countries, Ghana and Nigeria' (2002) 40 *J Mod Afr Stud* 395, 421.

<sup>663</sup> P Collier, 'Living down the Past: Redesigning Nigerian Institutions for Economic Growth' (1996) 95 *Afr Aff* 325, 325. See also 336

<sup>664</sup> B Dauda, 'Industrial Policy and the Nigerian Bureaucracy, 1900-1988' (1993) 21 *African Econ Hist* 73, 75. Also see 90-92.

<sup>665</sup> *Ibid* 85. Similarly, opinion has also been expressed that the massive expansion of the state sector in the 1970s was not borne out of careful planning and preparation but was primarily enabled by the influx of petro-dollars and that there is considerable incoherence and absence of co-ordination between different government ministries and agencies involved in policymaking in the country. See T Forrest, 'The Political Economy of Civil Rule and the Economic Crisis in Nigeria (1979-84)' [1986] (35) *Rev African Polit Economy* 4, 7, 14-15.

appropriate way of overcoming various problems associated with state ownership, positioning the country for inflow of foreign direct investment and associated financial resources and managerial and technical expertise, delivering fairly priced qualitative utility services to the citizens and positioning both the public and private sectors for greater efficiency.<sup>666</sup> President Obasanjo, under whose leadership many enterprises were privatised noted that ‘We are privatizing for the benefit of our economic recovery and our social life. We are not embarking on this exercise to please the World Bank or the IMF.’<sup>667</sup> He was also one of the key driving forces in the adoption of NEPAD which endorsed privatisation and close collaboration with the IFIs as noted in Chapter 3.<sup>668</sup> Some of the bodies set up in the past in Nigeria to look into the problems of public enterprises also made a number of reform recommendations, including privatisation.<sup>669</sup>

It should be noted however that some of the official government policies that endorsed the privatisation of some key sectors, such as the electricity sector, the broader energy sector and the industrial sector, actually post-date the Public Enterprises Decree 1999 that scheduled enterprises in these sectors for privatisation, which begs the question – on what basis were they scheduled for privatisation?<sup>670</sup> As earlier noted, Douglas Was points out that some of the arguments advanced in favour of privatisation constitute *a priori* justification of privatisation that may not stand up to close scrutiny.<sup>671</sup> Crafting policies after a law as already been enacted is indicative that the law informed and influenced the policies rather than the other way round, essentially placing the cart

---

<sup>666</sup> O Obasanjo (President of Nigeria), ‘Statement on the Occasion of the Inauguration of the National Council on Privatisation’ in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4-6.

<sup>667</sup> *Ibid.*

<sup>668</sup> Chapter 3 para 3.1.1.

<sup>669</sup> T Forrest, ‘The Political Economy of Civil Rule and the Economic Crisis in Nigeria (1979-84)’ [1986] (35) *Rev African Polit Economy* 4, 15.

<sup>670</sup> Federal Ministry of Industry, Nigeria, ‘Industrial Policy for Nigeria: Targets, Policies, Incentives, Guidelines and Institutional Framework’ (November 2001) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/E16B257D-99C8-46EA-B792-A339893D7107/0/IndustrialPolicy.pdf>> accessed 30 June 2006 15, 21, 22, 25, 39, 48; Energy Commission of Nigeria, ‘National Energy Policy’ (April 2003) <[http://www.energy.gov.ng/index.php?option=com\\_docman&task=cat\\_view&Itemid=&gid=19&orderby=dmdate\\_published&asc=DESC](http://www.energy.gov.ng/index.php?option=com_docman&task=cat_view&Itemid=&gid=19&orderby=dmdate_published&asc=DESC)> accessed 30 June 2006 6, 11, 64, 71, 78, 80; National Council on Privatisation, Nigeria, ‘National Electric Power Policy’ (October 2000) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/B3AE9394-8383-47E5-8199-CD1A325A265B/0/ElectricPowerPolicy.pdf>> accessed 30 June 2006 6, 8, 14, 25, 27-31.

<sup>671</sup> D Wass, ‘Checks and Balances in Public Policy Making’ [1987] *PL* 181, 186.

before the horse. The industrial policy also notes that ‘The trend worldwide is towards liberalisation and privatisation in manufacturing industry. Nigeria has taken an initial step at deregulating the industry through privatisation and commercialisation.’<sup>672</sup> This gives the appearance that privatisation in the country is premised more on conformity with the global trend rather than conviction as to its specific utility for advancing the economic interests of the country.

Considering the coercion viewpoint however, although Nigeria was not indebted to the IMF, it had to agree to adopt and implement its programmes of which privatisation was one of the key conditionalities, owing to the fact that the IMF’s endorsement was a basic prerequisite before other official lenders of the country like the Paris Club or the London Club could enter into debt relief/ rescheduling negotiations, which the country urgently needed.<sup>673</sup> Premised on this leverage, official documentation from the IMF usually contains information on the government’s compliance with target dates set for completing key privatisation transactions as well as privatisation related law reform.<sup>674</sup> The view has been expressed that for domestic political acceptability, the economic reforms endorsed by the ifis, including privatisation, have been presented to the citizens as home-grown reform programmes, of which both the first privatisation programme that ended in 1993 and the second one that commenced in 1999 fit within this scenario.<sup>675</sup> In this regard, it should be noted that the current development paradigm in

---

<sup>672</sup> Federal Ministry of Industry, Nigeria, ‘Industrial Policy for Nigeria: Targets, Policies, Incentives, Guidelines and Institutional Framework’ (November 2001) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/E16B257D-99C8-46EA-B792-A339893D7107/0/IndustrialPolicy.pdf>> accessed 30 June 2006 21.

<sup>673</sup> A Kolo, ‘Managing Post-Privatisation Political and Regulatory Risks in Nigeria – a Law and Policy Perspective’ (2004) 22 J Energy & Nat Resources L 473, 477-478; V Akpotaire, ‘The Nigerian Indigenisation Laws as Disincentives to Foreign Investment: The End of an Era’ (2005) 26 BLR 62, 67; NM Ogubunka, *Elements of Privatisation in Nigeria* (Rhema Enterprises, Lagos 2000) 51-52; J Herbst and CC Soludo, ‘Nigeria’, in S Devarajan, D Dollar and T Holmgren (eds), *Aid and Reform in Africa: Lessons from Ten Case Studies* (World Bank, Washington DC 2001) 650; JD Fearon, ‘International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa’ (1988) 26 J Mod Afr Stud 113, 122; W Reno, ‘Old Brigades, Money Bags, New Breeds, and the Ironies of Reform in Nigeria’ (1993) 27 Can J Afr Stud 66, 72; R Mowoe, ‘The World Bank and the IMF in External Debt Management’ in IA Ayua and B Owasanoye (eds), *External Debt and Financial Management in Nigeria* (NIALS, Lagos 1997) 71.

<sup>674</sup> IMF, ‘Nigeria: 2001 Article IV Consultation—Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion’ (Report) (August 2001) IMF Country Report No 01/131 24, 52, 59, 62-63, 67-72.

<sup>675</sup> OC Okafor, ‘The Precarious Place of Labour Rights and Movements in Nigeria’s Dual Economic and Political Transition, 1999–2005’ (2007) 51 JAL 68, 74-75; P Lewis, ‘From Prebendalism to Predation: The Political Economy of Decline in Nigeria’ (1996) 34 J Mod Afr Stud 79, 83, 103; PM Lewis, ‘State, Economy, and Privatisation in Nigeria’ in JL Upper and GB Baldwin, *Public Enterprises: Restructuring*

Nigeria called the National Economic Empowerment and Development Strategy (NEEDS), which was developed under the auspices of the Nigerian National Planning Commission, places emphasis on privatisation and has also been presented as a home-grown reform programme.<sup>676</sup> However it should be noted that this policy document is also Nigeria's Poverty Reduction Strategy Paper (PRSP), a key document in IFI financing/debt relief arrangements, of which Nigeria has been updating the IMF on its implementation.<sup>677</sup> As earlier indicated, some have noted that PRSPs are usually prepared within very narrow confines to tally with IFI pre-endorsed policies.<sup>678</sup> In addition, the World Bank has also provided significant funding for executing the privatisation programme.<sup>679</sup>

Regarding the vested interest viewpoint of the Nigerian privatisation programme, the concern is whether the undertaking of privatisation, rather than being genuinely motivated by the need to facilitate economic development, has rather being influenced by the rent seeking and patronage opportunities it presents. By way analogy, Morris Szeftel writes regarding Zambia, another African country that:

On the one hand, there is the demand by northern donors and the Bretton Woods institutions that international capital must have an attractive and

---

*and Privatization* (International Law Institute, Washington DC 1995) 320; P Mosley, 'Policy-Making without Facts: A Note on the Assessment of Structural Adjustment Policies in Nigeria, 1985-1990' (1992) 91 *Afr Aff* 227, 230.

<sup>676</sup> Nigerian National Planning Commission, *Meeting Everyone's Needs: National Economic Empowerment and Development Strategy* (Nigerian National Planning Commission, Abuja 2004).

<sup>677</sup> IMF, 'Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy' (Report) (December 2005) IMF Country Report No 05/433; IMF, 'Nigeria: Poverty Reduction Strategy Paper—Progress Report' (Report) (August 2007) IMF Country Report No 07/270.

<sup>678</sup> D Holtom, 'The Challenge of Consensus Building: Tanzania's PRSP 1998–2001' (2007) 45 *J Mod Afr Stud* 233, 240-247; T Mckinley, 'MDG-Based PRSPs Need More Ambitious Economic Policies' (2005) United Nations Development Programme Policy Discussion Paper <<http://www.undp.org/poverty/publications.htm>> accessed 24 October 2005 7-8. See also IMF, 'Guidelines on Conditionality' (September 2002) <<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>> accessed 20 March 2004 2.

<sup>679</sup> World Bank (International Development Association), 'Proposed Project Restructuring and Amendment of the Credit Agreements for the Privatization Support Project (Cr 3520-Uni) and Community Based Urban Development Project (Cr 3654-Uni) in the Context of the Portfolio Restructuring and in Alignment with the Country Partnership Strategy for the Federal Republic of Nigeria' (Report) (June 2005) Report No 32425-NG 5-7, 12-13; P Bennel, 'Privatization in sub-Saharan Africa' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 318. Also see I Abdulsalami, 'World Bank to Grant Aid via NEEDS' *The Guardian* (Lagos 26 July 2004) <<http://www.guardiannewsngr.com>> accessed 26 July 2004.

secure environment for investment; and, on the other, there are those in Zambia's ruling party for whom privatisation is an opportunity for personal accumulation. For those concerned with 'rolling back the state', who care little about how selling off public assets shapes Zambian society, the privatisation process *has* been exemplary. For those involved in private accumulation or perhaps more specifically, for the much larger number excluded from it, the programme is, indeed, less about liberalisation and more about looting.<sup>680</sup>

Issues pertaining to corruption in Nigeria's privatisation will be analysed later in the chapter, but what can be discerned from Morris Szeftel's observation above is the point earlier made that the different viewpoints of privatisation are not necessarily mutually inconsistent. However, to the extent that Nigeria's privatisation programme may not be solely or primarily driven by conviction about its economic development utility, and may not be a true home grown programme as claimed, which fully factors in the peculiarities of the social context of implementation, legal reforms undertaken to implement it may be less likely to facilitate such economic development in the country.

#### **4.1.2. THE PRIVATISATION LEGAL FRAMEWORK IN NIGERIA**

Some aspects of the legal and regulatory framework for the implementation of privatisation in Nigeria gives cause for concern, and the concern relates to both categories of laws and regulations noted in Chapter 2 as being vital for successful implementation of privatisation.<sup>681</sup> Specifically at issue are some legal and constitutional issues relating to the privatisation programme and the nature of some of the substantive provisions of the Public Enterprises Decree 1999 and other market-support legislations. Regarding the issue of legal and constitutional basis for some aspects of the privatisation programme and some transactions, there are some areas of conflict between the constitution of the country and the Public Enterprises Decree 1999. According to section 16 of the Nigerian Constitution:

The State shall, within the context of the ideals and objectives for which provisions are made in this constitution: (c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, *manage and operate the major sectors of the economy*; (d) without prejudice to the right of any person to *participate*

---

<sup>680</sup> M Szeftel, 'Globalisation & African Responses' (2000) 27 Rev African Polit Economy 353, 354.

<sup>681</sup> Chapter 2 para 2.3.1.2.



in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any *economic activities outside the major sectors of the economy*.<sup>682</sup> (emphasis added)

It further provides that:

The State shall direct its policy towards ensuring that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group.<sup>683</sup>

The above provisions appear inconsistent with the current privatisation agenda of the Federal Government, because while the Constitution stipulates that the state shall manage and operate the major sectors of the economy, the Public Enterprises Decree 1999 authorises the privatisation of many public enterprises that also fall within the major sectors of the economy, with the consequential takeover of management and operation by private investors.<sup>684</sup> Also, while the Constitution seeks to ensure that the means of production will not be concentrated in a few hands, the Public Enterprises Decree 1999, coupled with the current absence of a competition law or enforcement authority in the country, creates avenue for such concentration and the creation of monopolistic or oligopolistic market structures because the privatisation strategy of selling enterprises to core/ strategic investors provided under the decree, would mean fewer participants in the privatisation exercise particularly where such investors acquire full ownership of enterprises in which minority shareholders do not have effective means of participating in.<sup>685</sup> This has been noted to be the end result of privatisation in some of

---

<sup>682</sup> Constitution of the Federal Republic of Nigeria 1999 ss 16 (1)(c) and (d).

<sup>683</sup> Ibid s 16(2)(c).

<sup>684</sup> Public Enterprises Decree 1999 s 4. Also see K Onuoha, 'The Legal Regulation of Privatisation – A Critique' in E Onyekpere (ed), *Readings On Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 12-13. For contrasting views, see E Iheme, 'The Legal Regulation of Privatisation in Nigeria' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 2-3; MT Okorodudu-Fubara, 'State Control and Intervention in Strategic Business and the Promotion of Private Investment' in IA Ayua and B Owasanoye (eds), *Privatisation of Government Owned Banks and the Issue of Ownership and Control (Legal and Economic Perspectives)* (NIALS, Lagos 1996) 22-25.

<sup>685</sup> Public Enterprises Decree 1999 ss 4, 34; Guidelines on Privatisation of Government Enterprises paras 1, 13; O Igbuzor, 'Privatisation in Nigeria: Critical Issues of Concern to Civil Society' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 40, 41; L Azubuike, 'Privatization and Foreign Investments in Nigeria' (2005-2006) 13 *Tulsa J Comp & Int'l L* 59, 88; A Elebiju, 'The Investment and Securities Act of 1999: An Overview of Anti-Trust Considerations in the Regulation of Mergers in Nigeria' (2001) 3 *JIFM* 272, 279-281; A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] *IELTR* 219, 224.

the Africa countries and detracts from the privatisation objective of actualising popular capitalism.<sup>686</sup> Although the government indicated that privatisation would not be an instrument for the concentration of enterprise ownership in a few hands<sup>687</sup>, this may not have been reflected in the actual implementation process as will be seen later, and although the Public Enterprises Decree 1999 and Guidelines on Privatisation of Government Enterprises contain provisions for the general public to be able to acquire shares in various enterprises scheduled for privatisation, a key institutional mechanism for actualising this, the Share Purchase Fund Scheme, has still not been put in place several years after the commencement of the programme.<sup>688</sup> It should be noted however that section 16 noted above falls within Chapter 2 of the Constitution, which contains the Fundamental Objectives and Directive Principles of State Policy. These are policy objectives that should guide the government in policymaking and are non-justiceable by virtue of section 6(6)(c) of the Constitution, although the Nigerian Supreme Court has ruled that the parliament could enact legislation to make Chapter 2 provisions enforceable.<sup>689</sup> However, the fact that the same military government that enacted this Constitution equally enacted the Public Enterprises Decree 1999 buttresses the point earlier made that about insufficient consideration of the policy goals of the privatisation programme. Also regrettably, former President Obasanjo appeared to endorse such economic concentration based on a trickle down philosophy in an interview, and even referenced Russia where privatisation resulted in similar wealth concentration.<sup>690</sup> It

---

<sup>686</sup> C Cramer, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79, 89.

<sup>687</sup> V Akpotaire, 'The Nigerian Indigenisation Laws as Disincentives to Foreign Investment: The End of an Era' (2005) 26 BLR 62, 67; O Obasanjo (President of Nigeria), 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4.

<sup>688</sup> Public Enterprises Decree 1999 ss 2(2) and 5; Guidelines on Privatisation of Government Enterprises para 8(c), 9, 12.

<sup>689</sup> Attorney General of Ondo State v Attorney General of the Federation and 35 Others [2002] 6 SC (pt 1) 1. Also see BO Okere, 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' (1983) 32 ICLQ 214, 221-222; OO Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89, 104-105; KD Ewing, 'Social Rights and Constitutional Law' [1999] PL 104, 119-123; T Daintith, 'The Constitutional Protection of Economic Rights' (2004) 2 ICON 56, 71-74..

<sup>690</sup> W Wallis and D Mahtani, 'Why A Messianic Obasanjo Is Pleased By Nigeria's Progress' *Financial Times* (London 17 April 2007) <[http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto041720071453362471&page=2](http://us.ft.com/ftgateway/superpage.ft?news_id=fto041720071453362471&page=2)> accessed 17 April 2007. Also see D Doeh, 'Oil, Law and Politics in Russia' [2005] IELTR 205, 208; B Tsie, 'States and Markets in the Southern African Development Community (SADC): Beyond the Neo-Liberal Paradigm' (1996) 22 J S Afr Stud 75, 92; SJ King, 'Structural Adjustment and Rural Poverty in Tunisia' [1999] (210) Middle East Report 41, 42-43.

should be noted that a future government may yet decide to use section 16 as a basis to push for the nationalisation of some of the enterprises that have been privatised. In this regard, it could utilise the constitutional provision that says that:

A body shall be set up by an Act of the National Assembly which shall have power to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same.<sup>691</sup>

Another constitutional question has been raised regarding whether the National Council on Privatisation (NCP), the lead policymaking organ established under the Public Enterprises Decree 1999, can legally amend any of the schedules to the decree or sell to a core/ strategic investor, a stake that is more than the percentage of shares stipulated in the decree. Under the decree, the NCP is given the power to alter, amend, add to or delete from the privatisation and commercialisation schedules detailing the enterprises to be privatised.<sup>692</sup> Acting in exercise of this power, the NCP has made orders switching some enterprises from one list to the other or increasing the ownership stake to be acquired in some enterprises scheduled for partial privatisation.<sup>693</sup> Further, although the decree provides for the sale of privatisation shares to Nigerians on the basis of equality of states, the NCP has now decided that it should rather be done on the basis of equality of Federal Constituencies.<sup>694</sup> Although some have expressed the view that the NCP could validly exercise this power to alter or amend schedules to a legislation<sup>695</sup>, it should be noted that the Constitution vests all federal law making powers in the National Assembly, which is the federal legislature of the country.<sup>696</sup> Thus the

---

<sup>691</sup> Constitution of the Federal Republic of Nigeria 1999 s 16(3)(a). Also see C Bagu, 'Efficient Allocation of Resources or Looting the Patrimony – A Critical Review of Privatisation in Nigeria' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 48.

<sup>692</sup> Public Enterprises Decree 1999 ss 1(3) and 6 (3).

<sup>693</sup> Public Enterprises (Privatisation) Order 2000 and the Public Enterprises (Privatisation and Commercialisation) (No. 2) Order 2001.

<sup>694</sup> Public Enterprises Decree 1999 s 5(2); Guidelines on Privatisation of Government Enterprises paras 9.3(b), 12.1 and 12.4.

<sup>695</sup> A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] IELTR 219, 220.

<sup>696</sup> Constitution of the Federal Republic of Nigeria 1999 s 4.

Chairman of the legislative committee on privatisation and commercialisation has argued that such alteration of legislative schedules 'is unconstitutional, void, ultra vires and without legal backing whatsoever. An action can be maintained in court at any time to declare it so.'<sup>697</sup> The issue here is that the Public Enterprises Decree 1999, which was enacted during the era of military rule, became an 'existing law' upon the coming into force of the Constitution in 1999 and is now deemed to be an Act of the National Assembly, and thus cannot be amended by the NCP which the Constitution does not recognise as a law-making body.<sup>698</sup> This also applies to the power to 'approve the legal and regulatory framework for public enterprises to be privatised' conferred on the NCP by the Public Enterprises Decree 1999, which power falls squarely within the domain of the National Assembly.<sup>699</sup> The legal conflict explored above may later result in the legal challenge and invalidation of some privatisation transactions premised on the unconstitutionality of some of the actions of the NCP.

Some legal challenges may also result from issues stemming from the country's land tenure system. BPE has already been contacted by communities seeking substantial payment representing unpaid accumulated rent and compensation for land which the government used in building some enterprises that it now seeks to privatise.<sup>700</sup> In this regard, it should be noted that in some European countries for instance, the privatisation programmes provided for the compensation of, or reversion of title to previous owners of nationalised enterprises.<sup>701</sup> Unless BPE clearly resolves this issue and clarifies the property rights being acquired by private investors, the latter are likely to be wary about getting entangled in pre-existing conflicts and potentially facing lawsuits.

---

<sup>697</sup> NC Ughanze, 'Privatisation in Nigeria – Key Issues and Principles for the National Assembly' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 21.

<sup>698</sup> Constitution of the Federal Republic of Nigeria 1999 s 315.

<sup>699</sup> Public Enterprises Decree 1999 s 11(e); K Onuoha, 'The Legal Regulation of Privatisation – A Critique' in E Onyekpere (ed), *Readings On Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 16.

<sup>700</sup> O Okpongete, 'Refinery: Eleme Community Seeks N10bn Compensation' *Daily Independent* (Lagos 31 May 2004) <<http://www.dailyindependentng.com>> accessed 1 June 2004. Also see E Onyekpere, 'Challenges for the Privatisation Programme' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 31-32; C Bagu, 'Efficient Allocation of Resources or Looting the Patrimony – A Critical Review of Privatisation in Nigeria' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 49.

<sup>701</sup> KP Buschardt and WK Sievers, 'Privatisation in Poland' (1994) 5 ICCLR 128, 130; J Grozdanovic, 'Czechoslovakia: Privatisation' (1991) 2 ICCLR C155, C155-C156; A Evans, 'Privatisation and State Aid Control in E.C. Law' (1997) 18 ECLR 259, 260.

Besides the above issues, the Public Enterprises Decree 1999 does not appear to have adequate provisions for checks and balances to ensure proper accountability of the privatisation process. While it provided for the NCP to oversee the activities of the BPE in implementing privatisation, members of both bodies are appointees of the President, who is also the person to whom the NCP renders account to under the decree.<sup>702</sup> Given the legal, economic, social and other implications of privatisation especially where it involves enterprises in key sectors of the economy, it would have been better if there were an independent mechanism for overseeing their functioning. Efforts by the National Assembly to introduce such oversight mechanisms in a new legislative bill for privatisation were resisted by the former President until the last legislative session ended, although contemporaneous news reports indicate that the National Assembly still made effort to hold BPE and the President accountable.<sup>703</sup> Nevertheless, some of the flaws that have been observed in the implementation of privatisation in the country including transparency concerns, which will be examined later, may have resulted from absence of adequate checks and balances in the Public Enterprises Decree 1999.

Further on the issue of accountability as well as transparency, the methods of privatisation provided under the Public Enterprises Decree 1999 are open-ended, encompassing the sale of privatisation shares 'by public issue ... or private placement ... through a willing seller and willing buyer basis or through any other means.'<sup>704</sup> In this regard, the point was made earlier that privatisation through the capital market, which has been noted to offer greater transparency relative to other methods of privatisation, has not been predominantly used in Africa, partly due to the lack of robust capital markets in some African countries.<sup>705</sup> However, the Nigerian capital market, which has existed since the early 1960s is better developed than most of its counterparts in other

---

<sup>702</sup> Public Enterprises Decree 1999 ss 9, 10, 11(n)-(q), 17(1).

<sup>703</sup> C Ekpunobi, 'Obasanjo Vetoes Privatisation Amendment Bill' *Daily Champion* (Lagos 16 March 2005) <[http://champion-newspapers.com/news/teasers/article\\_2](http://champion-newspapers.com/news/teasers/article_2)> accessed 16 March 2005; U Awom and B Oladeji, 'Reps Override Obasanjo's Veto of Privatisation Bill' *Daily Independent* (Lagos 19 May 2005) <<http://www.dailyindependentng.com/>> accessed 19 May 2005; P Nwigwe, 'BPE's Never Ending Battle with the Reps' *The Guardian* (Lagos 6 May 2005) <[http://www.guardiannewsngr.com/policy\\_politics/article01](http://www.guardiannewsngr.com/policy_politics/article01)> accessed 6 May 2005; U Awom, 'Reps Raise Alarm over N43 Billion Privatisation Funds' *Daily Independent* (Lagos 9 April 2004) <<http://www.dailyindependentng.com>> accessed 9 April 2004.

<sup>704</sup> Public Enterprises Decree 1999 s 2(3).

<sup>705</sup> RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 58.

African countries and was extensively used during the first privatisation programme.<sup>706</sup> The earlier noted privatisation strategy of selling enterprises to core/ strategic investors coupled with the discretion afforded under the Public Enterprises Decree 1999 to utilise other methods of privatisation besides public offer, created openings for some of the non-transparent deals that emerged, as will be seen later in the chapter.<sup>707</sup> In this regard, it is curious that the privatisation decree does not have an ‘offences’ section that stipulates offences relating to privatisation and the punishment thereof.<sup>708</sup> Indeed it even seeks to place a limitation on law suits against members of the NCP and officers and staff of the BPE. Given the potential for conflict of interest in the discharge of responsibilities associated with selling multibillion dollar worth of national assets, the omission is quite regrettable. Regarding potential criminal prosecutions, it has also been pointed out that gaps in the old criminal procedure laws in the country could impact on the prosecution of corruption given that they have not been updated to take account of new and evolving forms of corruption.<sup>709</sup>

Beyond the completion of privatisation transactions, the legal framework for continued monitoring of privatised enterprises to ensure that their performance is in consonance with set objectives has some defects. Although the Guidelines on Privatisation of Government Enterprises state that a core/ strategic investor’s post-privatisation plans for the management, development and financing of the enterprise, as well as plans for employing local managers, technology transfer and staff welfare, retraining and development are some of the critical issues to be taken into consideration in negotiating with the investor<sup>710</sup>, the Public Enterprises Decree 1999 does not provide a post-privatisation monitoring mechanism to ensure that there is no post-contractual breach by the core/ strategic investor regarding these considerations which have significant

---

<sup>706</sup> J Edozien and SO Adeoye, ‘Privatisation in Nigeria’ in VV Ramanadham (ed), *Privatisation in Developing Countries* (Routledge, London 1989) 296; JJ Bala, ‘The Impacts of Privatization on Distributional Equity in Nigeria’ in VV Ramanadham (ed) *Privatization and Equity* (Routledge, London 1995) 210-214.

<sup>707</sup> Chapter 4 para 4.1.2.

<sup>708</sup> Cf The Public Enterprises Reform and Divestiture Act 1993 (Uganda) ss 36-39 (these sections are contained in pt VII of the Act titled ‘Offences and Penalties’, and stipulate various penalties for privatisation related malfeasance).

<sup>709</sup> NS Okogbule, ‘Official Corruption and the Dynamics of Money Laundering in Nigeria’ (2007) 14 JFC 49, 58.

<sup>710</sup> Guidelines on Privatisation of Government Enterprises para 14.3. Also see A Adefulu, ‘Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry’ [2000] IELTR 219, 221.

economic development implications.<sup>711</sup> There is also the risk of malfeasance such as asset stripping which has been noted in countries like Russia<sup>712</sup>, which would be particularly detrimental to the interests of ordinary citizens where they own minority shares, and same for the government where it still retains some stake in a privatised enterprise or has continuing financial commitment to it under the term of the privatisation contract. Unless such a mechanism is provided through privatisation contractual stipulations, the government will be constrained in its ability to effectively ensure that privatisation law achieves intended effects.

In absence of specific legal or contractual provisions for the post privatisation monitoring of privatised enterprises, the general legal provisions for regulating private enterprises in the country would have to be relied on. In the case of privatised enterprises listed on the stock exchange, they would be under the supervisory jurisdiction of the Securities and Exchange Commission, by virtue of the Investment and Securities Act 2007, while those that are non-listed, as is the case with many core/strategic investors, can be monitored by the Corporate Affairs Commission (CAC), the statutory body that administers the Company and Allied Matters Act 1990 which generally deals with corporate governance issues in Nigerian companies.<sup>713</sup> Issues relating to the effectiveness of these laws will be discussed later within the context of examining the robustness of the institutions charges with administering them.

A final point to consider is the legal requirement for foreign investors to incorporate their businesses as separate entities under Nigerian law before they can operate in the country.<sup>714</sup> Some have viewed this as an unnecessary bottleneck that does not particularly confer any benefit on the country, could cause bureaucratic delays and raise transaction costs for a prospective investor who may decide to turn to other jurisdictions with lesser procedural bottlenecks.<sup>715</sup>

---

<sup>711</sup> The Decree only provides for post-commercialisation monitoring. Unlike privatised enterprises, the government still has complete ownership and control of commercialised enterprises. See Public Enterprises Decree 1999 s 14(e); Guidelines on Privatisation of Government Enterprises para 7.

<sup>712</sup> N Lazarev, 'On Certain Issues of the Modern Corporate Governance Reform in Russia' (2006) 17 ICCLR 143, 144.

<sup>713</sup> Company and Allied Matters Act 1990 s 1.

<sup>714</sup> *Ibid* s 54.

<sup>715</sup> OO Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89, 97-98; TI Ogowewo, 'The Shift to the

## **4.2. ENSURING PROPER IMPLEMENTATION OF PRIVATISATION**

The view taken in the thesis is that while the above discussed design problems of the programme resulting from the inadequacy or insufficiency of the privatisation policy and legal provisions contributed to its problematic implementation, they may not fully account for the fact that key aspects of the economic development objectives of privatisation have not yet been realised. Following the analytical framework of the dissertation, 4 key implementation questions, answers to which have impact on the attainment of the key economic development objectives that informed the privatisation legal framework will be analysed namely, is the national environment conducive to embarking on privatisation and attracting private investments?; secondly, is the institutional framework for implementing and monitoring the outcome of privatisation robust?; thirdly, will the strategic approach to the implementation of privatisation lead to the realisation of set policy objectives?; and finally, is the privatisation process accountable, transparent and free from corruption?

### **4.2.1. IS THE NATIONAL ENVIRONMENT CONDUCTIVE TO EMBARKING ON PRIVATISATION AND ATTRACTING PRIVATE INVESTMENTS?**

Although the Nigerian government, like many other African countries, has enacted various laws that seek to promote foreign investments and stipulate various guarantees against various political risks that could erode the contractual rights and property rights of foreign investors<sup>716</sup>, this has not yet led to the expected massive investments in the country outside the oil and gas sector especially in the manufacturing sector.<sup>717</sup> Tunde Ogowewo notes that:

---

Classical Theory of Foreign Investment: Opening Up the Nigerian Market' (1995) 44 ICLQ 915, 924-925; KUK Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 JAL 177, 183-184. For possible advantages of local incorporation for Nigeria as well as foreign investors, see AA Akume, 'The Legal Status of Foreign Companies in Nigeria' (2000) 7 ABULSJ 46, 48-49, 53-54.

<sup>716</sup> Nigerian Investment Promotion Commission Decree (Act) No. 15 of 1995; The Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree (Act) No. 16 of 1995. See also KUK Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 JAL 177, 188-192.

<sup>717</sup> KUK Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 JAL 177, 204-206; O Obayomi, 'Nigeria: Capital Market Reform' (1996) 11 JIBFL 291, 291-292.



... countries are in a market for foreign investment where success is dependent on three variables: (a) country-specific factors ... (b) the foreign investment policy of the country ... and (c) the state of factors (a) and (b) of countries similarly situated.<sup>718</sup> (footnotes omitted)

Regarding such country-specific factors, the analysis here as in preceding chapters, focuses on three key issues namely socio-political concerns resulting from the implementation of privatisation, general socio-political instability in the country and pre-existing systemic problems affecting the private business sector in a country.

On the issue of socio-political concerns resulting from the implementation of privatisation, protests by key stakeholders and reprisal action by the government has dogged the implementation of privatisation in the country. Although the Nigerian government noted the necessity for 'mass participation, involvement and support of all stakeholders' in the privatisation programme<sup>719</sup>, it has been noted that 'there is a gap between the leadership and the people particularly in privatisation.'<sup>720</sup> Contemporaneous news reports indicate that force has sometimes been used to quell demonstrations by workers protesting their arbitrary sacking and the non-payment of their terminal benefits, and workers and other tenants have sometimes been forcibly evicted from public accommodation in readiness for privatisation, sometimes in defiance of court orders.<sup>721</sup> The government has also utilised new legislation to curb the ability of trade unions to embark on industrial action, thus substantially narrowing the

---

<sup>718</sup> TI Ogowewo, 'The Shift to the Classical Theory of Foreign Investment: Opening Up the Nigerian Market' (1995) 44 ICLQ 915, 920.

<sup>719</sup> A Abubakar (Vice President of Nigeria), 'Acceptance Speech on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 9.

<sup>720</sup> Note comments of the Socio-Economic Rights Initiative (SERI). On this see, E Ugwuanyi, 'Rights Group Rolls Out Action Agenda on Privatisation' *Vanguard* (Lagos 26 February 2004) <<http://www.vanguardngr.com>> accessed 26 February 2004.

<sup>721</sup> K Ehigiator and A Icheku, 'Mobile Policemen take Possession of Airways' Premises, Fire Tear Gas at Workers' *Vanguard* (Lagos 30 September 2004) <<http://odili.net/news/source/2004/sep/30/308.html>> accessed 3 October 2004; W Shadare, 'Liquidator Ejects Ex-Airways Workers from Quarters' *The Guardian* (Lagos 13 August 2005) <<http://www.guardiannewsngr.com/news/article05>> accessed 13 August 2005; D Jackson, 'Military Evict Eric Moore Residents in Lagos' *Daily Independent* (Lagos 9 December 2005) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 9 December 2005.

scope for challenging its implementation of key economic reforms.<sup>722</sup> Former President Obasanjo was quoted as saying that ‘One should really pity those that are against privatisation because one can even pass them as enemies of the society.’<sup>723</sup>, and this mindset perhaps reflects how the government perceived the issue of workers protests, and also echoes the earlier noted position articulated in a World Bank report that:

Leaders must have the means to implement change and to withstand opposition to reform ... the leadership must be able to withstand opposition to reform from potential losers, these may be SOE employees, especially when such groups are organized, numerous, and ready to engage in demonstrations, work stoppages in strategic industries, and other actions that might be costly to the government.<sup>724</sup>

The prevalence of protests as earlier noted is indicative of the absence of an adequate framework for the consultation and participation of key stakeholders in a privatisation programme, which is a key part of gaining broad-based local support for a reform measure, adapting it to suit local circumstances and ensuring genuine national ownership of the reform.<sup>725</sup> Commenting on the restrictions placed on workers’ rights in Nigeria in order to facilitate the implementation of economic reforms acceptable to the IFIs, Obiora Okafor notes as follows:

If, as the World Bank has recently shown, ‘‘within-country’’ and ‘‘global’’ inequities are key obstacles to economic development in third world states, then the equitable distribution of resources among a country’s population is also necessary for such development to occur. ...Real and meaningful popular participation, enabled by the exercise of basic civil/political rights, in the shaping of economic reform agendas is key to ensuring that economic policies lead to an equitable distribution among the population of the available resources of that country. As is

---

<sup>722</sup> Trade Union (Amendment) Act 2005. Also see OC Okafor, ‘The Precarious Place of Labour Rights and Movements in Nigeria’s Dual Economic and Political Transition, 1999–2005’ (2007) 51 JAL 68, 84–87. Also see 78.

<sup>723</sup> M Onuorah and L Anyikwa, ‘President Defends Privatisation, Eight Firms Bid for Afribank’ *The Guardian* (Lagos 14 January 2004) <<http://www.guardiannewsngr.com/news/article06>> accessed 14 January 2004.

<sup>724</sup> World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* - A World Bank Policy Research Report (OUP, New York 1995) 10, 11, 12. Also see Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 168; Chapter 2 para 2.3.2.1.

<sup>725</sup> Chapter 2 para 2.3.2.1; Chapter 3 para 3.2.1. See generally C Price, ‘Privatisation in Less Developed Countries’ in PM Jackson and CM Price (eds), *Privatisation and Regulation: A Review of the Issues* (Longman, London 1994) 250.

often the case, the economic policies that are appropriate to a particular society cannot be properly identified and implemented by relying solely on the technocratic wisdom of either the IMF/WB, the government in question, or both.<sup>726</sup> (footnote omitted)

It should be noted that although the NCP has a labour representative, this has not prevented the shabby treatment of staff of public enterprises slated for privatisation, of which it has been noted that the top hierarchy of the official labour movement appears to be too close to the government and supportive of its policies to adequately represent the interests of workers<sup>727</sup>, who have continued to resort to protests to press for their entitlements. On a broader note, the fact that the Public Enterprises Decree 1999 was enacted by a military regime and hence did not pass through the process of legislative drafting by an elected parliament would have contributed to the problem of ineffective consultation and participation. The key point however is that the pervasive cycle of protests and reprisals would likely make potential investors wary that they could inherit such issues from the government and commence business on a hostile and volatile note.<sup>728</sup>

There are also key concerns regarding general socio-political instability in the country, which also has impact on privatisation. It has been noted that:

A peaceful environment is a *sine qua non* to the attraction of foreign investment. The restiveness in the host communities makes the environment hostile and repulsive to investment, both in the maintenance of existing investments and the attraction of new ones. Potential new investors are apt to stay away from volatile host states.<sup>729</sup>

---

<sup>726</sup> OC Okafor, 'The Precarious Place of Labour Rights and Movements in Nigeria's Dual Economic and Political Transition, 1999–2005' (2007) 51 JAL 68, 91. Also see AO Olukoshi and I Aremu, 'Structural Adjustment and Labour Subordination in Nigeria: The Dissolution of the Nigeria Labour Congress Re-Visited' [1988] (43) Rev African Polit Economy 99, 99, 107.

<sup>727</sup> C Bagu, 'Efficient Allocation of Resources or Looting the Patrimony – A Critical Review of Privatisation in Nigeria' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 49.

<sup>728</sup> Note for instance D Ogah, 'We Can't Possess Our Terminals, Port Concessionaire Cries Out' *The Guardian* (Lagos 24 October 2005) <<http://www.guardiannewsngr.com/maritime/article01>> accessed 24 October 2005.

<sup>729</sup> GS Akpan, 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' [2006] IELTR 1, 8.

Such peaceful environment has been largely undermined in Nigeria by reports of general insecurity and widespread prevalence of criminality, and the ineffectiveness of the Nigerian police.<sup>730</sup> There have also been rising instances of armed bandits attacking or kidnapping investors in the country, including privatisation investors.<sup>731</sup> This has been particularly prevalent in the Niger Delta region of the country where several militant groups have sprung up and are creating an increasingly hostile situation for foreign investors operating in the region, partly as a result of environmental degradation stemming from oil production, which has persisted despite the laws, regulations and institutional structures designed to address such matters.<sup>732</sup> The fact that legal redress through the courts has often been time consuming and unsuccessful may have played a role in driving people towards unlawful ways of airing grievances.<sup>733</sup> These issues come within the categorisation of host community hostility risk, which is distinct from the political risks that investors usually fear, on account of the fact that whereas normal political risks stem from fear of government intervention, host community hostility risk could be as a result of non-state actors and may even pit the host community against both the investor and the government.<sup>734</sup>

With local communities threatening to frustrate the operations of some of the enterprise located there, and also stop the privatisation of some public enterprises based there<sup>735</sup>,

---

<sup>730</sup> N Out, 'The Development and Growth of the Nigeria Police Force from a Social Context Perspective' (2004) 77 PJ 19, 19-20; O Obayomi, 'Nigeria's New Investment Laws' [1997] JBL 593, 604; O Maduforo, 'Commercial Banks in Nnewi may Close Shop' *Daily Independent* (Lagos 5 June 2009) <<http://odili.net/news/source/2009/jun/5/403.html>> accessed 5 June 2009.

<sup>731</sup> O Bassey, 'Kidnapped UC RUSAL-ALSCON Director Feared Killed' *Thisday* (Lagos 1 January 2009) <<http://www.thisdayonline.com/nview.php?id=131981>> accessed 1 January 2009.

<sup>732</sup> NE Ojukwu-Ogba, 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth' [2006] IELTR 201, 201-202, 206-207; OO Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89, 107; R Eberlein, 'On the Road to the State's Perdition ? Authority and Sovereignty in the Niger Delta, Nigeria' (2006) 44 J Mod Afr Stud 573, 573-574, 579.

<sup>733</sup> KSA Ebeku, 'Compensation for Damage Arising from Oil Operations: Shell Petroleum Development Company of Nigeria v Ambah Revisited' [2002] IELTR 155, 155, 161-162. See however O Animashaun, 'Compensation for Damage Arising from Oil Operations: Shell Petroleum Development Company of Nigeria v Ambah revisited - a rejoinder' (2002) IELTR 164, 164-165.

<sup>734</sup> GS Akpan, 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' [2006] IELTR 1, 8, 11.

<sup>735</sup> S Igboanugo, 'Community Threatens to Stop NNPC's Privatisation' *Daily Independent* (Lagos 13 May 2004) <<http://www.dailyindependentng.com>> accessed 13 May 2004; I Ombe, 'Bayelsa Community Threatens to stop SPDC's Operations' *The Nation* (Lagos 22 October 2008) <<http://www.thenationonlineng.com/dynamicpage.asp?id=67027>> accessed 22 October 2008.

many potential investors would be concerned about getting entangled in pre-existing squabbles or lawsuits which could undermine the profitability of their investments. The above scenario could also play out in other host communities outside Niger Delta facing related issues.

The last issue to consider is the issue of systemic problems affecting the private business sector in Nigeria, which have resulted in the country having a very unfriendly business environment.<sup>736</sup> The country frequently ranks very low amongst other countries within and outside Africa in surveys that assess various hinderances to commencing and conducting business in various countries, of which a recent study shows that it is slipping further in the rankings.<sup>737</sup> Some of the problems facing the Nigerian private sector which affect productivity and profitability and have been noted to make foreign investors unwilling to invest include inconsistency in, and faulty implementation of business policies<sup>738</sup>, inadequate and inefficient utility/ infrastructural services<sup>739</sup>, multiple taxation<sup>740</sup>, public sector corruption and rent seeking<sup>741</sup>, and prevalence of fraud.<sup>742</sup>

---

<sup>736</sup> See generally KUK Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 JAL 177, 204-206.

<sup>737</sup> World Bank/IFC, *Doing Business 2009: Comparing Regulation in 181 Economies* (World Bank/IFC/Palgrave Macmillan, Washington DC 2008) 6, 83. Also see Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 180.

<sup>738</sup> TI Ogowewo, 'The Shift to the Classical Theory of Foreign Investment: Opening Up the Nigerian Market' (1995) 44 ICLQ 915, 926; Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 180; T Forrest, 'The Political Economy of Civil Rule and the Economic Crisis in Nigeria (1979-84)' [1986] (35) Rev African Polit Economy 4, 19.

<sup>739</sup> EI Kachikwu, *Nigerian Foreign Investment Law and Policy* (Mikzek Law Publications Limited, Lagos, 1988) 125-126; O Obayomi, 'Nigeria's New Investment Laws' [1997] JBL 593, 604; A Olukoju, "'Never Expect Power Always': Electricity Consumers' Response to Monopoly, Corruption and Inefficient Services in Nigeria' (2004) 103 Afr Aff 51, 60; AF Adenikinju, 'Electric Infrastructure Failures in Nigeria: A Survey-Based Analysis of the Costs and Adjustment Responses' (2003) 31 Energy Pol'y 1519, 1523.

<sup>740</sup> O Arowolo, 'Eti-Osa Local Government v Jegede: A Fillip for Responsible Tax Administration in Nigeria' (2008) 19 ICCLR 25, 25, 27-28.

<sup>741</sup> EI Kachikwu, *Nigerian Foreign Investment Law and Policy* (Mikzek Law Publications Limited, Lagos, 1988) 127-128; PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 JAL 173, 173-176, 184-185, 188-189.

<sup>742</sup> CA Malgwi, 'Fraud as Economic Terrorism: The Efficacy of the Nigerian Economic and Financial Crimes Commission' (2004) 12 JFC 144, 147-148

Some multinational investors it should be noted, have closed their operations or divested from the country in recent years according to news reports<sup>743</sup>, of which some other competing investment destinations within and outside Africa appear more competitive than the country in key sectors.<sup>744</sup>

#### **4.2.2. IS THE INSTITUTIONAL FRAMEWORK FOR IMPLEMENTING AND MONITORING THE OUTCOME OF PRIVATISATION ROBUST?**

It has been noted that Nigeria suffers from the problems of weak institutions and limited technical capacity in the implementation of economic reforms.<sup>745</sup> As the administrative body charged with implementing the Nigerian privatisation programme, BPE is tasked with undertaking various preparatory tasks that precede privatisation, overseeing the privatisation sale itself and ensuring that the privatisation programme is a success, and the Public Enterprises Decree 1999 places it under the supervision of the National Council of Privatisation (NCP), which is itself charged with making various approvals regarding the sale price and time of sale, the method of privatisation, the valuation criteria for enterprises and selection criteria for core/ strategic investors.<sup>746</sup> There are also various provisions in the Public Enterprises Decree 1999 as well as the Guidelines on Privatisation of Government Enterprises and the Blueprint of the Privatisation Programme that explain how the above tasks will be undertaken aimed at ensuring the

---

<sup>743</sup> K Ebiri, R Chikwreuba and S Salau, 'U.S. Firm Quits Nigeria as Militants Kidnap more Oil Workers' *The Guardian* (Lagos 11 August 2006) <<http://odili.net/news/source/2006/aug/11/52.html>> accessed 15 August 2006; E Amaefule, 'Foreign Investors Exit Caused Stock Market Crisis – Soludo' *Punch* (Lagos 4 October 2008) <<http://www.punchng.com/>> accessed 4 October 2008; E Onu, 'Dunlop Shuts Down Factory, Records N2bn Loss' *Daily Independent* (Lagos 3 December 2008) <<http://www.independentngonline.com/>> accessed 4 December 2008.

<sup>744</sup> EA Witten, 'Arbitration of Venezuelan Oil Contracts: A Losing Strategy?' (2008-2009) 4 *Tex J Oil, Gas & Energy* L 55, 84; G Tyler, 'Nigeria: Public and Private Electricity Provision as a Barrier to Manufacturing Competitiveness' (2002) 221 *Findings* (World Bank) <<http://www.worldbank.org/afr/findings/english/find221.pdf>> accessed 2 December 2005.

<sup>745</sup> IMF, 'Nigeria: 2004 Article IV Consultation—Staff Report; and Public Information Notice on the Executive Board Discussion' (Report) (August 2004) IMF Country Report No 04/239 33.

<sup>746</sup> Public Enterprises Decree 1999 ss 11, 13(1). See also O Arowolo, 'Nigeria's Downstream Sector Deregulation Crisis: What are the Unresolved Issues?' [2005] *IELTR* 10, 14.

predictability of the privatisation process, ensuring that qualitative investors emerge from it and ensuring that the country will not be short changed in the process.<sup>747</sup>

As noted by some scholars and also seen from contemporaneous news reports, the actual implementation of privatisation has in many instances been defined by errors and mishaps that undermined the predictability that prospective investors usually seek and raised questions about the capability of the above institutional mechanism for implementing privatisation.<sup>748</sup> Some of the major errors that have been recorded with regard to various privatisation transactions include the arbitrary and inconsistent extension of deadlines for receipt of Expression of Interest (EOI) by prospective investors as well as the deadline for payment by winning bidders<sup>749</sup>; non-disclosure of huge debt owed by a public enterprise to another public enterprise prior to privatisation<sup>750</sup>; arbitrary cancellation of some transactions either before or after the conclusion of bidding<sup>751</sup>; non-transparent short listing of bidders and introduction of

---

<sup>747</sup> Public Enterprises Decree 1999 ss 11(c), 13(1)(h), 19(1), 21, 22; Guidelines on Privatisation of Government Enterprises paras 8, 9(2), 13, 14, 17; National Council on Privatisation, Nigeria, 'Blueprint of the Privatisation Programme' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 73-75. Also see N Dimgba and LO Okeke, 'Nigeria: Telecommunications – Privatisation' (2000) 6 CCLR N124, N124-N125; Also see G Gbadamosi, 'BPE gets Report on Revised Privatisation Procedures' *The Guardian* (Lagos 15 September 2005) <<http://www.guardiannewsngr.com/business/article02>> accessed 15 September 2005.

<sup>748</sup> V Akpotaire, 'The Nigerian Privatisation Laws, Insider Dealing Abuses, and the Regulatory Authorities' (2002) 23 BLR 291, 292: 'The difficulties and problems associated with these agencies may be three-fold namely: a lack of consistency in the privatisation scheme, unfair market practices often visible from the initiatives of those in charge of these agencies, and sometimes outright incompetence of personnel and undue haste and compartmentalisation of the privatisation process.' See also O Gabriel, 'Privatisation Blues in Nigeria, ALSCON Another NITEL in the Waiting' *Vanguard* (Lagos 5 July 2004) <<http://www.vanguardngr.com/articles/2002/business/b305072004.html>> accessed 5 July 2004; C Ogbu, 'Transparency and Privatisation' *The Punch* (Lagos 25 March 2005) <<http://odili.net/news/source/2005/mar/25/524.html>> accessed 28 March 2005.

<sup>749</sup> F Abugu, 'Report Disqualifies All NITEL Bidders' *The Guardian* (Lagos 22 May 2005) <<http://www.guardiannewsngr.com/news/article02>> accessed 22 May 2005; E Amaefule and O Akintunde, 'NITEL: NCP Waives Deadline for Transcorp' *The Punch* (Lagos 14 August 2006) <<http://www.punchontheweb.com/articl.aspx?theartic=art200608141542436>> accessed 14 August 2006; S Adejokun, 'BPE Shuns Reps, Insists on ALSCON Sale to Rusal' *Daily Independent* (Lagos 4 May 2005) <<http://www.dailyindependentng.com/>> accessed 4 May 2005.

<sup>750</sup> LI Juwah, 'Securities Regulation: Issues of Ethics and Compliance in the Capital Market Of Nigeria' (2005) 20 JIBLR 193, 196.

<sup>751</sup> A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] IELTR 219, 221; M Oduniyi, 'BPE Cancels Bids for PH Refinery, says Investors Fail Qualification Test' *Thisday* (Lagos 19 December 2005) <<http://www.thisdayonline.com/nview.php?id=36115>> accessed 19 December 2005; C Akwaya, 'NCP Voids Katsina's Bid for Steel Mill' *Thisday* (Lagos 31 December 2004) <[www.thisdayonline.com](http://www.thisdayonline.com)> accessed 31 December 2004.

new rules mid-way into some transactions<sup>752</sup>; non-transparent selection of core/strategic investors or management contractors for some enterprises<sup>753</sup>; transfer of some enterprises to financially weak core/strategic investors that could not pay the bid price or technically incompetent core/strategic investors or management contractors that did not have verifiable track records<sup>754</sup>; disqualification of a bidder on basis of incompetence after the bidder successfully emerged from the 'rigorous' pre-qualification process and won the bid, and subsequently selling the same enterprise to a previously disqualified company<sup>755</sup>; changing the method of privatisation midway into a transaction<sup>756</sup>, adopting an inconsistent approach to failed transactions, with the BPE sometimes publicly re-advertising the enterprise and commencing the process again, and sometimes failing to do so and rather resorting to the non-transparent 'negotiated sale' method.<sup>757</sup> Although the BPE has sought to blame its technical advisers for some of the above failures, it appeared to have disregarded sound advice in some cases, only to proceed to make clearly avoidable blunders.<sup>758</sup> In some instances, it failed to

---

<sup>752</sup> E Okon, 'NITEL Privatisation: BPE Must do what is Really Right' *The Punch* (Lagos 17 August 2005) <<http://odili.net/news/source/2005/aug/17/464.html>> accessed 17 August 2005.

<sup>753</sup> S Adejokun, 'NCP Opens New Bid for Mint Management Contract' *Daily Independent* (Lagos 2 June 2004) <<http://www.dailyindependentng.com>> accessed 2 June 2004; Editorial, 'Transcorp and NITEL' *Thisday* (Lagos 9 July 2006) <[http://www.thisdayonline.com/nview.php?id=52653&printer\\_friendly=1](http://www.thisdayonline.com/nview.php?id=52653&printer_friendly=1)> accessed 9 July 2006.

<sup>754</sup> CA Malgwi, 'Fraud as Economic Terrorism: The Efficacy of the Nigerian Economic and Financial Crimes Commission' (2004) 12 JFC 144, 158; L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTLR 229, 231, 232-233; E Onyekpere, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005) 45-50; V Ebimomi, 'Receivers take over Daily Times' *Daily Independent* (Lagos 15 April 2005) <<http://www.independentng.com/news/nnapr150509.htm>> accessed 15 April 2005; J Elendu, 'Fraud at Daily Times: EFCC Petitioned', *Elendu Reports*, 1 March 2006) <[http://www.elendureports.com/index.php?option=com\\_content&task=view&id=179&itemid=33](http://www.elendureports.com/index.php?option=com_content&task=view&id=179&itemid=33)> accessed 1 March 2006; O Aihe and B Agande, 'Forged Papers Gave Pentascope the NITEL Contract' *Vanguard* (Lagos 1 June 2005) <<http://odili.net/news/source/2005/jun/1/308.html>> accessed 1 June 2005.

<sup>755</sup> E Ujah, 'FG U-Turns on ALSCON; Dumps BFIG, Invites Bid Losers Rusal' *Vanguard* (Lagos 18 June 2004) <<http://www.vanguardngr.com/articles/2002/nationalx/nr118062004.html>> accessed 18 June 2004.

<sup>756</sup> J Lohor, 'NCP Asks FG to Sell Afribank Shares' *Thisday* (Lagos 5 April 2005) <<http://odili.net/news/source/2005/apr/5/208.html>> accessed 6 April 2005; E Ujah, 'Afribank: BPE Insists on Core Investor Sale' *Vanguard* (Lagos 27 April 2004) <<http://www.vanguardngr.com/articles/2002/cover/f427042004.html>> accessed 27 April 2004.

<sup>757</sup> A Osae-Brown and A Olawunmi, 'FG Bends Backwards for Rusal over ALSCON' *Businessday* (Lagos 17 February 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 17 February 2006; S Adejokun and D Basse, 'Zenith, IGI, Five Others Pre-Qualify for NICON' *Daily Independent* (Lagos 1 August 2005) <<http://www.dailyindependentng.com/>> accessed 1 August 2005.

<sup>758</sup> L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTLR 229, 231, 234; F Abugu, 'Report Disqualifies All NITEL Bidders' *The Guardian* (Lagos 22 May 2005) <<http://www.guardiannewsngr.com/news/article02>> accessed 22 May 2005.



undertake basic tasks such as getting ready the fully audited accounts of some of the enterprises including detailed reports on the state of their facilities.<sup>759</sup> These issues would give any serious investor cause for concern, and the very broad disclaimer on the BPE website will do little to inspire investor confidence.<sup>760</sup>

At least 2 key issues appear to have contributed to the above errors and mishaps. The first is the inadequate staffing of BPE prior to the commencement of the privatisation programme, of which it has continued to undergo staff restructuring several years after the programme commenced<sup>761</sup>, and this might account for its inability to undertake basic due diligence to ascertain the competence of some of the prospective corestrategic investors.<sup>762</sup> The second is political interference in its functioning including frequent replacement of the head of BPE.<sup>763</sup> The issue of political interference will be examined in greater detail later within the context of analysing the influence of corruption in the privatisation programme.

There are a number of concerns regarding the adequacy of market support institutions needed to regulate the conduct of privatised enterprises after the conclusion of privatisation. In the first place, the point was earlier made that the country does not yet have a competition law or competition enforcement authority<sup>764</sup>, and the BPE has been

---

2005; O Aihe, 'Obasanjo Cancels \$256m Deal Offer for NITEL' *Vanguard* (Lagos 2 January 2006) <<http://odili.net/news/source/2006/jan/2/301.html>> accessed 2 January 2006; A Folasade-Koyi, 'BPE Misled by Bad Experts, Advisers, says Chigbue' *Daily Independent* (Lagos 1 June 2005) <<http://www.dailyindependentng.com/>> accessed 1 June 2005.

<sup>759</sup> J Nse, 'Privatisation: Bidders Seek Information on NICON's Audited Accounts' *The Guardian* (Lagos 30 August 2005) <<http://odili.net/news/source/2005/aug/30/46.html>> accessed 30 August 2005.

<sup>760</sup> BPE, 'Disclaimer' <<http://bpe.dev.bsh-bg.com/en/Disclaimer.htm>> accessed 22 June 2006.

<sup>761</sup> C Akwaya, 'BPE Moves Directors, Others in Major Re-Organisation' *Thisday* (Lagos 10 April 2005) <<http://www.thisdayonline.com/nview.php?id=14153>> accessed 10 April 2005.

<sup>762</sup> J Ogbodo, 'NCP, BPE Admit Error in ALSCON Privatisation' *The Guardian* (Lagos 14 June 2005) <<http://odili.net/news/source/2005/jun/15/17.html>> accessed 14 June 2005.

<sup>763</sup> K Aderinokun, 'Bala Replaces El-Rufai as BPE DG, Bureau Begins Search for Core Investor for Afribank Today' *Thisday* (Lagos 23 July 2003) <<http://odili.net/news/source/2003/jul/23/203.html>> accessed 23 July 2003; C Akwaya, 'FG Appoints Chigbue, BPE DG, Bala takes Removal Calmly, Hands over Today' *Thisday* (Lagos 8 March 2005) <<http://www.thisdayonline.com/nview.php?id=11319>> accessed 8 March 2005.

<sup>764</sup> Although the Investment and Securities Act 2007 has some competition provisions and tasks the Securities and Exchange Commission with undertaking some limited competition functions, it has been noted that 'the Act seems to misconceive the proper role of SEC by virtue of some specific antitrust powers given to SEC outside the sphere of merger control. See N Dimgba, 'The Regulation of Competition through Merger Control: the Case under the Investment and Securities Act 2007' (Nigerian

criticised for implementing the privatisation of enterprises in certain sectors in a way that way aimed at creating private monopolies<sup>765</sup>, despite the emphasis placed on competition in the privatisation blueprint and the government's emphasis that 'We are not about to replace public monopoly with private monopoly',<sup>766</sup>

There are also some questions about the ability of the Securities and Exchange Commission and the Corporate Affairs Commission to effectively supervise the conduct of privatised companies. It has been noted that 'successful privatisations and the development of vibrant private sectors depend to a significant extent on the existence of effective systems of corporate governance.'<sup>767</sup> In this regard, there have been increasing reports of the asset stripping of some privatised enterprises contrary to the contractual agreement to effectively manage and infuse new investments in such enterprises, with the government sometimes stepping in to revoke the transaction after such pillage had gone on for sometime.<sup>768</sup> Although the Corporate Affairs Commission is empowered, in the shareholders' interest as well as the wider public, to monitor corporate governance compliance in incorporated companies by investigating where necessary how they are run<sup>769</sup>, these instances of corporate governance failures have

---

Bar Association (NBA) Section on Business Law Conference, 2009) <<http://www.globalcompetitionforum.org/regions/africa/Nigeria/The%20Regulation%20of%20Competition%20through%20Merger%20Control%20and%20the%20ISA%202007.pdf>> accessed 30 April 2009 17-18.

<sup>765</sup> L. Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTLR 229, 230, 234-235; J Alechenu, 'Senate Queries BPE over Ports Concession' *The Punch* (Lagos 9 October 2008) <[www.punchng.com](http://www.punchng.com)> accessed 9 October 2008; G Etakibuebu, 'The Ports: Privatisation of Doom' *Vanguard* (Lagos 27 February 2004) <<http://www.vanguardngr.com>> accessed 27 February 2004.

<sup>766</sup> O Obasanjo (President of Nigeria), 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4; National Council on Privatisation, Nigeria, 'Blueprint of the Privatisation Programme' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 73..

<sup>767</sup> JW Salacuse, 'Corporate Governance in the New Century' (2004) 25 Comp Law 69, 69.

<sup>768</sup> E Onyekpere, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005) 50; J Elendu, 'Fraud at Daily Times: EFCC Petitioned', *Elendu Reports*, 1 March 2006) <[http://www.elendureports.com/index.php?option=com\\_content&task=view&id=179&itemid=33](http://www.elendureports.com/index.php?option=com_content&task=view&id=179&itemid=33)> accessed 1 March 2006; A Aminu and K Aderinokun, 'NITEL Board Orders Audit on Asset Stripping, Search for new MD begins' *Thisday* (Lagos 16 June 2009) <<http://www.thisdayonline.com/>> accessed 16 June 2009; O Ezeobi, 'Ajaokuta: FG moves to retrieve looted equipment, cash' *The Punch* (Lagos 26 September 2008) <[www.punchng.com](http://www.punchng.com)> accessed 26 September 2008.

<sup>769</sup> Companies and Allied Matters Act 1990 ss 7(1)(c), 314, 315 and 638.

nevertheless occurred, and it has been noted that there no history of such corporate investigation even by the predecessor to the Corporate Affairs Commission.<sup>770</sup> According to reports, in some cases the BPE sold or concessioned some enterprises to investors that were not registered with the Corporate Affairs Commission as required by law<sup>771</sup>, making it impossible for the Corporate Affairs Commission to effectively monitor them given that it does not even have any record of their existence.<sup>772</sup>

Regarding the Securities and Exchange Commission which has oversight responsibilities regarding the Nigerian capital market including to 'prevent fraudulent and unfair trade practices relating to the securities industry'<sup>773</sup>, a number of corporate scandals involving unethical or fraudulent transactions on the stock exchange have occurred under its watch, and where investors do not have full confidence in the oversight capabilities of the capital market regulator, they will be less inclined to invest, which would affect the ability of privatisation investors to raise funds in the capital market.<sup>774</sup> There were also some allegations of insider trading with regard to the first privatisation programme.<sup>775</sup> In one major scandal that occurred a few years ago during the current privatisation programme, a privatisation investor, after acquiring majority shares as a core investor in a company privatised through the stock exchange discovered that the company was substantially more indebted than was reflected in the audited accounts filed with the Securities and Exchange Commission.<sup>776</sup> Also to note is that regarding the use of other forms of privatisation by the BPE besides public issue as earlier noted, the Securities and Exchange Commission has not been involved in most of these

---

<sup>770</sup> A Guobadia, 'Guarding the Guards: CAMA and Investigation of Companies in Nigeria' (1996) 7 ICCLR 364, 370-371. Also see 364-365. Also see JO Anifalaje, 'The Corporate Structure and Main Features of the Companies and Allied Matters Decree 1990' (1993) 1(1) NCLJ 28, 35.

<sup>771</sup> Companies and Allied Matters Act 1990 ss 18-19, 35-37.

<sup>772</sup> A Folasade-Koyi, 'Senate accuses BPE of concessioning port to ghost firms' Daily Independent (Lagos 9 October 2008) <<http://www.independentngonline.com/>> accessed 9 October 2008.

<sup>773</sup> Investment and Securities Act 2007 s 13 pp 13(aa). Note that this Act superseded the earlier Investments and Securities Act 1999.

<sup>774</sup> LI Juwah, 'Securities Regulation: Issues of Ethics and Compliance in the Capital Market Of Nigeria' (2005) 20 JIBLR 193, 194-195, 200. Also see OO Oladele, 'Disclosure in Secondary Securities Transactions in Nigeria' (2008) 19 ICCLR 254, 264; O Ajayi, 'Checking Unethical Market Practices in Nigeria' (1995) 6 ICCLR 169, 169-171.

<sup>775</sup> PO Idornigie, 'The Impact of Insider Trading on the Nigerian Business Environment: An Overview' (1996) 1 JPPL 14, 22.

<sup>776</sup> LI Juwah, 'Securities Regulation: Issues of Ethics and Compliance in the Capital Market Of Nigeria' (2005) 20 JIBLR 193, 196.

transactions, of which some have opined that it should have been involved in private placements by the BPE, as a way of instilling confidence in the privatisation programme.<sup>777</sup> Although the supervisory jurisdiction of the Securities and Exchange Commission primarily covers sale of securities to the public and the Investment and Securities Act does not expressly subject private placement of shares to the oversight of the Securities and Exchange Commission<sup>778</sup>, opinion has been expressed that it could still within the ambit of its powers oversee securities privately issued by the government.<sup>779</sup>

It should be noted that the country does not appear to have a robust tax system, of which it was earlier noted that the economic development potential of privatisation is also hinged on having such a system in place to ensure the proper assessment and collection of taxes from privatised enterprises.<sup>780</sup> Nigeria's tax system is plagued by severe administrative weaknesses, corruption, and non-transparently granted waivers, which have created ample room for privatised companies to avoid or evade taxes that the government could utilise in pursuing the social objectives of national economic development.<sup>781</sup>

Finally, the judicial system in Nigeria has been criticised for inefficiency and very limited capacity, with case often dragging on for several years, which potentially undermines privatisation benefits for the government, the citizens and privatisation investors given that disputes stemming from privatisation, including issues pertaining to

---

<sup>777</sup> V Akpotaire, 'The Legal Regime for Privatisation in Nigeria and the Crisis of Confidence' (2004) 25 BLR 200, 202-203; V Akpotaire, 'The Nigerian Privatisation Laws, Insider Dealing Abuses, and the Regulatory Authorities' (2002) 23 BLR 291, 294-295.

<sup>778</sup> Investment and Securities Act 2007 ss 54 67, 69.

<sup>779</sup> GC Nnona, 'The Nigerian Investment and Securities Act: Delineating its Boundaries in Relation to the Registration of Securities' (2006) 50 JAL 24, 43-44.

<sup>780</sup> Chapter 2 para 2.3.2.2.

<sup>781</sup> IO Bolodeoku, 'Centralization of Tax Administration in Nigeria: The Legal and Efficiency Considerations' (2008) 37 CLWR 175, 189; O Arowolo, 'Eti-Osa Local Government v Jegede: A Fillip for Responsible Tax Administration in Nigeria' (2008) 19 ICCLR 25, 25, 27-28; I Ayua, 'The Problem of Tax Evasion and Avoidance in Nigeria' in IA Ayua (ed), *Nigerian Commercial Laws: Problems and Perspectives* (Department of Commercial Law, Ahmadu Bello University, Zaria 1984) 63; CS Ola, 'A Critical Analysis of the Nigerian Tax System' in IE Sagay and O Oliyide (eds), *Current Developments in Nigerian Commercial Law: Essays in Honour of Chief Samuel Igbayilola Adegbite* (Throne-of-Grace Limited, Lagos 1998) 269, 277; A Monkaree, 'The Problems of Tax Administration in Nigeria and Cameroon' (1994) 3 ABULSJ 68, 71.

exercise of regulatory powers and enforcement of privatisation rights and guarantees may take an inordinate period of time to resolve.<sup>782</sup>

#### **4.2.3. WILL THE STRATEGIC APPROACH TO THE IMPLEMENTATION OF PRIVATISATION LEAD TO THE REALISATION OF SET POLICY OBJECTIVES?**

The Nigerian government's strategic approach to many privatisation transactions, sometimes at the behest of the IFIs has often been at odds with the economic development objectives of the programme and has given rise to some avoidable problems in the privatisation process. Following the analytical structure of the thesis, the following 5 key strategic issues will be analysed:

- **The pace and sequencing of privatisation**
- **The strategy for engaging foreign investors**
- **The approach to socio-cultural issues in privatisation**
- **Weighing the cost of implementing privatisation against the expected benefits**
- **Balancing the economic and social issues in privatisation in the interest of the citizens**

##### **4.2.3.1. THE PACE AND SEQUENCING OF PRIVATISATION**

In Chapter 2, the point was made that the pace of implementing privatisation should factor in a country's peculiarities, including institutional capabilities, and in Chapter 3, the point was made that some African countries have speedily pursued privatisation even though they have considerable institutional weaknesses, sometimes due to the influence of the IFIs.<sup>783</sup> With regard to Nigeria, the discussion above on the robustness of key institutions for implementing privatisation and monitoring its outcome reveals

---

<sup>782</sup> Y Dankofa, 'Law as a Tool for Societal Development: The Islamic Law Option' (1997) 4 ABULSJ 128, 135; B Ardo, 'Causes of and Remedies for Court Congestion' in Y Osinbajo and AU Kalu (eds), *Law Development and Administration in Nigeria* (The Federal Ministry of Justice, Lagos 1990) 488-490; KSA Ebeku, 'Compensation for Damage Arising from Oil Operations: Shell Petroleum Development Company of Nigeria v Ambah Revisited' [2002] IELTR 155, 155, 161-162. For a discussion of further limitations facing the Nigerian judiciary, see JE Abibo, 'Independence of the Nigerian Judiciary: How Feasible?' (2000) 7 ABULSJ 81, 86-87, 88-89.

<sup>783</sup> Chapter 2 para 2.3.2.3; Chapter 3 para 3.2.3.1.

various weaknesses, which would have meant emphasis on careful gradual implementation as opposed to speedy implementation.<sup>784</sup> However right from the onset of the programme, the National Council on Privatisation had prepared an elaborate privatisation timetable premised on which most of the enterprises would have been privatised within a 3-4 year period including the telecommunications and power utilities and other enterprises with huge capitalization and heavy staffing.<sup>785</sup> As earlier noted, correspondence between the country and the IMF also shows that it agreed on certain target dates for completion of various privatisation transactions as well as privatisation related law reform<sup>786</sup> Contemporaneous news reports also shows the BPE striving to meet various privatisation targets<sup>787</sup> while acknowledging the weakness of Nigeria's institutions and its limited technical capacity in the implementation of economic reforms, the IMF still noted the need for 'the privatization program ... to be accelerated.'<sup>788</sup> Although it acknowledged the need for transparency in the privatisation programme and for 'putting in place the necessary regulatory and legal frameworks to ensure a level playing field, so that the public can begin benefiting from the fruits of privatization'<sup>789</sup>, the key question is whether this can be accomplished within the limits of an accelerated privatisation programme.

A number of issues pertaining to poor pacing and sequencing have already been touched on. For instance while the privatisation blueprint recognises the need for legal reform to usher in market competition, it was noted earlier that the implementation of privatisation has proceeded without waiting for the competition legislation to be passed

---

<sup>784</sup> Also see NM Ogubunka, *Elements of Privatisation in Nigeria* (Rhema Enterprises, Lagos 2000) 123-124.

<sup>785</sup> National Council on Privatisation, Nigeria, 'Blueprint of the Privatisation Programme' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 75-86. Also see Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 169.

<sup>786</sup> IMF, 'Nigeria: 2001 Article IV Consultation—Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion' (Report) (August 2001) IMF Country Report No 01/131 24, 52, 59, 62-63, 67-72.

<sup>787</sup> E Imisim, 'BPE Privatises 24 Coys, Nets N43 Billion in 2005' *Thisday* (Lagos 23 January 2006) <<http://www.thisdayonline.com/nview.php?id=38845>> accessed 23 January 2006; S Adejokun, 'BPE Plans to Sell 21 Firms in 2005' *Daily Independent* (Lagos 14 April 2005) <<http://www.independentng.com/news/nnapr140504.htm>> accessed 14 April 2005.

<sup>788</sup> IMF, 'Nigeria: 2004 Article IV Consultation—Staff Report; and Public Information Notice on the Executive Board Discussion' (Report) (August 2004) IMF Country Report No 04/239 33.

<sup>789</sup> *Ibid.*

or for a competition authority to get set up, of which some monopolies/ oligopolies have been the end result especially in the area of ports management and the steel sector.<sup>790</sup> In its haste, BPE has sometimes deferred privatisation due diligence till after the conclusion of some transactions, which begs the question – on what basis did it confirm that the investor possessed the managerial, technical and financial capacity noted under the Public Enterprises Decree 1999 and the Guidelines on Privatisation of Government Enterprises.<sup>791</sup> In some cases, the BPE proceeded to wrap up transactions within arbitrarily set deadlines, only for such privatised companies to plunge into avoidable crisis soon afterwards.<sup>792</sup>

In fixing the privatisation timetable, it does not appear that careful thought was given to the earlier noted problem of absence of conducive or enabling environment for sustainable investments.<sup>793</sup> One of the manifestations of this problem is the issue of inadequate investor financing for purchasing privatisation shares, of which BPE has sometimes pressed on to conclude transactions within the allotted timeframe even in the face of apparently limited investor interest and very low bids.<sup>794</sup> Sometimes such winning bids ended up being rejected for being too low<sup>795</sup>, and sometimes, successful bidders ultimately could not come up with the funds to pay for their acquisition.<sup>796</sup>

---

<sup>790</sup> National Council on Privatisation, Nigeria, 'Blueprint of the Privatisation Programme' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 73; SA Mohammed, 'Privatisation of the Iron and Steel Industry in Africa' (8th International Arab Iron and Steel Conference, 2008) <<http://www.afristeel.org/PRIVATISATION%20OF%20THE%20IRON%20AND%20STEEL%20INDUSTRY%20IN%20AFRICA.pdf>> accessed 1 August 2008 10; J Alechenu, 'Senate Queries BPE over Ports Concession' *The Punch* (Lagos 9 October 2008) <[www.punchng.com](http://www.punchng.com)> accessed 9 October 2008; E Onyekpere, 'Challenges for the Privatisation Programme' in E Onyekpere (ed), *Readings on Privatisation (Socio-Economic Rights Initiative, Lagos 2003)* 31; Also see L Azubuike, 'Privatization and Foreign Investments in Nigeria' (2005-2006) 13 *Tulsa J Comp & Int'l L* 59, 88; A Elebiju, 'The Investment and Securities Act of 1999: An Overview of Anti-Trust Considerations in the Regulation of Mergers in Nigeria' (2001) 3 *JIFM* 272, 279-281; L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 *CTLR* 229, 230, 234-235.

<sup>791</sup> Public Enterprises Decree 1999 s 34; Guidelines on Privatisation of Government Enterprises para 13; J Ogbodo, 'NCP, BPE Admit Error in ALSICON Privatisation' *The Guardian* (Lagos 14 June 2005) <<http://odili.net/news/source/2005/jun/15/17.html>> accessed 14 June 2005.

<sup>792</sup> KA Garba, 'Whirl Wind against the Soul of Daily Times' *The Guardian* (Lagos 10 January 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 10 January 2006.

<sup>793</sup> Chapter 4 para 4.2.1.

<sup>794</sup> L Anyikwa, 'Sierra Leonean Firm Offers N47.2m for Abacha Refinery, Govt Loses N4.9b to American Firm over NAFCON' *The Guardian* (Lagos 9 March 2004) <<http://odili.net/news/source/2004/mar/9/15.html>> accessed 9 March 2004.

<sup>795</sup> O Aihe, 'Obasanjo Cancels \$256m Deal Offer for NITEL' *Vanguard* (Lagos 2 January 2006) <<http://odili.net/news/source/2006/jan/2/301.html>> accessed 2 January 2006.

Finally it should be noted that the speedy implementation timetable in many cases did not factor in adequate time and resources for effectively resolving various issues regarding stakeholders of which the point was made earlier about the protests by labour groups and reprisal action by the government, further undermining the investment climate. While transactions could be speedily concluded, such urgency has not been adopted with regard to the issue of workers' welfare<sup>797</sup>, and while the Guidelines on Privatisation of Government Enterprises recognizes the need for a Share Purchase Fund Scheme to allow poor people to be able to purchase privatisation shares that are sold on the stock exchange<sup>798</sup>, the scheme as earlier noted, has not yet become operational several years after the privatisation exercise commenced.

#### **4.2.3.2. THE STRATEGY FOR ENGAGING FOREIGN INVESTORS**

Although Nigeria initially enacted laws aimed at restricting foreign ownership and control of enterprises in the country after independence and boosting indigenous ownership and control<sup>799</sup>, these laws have now been repealed and replaced with a legal regime receptive to foreign investments.<sup>800</sup> The Nigerian government hopes that the

---

<sup>796</sup> L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTRLR 229, 231, 232-233.

<sup>797</sup> S Amadi, 'Contextualizing NEEDS: Politics and Economic Development' in S Amadi and F Ogowo (eds), *Contextualizing NEEDS Economic/Political Reform in Nigeria: Report of Civil Society Policy Dialogue on the National Economic Empowerment and Development Strategy (NEEDS)* (HURILAWS/CPFR, Lagos 2004) 25.

<sup>798</sup> Guidelines on Privatisation of Government Enterprises para 9.4.

<sup>799</sup> Nigerian Enterprises Promotion Decree (Act) No 4 of 1972; Nigerian Enterprises Promotion Decree (Act) No 3 of 1977 (repealed the 1972 decree but further enhanced indigenous ownership and control of enterprises at the expense of foreign ownership); FC Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302, 308, 315-317; RO Ekundare, 'The Political Economy of Private Investment in Nigeria' (1972) 10 J Mod Afr Stud 37, 44-47.

<sup>800</sup> Nigerian Enterprises Promotion Decree (Act) No 54 of 1989 (repealed the 1977 decree); Nigerian Enterprises Promotion (Repeal) Decree (Act) No 7 of 1995 (repealed the 1989 decree); Nigerian Investment Promotion Commission Decree (Act) No. 16 of 1995 (established the Nigerian Investment Promotion Commission, s 1); The Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree (Act) No. 17 of 1995 (amongst other things, permitted both Nigerians and non-Nigerians to invest and transact in securities in the capital market or via private placement, s 26); PT Muchlinski, *Multinational Enterprises and the Law* (2<sup>nd</sup> edn OUP, Oxford 2007) 185-186; V Akpotare, 'The Nigerian Indigenisation Laws as Disincentives to Foreign Investment: The End of an Era' (2005) 26 BLR 62, 62-67; KUK Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 JAL 177, 177-182; TI Ogowewo, 'The Shift to the Classical Theory of Foreign Investment: Opening Up the Nigerian Market' (1995) 44 ICLQ 915, 915-919.



privatisation programme would be a key gateway for foreign investors to invest in the country and bring in much needed technical and managerial skills as well as investment capital.<sup>801</sup> Two key issues will be analysed here namely, the extent to which the expected resource inflow from foreign investors has materialised and secondly the extent to which foreign investment is in consonance with the interests of some other stakeholders in the privatisation process. Regarding the first issue, the point was earlier made about the need to establish criteria for assessing the quality of prospective investors.<sup>802</sup> Commenting on the Nigerian Investment Promotion Commission Decree (Act) 1995, Khrushchev Ekwueme notes that:

It is striking that the NIPC Act does not contain a list of criteria which a proposed investment must satisfy before its admission into Nigeria. Ideally, investment codes tie the admission of foreign investment to the ability of the potential investment to meet the developmental needs of the relevant host States. The omission of specific criteria in the NIPC Act for the admission of investment into Nigeria allows the Commission to screen applications for the registration of business enterprises on a purely discretionary basis<sup>803</sup>

As earlier noted however, the Public Enterprises Decree 1999 and the Guidelines on Privatisation of Government Enterprises both contain provisions on what is expected of any core/strategic investor, namely adequate financial resources as well as technical and managerial competence to run the enterprise, and the negotiation with the investor will also include issues like technology transfer, participation by indigenous managers and workers' welfare.<sup>804</sup> Some of the observations regarding foreign investment in Nigeria however give cause for concern.

Reports indicate that some foreign investors, rather than bringing in much needed foreign exchange into the country, have largely relied on funds sourced from local banks in the country to pay for their privatisation acquisitions and finance their operations, which could limit the pool of funds available for local investors to borrow

---

<sup>801</sup> Public Enterprises Decree 1999 s 13(1)(i); Guidelines on Privatisation of Government Enterprises para 2.

<sup>802</sup> Also see EI Kachikwu, *Nigerian Foreign Investment Law and Policy* (Mikzek Law Publications Limited, Lagos, 1988) 62-75.

<sup>803</sup> KUK Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 JAL 177, 184.

<sup>804</sup> Public Enterprises Decree 1999 s 34; Guidelines on Privatisation of Government Enterprises para 13

from local banks.<sup>805</sup> Further, objectives such as efficiency improvement, transfer of technology and development of linkages with the local economy do not seem to be high priority for some of these foreign investors given the fact that there are mounting allegations of asset stripping regarding some of the privatized enterprises that have been handed over to foreign investors.<sup>806</sup> Contrasting Nigeria's approach to foreign investments with the Taiwanese approach, Deborah Brautigam notes that:

The state in Taiwan took an active role in creating backward and forward linkages between foreign and domestic capital. Local sourcing, sub-contracting, and worker-training targets were mandated and frequently revised, and the Government monitored and enforced them, threatening (and carrying out its threats) to remove protections and incentives for firms that failed to meet their targets. ... In Nigeria, by contrast, although the same targets are frequently part of the investment package, the Government fails to monitor and take action early when targets are clearly not being met. In the motor-vehicle assembly industry, for example, foreign firms agreed to progress in stages towards 100 per cent local content, but they failed to adopt programmes to implement this strategy, and after 30 years of assembly, less than 30 per cent of components are locally procured.<sup>807</sup> (footnote omitted)

Another observation is that rather than qualitative foreign investments flowing into the country through privatisation, many foreign investors besides those that are into oil and gas production, have opted more for service contracts, such as turnaround maintenance (TAM) contracts, management contracts and rehabilitation contracts under which they earn foreign exchange for rendering specialised services rather than investing any money in the country.<sup>808</sup>

Regarding the issue of how foreign investment is in consonance with the interests of some other stakeholders in the privatisation process, rather than creating opportunities

---

<sup>805</sup> L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTLR 229, 233; E Onyekpere, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005) 45; Cf K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 224.

<sup>806</sup> H Igbikiowubo, 'Alarm over Continued Asset Stripping at Ajaokuta, Monitoring Committee Damns Concessionaire' *Vanguard* (Lagos 29 August 2006) <<http://odili.net/news/source/2006/aug/29/315.html>> accessed 29 August 2006.

<sup>807</sup> DA Brautigam, 'What Can Africa Learn from Taiwan? Political Economy, Industrial Policy, and Adjustment' (1994) 32 J Mod Afr Stud 111, 134.

<sup>808</sup> O Arowolo, 'Nigeria's Downstream Sector Deregulation Crisis: What are the Unresolved Issues?' [2005] IELTR 10, 11; O Aihe and B Agande, 'Forged Papers Gave Pentascope the NITEL Contract' *Vanguard* (Lagos 1 June 2005) <<http://odili.net/news/source/2005/jun/1/308.html>> accessed 1 June 2005.

for indigenous participation in management, some foreign investors have focussed more on replacing local staff with employees from their home jurisdictions, thus further contributing to the unemployment problem in the country.<sup>809</sup> Also to note is that rather than primarily focusing on making more sustainable reforms to the general investment climate in the country, the government has sometimes sought to attract foreign investments by structuring privatisation contracts with monopoly elements that put the investor at some advantage over local entrepreneurs in the same sector.<sup>810</sup> This is at variance with the privatisation provision that requires ‘taking into account the need for balance and meaningful participation by Nigerians and foreigners’, given that it tilts the balance towards the latter. It has been noted that sometimes due to the ability of foreign investors to offer large bribes to public officials in developing countries like China and Nigeria, they are often accorded higher priority and more favourable treatment than their local competitors in states where they invest.<sup>811</sup> The issue of privatisation corruption will be analysed later in the chapter.

It is not asserted that foreign investors have not made any positive contribution to Nigeria, because there is also some evidence that some privatised companies taken over by foreign investors are doing well and increasing their productivity.<sup>812</sup> What is also clear from the discussion above is that the economic development objectives behind privatisation laws and foreign investment laws could be undermined where the country does not strategise properly in its approach to foreign investments either generally or with respect to certain transactions.

---

<sup>809</sup> E Onyekpere, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005) 51; J Ogbodo and T Daka, ‘Reps Probe Foreign Firms over Discrimination in Employment’ *The Guardian* (Lagos 3 June 2009) <<http://odili.net/news/source/2009/jun/3/12.html>> accessed 3 June 2009.

<sup>810</sup> Note for instance, the complaints by Airline Operators of Nigeria (AON) regarding monopoly and other incentives, including regulatory waiver, given to Virgin Nigeria, the new national carrier. See on this, T Oketunbi, ‘Virgin Nigeria Faces Testy Regulatory Hurdle’ *The Guardian* (Lagos 1 June 2005) <<http://www.guardiannewsngr.com/business/article01>> accessed 1 June 2005; W Shadare and B Nwankwo, ‘Minister Decries Suit against Virgin Nigeria, says Govt Loses N2b Yearly’ *The Guardian* (Lagos 1 June 2005) <<http://www.guardiannewsngr.com/news/article05>> accessed 1 June 2005.

<sup>811</sup> E Spahn, ‘International Bribery: The Moral Imperialism Critiques’ (2009) 18 *Minn J Int'l L* 155, 221-222. Also see AY Shehu, ‘Combating Corruption in Nigeria - Bliss or Bluster?’ (2004) 12 *JFC* 69, 77.

<sup>812</sup> Note for instance B Adeyemi, ‘ALSCON commences sale of locally made aluminium products’ *The Guardian* (Lagos 19 June 2009) <<http://www.ngrguardiannews.com/>> accessed 19 June 2009.

#### 4.2.3.3. THE APPROACH TO SOCIO-CULTURAL ISSUES IN PRIVATISATION

It has been noted regarding Nigeria that the 'definition and operation of the law should be contextually situated to reflect the values, beliefs and practices of the people.'<sup>813</sup> The country has a multiplicity of states, ethno-linguistic groups and religious groups, has been through a bitter ethnic-based civil war and still has periodic flashes of ethnic and religious conflicts, with adverse impact on both indigenous and foreign investments and the overall development of the country.<sup>814</sup> Raymond Vernon notes that in Sub Saharan African countries like Nigeria, communal suppression is sometimes a reflection of 'political rivalries drawn on tribal and religious lines.'<sup>815</sup> Some of the public enterprises in Nigeria were geographically cited and staffed based on geo-political, ethnic and other cultural considerations, rather than economic and technical considerations and were used for political patronage stemming from these extraneous considerations with adverse impact on economic growth and development.<sup>816</sup> According to Peter Lewis:

Privatization policy in particular, and public sector reform in general, must be viewed against Nigeria's history of contentious ethnic and regional rivalries, institutional weaknesses, and political instability.<sup>817</sup>

---

<sup>813</sup> MI Isokun, 'Law and Development in Nigeria: A Contextual Definition' (1991/92) 1(1) Bendel State University Law Journal 121, 127.

<sup>814</sup> AY Shehu, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 ; F Ezeala-Harrison, 'Structural Re-Adjustment in Nigeria: Diagnosis of a Severe Dutch Disease Syndrome' (1993) 52 Amer J Econ Sociology 193, 198; D Abubakar, 'Ethnic Identity, Democratization, and the Future of the African State: Lessons from Nigeria' (2001) 29 (1/2) African Issues 31, 33-34; P Lewis, 'Nigeria's Economy: Opportunity and Challenge' (1999) 27(1) Issue: A Journal of Opinion 50, 50; U Ukiwo, 'Politics, Ethno-Religious Conflicts and Democratic Consolidation in Nigeria' (2003) 41 J Mod Afr Stud 115, 115-116, 120-126.

<sup>815</sup> R Vernon, 'Introduction: The Promise And The Challenge' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988) 7. Also see UB Ikpe, 'Public Culture and National Integration in Multi-Cultural States: Comparative Observations from the United States and Nigeria' (2004) 2 Comparative American Studies 91, 92, 107 L Diamond, Class, *Ethnicity and Democracy in Nigeria: The Failure of the First Republic* (Syracuse University Press, Syracuse 1988) 59-63.

<sup>816</sup> NI Ikpeze, CC Soludo and NN Elekwa, 'Nigeria: The Political Economy of the Policy Process, Policy Choice and Implementation' in CC Soludo, O Ogbu and H Chang, *The Politics of Trade and Industrial Policy in Africa: Forced Consensus?* (Africa World Press/ International Development Research Centre, New Jersey 2004) 353-355; MA Tokunboh, *Public Enterprises: The Nigerian Experience* (Lantern Books, Lagos 1990) 53; B Dauda, 'Industrial Policy and the Nigerian Bureaucracy, 1900-1988' (1993) 21 African Econ Hist 73, 77, 90-92; Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 172.

<sup>817</sup> PM Lewis, 'State, Economy, and Privatisation in Nigeria' in JL Upper and GB Baldwin, *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) 315. Also see 318.

Regarding the first privatisation programme which was initiated by a President from the Northern part of the country, some have alleged that there was some political manipulation in its implementation due to ethnic/geopolitical considerations of which some business people from the Northern part of the country were perceived to have benefitted from illicit patronage.<sup>818</sup> Prior to that, it was also alleged that the indigenisation programme carried out in the 1970s disproportionately favoured the Yoruba ethnic group.<sup>819</sup>

The current implementation of privatisation therefore raises key concerns regarding how to avoid perceptions of favouritism based on geo-political, ethnic and other cultural considerations, which could undermine its legitimacy and further sow seeds of discord that may later blossom into socio-political crisis in the country. It should be noted that the Constitution provides that:

The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.<sup>820</sup>

Some of the privatisation legal provisions and guidelines are aimed at ensuring equal opportunity and participation as well as even spread of the benefits of privatisation amongst cultural stakeholders in the country, such as the provision for sale of

---

<sup>818</sup> W Reno, 'Old Brigades, Money Bags, New Breeds, and the Ironies of Reform in Nigeria' (1993) 27 *Can J Afr Stud* 66, 72-76; P Lewis, 'From Prebendalism to Predation: The Political Economy of Decline in Nigeria' (1996) 34 *J Mod Afr Stud* 79, 89.

<sup>819</sup> PM Lewis, 'State, Economy, and Privatisation in Nigeria' in JL Upper and GB Baldwin, *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) 322. NI Ikpeze, CC Soludo and NN Elekwa, 'Nigeria: The Political Economy of the Policy Process, Policy Choice and Implementation' in CC Soludo, O Ogbu and H Chang, *The Politics of Trade and Industrial Policy in Africa: Forced Consensus?* (Africa World Press/ International Development Research Centre, New Jersey 2004) 352.

<sup>820</sup> Constitution of the Federal Republic of Nigeria 1999 s 14(3). For further discussion of the application of the federal character principle, see B Dauda, 'Industrial Policy and the Nigerian Bureaucracy, 1900-1988' (1993) 21 *African Econ Hist* 73, 90; UB Ikpe, 'Public Culture and National Integration in Multi-Cultural States: Comparative Observations from the United States and Nigeria' (2004) 2 *Comparative American Studies* 91, 110; O Fatula, 'Constitutional Issues in Nigerian Federalism' (2003) 6 *U Maid LJ* 84, 95-96.

privatisation shares to Nigerians on the basis of equality of Federal Constituencies in the country.<sup>821</sup> There is also a maximum limit of one percent of shares, which any single individual can acquire in a privatised enterprise and multiple applications are to be rejected.<sup>822</sup> Although these provisions might have been designed with the best of intentions, they are inadequate in some respects and there have already been complaints of marginalisation in the implementation of the programme. Firstly, although the constitutional provision above notes the need for cultural balance in the composition of federal agencies in the country, the Public Enterprises Decree 1999 does not specifically provide for this regarding the key privatisation bodies, the BPE and the NCP, which could pave the way for cultural imbalance in their composition, whether inadvertently or purposely.<sup>823</sup>

Secondly, the provision for participation of Nigerians on the basis of equality of Federal Constituencies does not factor in the fact that within some Federal Constituencies there is more than one ethnic or religious group, with clashed often occurring amongst these groups, of which there is no framework for ensuring the full participation of all cultural groups especially those that may be in the minority and potentially face marginalisation in the process.<sup>824</sup> A further complication is that the privatisation guidelines provide that Nigerians that wish to participate in any Federal Constituency of the Federation have to be indigenes of such constituencies.<sup>825</sup> A preliminary problem would be how to conclusively prove that one is an indigene of a constituency because many people especially those living in rural parts of the country may not have documentary proof of identity and address, which could pave way wrongful exclusion from participation.<sup>826</sup> It

---

<sup>821</sup> Public Enterprises Decree 1999 s 5(2); Guidelines on Privatisation of Government Enterprises paras 9.3(b), 12.1, 12.4. Note that the initial provisions under s 5(2) was for the allocation of shares on the basis of equality of states rather than Federal Constituencies.

<sup>822</sup> Guidelines on Privatisation of Government Enterprises paras 9.3(a), 12.3.

<sup>823</sup> K Onuoha, 'The Legal Regulation of Privatisation – A Critique' in E Onyekpere (ed), *Readings On Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 15.

<sup>824</sup> U Ukiwo, 'Politics, Ethno-Religious Conflicts and Democratic Consolidation in Nigeria' (2003) 41 *J Mod Afr Stud* 115, 115-116, 120-126; K Onuoha, 'The Legal Regulation of Privatisation – A Critique' in E Onyekpere (ed), *Readings On Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 17.

<sup>825</sup> Guidelines on Privatisation of Government Enterprises para 9.3(b). Also see S Adejokun, 'BPE Allots Highest NAHCO Shares to Lagos, Kano' *Daily Independent* (Lagos 2 February 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 2 February 2006.

<sup>826</sup> See for instance Editorial, 'Yobe Bars Non-Indigenes from Running Schools' *The Guardian* (Lagos 3 May 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 3 May 2006.

would also create a logistical nightmare if people that are resident in a particular constituency have to travel to other constituencies across the country where they are indigenes of, in order to be eligible to participate in the privatisation programme.

Thirdly, given that the privatisation decree as earlier noted provides for the sale of public enterprises to core/strategic investors, nothing prevents some Nigerians from floating or using existing private companies to acquire the shares of some enterprises as core/ strategic investors, contravening the provisions for geopolitical balance and one percent maximum individual share allocation, which were both designed to ensure broad participation of the citizenry in the programme.<sup>827</sup> This would effectively make the provision on equal participation by Nigerians meaningless.<sup>828</sup> Also noteworthy is that unlike the United Kingdom where there has been prosecution and conviction for fraudulently making multiple applications for privatisation shares on the stock exchange<sup>829</sup>, the Guidelines on Privatisation of Government Enterprises only provide for rejection of such applications, but even then there is provision for refund.<sup>830</sup>

Regardless of the merits of the cultural safeguard provisions in the current Nigerian privatisation programme, it has been alleged that its implementation has been aimed at consolidating economic control with the *Yoruba*, the ethnic group of the former President under whose tenure many enterprises were privatised.<sup>831</sup> It has also been alleged that the utilisation of the core/ strategic investor strategy has been discriminatory to the *Igbo* ethnic group.<sup>832</sup> Some transactions have also raised tensions,

---

<sup>827</sup> With regard to the first privatisation programme, it has been noted that public issue of privatisation shares on the stock exchange coupled with massive publicity of the programme helped in addressing concerns about possible geopolitical imbalance in the implementation of the programme, although as noted there were still some allegations of manipulation. See RA Young, 'Privatisation in Africa' [1991] (51) *Rev African Polit Economy* 50, 60; W Reno, 'Old Brigades, Money Bags, New Breeds, and the Ironies of Reform in Nigeria' (1993) 27 *Can J Afr Stud* 66, 72-76.

<sup>828</sup> K Onuoha, 'The Legal Regulation of Privatisation – A Critique' in E Onyekpere (ed), *Readings On Privatisation* (Socio-Economic Rights Initiative, Lagos 2003) 17.

<sup>829</sup> *R v Best*, Times 6 October 1987 (CA), *R v Griffiths (Ronald Paul)* [1989] 11 Cr App R (S) 216 (CA).

<sup>830</sup> Guidelines on Privatisation of Government Enterprises para 12.3.

<sup>831</sup> U Ukiwo, 'Politics, Ethno-Religious Conflicts and Democratic Consolidation in Nigeria' (2003) 41 *J Mod Afr Stud* 115, 123. Also see Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 169.

<sup>832</sup> E Ugwu, 'Privatisation: FG Urged to Drop Core Investor Policy' *Thisday* (Lagos 30 August 2004) <[www.thisdayonline.com](http://www.thisdayonline.com)> accessed 30 August 2004.

of which in one instance some indigenes in a particular locality, for several years, resisted the takeover of an enterprise by a successful privatisation investor from another geopolitical zone ostensibly due to cultural concerns.<sup>833</sup> Other potential cultural flash points in the implementation of privatisation in Nigeria include the sacking of workers before or after privatisation in the course of restructuring the enterprises for greater productivity, and the supply of privatised goods or services where increased prices may lead to social exclusion that disproportionately affects some cultural groups in the absence of public subsidies.

To the extent that the above issues have not been fully addressed through privatisation legal reform, the economic development sought to be actualised may fail to materialise, and rather privatisation may pave the way for heightened tensions and socio-political crisis in the country.<sup>834</sup> It should also be noted that where core/strategic investors are selected based on cultural preferences, the economic development objective of efficient enterprise management may be defeated where such investors lack relevant expertise.

#### **4.2.3.4. WEIGHING THE COST OF IMPLEMENTING PRIVATISATION AGAINST THE EXPECTED BENEFITS**

Another strategic flaw with the Nigerian privatisation programme is that the way it has been implemented so far could undermine the argument that privatisation yields fiscal benefits for an implementing country. As earlier noted, an IMF report indicates that some fiscal gains have resulted from the country's implementation of privatisation.<sup>835</sup> The concern here is that the figures may reveal as much as they do not reveal. While it cannot be said with mathematical certainty that privatisation has resulted in a net financial loss for the country, what is clear is that the cost of its implementation is mounting by the day, such that it should seriously be asked whether the proposed gains of this massive expenditure would really offset the cost. The economic development

---

<sup>833</sup> NM Ogubunka, *Elements of Privatisation in Nigeria* (Rhema Enterprises, Lagos 2000) 123; S Adejokun, 'Dangote takes over Benue Cement Four Years After' *Daily Independent* (Lagos 22 January 2004) <<http://www.dailyindependentng.com>> accessed 22 January 2004.

<sup>834</sup> Also see AL Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 *Yale LJ* 1, 19, 20, 21.

<sup>835</sup> IMF, 'Nigeria: 2007 Article IV Consultation—Staff Report; Staff Supplement and Statement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Nigeria' (Report) (February 2008) IMF Country Report No 08/64 17, 18, 25-27.



potential of the programme could be imperilled if the government does not keep close tabs on its expenditure in implementing it. A number of factors appear to be responsible for the rising implementation cost of the privatisation programme. The budgetary projections for implementing the privatisation programme is quite high<sup>836</sup> Although it has been noted that privatisation through the capital market has on the average lower transaction costs than other forms of privatisation like private placement and asset sales<sup>837</sup>, the privatisation programme has primarily utilised these other forms of privatisation. There have also been many transaction failures in the implementation of privatisation through these other forms of privatisation, with the government having to embark on fresh privatisation attempts, with attendant costs.<sup>838</sup>

The implementation of privatisation has also accelerated the repayment of pre-existing debts owed by various public enterprises to foreign creditors and suppliers in a bid to sell them debt-free to prospective investors<sup>839</sup>, of which it should be noted that in some other jurisdictions, the strategy has been to transfer both assets and liabilities in order to limit the government's financial exposure<sup>840</sup> A lot of workers have also been laid off as a result of privatisation, with the government incurring the huge immediate cost of settling their terminal benefits at a time when it is still struggling to meet up with existing pension payments.<sup>841</sup> Also to note is that the government decided to invest huge sums of money in service contracts for the rehabilitation of some enterprises it had already earmarked for privatisation<sup>842</sup>, of which it ended up selling them far below the rehabilitation cost in many cases.<sup>843</sup>

---

<sup>836</sup> DO Adeyemo, 'Public Enterprises Reform in Nigeria: A Review' (2005) 10 J Soc Sci 223, 230.

<sup>837</sup> NM Ogubunka, *Elements of Privatisation in Nigeria* (Rhema Enterprises, Lagos 2000) 105-109, pp 109.

<sup>838</sup> L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTRLR 229, 231, 232-233; T Chiahemen, 'BPE Begins Fresh Privatisation of NITEL' *Daily Independent* (Lagos 1 August 2008) <[www.independentngonline.com](http://www.independentngonline.com)> accessed 1 August 2008; L Binniyat, 'FG Shops for New Investors for Ajaokuta Steel' *Vanguard* (Lagos 1 August 2008) <<http://www.vanguardngr.com/>> accessed 1 August 2008.

<sup>839</sup> O Akintunde and T Soniyi, 'Eleme: FG, Creditors Reach Agreement over N28.6bn Debts' *The Punch* (Lagos 5 September 2005) <<http://odili.net/news/source/2005/sep/5/420.html>> accessed 5 September 2005; G Gbadamosi, 'Foreign Firm Files Suit against Virgin Nigeria' *The Guardian*, (Lagos 4 October 2004) <<http://odili.net/news/source/2004/oct/4/28.html>> accessed 7 October 2004.

<sup>840</sup> JMP Nelson, 'Modernisation and Privatisation in Ecuador' (1994) 5 ICCLR 289, 292.

<sup>841</sup> JEO Abugu, 'Nigeria's Evolving Legal Framework for Pensions and Pension Fund Administration' (2006) 17 ICCLR 345, 348-349.

<sup>842</sup> AY Shehu, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 JFC 69, 73; L Anyikwa,

The point was made earlier that the nature of some of the contracts the government has entered into with foreign investors has seen it paying huge sums to these investors rather than the other way round as projected under the privatisation guidelines, and some privatisation investors ended up stripping the assets of various enterprises, which represents serious financial losses for the country especially with regard to enterprises in which the country still had some partial ownership stake.<sup>844</sup> There has also been considerable off-balance sheet expenditure in the form of tax and duty concessions and other kinds of incentives, which constitute significant forgone public revenue.<sup>845</sup> In this regard, Peter Muchlinski notes that ‘The principal danger with investment incentive policies is that they may, in fact, be ineffective in attracting useful long-term investment. A foreign investor may be happy to take advantage of the host state’s incentives, and as soon as these run out, to divest.’<sup>846</sup>

Finally, privatisation-related corruption in Nigeria, which will be examined later in the chapter may mean that the country has been short-changed in various privatisation transactions, and the government has also had problems in satisfactorily accounting for the proceeds of privatisation.<sup>847</sup>

---

‘Sierra Leonean Firm Offers N47.2m for Abacha Refinery, Govt Loses N4.9b to American Firm over NAFCON’ *The Guardian* (Lagos 9 March 2004) <<http://odili.net/news/source/2004/mar/9/15.html>> accessed 9 March 2004.

<sup>843</sup> E Imisim, ‘Kaduna FSFC Sold for N500m, Sunti Sugar N185m, as BPE Opens Bids for Calabar, Warri Ports’ *Thisday* (Lagos 6 September 2005) <<http://odili.net/news/source/2005/sep/6/206.html>> accessed 6 September 2005; M Okwe, ‘Firms Buy Daily Times for N1.25b, ALSCON, N800m’ *The Guardian* (Lagos 15 June 2004) <<http://www.guardiannewsngr.com/news/article02>> accessed 15 June 2004.

<sup>844</sup> E Onyekpere, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005) 50; O Arowolo, ‘Nigeria’s Downstream Sector Deregulation Crisis: What are the Unresolved Issues?’ [2005] IELTR 10, 11; O Aihe and B Agande, ‘Forged Papers Gave Pentascope the NITEL Contract’ *Vanguard* (Lagos 1 June 2005) <<http://odili.net/news/source/2005/jun/1/308.html>> accessed 1 June 2005; A Aminu and K Aderinokun, ‘NITEL Board Orders Audit on Asset Stripping, Search for new MD begins’ *Thisday* (Lagos 16 June 2009) <<http://www.thisdayonline.com/>> accessed 16 June 2009; O Ezeobi, ‘Ajaokuta: FG moves to retrieve looted equipment, cash’ *The Punch* (Lagos 26 September 2008) <[www.punchng.com](http://www.punchng.com)> accessed 26 September 2008.

<sup>845</sup> S Adejokun, ‘Nigeria Loses N100b to Tariff Waivers’ *Daily Independent* (Lagos 25 February 2004) <<http://www.dailyindependentng.com>> accessed 25 February 2004; K Ologbondiyan, ‘Senate Wants MTN Tax Concession Reversed’ *Thisday* (Lagos 28 July 2004) <[www.thisdayonline.com](http://www.thisdayonline.com)> accessed 28 July 2004.

<sup>846</sup> PT Muchlinski, *Multinational Enterprises and the Law* (2<sup>nd</sup> edn OUP, Oxford 2007) 224.

<sup>847</sup> V Akpotaire, ‘The Nigerian Privatisation Laws, Insider Dealing Abuses, and the Regulatory Authorities’ (2002) 23 BLR 291, 291, 294; M Oloja, J Ogbodo and A Ashaolu, ‘“Missing” Privatisation

#### 4.2.3.5. BALANCING THE ECONOMIC AND SOCIAL ISSUES IN PRIVATISATION IN THE INTEREST OF THE CITIZENS

The implementation of privatisation as earlier noted raises concern about whether the social ends of development can be accomplished in a privatising country or whether they will be overshadowed by the economic objectives sought to be achieved.<sup>848</sup>

According to the Guidelines on Privatisation of Government Enterprises:

... nearly 70% of Nigerians are highly impoverished; having been adjudged by the UNDP as living below poverty line. Living on less than US\$1 a day, most Nigerians cannot sustain themselves ...<sup>849</sup>

An IMF report on Nigeria's poverty reduction strategy notes the above high poverty level as well as the high rate of unemployment in the country, and also notes the strategic importance of privatisation in poverty reduction efforts in the country.<sup>850</sup> A number of issues arising from the implementation of privatisation indicate that privatisation legal reform may not necessarily address the problems of poverty, inequality and unemployment which need to be effectively addressed if economic development is to be achieved in Nigeria. Some of these issues will be analysed here while some others will be analysed in the next chapter specifically dealing with electricity privatisation, such as the issues of utility rates and utility regulation .

It has been noted that 'as a colonial contraption, Nigeria's relationship with its citizens has remained tenuous, abstract and superficial'<sup>851</sup>, which indicates that issues pertaining to the welfare of all the citizens may not be fully factored into the formulation and implementation of national economic reforms. As earlier noted, a lot of focus has been

---

Fund Part of 2001 Budget, Says Govt' *The Guardian* (Lagos 1 April 2004) <<http://www.guardiannewsngr.com/news/article01>> accessed 1 April 2004; A Ossai, 'N117bn Expected Privatisation Proceeds not Reflected in Budget' *Daily Times* (Lagos 2 February 2004) <<http://www.dailytimesofnigeria.com>> accessed 4 February 2004.

<sup>848</sup> Chapter 2 para 2.3.2.3.

<sup>849</sup> Guidelines on Privatisation of Government Enterprises para 9.4.

<sup>850</sup> IMF, 'Nigeria: Poverty Reduction Strategy Paper—Progress Report' (Report) (August 2007) IMF Country Report No 07/270 1, 3, 13, 14, 15, 18, 19.

<sup>851</sup> PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 JAL 173, 191.

on speedy completion of privatisation and meeting target dates.<sup>852</sup> One of the key issues in assessing how citizens benefit from privatisation is how privatisation proceeds are utilised. The Guidelines on Privatisation of Government Enterprises notes that the use of privatisation proceeds ‘will include the use of the funds for productive investment and for the improvement of education, agriculture, health and other social sectors.’<sup>853</sup> However it should be noted that a significant part of privatisation expenditure comes from money that the country borrowed from the World Bank, which means that whatever financial proceeds that possibly materialises from privatisation may be used to repay this debt rather than to address the above social concerns.<sup>854</sup> Besides, as will be seen in the later discussion on privatisation-related corruption in Nigeria, it is by no means certain that the proceeds of privatisation will be properly accounted for and judiciously utilised where privatisation is implemented non-transparently.<sup>855</sup> Regarding post-privatisation revenue that could accrue to the government through taxation and be used for addressing a host of social issues, the point was earlier made that the country’s tax system does not appear to be robust, and also has a lot of non-transparently granted waivers.<sup>856</sup>

Another key issue concerning citizens welfare is the issue of how they can effectively participate in the privatisation process, of which the point was made earlier that

---

<sup>852</sup> Chapter 4 para 4.3.2.1. Also see Chapter 2 para 2.3.2.3; Chapter 3 para 3.2.3.1.

<sup>853</sup> Guidelines on Privatisation of Government Enterprises para 17.

<sup>854</sup> World Bank (International Development Association), ‘Proposed Project Restructuring and Amendment of the Credit Agreements for the Privatization Support Project (Cr 3520-Uni) and Community Based Urban Development Project (Cr 3654-Uni) in the Context of the Portfolio Restructuring and in Alignment with the Country Partnership Strategy for the Federal Republic of Nigeria’ (Report) (June 2005) Report No 32425-NG 5-7, 12-13. P Bennel, ‘Privatization in sub-Saharan Africa’ in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 318. For contrast, see JMP Nelson, ‘Modernisation and Privatisation in Ecuador’ (1994) 5 ICCLR 289, 292.

<sup>855</sup> V Akpotaire, ‘The Nigerian Privatisation Laws, Insider Dealing Abuses, and the Regulatory Authorities’ (2002) 23 BLR 291, 291, 294; M Oloja, J Ogbodo and A Ashaolu, ‘“Missing” Privatisation Fund Part of 2001 Budget, Says Govt’ *The Guardian* (Lagos 1 April 2004) <<http://www.guardiannewsngr.com/news/article01>> accessed 1 April 2004; A Ossai, ‘N117bn Expected Privatisation Proceeds not Reflected in Budget’ *Daily Times* (Lagos 2 February 2004) <<http://www.dailytimesofnigeria.com>> accessed 4 February 2004.

<sup>856</sup> CS Ola, ‘A Critical Analysis of the Nigerian Tax System’ in IE Sagay and O Oliyide (eds), *Current Developments in Nigerian Commercial Law: Essays in Honour of Chief Samuel Igbayilola Adegbite* (Throne-of-Grace Limited, Lagos 1998) 269, 277; IO Bolodeoku, O Arowolo, ‘Eti-Osa Local Government v Jegede: A Fillip for Responsible Tax Administration in Nigeria’ (2008) 19 ICCLR 25, 25, 27-28; S Adejokun, ‘Nigeria Loses N100b to Tariff Waivers’ *Daily Independent* (Lagos 25 February 2004) <<http://www.dailyindependentng.com>> accessed 25 February 2004.

although the Guidelines on Privatisation of Government Enterprises recognizes the need for a Share Purchase Fund Scheme that will facilitate widespread participation<sup>857</sup>, the scheme has not yet started functioning several years after the commencement of the privatisation exercise. An attempt to set up the scheme some years ago ended in controversy and allegations of corruption, cronyism and lack of transparency.<sup>858</sup>

Regarding the strategic approach to issues concerning workers, it is worth pointing out that some layoffs may be inevitable for achieving greater productivity and efficiency given the poor staffing of many public enterprises<sup>859</sup>, however the key issue is proper timing and strategising, considering that the country has a very high unemployment rate and does not have a welfare system that pays unemployment benefits to those that are unemployed. Bode Agoro notes that:

... the programme of redundancies must be carried out properly. If it is not properly planned and executed, there is the potential not only of leading to a spontaneous industrial crisis but also frustrating the entire privatisation process. The Government must therefore carefully study the existing conditions of service of ... staff with a view to evolving a more favourable retirement package for those who will eventually be laid off....<sup>860</sup>

Such careful planning does not seem to have taken place, with the result that privatisation related job cuts has proceeded at the same time as massive civil service purges, with thousands of workers entering the unemployment queue at the same time.<sup>861</sup> Due to the earlier noted problems with the investment climate in the country,

---

<sup>857</sup> Guidelines on Privatisation of Government Enterprises para 9.4.

<sup>858</sup> L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTLR 229, 232; Y Odunuga, O Akintunde and C Nwankwo, 'Share Purchase Scam: "BPE Paid Us Only \$5.7m"' *The Punch* (Lagos 28 March 2005) <<http://odili.net/news/source/2005/mar/28/501.html>> accessed 29 March 2005; O Akintunde, C Nwankwo and I Isine, 'BPE Paid \$41m to a Nigerian Firm for Share Scheme – CAC' *The Punch* (Lagos 18 March 2005) <<http://odili.net/news/source/2005/mar/18/512.html>> accessed 19 March 2005.

<sup>859</sup> B Agoro, 'The Nigerian Oil Industry Privatisation Process: An Alternative' [2000] IELTR 225, 226.

<sup>860</sup> *Ibid.*

<sup>861</sup> B Oladeji, 'Mass Purge of FG Workforce Begins - Yayale' *Daily Independent* (Lagos 25 January 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 25 January 2006; G Faturoti, 'Dangote Sacks Osogbo Steel Plant Workers' *Daily Independent* (Lagos 9 January 2006) <<http://www.independentng.com/news/njjan090607.htm>> accessed 9 January 2006; S Adebayo, 'Delta Steel Sacks 1,051' *The Punch* (Lagos 4 July 2005) <<http://www.punchng.com/main/article05>> accessed 4 July 2005.

including the systemic issues facing the private sector, the ability of these workers to find alternative employment is highly constrained, meaning potential long term unemployment for thousands of people.<sup>862</sup> Workers have challenged the government to first deliver on the promise of creating 7 million jobs in the economy (target date of 2007) before destroying existing jobs<sup>863</sup>, of which trade liberalisation may also have resulted in net job losses from local firms that are unable to compete with cheaper foreign goods.<sup>864</sup> Although there is usually a six-month moratorium on lay offs by privatised enterprises, this is quite limited considering the above noted risk of long term unemployment, and sometimes the moratorium deadline has been ignored.<sup>865</sup> Severance packages are frequently delayed and paid haphazardly.<sup>866</sup> Workers that are retained by privatised enterprises often lose job security owing to new employment contracts that emphasize the flexibility and casualisation of employment.<sup>867</sup> Also noteworthy is the point made earlier that some foreign investors, rather than facilitating local employment creation, have focussed more on employing workers from their home jurisdictions.<sup>868</sup>

---

<sup>862</sup> Chapter 4 para 4.2.1.

<sup>863</sup> IMF, 'Nigeria: Poverty Reduction Strategy Paper—Progress Report' (Report) (August 2007) IMF Country Report No 07/270 10; C Edomarus, 'You Can't Sack any Worker, Labour tells FG, Fulfil Promise on Job Creation First' *Thisday* (Lagos 19 March 2005) <<http://www.thisdayonline.com/nview.php?id=12247>> accessed 19 March 2005.

<sup>864</sup> OAO Alegimlen, 'Structural Adjustment and Nigerian Development: A Third World Angle' (1996-1998) 4 & 5 *Nigerian Current Legal Problems* 28, 35.

<sup>865</sup> E Onyekpere, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005) 48, 51; A Ukodie and S Adejokun, 'NITEL: 7,144 Lose Job this Week' *Daily Independent* (Lagos, Nigeria 4 September 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 4 September 2006; N Duru, 'Privatisation: Workers Seek One-Year Moratorium' *Thisday* (Lagos 31 July 2005) <<http://www.thisdayonline.com/nview.php?id=24035>> accessed 31 July 2005.

<sup>866</sup> Editorial, 'Proposed Mass Sack in Public Service' *The Guardian* (Lagos 24 March 2005) <<http://odili.net/news/source/2005/mar/24/25.html>> accessed 24 March 2005; M Ebosele, 'Anxiety Grips Workers as Railway Begins Financial Autonomy' *The Guardian* (Lagos 1 January 2004) <<http://www.guardiannewsngr.com/news/article06>> accessed 1 January 2004; D Fanim, 'Privatisation: Senior Workers Tackle BPE over Members' Welfare' *The Guardian* (Lagos 8 August 2005) <<http://www.guardiannewsngr.com/appointment/article01>> accessed 8 August 2005.

<sup>867</sup> D Fanim, 'Privatisation: Senior Workers Tackle BPE over Members' Welfare' *The Guardian* (Lagos 8 August 2005) <<http://www.guardiannewsngr.com/appointment/article01>> accessed 8 August 2005; B Oke, 'Workers Threaten Employers over Casualisation' *The Punch* (Lagos 17 August 2005) <<http://odili.net/news/source/2005/aug/17/461.html>> accessed 17 August 2005.

<sup>868</sup> E Onyekpere, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005) 51; J Ogbodo and T Daka, 'Reps Probe Foreign Firms over Discrimination in Employment' *The Guardian* (Lagos 3 June 2009) <<http://odili.net/news/source/2009/jun/3/12.html>> accessed 3 June 2009.

The implementation of the provision in the Public Enterprises Decree 1999, which provides that some shares would be allocated to workers of privatised enterprises in a bid to ameliorate the potential adverse impact of the exercise on them<sup>869</sup>, will give rise to one key problem – it is not clear whether workers that are sacked immediately before or immediately after privatisation as a result of privatisation-related restructuring would also benefit from this provision.<sup>870</sup> If sacked workers do not benefit from the provision, it severely diminishes its utility, and the government or strategic investor could massively sack workers in order to reduce the scope of potential beneficiaries.

As earlier noted, workers have often resorted to strikes and protests to register their opposition to the manner and pace of implementation of the privatisation programme, and such protests, combined with the government's reaction could have implications for the investment climate in the country.<sup>871</sup> It has been noted with reference to Nigeria that the curtailment of labour rights in the course of implementing economic reform measures often has the tacit support of the IFIs where they consider such reforms acceptable, of which the need to implement the reforms is prioritised over the need to respect labour rights.<sup>872</sup> In this regard, the IMF's view that there is need for 'the privatization program ... to be accelerated'<sup>873</sup>, does not seem to fully factor in the implementation reality of privatisation for key stakeholders in the country, such as workers.

Although the constitution provides that State policy shall be directed towards the provision of 'reasonable national minimum wage' as well as unemployment benefits, and also ensuring that 'all citizens ... have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment'<sup>874</sup>, given

---

<sup>869</sup> Public Enterprises Decree 1999 s 5(3); Guidelines on Privatisation of Government Enterprises para 12.2.

<sup>870</sup> Also see IO Bolodeoku, 'The Search for Global Capital: What has Privatisation Got to do with it, What are the Challenges for Nigeria' (2003) 23 JPPL 93, 113.

<sup>871</sup> Chapter 4 para 4.2.1.

<sup>872</sup> OC Okafor, 'The Precarious Place of Labour Rights and Movements in Nigeria's Dual Economic and Political Transition, 1999–2005' (2007) 51 JAL 68, 68, 89-94.

<sup>873</sup> IMF, 'Nigeria: 2004 Article IV Consultation—Staff Report; and Public Information Notice on the Executive Board Discussion' (Report) (August 2004) IMF Country Report No 04/239 33.

<sup>874</sup> Constitution of the Federal Republic of Nigeria 1999 ss 16(2)(d), 17(3)(a).

that these provisions are non-justiceable, they cannot form the basis for citizens that have been adversely affected by the implementation of privatisation to maintain action against the government.<sup>875</sup> Besides, it has also been noted that most poor people cannot afford the high cost of litigation in Nigeria, including lawyers' fees and court fees.<sup>876</sup>

Finally it should be noted that although the Public Enterprises Decree 1999 empowers the NCP to periodically review the socio-economic effect of the privatisation programme and decide on appropriate remedies<sup>877</sup>, there is no indication that this has ever been done. Ordinarily this would have been a useful means of ensuring that the implementation of privatisation remains in consonance with the economic development objectives of privatisation in the country.

#### **4.2.4. IS THE PRIVATISATION PROCESS ACCOUNTABLE, TRANSPARENT AND FREE FROM CORRUPTION?**

Corruption has been linked to the malfunctioning of public enterprises in Nigeria, the massive poverty and unemployment facing the country and the reluctance of foreign investors to invest in the country<sup>878</sup>, and the government considered privatisation as a key policy measure for effacing corruption and other problems facing public enterprises.<sup>879</sup> However despite various safeguard measures contained in the Public Enterprises Decree 1999 and the Guidelines on Privatisation of Government Enterprises

---

<sup>875</sup> Ibid s 6(6)(c); BO Okere, 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' (1983) 32 ICLQ 214, 221-222. Also see D Foster and D Braddon, 'An Inter-Disciplinary Approach to the Analysis of Privatisation and Marketisation' in D Braddon and D Foster (eds), *Privatization: Social Science Themes and Perspectives* (Dartmouth, Aldershot 1996) 296.

<sup>876</sup> Y Dankofa, 'Law as a Tool for Societal Development: The Islamic Law Option' (1997) 4 ABULSJ 128, 135. Also see AO Obilade, 'Poverty and the Legal System: The Laws' Response to Poverty in Nigeria' in DA Guobadia and E Azing (eds), *Poverty, The Nigerian Economy and The Law* (NIALS, Lagos 2004) 203-204, 210, 218, 220.

<sup>877</sup> Public Enterprises Decree 1999 s 11(i).

<sup>878</sup> Y Dankota, 'Socio-Economic Costs of Corruption to the Nigerian State' [1996] Nigerian Current Law Review 256, 262, 265-266; AY Shehu, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 JFC 69, 69, 71, 74, 84; NS Okogbule, 'Official Corruption and the Dynamics of Money Laundering in Nigeria' (2007) 14 JFC 49, 50; NS Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13 JFC 2006 92, 93; OF Arowolo, 'In the Shadows of the EFCC: Is the ICPC Still Relevant?' (2006) 9 JMLC 203, 203.

<sup>879</sup> O Obasanjo (President of Nigeria), 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4.



to ensure accurate valuation and pricing of privatisation shares and assets, transparent selection of qualitative core/ strategic investors through international competitive bidding and proper accounting of privatisation proceeds<sup>880</sup>, and despite transparency assurances by the government<sup>881</sup>, allegations of corruption and cronyism have characterised the implementation of the programme. This relates to both the sale of public enterprises and assets as well as the utilisation of privatisation proceeds. In one instance, public assets were advertised for sale through public bidding after such assets had already been secretly pre-allocated to top government officials and their family members.<sup>882</sup> Some enterprises have been controversially sold to, and concessions and contracts awarded to companies in which top government officials and those connected to the ruling political party have financial interests.<sup>883</sup> Some of these companies lacked technical or financial track record and seemed to have been set up specifically to bid for enterprises being privatised.<sup>884</sup>

On the issue of utilisation of privatisation revenue, news reports indicate that the Nigerian government has not been able to satisfactorily explain how much it has

---

<sup>880</sup> Public Enterprises Decree 1999 ss 11(c), 13(1)(h), 19(1), 21, 22; Guidelines on Privatisation of Government Enterprises paras 8, 9(2), 13, 14, 17; National Council on Privatisation, Nigeria, 'Blueprint of the Privatisation Programme' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 73-75. Also see N Dimgba and LO Okeke, 'Nigeria: Telecommunications – Privatisation' (2000) 6 CTLR N124, N124-N125.

<sup>881</sup> O Obasanjo (President of Nigeria), 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4.

<sup>882</sup> Editorial, 'The Ikoyi Housing Scam' *Thisday* (Lagos 11 April 2005) <[http://www.nigerianmuse.net/nigeriawatch/officialfraud/?u=media\\_editorials\\_opinions\\_on\\_ikoyi\\_scandal.htm](http://www.nigerianmuse.net/nigeriawatch/officialfraud/?u=media_editorials_opinions_on_ikoyi_scandal.htm)> accessed 7 September 2006.

<sup>883</sup> V Akpotaire, 'The Nigerian Privatisation Laws, Insider Dealing Abuses, and the Regulatory Authorities' (2002) 23 BLR 291, 291, 294; J Alechenu, 'Senate Queries BPE over Ports Concession' *The Punch* (Lagos 9 October 2008) <[www.punchng.com](http://www.punchng.com)> accessed 9 October 2008; I Adams, 'Atiku's Intels in the Eye of a Storm' *The Punch* (Lagos 23 December 2005) <<http://odili.net/news/source/2005/dec/23/402.html>> accessed 23 December 2005; Editorial, 'Obasanjo Holdings and Transcorp PLC' *Daily Independent* (Lagos 16 August 2006) <<http://www.independentngonline.com/news/102/article/9005/2006-08-16.html>> accessed 16 August 2006; Editorial, 'Integrity of ALSCON's Sale' *The Punch* (Lagos 12 May 2005) <<http://www.punchng.com/editorial/article01>> accessed 12 May 2005; M Okwe, 'Dangote Buys Osogbo Steel Plant for N2.61b' *The Guardian* (Lagos 23 November 2005) <<http://odili.net/news/source/2005/nov/23/27.html>> accessed 23 November 2005. Also see IO Bolodeoku, 'Corporate Political Contributions: A Comment on Nigeria's Electoral Act 2006' (2007) 18 ICCLR 107, 107, 113; O Akintunde, 'PDP is not a Political Party' *The Punch* (Lagos 6 April 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 6 April 2006.

<sup>884</sup> L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 Editorial, 'Transcorp and NITEL' *Thisday* (Lagos 9 July 2006) <[http://www.thisdayonline.com/nview.php?id=52653&printer\\_friendly=1](http://www.thisdayonline.com/nview.php?id=52653&printer_friendly=1)> accessed 9 July 2006.

realised from the privatisation programme or account for how such privatisation proceeds have been utilised, which has given rise to concerns about misappropriation of public funds.<sup>885</sup>

Two key factors appear to have contributed to the vices of corruption and cronyism in the implementation of the Nigerian privatisation programme. In the first place, despite the merits of various privatisation safeguard measures, concern was earlier raised regarding the open ended methods of privatisation provided under the Public Enterprises Decree 1999, which encompasses privatisation 'by public issue ... or private placement ... through a willing seller and willing buyer basis or through any other means.'<sup>886</sup> BPE, which has manifested institutional weaknesses that have had impact on its functioning, has placed considerable reliance on other methods of privatisation besides public issue which have been noted to be less transparent.<sup>887</sup> Where they are used effectively, private sales could be utilised for selecting the most qualified core investors to take over and add value to public enterprises and obtaining commitments from them regarding future operations and staff welfare, but on the other hand, such

---

<sup>885</sup> Editorial, 'Re-Investing Proceeds of the Privatisation Programme' *Daily Independent* (Lagos 31 May 2006) <<http://www.independentngonline.com/print.php?a=3593>> accessed 31 May 2006; M Oloja, J Ogbodo and A Ashaolu, "'Missing" Privatisation Fund Part of 2001 Budget, Says Govt' *The Guardian* (Lagos 1 April 2004) <<http://www.guardiannewsngr.com/news/article01>> accessed 1 April 2004; A Ossai, 'N117bn Expected Privatisation Proceeds not Reflected in Budget' *Daily Times* (Lagos 2 February 2004) <<http://www.dailytimesofnigeria.com>> accessed 4 February 2004.

<sup>886</sup> Public Enterprises Decree 1999 s 2(3). Also see V Akpotaire, 'The Nigerian Privatisation Laws, Insider Dealing Abuses, and the Regulatory Authorities' (2002) 23 BLR 291, 293.

<sup>887</sup> Regarding transparency requirements in public issues in Nigeria, see OO Oladele, 'Information Equalisation and Candour in Public Offers of Securities in Nigeria' (2008) 19 ICCLR 311, 311-324; OO Oladele, 'Disclosure in Secondary Securities Transactions in Nigeria' (2008) 19 ICCLR 254, 254-264. Regarding the use of other forms of privatisation, see for instance, K Aderinokun, 'Orascom Telecom Wins NITEL with \$256m' *Thisday* (Lagos 30 December 2005) <<http://www.nigeriamasterweb.com/paperfirms.html>> accessed 30 December 2005; Editorial, 'Should the Sale of NITEL Stand?' *The Guardian* (Lagos 21 July 2006) <<http://odili.net/news/source/2006/jul/21/11.html>> accessed 21 July 2006; Adejokun, 'FG to Sell NAFCON through Guided Liquidation, says BPE' *Daily Independent* (Lagos 19 May 2005) <<http://www.dailyindependentng.com/>> accessed 19 May 2005. Note that under the first privatisation programme, public issue of shares was primarily used and some have portrayed it as being transparently implemented. See JJ Bala, 'The Impacts of Privatization on Distributional Equity in Nigeria' in VV Ramanadham (ed) *Privatization and Equity* (Routledge, London 1995) 211, 219. Others have however noted that the first privatisation programme was also utilised for patronage purposes with politically connected people having an edge in acquisition of state assets, including the use of loans non-transparently sourced from state banks to buy some of the privatised enterprises. See P Lewis, 'From Prebendalism to Predation: The Political Economy of Decline in Nigeria' (1996) 34 J Mod Afr Stud 79, 89; W Reno, 'Old Brigades, Money Bags, New Breeds, and the Ironies of Reform in Nigeria' (1993) 27 Can J Afr Stud 66, 74-75. The key point therefore is that public issue may also be susceptible to some manipulation. See T Prosser and C Graham, 'Golden Shares: Industrial Policy by Stealth?' [1988] PL 413, 423-424.

arrangements are also open to abuse.<sup>888</sup> While some countries have used safeguard measures like public disclosure of enterprise valuation<sup>889</sup>, in Nigeria the secrecy surrounding enterprise valuation and negotiations between public officials and prospective investors under such arrangements often creates an enabling environment for favouritism and the execution of non-transparent transactions.<sup>890</sup>

The second key contributory factor regarding corruption and cronyism is the earlier noted excessive political interference in the functioning of BPE resulting in arbitrariness in the conduct of various transactions despite the legal provisions and guidelines designed to ensure transparency in its functioning.<sup>891</sup> As indicated in Chapter 3, where national political leaders that have adopted the policy of privatising public enterprises have vested interest in its outcome, it creates an incentive to interfere in the undertaking of such a sensitive exercise.<sup>892</sup> A lot has been written on the prevalence of massive public sector corruption in Nigeria, including corruption in public contracts and misuse of public funds, and corruption goes beyond public enterprises and is noted to also permeate key institutions of governance in the country.<sup>893</sup> This is inspite of the fact that Nigeria has various anti-corruption laws and anti-corruption bodies set up to enforce

---

<sup>888</sup> KP Buschardt and WK Sievers, 'Privatisation in Poland' (1994) 5 ICCLR 128, 129; A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] IELTR 219, 221, 222; OO Oladele, 'Information Equalisation and Candour in Private Placement of Securities in Nigeria' (2008) 19 ICCLR 355, 360. Also see C Bovis, 'An Impact Assessment of the European Public Procurement Law and Policy' [1999] JBL 126, 139; T Prosser and C Graham, 'Golden Shares: Industrial Policy by Stealth?' [1988] PL 413, 423-424.

<sup>889</sup> A Echard and P Billot, 'Privatisation in France in 1993' (1993) 4 ICCLR 406, 406, 409.

<sup>890</sup> V Onyeka-Ben, 'Mixed Reactions, Worries Trail Sale of NITEL' *The Guardian* (Lagos 10 July 2006) <<http://odili.net/news/source/2006/jul/10/65.html>> accessed 10 July 2006.

<sup>891</sup> Chapter 4 para 4.2.2.

<sup>892</sup> Chapter 3 para 3.2.4.

<sup>893</sup> EG Bello, 'Evolving a Legal and Institutional Framework for Combating Corruption and Other Economic Crimes in Nigeria' in AU Kalu and Y Osinbajo (eds), *Perspectives on Corruption and Other Economic Crimes in Nigeria* (The Federal Ministry of Justice, Lagos, 1991) 180; T Forrest, 'The Political Economy of Civil Rule and the Economic Crisis in Nigeria (1979-84)' [1986] (35) *Rev African Polit Economy* 4, 4-6, 20; PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 *JAL* 173, 173-176, 184-185, 188-189; PD Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 *LJIL* 749, 753-757; D Olowu, 'Bureaucratic Morality in Africa' (1988) 9 *IPSR* 215, 217; M Szeftel, 'Between Governance & Underdevelopment: Accumulation & Africa's "Catastrophic Corruption"' (2000) 27 *Rev African Polit Economy* 287, 303; P Lewis, 'Nigeria's Economy: Opportunity and Challenge' (1999) 27(1) *Issue: A Journal of Opinion* 50, 51; S Williams, 'The Development of Defence Procurement Policy in Nigeria and the Case for Reform' [2005] *PPLR* 153, 161-162, 169-170, 174.

these laws.<sup>894</sup> Dubious procurement contracts have also been awarded despite the fact that the government has set up a due process office whose duty it is to insist on compliance with contract procedural guidelines.<sup>895</sup> Akin to the research argument that privatisation laws alone cannot facilitate economic development in Nigeria due to other issues within the social context of its adoption and implementation, it has also been argued that corruption laws alone cannot effectively resolve the problem of corruption in the country where it is embedded in:

... the larger mix of social and political problems that afflict the country.  
... Once it is recognized that the social environment is the proper arena of engagement, then the relatively limited place of law in the grand scheme of things becomes evident.<sup>896</sup>

Within this social context in which corruption manifests, political will is required to effectively address it of which it has been noted that 'Nigerian governments are notorious for their lack of political will in the matter of control of corruption.'<sup>897</sup> Although privatisation has been presented as an effective way of reforming public enterprises and facilitating economic development, to the extent that the political leaders in the country appear to lack the necessary incentive and political will to privatise transparently and prevent corruption from contaminating the divestiture process itself, privatisation may remain ineffective in actualising these objectives. The influence of corruption in privatisation, which stems from the vested interest viewpoint of privatisation earlier articulated, provides a broader framework for understanding why

---

<sup>894</sup> The Corrupt Practices and Other Related Offences Act 2000 established the Independent Corrupt Practices and Other Related Offences Commission, while the Economic and Financial Crimes Commission Establishment Act 2004 established the Economic and Financial Crimes Commission. See also NS Okogbule, 'Official Corruption and the Dynamics of Money Laundering in Nigeria' (2007) 14 JFC 49, 50, 57; AY Shehu, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 JFC 69, 69.

<sup>895</sup> NS Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13 JFC 2006 92, 101; CA Malgwi, 'Fraud as Economic Terrorism: The Efficacy of the Nigerian Economic and Financial Crimes Commission' (2004) 12 JFC 144, 149.

<sup>896</sup> PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 JAL 173, 184. Also see 185.

<sup>897</sup> Ibid 190. Also see 191 – 195. See further AY Shehu, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 JFC 69, 72-73, 75, 77, 81, 83-84; O Arowolo, 'Nigeria's Downstream Sector Deregulation Crisis: What are the Unresolved Issues?' [2005] IELTR 10, 16; OF Arowolo, 'In the Shadows of the EFCC: Is the ICPC Still Relevant?' (2006) 9 JMLC 203, 204; NS Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13 JFC 2006 92, 100, 103; Lewis, 'Nigeria's Economy: Opportunity and Challenge' (1999) 27(1) Issue: A Journal of Opinion 50, 52.

African countries like Nigeria may be willing to implement privatisation even when evidence may show some degree of coercion by IFIs.

#### **4.3. EVALUATION AND CONCLUDING REMARKS**

The implementation of privatisation in Nigeria was critically analysed in this chapter. Similar to the situation with some other African countries, some obstacles stand in the way of fully actualising economic development through the instrumentality of privatisation. While some of the problems may be rooted in deficiencies in the laws and regulations guiding privatisation, which may be cured by further legal reform, it is also clear that there is a limit to what law can accomplish in the implementation of privatisation given that other issues pertaining to the underlying investment climate in Nigeria, the functioning of various public institutions, the strategic approach to privatisation and the political dynamics inherent in corruption and cronyism in Nigeria, could all have impact on its outcome. Essentially, the laws cannot be considered in the abstract, without factoring in the social context of the implementation of privatisation in Nigeria. The next chapter focuses on how the above issues have manifested in the implementation of electricity reforms in Nigeria, which is expected to culminate in privatisation.

## CHAPTER FIVE

### CRITICAL APPRAISAL OF THE ADOPTION AND IMPLEMENTATION OF ELECTRICITY PRIVATISATION IN NIGERIA

Having analysed the case for privatisation in Africa, and examined how privatisation was adopted and implemented in Nigeria, this chapter narrows the discussion to the Nigerian electricity sector which is one of the key sectors of the economy earmarked for extensive reforms including privatisation.

The electricity sector has been under monopoly public sector ownership and control and the National Electric Power Authority (NEPA) was tasked with developing and maintaining 'an efficient, coordinated and economical system of electricity supply for all parts of the Federation' including the generation, transmission and distribution of electricity.<sup>898</sup> Although over the years considerable public investment has gone into increasing the volume of generated power, extending power coverage in the country and upgrading power facilities, the research case study showed that power supply remains inadequate for electricity users in the country. As of 2000, the National Electric Power Policy estimated that only 36 per cent of the country had access to power from NEPA and a big gap exists between the demand for, and supply of power in the country.<sup>899</sup> Increasing industrialisation, unplanned urbanisation and the use of obsolete power equipment are some of the issues that have contributed to the power deficit in the country, and power rationing and load shedding have been inevitable because of the growing energy gap, in a bid to evenly distribute a scarce commodity, but even then, the rationing is done in a haphazard manner with frequent and irregularly patterned

---

<sup>898</sup> National Electric Power Authority Act No 24 of 1972, Chapter 256 Laws of the Federation of Nigeria 1990 ss 1(1), 35. Also see Electricity Act, Chapter 106 Laws of the Federation of Nigeria 1990, which also guided NEPA's operations; AG Adaralegbe, 'Are the Energy Laws of Nigeria Sufficient to Promote and Preserve Competition?' [2003] IELTR 251, 252-253; A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] IELTR 219, 219-220.

<sup>899</sup> Electric Power Sector Reform Implementation Committee, Nigeria, 'National Electric Power Policy' (October 2000) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/B3AE9394-8383-47E5-8199-CD1A325A265B/0/ElectricPowerPolicy.pdf>> accessed 6 September 2004 paras 1.2, 1.3. Further references to this policy shall simply read 'National Electric Power Policy', without the full citation. paras 1.2, 1.3; Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002) 171.

blackouts occurring at both peak and off-peak periods.<sup>900</sup> It is fair to say that in many parts of the country with access to grid electricity, NEPA has been synonymous more with darkness than light, with the availability of electricity power supply being more of an exception rather than the rule. From epileptic power supply and frequent power outages, the situation has worsened to periodic total systemic failures and blackouts throughout the country, affecting homes, businesses, government departments and public services.<sup>901</sup>

The National Electric Power Policy considers that adequate electricity supply will play a key role in advancing economic development in the country.<sup>902</sup> In seeking to privatise NEPA, the government expressed the intention of attracting greater private foreign and domestic investment to, and participation in the country's power sector while limiting government guarantees to private investors; making the sector more efficient, profitable and competitive; facilitating the development of an electricity market; ensuring appropriate electricity regulation; extending electricity coverage in the country with a view to achieving universal access; ensuring the citizens get qualitative and affordable electricity and electricity workers equitable treatment; and accelerating the country's socio-economic development and enhancing the life quality of its citizens.<sup>903</sup> The President also emphasised the need for utilising privatisation as a policy tool for integrating the national economy into the global economy and attracting foreign

---

<sup>900</sup> OU Oparaku, 'Photovoltaic Systems for Distributed Power Supply in Nigeria' (2002) 25 *Renewable Energy* 31, 31; J Ikeme and OJ Ebohon, 'Nigeria's Electric Power Sector Reform: What should Form the Key Objectives?' (2005) 33 *Energy Pol'y* 1213, 1215-1216; MA Tokunboh, *Public Enterprises: The Nigerian Experience* (Lantern Books, Lagos 1990) 33; AF Adenikinju, 'Electric Infrastructure Failures in Nigeria: A Survey-Based Analysis of the Costs and Adjustment Responses' (2003) 31 *Energy Pol'y* 1519, 1523-1525.

<sup>901</sup> J Ikeme and OJ Ebohon, 'Nigeria's Electric Power Sector Reform: What should Form the Key Objectives?' (2005) 33 *Energy Pol'y* 1213, 1215; G Tyler, 'Nigeria: Public and Private Electricity Provision as a Barrier to Manufacturing Competitiveness' (2002) 221 *Findings* (World Bank) <<http://www.worldbank.org/afr/findings/english/find221.pdf>> accessed 2 December 2005; C Ogugbuaja, T Alao and S Olumide, 'NEPA, Still in Shock, Remains Prostrate' *The Guardian* (Lagos 8 February 2005) <<http://odili.net/news/source/2005/feb/8/27.html>> accessed 10 February 2005; B Anaro, 'Firms Suffer as Power Holding Fails to Tackle Outages Problems' *Businessday* (Lagos 15 February 2006) <<http://www.nigeriamasterweb.com/paperfirms.html>> accessed 15 February 2006.

<sup>902</sup> National Electric Power Policy paras 1.1, 2.2(b), 17. Also see J Turkson and N Wohlgemuth, 'Power Sector Reform and Distributed Generation in Sub-Saharan Africa' (2001) 29 *Energy Pol'y* 135, 135; O Arowolo, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] *IELTR* 163, 163; AG Adaralegbe, 'Are the Energy Laws of Nigeria Sufficient to Promote and Preserve Competition?' [2003] *IELTR* 251, 252-253; A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] *IELTR* 219, 219-220.

<sup>903</sup> National Electric Power Policy paras 1.4, 2, 3.1.4, 4.0, 4.2.5, 5.0-5.5, 6.1-6.2, 10.0, 17.

technology, expertise and capital in improving the country's utilities.<sup>904</sup> The wide ranging objectives of the privatised electricity sector recognises key potential benefits for various stakeholders which reflect the key economic development benefits of privatisation noted in this thesis. In the specific context of electricity privatisation, as seen above, privatisation would be beneficial for the government and the privatised utility/infrastructural enterprise, it would contribute to the overall development of the private sector-led power sector, and will be beneficial to the citizens, including the power sector workers, and would provide a conduit for qualitative foreign investments to flow to the country further positioning it as a global investment destination.

The National Electric Power Policy also noted the need for legal and regulatory reform in order to actualise the policy objectives of power sector reform.<sup>905</sup> The government has now put in place the legal and regulatory framework for undertaking extensive reform of the electricity sector, of which privatisation forms a key part of the reform programme.<sup>906</sup> Under the Public Enterprises Decree 1999, NEPA had already been placed under the category of enterprises to be partially privatised, meaning that a maximum of 40 per cent of the shares would be sold to a core/strategic investor, 20 per cent of the shares would be sold to Nigerian citizens, while the government will retain the balance of 40 percent of the shares.<sup>907</sup>

The case study examined the on-going electricity reform programme in order to assess whether the above-noted benefits of privatising and regulating the electricity sector in the country are likely to be realised, and noted that there are many challenges and problems facing the reform programme, which could be formidable obstacles in realising these benefits. While some of these problems specifically relate to the electricity sector including its law and policy framework, some others are symptomatic of broader problems facing the Nigerian privatisation programme, which were

---

<sup>904</sup> O Obasanjo (President of Nigeria), 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001) 4-5.

<sup>905</sup> National Electric Power Policy para 1.4.

<sup>906</sup> Electric Power Sector Reform Act No 6 of 2005. It established the Nigerian Electricity Regulatory Commission (NERC). See ss 31-32.

<sup>907</sup> Public Enterprises Decree 1999 1<sup>st</sup> Sch pt I; Guidelines on Privatisation of Government Enterprises para 1.4.



examined in Chapter 4. Following the analytical framework of the thesis, the design and implementation concerns of the electricity sector reform programme will be analysed.

## **5.1. DESIGNING AN EFFECTIVE POLICY AND LEGAL FRAMEWORK**

### **5.1.1. THE ELECTRICITY PRIVATISATION POLICY FRAMEWORK IN NIGERIA**

The case study examined why the Nigerian government decided to embark on electricity reforms including the restructuring and privatisation of NEPA and regulation of the sector. Three viewpoints were earlier discussed on this issue with regard privatisation in Africa generally, as well as with specific reference to Nigeria, namely the conviction, coercion and vested interest viewpoints. As reasoned in Chapters 2 and 3, privatisation has to be well thought out and primarily driven by conviction before it can be effective as an economic development policy measure, however as noted in Chapter 4, the adoption of privatisation in Nigeria bears elements of the 3 viewpoints and it is not clear that conviction was the primary deciding factor in the decision to embark on privatisation.<sup>908</sup>

Regarding the electricity privatisation programme, conviction does not appear to be the primary deciding factor. During the first privatisation programme, NEPA was scheduled for partial commercialisation.<sup>909</sup> In 1997, a government committee assigned the task of examining the various problems besetting the country in the political, socio-cultural and economic spheres, making appropriate recommendations and developing a short to medium term programme for the development of the country, after noting the dilapidated state of the power infrastructure and low power coverage in the country, recommended massive power sector investments and the undertaking of legal reform to pave way for deregulation and introduction of competition into the power sector.<sup>910</sup> However, after the submission of this report that did not recommend the privatisation of NEPA, the government announced its decision to reorganise, unbundle and privatise the

---

<sup>908</sup> Chapter 2 para 2.3.1.1, Chapter 3 para 3.1.1; Chapter 4 para 4.1.1.

<sup>909</sup> Privatisation and Commercialisation Decree (Act) No 25 of 1988 2<sup>nd</sup> sch. Pt 1.

<sup>910</sup> Vision 2010 Committee, Nigeria, 'Vision 2010: Main Report' Vol 1 (Report) (September 1997) <[http://www.vision2010.org/downloads/main%20report%20\(vol1\).doc](http://www.vision2010.org/downloads/main%20report%20(vol1).doc)> accessed 7 February 2006 23, 25, 99-100, 115, 195, 208.

power utility to promote competition and efficiency.<sup>911</sup> The point was also made in Chapter 4 that the National Electric Power Policy, which was adopted in October 2000 actually post-dates the decision to privatise the electricity utility given that NEPA had already been scheduled for privatisation under the Public Enterprises Decree 1999, thus the decision could not have been based on the policy.<sup>912</sup> The policy itself, in seeking to justify the implementation of privatisation, notes that:

*Across the world, countries are unbundling their electricity supply industries. Only the network elements of electricity transmission and distribution are natural monopolies. Both electricity generation and the sales/marketing of electricity are potentially competitive activities. ... Such markets encourage the introduction of private management methods and private investment as well as fostering the privatization of existing assets. The intention is that the proposed reforms should introduce these now widely applied developments to Nigeria, as laid out in this policy document.*<sup>913</sup> (emphasis added)

This above quotation, to some extent, appears like an attempt to justify power sector unbundling and privatisation primarily because of the global appeal of the reform strategy, rather than by reference to how the strategy fits within the social context of Nigeria where it will be implemented. As noted by Adebayo Adaralegbe, ‘while global trends tend towards more liberalised energy markets, there is no universal model in achieving this, and approaches differ between countries’<sup>914</sup> Further evidence of poor

---

<sup>911</sup> ——— ‘Nigerian Electric Privatisation Attracts Major Companies’ *Alexander’s Gas And Oil Connections* (Vooburg 4 March 1998) <<http://www.gasandoil.com/goc/history/>> accessed 2 December 2004.

<sup>912</sup> Chapter 4 para 4.1.1.

<sup>913</sup> National Electric Power Policy para 3.0.

<sup>914</sup> AG Adaralegbe, ‘Are the Energy Laws of Nigeria Sufficient to Promote and Preserve Competition?’ [2003] IELTR 251. Also see F Urban, RMJ Benders and HC Moll, ‘Modelling Energy Systems for Developing Countries’ (2007) 35 *Energy Pol’y* 3473, 3474, 3481; R Pritchard, ‘The IPP Experiment’ [2001] IELTR 29, 32. P Andrews-Speed and R Pritchard, ‘Eight Principles of Electricity Industry Reform’ [2001] IELTR 11, 11, 12; Other countries that have utilised the power sector reform strategy of unbundling, privatisation and regulation include European countries like the United Kingdom and Czech Republic see A Mares, I Martinkova and I Zothova, ‘Czech Republic: Electricity and Gas Industry Privatisation’ [2001] IELTR N39, N39-N41; MB Hassan, ‘The Utilities Act 2000: Impact on the Electricity Industry’ [2000] IELTR 231, 231-232. However, even within Europe, some countries have sought to introduce restrictions to some aspects of electricity privatisation, for instance Netherlands. See E Van Schilfgaarde and P Verkleij, ‘Netherlands Parliament Adopts Controversial Energy Legislation: Energy Companies will have to Split Up and Privatization of Networks is Unlikely’ [2006] IELTR 170, 170, 172; MM Roggenkamp, ‘Ownership Unbundling of Energy Distribution Companies: The Netherlands’ [2006] IELTR 240, 243. Beyond Europe, some other reform variations have been utilised in some countries rather than a perceived global model. Note for instance A Bonollo and G Anderson, ‘The South Australian Model of Electricity Privatisation’ [2001] IELTR 107, 107, 108-109, 112. Within Africa, South Africa for instance has a vertically integrated electricity public monopoly, ESKOM, which

policy making includes the fact that after NEPA had already been scheduled for privatisation, the former president noted in an interview that the power minister who did not keep the promise of stable power supply by the end of 1999 ‘did not fully comprehend what the problem with NEPA and with energy in general was.’<sup>915</sup>

It is important to note that as of February 1999, the government had already agreed with the IMF that it would privatise NEPA and agreed the timeframe for taking key steps towards this, and power sector reforms including NEPA privatisation fall within the funding scope of the World Bank’s Privatization Support Project for the country, of which the World Bank favours the electricity reform strategy of unbundling, privatisation and regulation.<sup>916</sup> The current development paradigm in Nigeria called the National Economic Empowerment and Development Strategy (NEEDS) places emphasis on accelerating the ‘fast-tracking the restructuring and privatization of the [power] sector’, however as noted in Chapter 4, NEEDS is actually Nigeria’s Poverty Reduction Strategy Paper (PRSP), which is a key documentary requirement in IFI financing/debt relief arrangements and some have noted that its preparation is often done within a very narrow policy space to ensure its conformity with IFI pre-endorsed policies.<sup>917</sup> Within the context of the PRSP, Nigeria has been updating the IMF on its

---

also operates in other countries within the region. See K Pakendorf, ‘South Africa: Electricity and Natural Gas’ [2000] IELTR 202, 203-206.

<sup>915</sup> ——— ‘People Talking About Hidden Agenda Are Those With Hidden Agenda —Obasanjo’ *Daily Independent* (Lagos 3 May 2005) <<http://www.dailyindependentng.com/>> accessed 3 May 2005.

<sup>916</sup> IMF, ‘Memorandum on Economic and Financial Policies of the Federal Government of Nigeria for 1999’ (February 1999) <<http://www.imf.org/external/np/loi/1999/022299.htm>> accessed 22 March 2006 para 27, 28, Appendix 2; World Bank (International Development Association), ‘Proposed Project Restructuring and Amendment of the Credit Agreements for the Privatization Support Project (Cr 3520-Uni) and Community Based Urban Development Project (Cr 3654-Uni) in the Context of the Portfolio Restructuring and in Alignment with the Country Partnership Strategy for the Federal Republic of Nigeria’ (Report) (June 2005) Report No 32425-NG 5-7, 12-13; World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000) 148-149.

<sup>917</sup> Chapter 4 para 4.1.1; IMF, ‘Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy’ (Report)(December 2005) IMF Country Report No 05/433 60, 61; D Holtom, ‘The Challenge of Consensus Building: Tanzania’s PRSP 1998–2001’ (2007) 45 *J Mod Afr Stud* 233, 240-247; T Mckinley, ‘MDG-Based PRSPs Need More Ambitious Economic Policies’ (2005) United Nations Development Programme Policy Discussion Paper <<http://www.undp.org/poverty/publications.htm>> accessed 24 October 2005 7-8. See also IMF, ‘Guidelines on Conditionality’ (September 2002) <<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>> accessed 20 March 2004 2.

progress in implementing power sector privatisation.<sup>918</sup> These are all indicative of a privatisation programme that may be partly motivated by some coercion.

It should also be noted that the government, having decided to pursue privatisation, suddenly decided to also embark on the construction of several new power plants in different parts of the country and extensive refurbishing of power facilities and equipment.<sup>919</sup> This is indicative of some policy confusion and perhaps lack of conviction about the effectiveness of the privatisation reform measure. The final consideration stemming from the vested interest viewpoint is that the implementation of privatisation may also be partly motivated by issues pertaining to corruption, which will be examined in some detail later in the work.<sup>920</sup>

### **5.1.2. THE ELECTRICITY PRIVATISATION LEGAL AND REGULATORY FRAMEWORK IN NIGERIA**

The importance of independent utility regulation was noted in Chapter 2.<sup>921</sup> The legal and regulatory framework for electricity reform in Nigeria, although commendable in many respects, could nevertheless give rise to various implementation challenges that could jeopardize the attainment of the economic development objectives of the power sector reforms. Specifically, there are some concerns about some of the provisions of the Electric Power Sector Reform Act 2005, including provisions relating to the structure, composition and functioning of the new electricity regulatory body, NERC that commenced operations in August 2005.

Although the regulatory framework for the power sector would need to be very robust in order to deliver on the key reform objectives of the government, the structure, composition and functioning of the Nigerian Electricity Regulatory Commission

---

<sup>918</sup> IMF, 'Nigeria: Poverty Reduction Strategy Paper — Progress Report' (Report)(August 2007) IMF Country Report No 07/270 13-14.

<sup>919</sup> Ibid 14; M Oduniyi, 'FG Releases N25bn for New Power Plants' *Thisday* (Lagos 24 March 2005) <<http://www.thisdayonline.com/nview.php?id=12656>> accessed 24 March 2005.

<sup>920</sup> Editorial, 'Obasanjo Holdings and Transcorp PLC' *Daily Independent* (Lagos 16 August 2006) <<http://www.independentngonline.com/news/102/article/9005/2006-08-16.html>> accessed 16 August 2006.

<sup>921</sup> Chapter 2 paras 2.3.1.2, 2.3.2.2. Also see T Prosser, 'Regulating Public Enterprises' [2001] PL 505, 506.

(NERC) as provided under the Act would likely give rise to various implementation problems. Many functions are assigned to NERC under the Electric Power Sector Reform Act 2005 and it has also been granted ample regulatory powers in order to effectively carry out the assigned functions. A source of concern however is that the new regulatory structure under the Act appears to be too monolithic or centralised, given the large geographical size of the country. Under the Act, the task of regulating the power sector for the entire country is assigned to 7 Commissioners.<sup>922</sup> The key essence of the Electric Power Sector Reform Act 2005 is to unbundle NEPA and pave way for many private power companies to take over the functions of NEPA, of which the unbundled company now awaiting full privatisation is called the Power Holding Company of Nigeria (PHCN). Assigning to one regulatory body the task of regulating the activities of all these private power companies may pave way for monopoly inefficiencies of the old era to creep into the reformed power sector. Where regulation is decentralised, perhaps according to the geopolitical regions in the country, it will be possible to generate regional benchmarks and best practices for assessing the performance of the electricity regulators. The United Kingdom for instance has a smaller population and geographical area than Nigeria and yet there are separate electricity regulatory bodies for England, Scotland and Wales on the one hand (Office of the Gas and Electricity Markets, OFGEM) and Northern Ireland on the other hand (Office for the Regulation of Electricity and Gas, OFREG).<sup>923</sup> If such were to be done in Nigeria, each regional regulatory body will oversee the activities of the power companies located in that region only, which will be a much more manageable task. The government would be able to assess whether a particular regional regulatory body is functioning well based on the performance of the regulatory bodies in other regions.

The composition of NERC also poses some problems given that both the power ministry and the BPE have expressed concern about the lack of adequate local capacity for implementation of the Electric Power Sector Reform Act 2005.<sup>924</sup> Despite this however, in keeping with the federal character principle, regional representation is stipulated as a key requirement in the appointment of electricity commissioners, in

---

<sup>922</sup> Electric Power Sector Reform Act 2005 s 34.

<sup>923</sup> Also see C Scott, 'Accountability in the Regulatory State' (2000) 27 *JL & Soc'y* 38, 45.

<sup>924</sup> C Akwaya, 'Power Sector: FG Seeks Foreign Experts for Regulatory Commission', *Nnaji To Set Up Three IPPS* *Thisday* (Lagos 3 April 2005) <<http://www.nigeriamasterweb.com/paperfmes.html>> accessed 3 April 2005.

addition to expertise.<sup>925</sup> This requirement of geo-political balancing may end up according higher priority to political correctness than competence and undermine the effectiveness of the regulatory body. It should be noted this was one of the contributory factors in the failure of Nigerian public enterprises in the first place.<sup>926</sup> There is the risk that where some regions lack suitably qualified people to represent them, incompetent or poorly qualified people from such regions may ultimately be appointed to serve on the Commission owing to political correctness. This would undoubtedly cripple the NERC, and since the NERC makes policies for the whole country, regions with suitably qualified commissioners would be saddled with the overall inefficiency of the NERC. Further, NERC commissioners are to be selected by the President rather than elected by their geo-political zones.<sup>927</sup> They may not necessarily represent the best interests of their zones, especially where they are resident in a zone other than where they are indigenes and could feel more beholden to their appointor than the people whose interests they are supposedly representing. Commenting on a similar issue with regard to another government commission called the Niger Delta Development Commission set up under the Niger Delta Development Commission (NDDC) (Establishment, etc) Act 2000, Kaniye Ebeku notes as follows:

The greatest of the problems that the NDDC face relate to its composition. Moreover, the NDDC Act lacks other appropriate and necessary participatory provisions. In particular, the NDDC Act does not make provision for the representation of the indigenous people (for whose benefit the Act was made) in the executing body nor is there a provision for their participation in the planning and execution of projects. Certainly, the provision for the representation of state members in the Commission cannot be properly regarded as affording representation to the local people, since they have no input in the process of appointment. The problem with this situation lies in the fact that such appointees are likely to see themselves as representing the state authorities that appointed them, and not the people.<sup>928</sup>

---

<sup>925</sup> Electric Power Sector Reform Act 2005 s 34.

<sup>926</sup> MA Tokunboh, *Public Enterprises: The Nigerian Experience* (Lantern Books, Lagos 1990) 53. Also see Constitution of the Federal Republic of Nigeria 1999 s 14(3).

<sup>927</sup> Electric Power Sector Reform Act 2005 s 34.

<sup>928</sup> KSA Ebeku, 'Appraising Nigeria's Niger Delta Development Commission Act 2000' (2003) 25 Stat LR 85, 87.

Another concern is that although the Electric Power Sector Reform Act 2005 provides that the quorum for the meetings of the NERC Commissioners shall be 4<sup>929</sup>, it also provides that,

No decision or act of the Commission or act done under the direction of the Commission shall be invalid on the ground that, (a) there existed a vacancy or vacancies among the Commissioners; or (b) there existed some defect in the constitution of the Commission at the time the decision was taken or act was done or authorised.<sup>930</sup>

This seems to create a legal leeway for undermining the functioning of the NERC and could be a licence for corruption and a cover for underhand dealings, an issue that will be further examined later in the chapter. The Chairman/ Vice Chairman of the NERC could collude with one or 2 other Commissioners to usurp the powers of the Commission and take key decisions to the exclusion of the other Commissioners.

As earlier noted, it may be necessary to subject regulators to some forms of accountability, including oversight by political institutions in the country as well as legal accountability through the courts.<sup>931</sup> It is important however to consider how these accountability mechanisms function in the Nigerian context. Some of the other provisions of the Electric Power Sector Reform Act 2005 that could affect the realization of the policy objectives of privatisation and regulation include the provisions dealing with the relationship between NERC and the Minister in charge of the power sector, the pursuit of legal redress through the courts and penalties for offences under the Act. Regarding the relationship between NERC and the Minister in charge of the power sector, the autonomy and independence of the NERC is compromised by the fact that its annual budget shall be submitted to the Minister, who is also empowered to give general policy directions to the NERC.<sup>932</sup> By way of contrast, the Georgian National Energy Regulatory Commission for instance is not required to present its budget to the Ministry of Energy, but is only required to send its annual performance report to the

---

<sup>929</sup> Electric Power Sector Reform Act 2005 s 41(4).

<sup>930</sup> *Ibid* s 44(1).

<sup>931</sup> Chapter 2 para 2.3.2.2; A Ogus, 'Comparing Regulatory Systems' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003) 527.

<sup>932</sup> Electric Power Sector Reform Act 2005 ss 33, 51. See also O Arowolo, 'Licensing of Electricity Business in Nigeria: Issues and Comments' [2006] IELTR 29, 30.

Ministry, the President and the parliament<sup>933</sup>. Given the earlier noted problem of political meddling in public enterprises in Nigeria<sup>934</sup>, this administrative link between the NERC and the Minister could potentially undermine regulatory independence and could be a conduit for bureaucratic bottlenecks, corruption and cronyism to creep into the functioning of the NERC. John Hatchard notes with respect to Africa that ‘National institutions must enjoy operational independence through adequate and secure funding so as to ensure appropriate staffing levels, premises and resources.’<sup>935</sup> Essentially, the concept of regulatory capture does not just refer to direct capture by vested industry interests but could also mean state capture where the regulatory structure permits the central government to have considerable influence over sector regulators, severely undermining their independence, of which such influence could even be exerted on behalf of industry or other interests in some cases, as has been observed regarding the South African telecommunications sector for instance.<sup>936</sup>

Regarding the issue of pursuit of legal redress through the courts, it is commendable that the Electric Power Sector Reform Act 2005 provides an avenue for independent examination of orders or decisions of the NERC by the High Court given the point made in Chapter 2 about the need to keep regulators accountable for the exercise of regulatory powers.<sup>937</sup>, however, the scope for such judicial examination is curtailed given that the Act expressly limits it to questions of law arising from orders or decisions of the NERC and also such questions have to be referred to it by the NERC either on its own initiative or at the instance of an affected party.<sup>938</sup> Further, it should also be noted that Section 61 of the Act exempts the NERC, its employees and Commissioners from liability for any loss or damage resulting from the bona fide exercise or performance of

---

<sup>933</sup> Georgian Law on Electricity and Natural Gas 1997 clauses 19-21; P Ballonoff, ‘Brief Summary of the Revised Georgian Law on Electricity and Natural Gas, as Applied to the Power Sector of Georgia’ [2007] IELTR 58, 60.

<sup>934</sup> PM Lewis, ‘State, Economy, and Privatisation in Nigeria’ in JL Upper and GB Baldwin, *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) 318.

<sup>935</sup> J Hatchard, ‘The Development of New National Institutions in Commonwealth Africa’ (1995) 21 *Commw L Bull* 1313, 1317.

<sup>936</sup> T Cohen, ‘Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation’ (2003) 47 *JAL* 65, 81-87 pp 82, 85.

<sup>937</sup> Chapter 2 para 2.3.2.2. Also see R Pritchard, ‘Managing Electricity Industry Reform: Responding to the Challenge’ [2003] IELTR 149, 150.

<sup>938</sup> Electric Power Sector Reform Act 2005 s 49.



its statutory functions under the Act. Whether or not a particular act or omission purportedly done under the Act is bona fide may be a question of fact but given the limitation imposed by the Act, which resembles the limitation in judicial review proceedings, the court will not be able to examine the facts.<sup>939</sup> In the Nigerian and indeed African context, it may be necessary for the courts to be permitted to examine facts behind decision rather than be confined to questions of law, owing to the fact that the cancellation of a licence or the imposition of a fine by the NERC may not necessarily be above board, for instance, where it stems from the refusal to pay a bribe or is politically motivated and therefore may require a consideration of surrounding facts by the High Court.<sup>940</sup> The Act confers power on the NERC to grant, extend or cancel licences in the public interest<sup>941</sup> but where regulators are corrupt, they are often not motivated by public interest considerations in their actions or inactions. Indeed recently, all the Commissioners of NERC were suspended from office based on corruption allegations.<sup>942</sup> It is not unimaginable that regulators that have been compromised could take care to ensure that their corruptly induced actions and omissions are procedurally above board and hence may not be overturned by the court.

The fact that those affected by the orders or decisions of NERC cannot proceed directly to the courts but rather need to request NERC to refer questions pertaining to such orders or decisions to the court for determination is both cumbersome and unnecessarily limiting given that NERC may have vested interest in frustrating any attempt to examine its own actions. Also, since it is the NERC that states the question to the High Court for judicial examination, it may frame the question in a way that is most favourable to it. Further, given that such referral of questions of law is restricted to orders and decision of the commission, its omissions may be outside the purview of judicial examination. Under the Electricity Act 1989 of the United Kingdom for

---

<sup>939</sup> H Woolf, 'Public Law - Private Law: Why the Divide? - A Personal View' [1986] PL 220, 225.

<sup>940</sup> See for instance I Adams, 'Atiku's Intel in the Eye of a Storm' *The Punch* (Lagos 23 December 2005) <<http://odili.net/news/source/2005/dec/23/402.html>> accessed 23 December 2005. Note also PO Pedersen and D McCormick, 'African Business Systems in a Globalising World' (1999) 37 *J Mod Afr Stud* 109, 131; J Kraus, 'Capital, Power and Business Associations in the African Political Economy: A Tale of Two Countries, Ghana and Nigeria' (2002) 40 *J Mod Afr Stud* 395, 428.

<sup>941</sup> Electric Power Sector Reform Act 2005 ss 70(4)(b), 71(10) and 74(4). Also see O Arowolo, 'Licensing of Electricity Business in Nigeria: Issues and Comments' [2006] *IELTR* 29, 32-33, 36.

<sup>942</sup> P Ibe, 'NERC: FG Suspends Owan, Six Others' *Thisday* (Lagos 19 February 2009) <<http://www.thisdayonline.com/>> accessed 19 February 2009.

instance, licence holders do not need such permission before going to court<sup>943</sup>, which is also the case with some other regulatory provisions in Nigeria, such as the Nigerian Communications Act 2003<sup>944</sup>

The Electric Power Sector Reform Act 2005 also provides for an internal review mechanism for its actions at the instance of a party aggrieved by its decisions, orders and refusals pertaining to licences, approvals, authorisations, prices or tariffs.<sup>945</sup> This would be of little comfort to aggrieved customers or licensees and does not adequately make up for the limitations placed on recourse to the courts. Where the Commission is already compromised or captured or simply incapable of efficiently and effectively discharging its assigned functions, its internal review mechanism may not hold much hope for aggrieved consumers and offers insufficient guarantees to prospective investors regarding regulatory risk. It should be noted however that the judicial option itself, as earlier seen, is not without its own problems<sup>946</sup>, of which it may be possible that in some cases, neither the internal review mechanism of the NERC nor the external review mechanism of courts offers real hope. Regarding the citizens, it should also be noted that key weaknesses have also been noted in the legal and institutional structure for consumer protection in Nigeria.<sup>947</sup>

Finally, the punishment for various offences under the Electric Power Sector Reform Act 2005 appears inadequate to the extent that the law permits the imposition of meagre fines in lieu of imprisonment.<sup>948</sup> The maximum possible fine under the Act, which is equivalent to about £2,000 pounds sterling, may not be sufficient deterrence against regulatory breaches given that such breaches could yield substantial gains for the offender, and impose huge costs on the government or the customers as the case may

---

<sup>943</sup> Electricity Act 1989 (UK) s 27.

<sup>944</sup> Nigerian Communications Act 2003 s 87.

<sup>945</sup> Electric Power Sector Reform Act 2005 s 50.

<sup>946</sup> B Ardo, 'Causes of and Remedies for Court Congestion' in Y Osinbajo and AU Kalu (eds), *Law Development and Administration in Nigeria* (The Federal Ministry of Justice, Lagos 1990) 488-490.

<sup>947</sup> BB Kanyip, 'Reflections on Consumer Protection Law in Nigeria' in IA Ayua (ed), *Law, Justice and the Nigerian Society: Essays in Honour of Hon Justice Mohammed Bello* (NIALS, Lagos 1995) 303-304.

<sup>948</sup> Electric Power Sector Reform Act 2005 ss 93, 94.

be. This is often the case with many Nigerian laws that seek to punish regulatory breaches but which often provide non-deterrent penalties.<sup>949</sup>

## **5.2. ENSURING PROPER IMPLEMENTATION OF PRIVATISATION**

### **5.2.1. IS THE NATIONAL ENVIRONMENT CONDUCTIVE TO EMBARKING ON PRIVATISATION AND ATTRACTING PRIVATE INVESTMENTS?**

In Chapter 4, various concerns regarding the general investment climate in Nigeria were discussed.<sup>950</sup> There are some issues specifically affecting the electricity sector that could affect the sustainability of long term investments in the sector and dampen investor interest if unaddressed.

The oil-rich Niger Delta region of Nigeria is where many of the power plants that should be privatised are located, as well as the gas required by power plants in other parts of the country, and as noted in Chapter 4, it has been plagued by violence stemming from the activities of various militant groups, of which environmental degradation that has persisted even with the enactment of various environmental laws, has been identified as a key causative factor.<sup>951</sup> Some of the environmental problems have been attributed to these power plants, of which communities that live around them have been complaining bitterly about the discharge of effluents from them with adverse impact on the environment as well as the health of the residents and their economic well being. Some of them have sent protest letters and petitions to NEPA/PHCN as well as government officials requesting immediate abatement of the nuisance, restoration of the

---

<sup>949</sup> For a discussion on the issue of meagre penalties for environmental degradation for instance, see EO Nwosu, 'Petroleum Legislation and Enforcement of Environmental Laws and Standards in Nigeria' (1998-1999) 7 Nig JR 80, 98-99; AO Okukpon, 'Criminal Liability for Oil Pollution Damage in Nigeria' (1996/99) 3 University of Benin Law Journal 158, 179.

<sup>950</sup> Chapter 4 para 4.2.1.

<sup>951</sup> Ibid; OO Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89, 107; R Eberlein, 'On the Road to the State's Perdition ? Authority and Sovereignty in the Niger Delta, Nigeria' (2006) 44 J Mod Afr Stud 573, 573-574, 579; NE Ojukwu-Ogba, 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth' [2006] IELTR 201, 201-202, 206-207; P Lewis, 'Nigeria's Economy: Opportunity and Challenge' (1999) 27(1) Issue: A Journal of Opinion 50, 50.

environment and adequate compensation prior to privatisation, failing which they would disrupt the exercise.<sup>952</sup> To further compound the above problem, some of these communities have not yet been connected to the national grid and have threatened to damage/ sabotage the power infrastructure in their domain if they continue to remain in darkness<sup>953</sup> Apart from the issue of socio-political instability, legal liability for environmental degradation could also be of concern to prospective investors given that some of the communities facing environmental degradation caused in part by the government owned power plants, could decide to sue the privatisation investors that take over these plants. Also, even though the state has been accused of not having the political will to enforce environmental laws and regulations<sup>954</sup>, this does not rule out the fact that the laws may yet be enforced in the future by a regulatory agency that is determined to do a good job. In the United Kingdom for instance, the issue of liability of privatisation successors-in-title for land contamination that occurred during public ownership has been the subject of litigation and even though the House of Lords' decision was ultimately against such liability being imposed on a successor-in-title, this seemed to be based on the specific way the relevant legislation was worded, and it should be noted that the earlier ruling at the court of first instance was against the private investor.<sup>955</sup>

As noted in Chapter 4, the above issues come within the scope of host community hostile risk<sup>956</sup>, and in absence of sufficient government guarantees<sup>957</sup>, could dissuade a

---

<sup>952</sup> ——— ‘Community Warns Shell on Afam Power Station take over... Demands N2.5b Reparation’, *The Port Harcourt Telegraph*, (Port Harcourt, 10 October 2005) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 10 October 2005.

<sup>953</sup> GS Akpan, ‘The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria’ [2006] IELTR 1, 2; J Ushigiale, ‘Delta: Protest Threatens New IPP Project’ *Thisday* (Lagos 3 April 2005) <<http://www.thisdayonline.com/nview.php?id=13537>> accessed 3 April 2005; C Nwachukwu, ‘No Free Electricity for Host Communities – NERC’ *The Punch* (Lagos 7 November 2006) <<http://www.punchontheweb.com/articl.aspx?theartic=art2006110765046>> accessed 7 November 2006.

<sup>954</sup> NE Ojukwu-Ogba, ‘Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth’ [2006] IELTR 201, 201-202, 206-207.

<sup>955</sup> *R (on the application of National Grid Gas Plc (formerly Transco Plc)) v Environment Agency* [2007] 1 WLR 1780 (HL); J Garbett, ‘Contaminated Land - Liability for Historic Gas Contamination’ [2007] IELTR 122, 122-124; J Thornton, ‘Contaminated Land’ (2008) 20 JEL 293, 293-295; S Nield, ‘The Polluter Pays: But who is a Polluter who Can Pay?’ [2008] Conv 539, 539-544.

<sup>956</sup> Chapter 4 para 4.2.1; GS Akpan, ‘The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria’ [2006] IELTR 1, 8, 11.

prospective investor from investing in the power plants located there, as well as the power plants outside the region which face gas shortages owing to damage to gas pipelines within the region. Beyond the Niger Delta part of the country, the downstream electricity sector is still plagued by a host of problems including the problem of old and derelict power infrastructure that gives rise to massive energy losses between the point of generation and point of distribution, as well as the problem of vandalising and stealing of power transmission and distribution lines that transport generated power to customers.<sup>958</sup> This has created a major implementation problem for electricity privatisation given that many potential investors in the downstream sector will consider that their business will be hampered where power cannot be generated in the first place due to vandalised power or gas equipment, and power cannot be distributed due to vandalised power cables.

The bottom line is that the electricity sector necessarily requires long-term investment and Where the investment climate is not clement and the government is unable to effectively address its underlying problems as is presently the case with Nigeria, a potential investor may either not invest at all or may insist on very high premium to cover the risks and negative eventualities of operating in such a hostile environment.

### **5.2.2. IS THE INSTITUTIONAL FRAMEWORK FOR IMPLEMENTING AND MONITORING THE OUTCOME OF PRIVATISATION ROBUST?**

There are some key concerns regarding the institutional framework for undertaking the extensive reform of the electricity sector and regulating the operations of private investors in the sector after the reforms have been concluded. As earlier noted, an IMF report notes that the country suffers from the problems of weak institutions and limited

---

<sup>957</sup> JJ Sanders, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) (2000) 9 Currents Int'l Trade LJ 37, 42.

<sup>958</sup> F Urban, RMJ Benders and HC Moll, 'Modelling Energy Systems for Developing Countries' (2007) 35 Energy Pol'y 3473, 3474; Y Wolde-Rufael, 'Electricity Consumption and Economic Growth: A Time Series Experience for 17 African Countries' (2006) 34 Energy Pol'y 1106, 1111-1112; O Arowolo, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] IELTR 163,168; J Ikeme and OJ Ebohon, 'Nigeria's Electric Power Sector Reform: What should Form the Key Objectives?' (2005) 33 Energy Pol'y 1213, 1215.

technical capacity in implementing economic reforms.<sup>959</sup> This would be contrasted with the position in some developed countries where regulatory systems have been functioning and evolving over many years.<sup>960</sup> Paul Collier notes that:

Evidently, Nigerian public utilities have the wrong managerial structure and some form of privatization seems essential. This is obviously not a 'stroke of the pen' reform, nor is there a single model to serve as the policy goal. Privatized utilities need a framework of regulation, and if an established central bank cannot supervise an uncomplicated activity such as private banking, the prospects for a new utility supervision institution cannot be bright.<sup>961</sup>

As earlier noted, both the power ministry and the BPE have expressed concern about the lack of adequate local capacity for implementing the Electric Power Sector Reform Act 2005.<sup>962</sup> Some of the areas of concern regarding the institutional capacity for implementing electricity privatisation are the framework for negotiating electricity privatisation contracts and the capacity for effectively supervising contractual performance and the market competition. It was noted in Chapter 4 that despite the detailed requirements in the privatisation guidelines for selecting privatisation core/strategic investors, BPE appeared to lack the capacity for undertaking basic due diligence on prospective investors, of which there have been many high profile transaction failures and instances where the government ended up revoking transactions in which the successful investor appeared to lack the requisite technical, managerial or financial capacity and sometimes sought to strip the assets of the enterprise.<sup>963</sup> The

---

<sup>959</sup> IMF, 'Nigeria: 2004 Article IV Consultation—Staff Report; and Public Information Notice on the Executive Board Discussion' (Report) (August 2004) IMF Country Report No 04/239 33.

<sup>960</sup> J Black, 'Tensions in the Regulatory State' [2007] PL 58, 60-61.

<sup>961</sup> P Collier, 'Living down the Past: Redesigning Nigerian Institutions for Economic Growth' (1996) 95 Afr Aff 325, 346.

<sup>962</sup> C Akwaya, 'Power Sector: FG Seeks Foreign Experts for Regulatory Commission', Nnaji To Set Up Three IPPS' *Thisday* (Lagos 3 April 2005) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 3 April 2005.

<sup>963</sup> Chapter 4 para 4.2.2; L Juwah, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTLR 229, 231, 232-233; T Chiahemen, 'BPE Begins Fresh Privatisation of NITEL' *Daily Independent* (Lagos 1 August 2008) <[www.independentngonline.com](http://www.independentngonline.com)> accessed 1 August 2008; A Aminu and K Aderinokun, 'NITEL Board Orders Audit on Asset Stripping, Search for new MD begins' *Thisday* (Lagos 16 June 2009) <<http://www.thisdayonline.com/>> accessed 16 June 2009; O Ezeobi, 'Ajaokuta: FG moves to retrieve looted equipment, cash' *The Punch* (Lagos 26 September 2008) <[www.punchng.com](http://www.punchng.com)> accessed 26 September 2008; J Ogbodo, 'NCP, BPE Admit

implementation of power sector reforms involves the use of various contractual arrangements including sales contracts with core/strategic investors, concessions, management contracts, Power Purchase Agreement (PPA) contracts with Independent Power Producers (IPPs), contracts with Emergency Power Producers (EPPs) and Rehabilitate, Operate and Transfer (ROT) contracts.<sup>964</sup> Securing adequate value for money and firm contractual commitments regarding service quality are very essential for protecting the public interest in the negotiation of these contracts. However, regarding the service contracts for the building of new government-owned power plants, there are reports that some of the contractors abandoned these projects after being paid.<sup>965</sup> In the case of IPPs, most of them have not yet commenced operations even though they have had their licences for some years of which the government is reported to be considering revoking some of the licences, and some of the ones that have become operational have been reported to be functioning below capacity<sup>966</sup>

The above problems may be indicative of an inadequate technical and financial due diligence on prospective licencees and contractors. Specifically regarding the NERC, the Electric Power Sector Reform Act 2005 requires it, in determining whether to grant a power licence, to be satisfied that the licence applicant is 'likely to comply' with licence requirements, of which it has been noted that this requirement is not stringent enough and could pave the way for lax vetting of licence applicants.<sup>967</sup>

Actualising the benefits of electricity privatisation requires the undertaking of key tasks of protecting consumers and promoting competition.<sup>968</sup> Some other problems posed by the regulatory framework for the power sector have already been examined, including

---

Error in ALSCON Privatisation' *The Guardian* (Lagos 14 June 2005) <<http://odili.net/news/source/2005/jun/15/17.html>> accessed 14 June 2005.

<sup>964</sup> IMF, 'Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy' (Report)(December 2005) IMF Country Report No 05/433 62; Guidelines on Privatisation of Government Enterprises para 1; National Electric Power Policy paras 4.2.3, 5.2.

<sup>965</sup> I Samuel, 'Power Contract Scandal: How Contractors Collected N19bn, Abandoned Jobs' *Nigerian Tribune* (Lagos 1 April 2008) <<http://www.tribune.com.ng/>> accessed 1 April 2008.

<sup>966</sup> O Ezeobi, 'FG may Cancel IPP Licences' *The Punch* (Lagos 20 January 2009) <[www.punchng.com](http://www.punchng.com)> accessed 20 January 2009; L Iba, 'Why We Can't Perform – PHCN' *The Punch* (Lagos 30 November 2005) <<http://odili.net/news/source/2005/nov/30/457.html>> accessed 30 November 2005.

<sup>967</sup> Also see O Arowolo, 'Licensing of Electricity Business in Nigeria: Issues and Comments' [2006] IELTR 29, 35-36.

<sup>968</sup> R Barnard and J Cooper, 'Is Ofgem Still Fit for Purpose?' [2008] IELR 158, 158, 159.

its centralised nature, the geo-political considerations in appointment of commissioners and the issue of ministerial oversight.<sup>969</sup> Regulatory bodies in Nigeria are often unable or unwilling to discharge regulatory responsibilities spelt out in various laws and regulations, of which inadequate funding, training and expertise and conflict of interest have been identified as some of the reasons for this situation.<sup>970</sup> In addition, it was noted in Chapter 2 that regulatory and competition laws are complementary in the privatised sector, of which regulators are sometimes granted powers to promote competition in the provision of various utility/infrastructural services.<sup>971</sup> The National Electric Power Policy recognises the importance of competition in the privatised power sector, while the Electric Power Sector Reform Act 2005 requires NERC to promote competition and private sector participation.<sup>972</sup> The country as earlier noted, does not yet have a competition law or competition authority<sup>973</sup>, of which the National Electric Power Policy states that NERC will undertake the functions of the competition authority regarding the electricity supply industry prior to the establishment of the competition authority.<sup>974</sup>

In the light of the institutional concerns noted earlier, it would appear that the NERC may not yet be fully positioned to effectively undertake its core regulatory functions let alone functions as a competition authority. Indeed the fact that the government has not yet enacted the competition law or set up the competition authority several years after adopting the National Electric Power Policy that lays emphasis on privatisation, regulation and competition buttresses the point earlier made about possible lack of

---

<sup>969</sup> Electric Power Sector Reform Act 2005 ss 33, 34, 51. See also O Arowolo, 'Licensing of Electricity Business in Nigeria: Issues and Comments' [2006] IELTR 29, 30.

<sup>970</sup> Note for instance GS Akpan, 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' [2006] IELTR 1, 7.

<sup>971</sup> Chapter 2 para 2.3.1.2, 2.3.2.2; A McHarg, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] PL 385, 386; ME Beesley and SC Littlechild, 'The Regulation of Privatised Monopolies in the United Kingdom' in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996) 213-214.

<sup>972</sup> National Electric Power Policy paras 2.1(g), 2.1(h), 3.0, 3.1.2, 3.1.4.1, 3.1.4.2, 4.0, 4.3, 4.3.4(v), 4.4, 5.0, 5.3, 6.0, 6.1(iii)(e), 6.2(iii), 17; Electric Power Sector Reform Act 2005 s 32(2)(a).

<sup>973</sup> L Azubuike, 'Privatization and Foreign Investments in Nigeria' (2005-2006) 13 *Tulsa J Comp & Int'l L* 59, 88; A Elebiju, 'The Investment and Securities Act of 1999: An Overview of Anti-Trust Considerations in the Regulation of Mergers in Nigeria' (2001) 3 *JIFM* 272, 279-281; A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] IELTR 219, 224.

<sup>974</sup> National Electric Power Policy para 4.3.4(v).



adequate policy consideration and conviction on the part of the government about the merits of privatisation.

Some concern has also been raised about the fragmented nature of the organisational structure for electricity reforms, which involves various responsibilities being undertaken by the power ministry, BPE, NCP, NERC, PHCN, the Rural Electrification Agency, and some special presidential bodies.<sup>975</sup> Besides the risk of overlap in assigned functions, prospective investors may also find such fragmentation confusing and may not be certain about which of these organisations is in a position to make binding legal commitments on behalf of the government.

On a final note, it should be pointed out that the World Bank recently approved funding for extensive capacity building in the power sector covering both the unbundled successor companies of the power utility as well as NERC. While this may play a role in positioning the power sector for privatisation, it does reveal that several years after the scheduling of the power utility for privatisation (1999), the adoption of the power policy (2001) and the enactment of the Electric Power Sector Reform Act 2005 (2005), key institutional constraints still stand in the way of actualising economic development through electricity privatisation.<sup>976</sup>

### **5.2.3. WILL THE STRATEGIC APPROACH TO THE IMPLEMENTATION OF ELECTRICITY PRIVATISATION LEAD TO THE REALISATION OF SET POLICY OBJECTIVES?**

In Chapter 4, the strategic flaws of the Nigerian privatisation programme were examined.<sup>977</sup> In the implementation of various reforms in the electricity sector which is expected to culminate in privatisation, a number of strategic flaws can be observed, which would have impact on the implementation outcome of the Electric Power Sector

---

<sup>975</sup> KD Larson, 'Sparking a Spread?: Regulatory Efforts to Stimulate Independent Power in Nigeria' (2008) 3 Tex J Oil, Gas & Energy L 151, 161-162.

<sup>976</sup> World Bank, 'Project Appraisal Document on a Proposed Credit in the Amount of SDR 134.4 Million (US\$200 Million Equivalent) to the Federal Republic of Nigeria Along with a Proposed Series of IDA Partial Risk Guarantees in the Amount of US\$400 Million in Support of Gas Supply and Aggregation Agreements of Shell Petroleum Development Company, Chevron Nigeria Ltd and other Oil Companies with Power Holding Company of Nigeria for the Nigeria Electricity and Gas Improvement Project' (Report) (May 2009) Report No 47945-NG 70, 86-87. Also see 46.

<sup>977</sup> Chapter 4 para 4.2.3.

Reform Act 2005. The following issues will be analysed following the analytical structure of the thesis:

- **The pace and sequencing of privatisation**
- **The strategy for engaging foreign investors**
- **The approach to socio-cultural issues in privatisation**
- **Weighing the cost of implementing privatisation against the expected benefits**
- **Balancing the economic and social issues in privatisation in the interest of the citizens**

#### **5.2.3.1. THE PACE AND SEQUENCING OF PRIVATISATION**

As currently implemented, some of the constituent reforms power sector reform programme could be at cross purposes. In the first place, the Electric Power Sector Reform Act 2005 provides for the NCP to undertake the unbundling of NEPA into an initial holding company and then subsequently into a number of successor companies, within statutorily set time limits.<sup>978</sup> This has now been completed, of which the Act gave the NCP the discretion to commence the privatisation of the successor generation, transmission and distribution companies when and how it considers appropriate.<sup>979</sup> However prior to the enactment of the Act, the National Electric Power Policy which endorsed speedy privatisation had also endorsed the rehabilitation of PHCN (as it is now called. power plants prior to privatisation through Rehabilitate, Operate and Transfer (ROT) as well as the negotiation of agreements for the purchase of power from Independent Power Producers (IPPs) and Emergency Power Producers (EPPs) to provide extra power to bridge the gap between the demand and supply of power.<sup>980</sup>

---

<sup>978</sup> Electric Power Sector Reform Act 2005 ss 1, 8-10. National Electric Power Policy para 5. Also see O Arowolo, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] IELTR 163, 164-166.

<sup>979</sup> Electric Power Sector Reform Act 2005 s 24. Also see IMF, 'Nigeria: Poverty Reduction Strategy Paper—Progress Report' (Report) (August 2007) IMF Country Report No 07/270 14.

<sup>980</sup> National Electric Power Policy para 4.2.3, 5.1, 5.2, 5.3. Also on the need for speedy privatisation, see IMF, 'Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy' (Report) (December 2005) IMF Country Report No 05/433 61.

Having speedily concluded the unbundling process, the government in addition to undertaking the rehabilitation of NEPA power plants suddenly embarked on the construction of several new power plants in the country, at massive cost, despite the fact that the reasoning behind the power sector reforms endorsed under the Electric Power Sector Reform Act 2005 is to ‘transform the power sector into one led by the private sector’.<sup>981</sup>

The task of privatising NEPA, which is the biggest public enterprise in the country, is quite daunting, of which the government has privatised only 3 out of 18 unbundled enterprises.<sup>982</sup> Given that the government has decided to privatise the enterprise, every institutional and financial resource ought to have been primarily devoted to this major project. Rather than spending considerable time and money to rehabilitate and add value to power equipment and facilities that will be eventually privatised, this responsibility should have been ceded to the new power investors. The massive project of building new power plants is at cross purposes with electricity privatisation programme given that it will increase the government’s asset ownership and expenditure in the power sector while privatisation aims to achieve lesser government presence and financial commitment. Prospective investors could be worried about investing in a power sector where the government is not only the regulator but also a significant participant.

Due to lack of proper planning and sequencing, it has been noted that the building of the new gas-powered plants is going far ahead of the setting up of gas supply infrastructure and development of new gas fields to ensure adequate supply of gas to them, meaning that the power plants could remain idle for quite sometime after they have been completed.<sup>983</sup>

On the issue of granting licences to Independent Power Producers (IPPs) to generate and sell power, the role of IPPs in the Nigerian electricity reform programme needs to be critically examined due to the fact that some negative attributes have been associated

---

<sup>981</sup> IMF, ‘Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy’ (Report)(December 2005) IMF Country Report No 05/433 60.

<sup>982</sup> Also see IMF, ‘Nigeria: Poverty Reduction Strategy Paper—Progress Report’ (Report) (August 2007) IMF Country Report No 07/270 14.

<sup>983</sup> J Tolken, ‘Power Projects: Where will the Gas Come from?’ *Businessday* (Lagos 20 March 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 20 March 2006; A Adefulu, ‘How Can Nigeria Develop a Domestic Market for its Gas?’ [2000] IELTR 99, 101.

with them in some countries where they have been introduced in the course of liberalising the power sector.<sup>984</sup> The problem is not the use of IPPs per se but the strategy for using them. The National Electric Power Policy initially envisioned a limited supplementary role for IPPs in the liberalised power sector in Nigeria and placed annual limits on the amount of IPP power that could be purchased with the backing of government guarantee<sup>985</sup>, however its use has now been massively expanded<sup>986</sup> Premature excessive reliance on IPPs in Nigeria could have implications for both privatisation and market competition. This is because IPPs, especially those of the single-buyer model sometimes distort competition in a deregulated power sector even though the Nigerian government has emphasised the need for such market competition.<sup>987</sup> The way the deals are structured in the single buyer model means that the government would contract to buy all the generated power in bulk over many years (sometimes up to 25 years), and now set the tariff for retail sale to power consumers<sup>988</sup>, a strategy also adopted by some other African countries<sup>989</sup>, and encouraged by the World Bank with further risk guarantees.<sup>990</sup> Although long-term commitments in the energy sector may be needed to persuade prospective investors of the long-term

---

<sup>984</sup> H Nagayama, 'Effects of Regulatory Reforms in the Electricity Supply Industry on Electricity Prices in Developing Countries' (2007) 35 *Energy Pol'y* 3440, 3453; R Pritchard, 'The IPP Experiment' [2001] *IELTR* 29, 30-31; K Bayliss and D Hall, 'Independent Power Producers: A Review of the Issues' (Public Services International Research Unit Report) (November 2000) <<http://www.psir.org/publicationsindex.asp>> accessed 13 November 2006.

<sup>985</sup> National Electric Power Policy para 4.2.6(ii): 'The maximum IPP capacity to be guaranteed shall be limited to 800MW in 2001 and 700MW in 2002, subject to the findings of supply and demand forecast, in order to prevent excessive burden from the cost of the guarantees.' Also see para 4.2.3(iii),

<sup>986</sup> Licences for about 10,000 megawatts of electricity have now been issued by NERC. See Nigerian Electricity Regulatory Commission, 'Licensees' <<http://www.nercng.org/site/383/default.aspx>> accessed 10 May 2009. Also see IMF, 'Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy' (Report)(December 2005) IMF Country Report No 05/433 45.

<sup>987</sup> National Electric Power Policy paras 2.1(g), 2.1(h), 3.0, 3.1.2, 3.1.4.1, 3.1.4.2, 4.0, 4.3, 4.3.4(v), 4.4, 5.0, 5.3, 6.0, 6.1(iii)(e), 6.2(iii), 17; Electric Power Sector Reform Act 2005 s 32(2)(a).

<sup>988</sup> O Arowolo, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] *IELTR* 163, 166; M Oduniyi and O Nzechi, 'Agip's \$450m IPP takes Off, Boost Power Supply by 300mw' *Thisday* (Lagos 25 March 2005) <<http://www.thisdayonline.com/nview.php?id=12749>> accessed 25 March 2005. Also see R Pritchard, 'The IPP Experiment' [2001] *IELTR* 29, 29.

<sup>989</sup> J Turkson and N Wohlgemuth, 'Power Sector Reform and Distributed Generation in Sub-Saharan Africa' (2001) 29 *Energy Pol'y* 135, 140; J Girod and J Percebois, 'Reforms in Sub-Saharan Africa's Power Industries' (1998) 26 *Energy Pol'y* 21, 29.

<sup>990</sup> R Lock, 'Financing of Private Power Development and Power Sector Reform in Emerging Nations: An Essential Nexus?' (1995) 23 *Energy Pol'y* 955, 957, 960; R Pritchard, 'The IPP Experiment' [2001] *IELTR* 29, 31.

viability of their proposed investments<sup>991</sup>, the ‘take or pay’ obligation under long-term Power Purchase Agreements means that the government will continue to purchase expensive IPP power at pre-agreed rates even if other power companies are in a position to enter the market with better rates.<sup>992</sup> Premature termination of such contracts carries the risk of legal action and payment of considerable damages.<sup>993</sup> Continuing them however would limit market competition and the choice it offers to consumers and could foreclose or constrain the market space available to other private power suppliers.<sup>994</sup> To the extent that the bulk purchase of IPP power is guaranteed by the government, IPPs may not have the incentive to seek new customers or compete with other power companies since the government is already a captive customer yielding sufficient profits.<sup>995</sup>

Essentially, single buyer obligations could distort and complicate competition efforts, and the retention of elements of monopoly even with private sector participation in the power sector could undermine the potential benefits of such participation for the country, the citizens and overall private sector development.<sup>996</sup> Also to note is that

---

<sup>991</sup> SL Teichler and I Levitine, ‘Long Term Power Purchase Agreements in a Restructured Electricity Industry’ (2005) 40 *Wake Forest L Rev* 677, 691, 701-703.

<sup>992</sup> K Talus, ‘Long-term Gas Agreements and Security Of Supply - Between Law and Politics’ (2007) 32 *EL Rev* 535, 536, 539, 540, 541, 542, 543. Also see JR Branston, ‘The Price of Independents: An Analysis of the Independent Power Sector in England and Wales’ (2002) 30 *Energy Pol’y* 1313, 1319-1321.

<sup>993</sup> C Markus, ‘Stranded Costs of Former Electricity Monopolies under E.U. law: Part 1’ [2000] *IELTR* 144, 146. Also note the case of Argentina where such termination led to multiple cases at the International Centre for the Settlement of Investment Disputes (ICSID). See D Foster, “Necessity Knows No Law!” – *LG&E v Argentina*’ (2006) 9 *Int ALR* 149, 151-155; *JBL 570, 570-571, 577-578*; *LG&E Energy Corp v The Argentine Republic*, Decision on Liability dated October 3, 2006, ICSID Case No.ARB/02/1; ICSID Case No ARB/03/15, *El Paso Energy International Co Ltd v The Argentine Republic*, Decision on Jurisdiction dated April 27, 2006.

<sup>994</sup> K Talus, ‘Long-term Gas Agreements and Security Of Supply - Between Law and Politics’ (2007) 32 *EL Rev* 535, 536, 539, 540, 541, 542, 543.

<sup>995</sup> Note that even where an IPP is of the multiple buyer model whereby the IPP retails power directly to the end-users without the government intermediary, they may likely focus on the few customers that can afford to pay huge sums for power supply, leaving out poor households, and where they are serving a captive area, the people living there will not have any alternative supplier to turn to. In Nigeria, some IPPs are of this type See generally — ‘Aba Power Plant is a Model — Prof. Nnaji’, *Vanguard* (3 August 2005) <<http://odili.net/news/source/2005/aug/3/327.html>> accessed 3 August 2005.

<sup>996</sup> AO Popoola, ‘Consumer Protection within the Framework of Economic Liberalisation: The Impact of Privatisation, Commercialisation and Deregulation on Consumers’ in IA Ayua and DA Guobadia (eds), *Political Reform and Economic Recovery in Nigeria* (NIALS, Lagos 2001) 417; O Fatula, ‘Critical Issues in Privatisation, Commercialisation and Competition in Nigeria’ (2004) 7 *U Maid LJ* 109, 118-120; C Markus, ‘Stranded Costs of Former Electricity Monopolies under E.U. law: Part 1’ [2000] *IELTR* 144,

excessive use of IPPs could frustrate the privatisation of the electricity utility itself on account of the fact that potential buyers of the existing government-owned power plants may be discouraged from doing so unless there is an assurance that the sort of incentives or guarantees that are included in power purchase agreements would be extended to them as well, in order to level the playing field.<sup>997</sup>

In some other countries, IPPs have been utilised as a sub-part of the competitive electricity market rather than as the predominant providers to a captive market, in which case they may actually add value to market competition, for the benefit of consumers.<sup>998</sup>

Although the NERC is responsible for regulating the power sector in the country and promoting competition in the sector<sup>999</sup>, IPPs could still pose a regulatory problem in Nigeria given that some of them had already signed Power Purchase Agreements with the government prior to the passing of the EPSRA that ushered in the new regulatory framework for the power sector.<sup>1000</sup> Although the EPSRA contains a transitional provision that states that any power licence issued under pre-existing legislation would continue to have effect as if it had been issued under the EPSRA<sup>1001</sup>, IPPs could insist on the sanctity of their pre-existing Power Purchase Agreements, including the tariffs and contractual obligations enshrined in such agreements, and may pursue dispute settlement as provided under these agreements to ensure that they do not face greater regulatory supervision or end up with lesser earnings than they initially contracted with the government.

In the final analysis, it may have been better and more prudent for the government to have sequenced the power sector reforms properly and sorted out privatisation,

---

149.; P Andrews-Speed and R Pritchard, 'Eight Principles of Electricity Industry Reform' [2001] IELTR 11, 15.

<sup>997</sup> K Bayliss and D Hall, 'Independent Power Producers: A Review of the Issues' (Public Services International Research Unit Report) (November 2000) <<http://www.psir.org/publicationsindex.asp>> accessed 13 November 2006.

<sup>998</sup> J Weller, 'Macedonia's New Energy Law' [2006] IELTR 191, 191-193.

<sup>999</sup> Electric Power Sector Reform Act 2005 s 32.

<sup>1000</sup> Also see A Adefulu, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] IELTR 219, 222.

<sup>1001</sup> Electric Power Sector Reform Act 2005 s 98(2).

regulation and tariff issues, and put in place a competition law and competition authority, before engaging IPPs, so as to be sure whether they are really needed and if so, the volume of power that is actually required from them. The new regulatory regime under the EPSRA 2005 should have been the basis for negotiations with all IPPs in the country.

### **5.2.3.2. THE STRATEGY FOR ENGAGING FOREIGN INVESTORS**

The need for appropriate strategising with regard to privatisation investments, especially foreign investments was noted in Chapter 2 of which the point was made in Chapter 3 about imbalance in risk allocation in the foreign investment contracts executed in some African countries.<sup>1002</sup> As noted in Chapter 4, many of the foreign investors operating in Nigeria outside the oil and gas sector where profits are more predictable have often entered into contractual arrangements by virtue of which they earn foreign exchange from the country, rather than commit their own funds to the country.<sup>1003</sup> As noted above, the government has entered into several contracts for the construction of new power plants mostly with foreign contractors. Some of these contractors, owing to poor regulation, have abandoned their work sites after getting paid.<sup>1004</sup> Given some of the earlier noted concerns about the Nigerian investment climate<sup>1005</sup>, attracting long term foreign direct investment to the country's power sector may be difficult. Rather than development a coherent strategy for resolving some of the underlying problems with the investment climate, the government has focused more on promises of investment incentives.<sup>1006</sup> According to Nigeria's poverty reduction strategy paper:

---

<sup>1002</sup> Chapter 2 para 2.3.2.3; Chapter 3 para 3.2.3.2..

<sup>1003</sup> Chapter 4 para 4.2.3.2.

<sup>1004</sup> I Samuel, 'Power Contract Scandal: How Contractors Collected N19bn, Abandoned Jobs' *Nigerian Tribune* (Lagos 1 April 2008) <<http://www.tribune.com.ng/>> accessed 1 April 2008.

<sup>1005</sup> Chapter 4 para 4.2.1; Chapter 5 para 5.2.1.

<sup>1006</sup> L Salami and A Elebiju, 'Investment Incentives for the Electricity Business in Nigeria' (2004) 22 *J Energy & Nat Resources* L 94, 96-100; O Arowolo, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] *IELTR* 163, 167; NA El-Rufai (BPE Director-General), 'The Privatisation of Nigeria's Electricity Supply Industry' (The Future of Nigeria's Power Sector Conference, 2002) <[www.bpeng.org](http://www.bpeng.org/)> accessed 16 October 2003.

... the private sector will be granted incentives to invest in infrastructure especially in power generation and supply ... Accordingly, new strategies for increasing private sector participation such as build-operate-and-transfer (BOT), build-own-operate-and-transfer (BOOT), and rehabilitate-operate-and-transfer (ROT) schemes, will be pursued.<sup>1007</sup>

Power Purchase Agreements with IPPs owned by some foreign multinationals, which are essentially profit guarantees come within this rubric.<sup>1008</sup>, and the government has also laid strong emphasis on raising of tariffs to ensure profitability as a way of incentivising much needed investments in the power sector. In this regard, it has been noted that

... there is some possibility that prices may go up in developing countries because payment to IPP is guaranteed in PPA contracts in order to promote investment. Thus, if payments are guaranteed for foreign investors to increase their revenue, general electricity prices will have to be raised to meet commitments to foreign investors.<sup>1009</sup>

The social implications of this approach to investment will be considered in later discussion on the economic and social concerns arising from the implementation of privatisation.

Regarding the issue of foreign versus indigenous investments, the National Electric Power Policy embraces both indigenous and foreign investments, and seeks to facilitate technology transfer in the power sector through the electricity privatisation programme. Even if foreign multinationals are not yet willing to invest their resources in the country's power sector but rather prefer service contracts as well as IPPs where they receive guaranteed substantial payments for power supply, the government could still aim to utilise these contractual arrangements to facilitate some benefits of globalisation like technology transfer by including social clauses that require the employment or

---

<sup>1007</sup> IMF, 'Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy' (Report)(December 2005) IMF Country Report No 05/433 117.

<sup>1008</sup> L Salami and A Elebiju, 'Investment Incentives for the Electricity Business in Nigeria' (2004) 22 J Energy & Nat Resources L 94, 99-100; ——— 'NEPA to pay N700m Monthly for Agip Power Supply' *The Guardian* (Lagos 4 April 2005) <<http://odili.net/news/source/2005/apr/4/24.html>> accessed 4 April 2005. Also see H Nagayama, 'Effects of Regulatory Reforms in the Electricity Supply Industry on Electricity Prices in Developing Countries' (2007) 35 Energy Pol'y 3440, 3446; R Pritchard, 'The IPP Experiment' [2001] IELTR 29, 29.

<sup>1009</sup> H Nagayama, 'Effects of Regulatory Reforms in the Electricity Supply Industry on Electricity Prices in Developing Countries' (2007) 35 Energy Pol'y 3440, 3453.



training of indigenous managers and technical staff, but there is no indication that this has been the case.<sup>1010</sup> Indeed in the award of the service contracts, despite the policy stipulation about promoting indigenous participation alongside foreign investment, the government's utilisation of local expertise has been minimal even though some evidence indicates that local expertise exists in this area.<sup>1011</sup>

On a final note, as earlier noted, the Public Enterprises Decree 1999 provides for the privatisation of only 40 per cent of the equity in NEPA. Continued government ownership of significant equity in the power utility could amount to retention of 'golden shares' in the enterprise, earlier noted regarding some of the enterprises privatised in other countries.<sup>1012</sup> While this could be a means of ensuring that the power industry continues to function in the public interest, it could also dissuade potential local and foreign investors concerned about continued government interference, which was noted regarding some of the enterprises privatised under the country's first privatisation programme.<sup>1013</sup> This could also be one of the reasons why foreign power investors have opted more for IPPs, which they own fully, rather than acquiring part stake in the power utility.

### **5.2.3.3. THE APPROACH TO SOCIO-CULTURAL ISSUES IN PRIVATISATION**

In Chapter 4, the influence of geopolitical and other cultural factors in the setting up of some of the public enterprises in Nigeria was noted.<sup>1014</sup> A perusal of the list of

---

<sup>1010</sup> See generally F Ortino, 'Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model' (2005) 7 Int'l LF D Int'l 243, 249-250.

<sup>1011</sup> Note that of the up to ten power plants being build by the Federal Government, only one is being undertaken by an indigenous company, Rockson Engineering Company. See ——— '346 Megawatts For National Grid Soon – NEPA' *Thisday* (Lagos 1 April 2005) <<http://odili.net/news/source/2005/apr/1/215.html>> accessed 1 April 2005. See also, K Ebiri, 'NEPA to Begin Payment for Power from Rivers Turbine Station' *The Guardian* (Lagos 14 June 2004) <<http://www.guardiannewsngr.com/news/article13>> accessed 14 June 2004. Limited local participation has also been noted with regard to many African countries generally. See S Karekezi and J Kimani, 'Status of Power Sector Reform in Africa: Impact on the Poor' (2002) 30 Energy Pol'y 923, 935-936, 937; UNECA/UNEP, *Making Africa's Power Sector Sustainable: An Analysis of Power Sector Reforms in Africa* (UNECA, Addis Ababa 2007) 71-72, 90.

<sup>1012</sup> Chapter 2 para 2.3.2.3.

<sup>1013</sup> AO Oyewunmi, 'Privatisation and the Concept of Corporate Democracy in Nigeria' in EO Akanki (ed), *Unilag Readings in Law* (Faculty of Law, University of Lagos, Lagos 1999) 317-318.

<sup>1014</sup> Chapter 4 para 4.2.3.3; para NI Ikpeze, CC Soludo and NN Elekwa, 'Nigeria: The Political Economy of the Policy Process, Policy Choice and Implementation' in CC Soludo, O Ogbu and H Chang, *The*

companies that were granted IPP licences during the tenure of the last president shows that about one third of them are based in Ogun State, the home state of the president and about half were based in his geopolitical zone.<sup>1015</sup> While this may not be conclusive evidence of geo-political favouritism, it does indicate that the granting of these licences may not have been purely based on sound economic principles. But the broader concern is that if such licences were granted by the independent regulatory body premised on non-economic considerations, not only is it possible that the performance of the private power provider may not be top quality, but it could also mean that malfeasance could go unpunished to the extent that the licensee is seen to enjoy the patronage of the president. As will be seen in the broader discussion of corruption in the power sector, corruption and cronyism allegations currently pervade the entire sector of which law reform aimed at introducing private participation in the electricity sector, may fail to achieve intended ends where political leaders utilise these laws to accomplish other ends.

#### **5.2.3.4. WEIGHING THE COST OF IMPLEMENTING PRIVATISATION AGAINST THE EXPECTED BENEFITS**

As noted in Chapter 4, the cost of implementing the Nigerian privatisation programme has escalated since the programme commenced, raising concerns about whether the costs may ultimately eclipse the benefits expected to be derived from it.<sup>1016</sup> While the government has frequently emphasized its seriousness in dealing with the problems facing the power sector by reference to how much has budgeted for, or spent on the sector<sup>1017</sup>, and the structural reforms that are going on in the sector, an assessment of the resultant effect of such expenditure and structural reorganisation reveals a worsening state of power supply for end users of electricity in the country even as costs are escalating. Some aspects of this escalating cost have already been discussed including the government's significant expenditure on the pre-privatisation rehabilitation of power equipment and facilities in the country and excessive reliance on long-term dollar-denominated Power Purchase Agreements with independent power producers (IPPs) as

---

*Politics of Trade and Industrial Policy in Africa: Forced Consensus?* (Africa World Press/ International Development Research Centre, New Jersey 2004) 353-355.

<sup>1015</sup> See Nigerian Electricity Regulatory Commission, 'Licensees' <<http://www.nercng.org/site/383/default.aspx>> accessed 10 May 2009.

<sup>1016</sup> Chapter 4 para 4.2.3.4.

<sup>1017</sup> O Arowolo, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] IELTR 163, 167.

well as a host of other investment incentives. In the case of rehabilitation, the revenue realised through the eventual privatisation of rehabilitated power plants may not offset the huge rehabilitation expenditure, thus resulting in a net revenue loss for the country.

Regarding the IPPs, they have been presented as a new way of using private sector financing for the much-needed investments in the electricity sector in the country and relieving the government of the burden of funding much needed investments in the power sector. The fact however, is that rather than giving the government financial breathing space, commitments under power purchase agreements aimed at assuring good returns for the private power providers and often denominated in dollars rather than local currency, are very expensive to finance, constitute a massive long-term drain on public funds and they have compounded the pre-existing financial problems of the power utility.<sup>1018</sup> Given that IPPs only deal with power generation, when power transmission and distribution costs are also added, the final cost of power supply for the government becomes extremely high.<sup>1019</sup> With the federal government and various state governments all negotiating these agreements separately, they are not likely to realise the benefits of economies of scale that would have resulted from having one negotiating platform and one standard framework for these transactions, and different financial obligations currently exist under some of the PPAs that have been executed in the country.<sup>1020</sup>

The key concern regarding the mounting cost of power sector reforms is not the expenditure per se, but the absence of commensurate quid pro quo given that the government is left significantly out of pocket even as the power sector remains in bad

---

<sup>1018</sup> Note for instance, ——— ‘NEPA to pay N700m Monthly for Agip Power Supply’ *The Guardian* (Lagos 4 April 2005) <<http://odili.net/news/source/2005/apr/4/24.html>> accessed 4 April 2005; NA El-Rufai (BPE Director-General), ‘The Privatisation Of Nigeria’s Electricity Supply Industry’ (The Future of Nigeria’s Power Sector Conference, 2002) <[www.bpeng.org](http://www.bpeng.org)> accessed 16 October 2003. Also see KD Larson, ‘Sparking a Spread?: Regulatory Efforts to Stimulate Independent Power in Nigeria’ (2008) 3 *Tex J Oil, Gas & Energy* L 151, 165.

<sup>1019</sup> K Bayliss and D Hall, ‘Independent Power Producers: A Review of the Issues’ (Public Services International Research Unit Report) (November 2000) <<http://www.psir.org/publicationsindex.asp>> accessed 13 November 2006.

<sup>1020</sup> ——— ‘NEPA to pay N700m Monthly for Agip Power Supply’ *The Guardian* (Lagos 4 April 2005) <<http://odili.net/news/source/2005/apr/4/24.html>> accessed 4 April 2005; K Obasola, ‘PHCN Defies Supplement...with over 200 Megawatts’ Contribution by IPP, Lagosians say the State Government’s Effort is not Being Complemented’ *The Punch* (Lagos 22 November 2005) <<http://odili.net/news/source/2005/nov/22/433.html>> accessed 22 November 2005.

shape.<sup>1021</sup> This stems from the fact that the agreements are often structured in a way that insulates the IPPs from most investment risks and effectively guarantees them long term profits even when their performance is below par.<sup>1022</sup> In the case of Nigeria, the point was made earlier that they have not yet shown better performance than the inefficient power plants that are still under government ownership despite benefiting from incentives, and some doubt has been expressed regarding whether they actually deliver the contractually agreed quantity of power to the government.<sup>1023</sup>

It should also be noted that the ‘take or pay’ obligation in Power Purchase Agreements means that the government will be contractually obligated to continue to pay for IPP power even when it is unable to evacuate, transmit or distribute same to consumers in the country owing to problems like vandalised power lines or other problems facing the downstream power sector.<sup>1024</sup> In purchasing the power at pre-set prices over the long contractual period, it matters not that later entrants to the power generation sector are able to generate and supply cheaper power since this would not affect pre-existing contractual obligations, and the power purchase expenditure will continue to constitute a charge on public funds long after the privatisation of NEPA has been completed.<sup>1025</sup>

Nigeria also faces the risk that its regular payment of public sector debts stemming from power purchase commitments could be imperilled if the country suffers severe foreign

---

<sup>1021</sup> IMF, ‘Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy’ (Report) (December 2005) IMF Country Report No 05/433 60.

<sup>1022</sup> See generally JR Branston, ‘The Price of Independents: An Analysis of the Independent Power Sector in England and Wales’ (2002) 30 *Energy Pol’y* 1313, 1317.

<sup>1023</sup> Note that NEPA workers have queried whether the IPPs actually deliver the contractually agreed quantity of power to the organisation. See on this, P Jason, ‘Who Can Save Us from NEPA/PHCN Extortion?’ *Vanguard* (Lagos 20 December 2005) <<http://odili.net/news/source/2005/dec/20/328.html>> accessed 20 December 2005.

<sup>1024</sup> M Oduniyi and O Nzechi, ‘Agip’s \$450m IPP takes Off, Boost Power Supply by 300mw’ *Thisday* (Lagos 25 March 2005) <<http://www.thisdayonline.com/nview.php?id=12749>> accessed 25 March 2005.

<sup>1025</sup> K Bayliss and D Hall, ‘Independent Power Producers: A Review of the Issues’ (Public Services International Research Unit Report) (November 2000) <<http://www.psir.org/publicationsindex.asp>> accessed 13 November 2006. Note that in order to sell the power companies debt-free, the government has now transferred NEPA’s debts and financial obligations, including PPA and pension payments to the newly formed autonomous special purpose entity (SPE) called Nigeria Electricity Management Agency Limited/GTE (NEMA), which is charged with managing power sector liabilities and bulk purchase and resale of electricity. Effectively the PPA obligations will continue to constitute a charge on public funds long after the privatisation of NEPA has been completed. See B Ademuyiwa, ‘FG forms New Entity to take over PHCN Liabilities’ *Businessday* (Lagos 21 September 2006) <<http://www.businessdayonline.com/?c=45&a=8656>> accessed 21 September 2006.

exchange shortage possibly as a result of a future fall in the price of oil that is its main income generator.<sup>1026</sup> This could ultimately pose a stumbling block to national development and completely erode any benefit the country may have realised from having a private sector led power sector. It also needs to repay the World Bank loans used in financing key electricity reforms, of which it has been noted regarding World Bank loan repayment that the county has often repaid more than initially borrowed sums, due to a number of factors.<sup>1027</sup> Nevertheless, it is still borrowing more funds for the power sector<sup>1028</sup>, even as it has not been able to satisfactorily account for the money that has been spent so far.<sup>1029</sup>

#### **5.2.3.5. BALANCING THE ECONOMIC AND SOCIAL ISSUES IN PRIVATISATION IN THE INTEREST OF THE CITIZENS**

The electricity sector has been identified as one of the key sectors that need to be reformed in order to reduce poverty and facilitate economic development in Nigeria, and ‘fast-tracking the restructuring and privatization of the sector’ has also been identified as a vital strategy in this regard.<sup>1030</sup> One common thread however that runs through Nigerian policy documents and various policy documents of the IFIs is the strong emphasis on charging tariffs that adequately reflect the cost of providing electricity, as a way of attracting private investments to the power sector and also reducing governments’ overall expenditure in the sector.<sup>1031</sup> Other African countries pursuing

---

<sup>1026</sup> Argentina suffered similar fate. See H Seriki, ‘Umbrella Clauses and Investment Treaty Arbitration: All Encompassing or a Respite for Sovereign States and State Entities?’ [2007] JBL 570, 570-571, 577-578.

<sup>1027</sup> R Mowoe, ‘The World Bank and the IMF in External Debt Management’ in IA Ayua and B Owasanoye (eds), *External Debt and Financial Management in Nigeria* (NIALS, Lagos 1997) 66.

<sup>1028</sup> World Bank, ‘Project Appraisal Document on a Proposed Credit in the Amount of SDR 134.4 Million (US\$200 Million Equivalent) to the Federal Republic of Nigeria Along with a Proposed Series of IDA Partial Risk Guarantees in the Amount of US\$400 Million in Support of Gas Supply and Aggregation Agreements of Shell Petroleum Development Company, Chevron Nigeria Ltd and other Oil Companies with Power Holding Company of Nigeria for the Nigeria Electricity and Gas Improvement Project’ (Report) (May 2009) Report No 47945-NG 70, 86-87. Also see 46.

<sup>1029</sup> J Ameh and O Ezeobi, ‘Power: Reps Uncover another N10bn Inflated Contracts’ *The Punch* (Lagos, 19 March 2008) <<http://www.punchng.com/>> accessed 19 March 2008.

<sup>1030</sup> IMF, ‘Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy’ (Report)(December 2005) IMF Country Report No 05/433 61. Also see vii, xi, xv, 16, 53, 60.

<sup>1031</sup> IMF, ‘Nigeria: Poverty Reduction Strategy Paper—Progress Report—Joint Staff Advisory Note’ (Report) (August 2007) IMF Country Report No 07/271 6-7; IMF, ‘Nigeria: Poverty Reduction Strategy

power sector reforms have also implemented tariff increases.<sup>1032</sup> As earlier noted, in the Nigerian context, the government's expensive power purchase obligations regarding IPPs may make such price hikes inevitable, and given that there is still a big gap between the demand for, and supply of electricity in the country which is not the case with many developed countries, it is essentially a sellers' market with resulting upward pressure on prices.<sup>1033</sup> To the extent that private entrepreneurs may not bother to invest if rates are not profitable, it may be plausible to argue that tariffs have to be adjusted in a country where they do not cover the cost of supply<sup>1034</sup>, but the argument does not end there. While noting the need to devise ways of safeguarding poor people in the era of private provision, including the restricted and targeted use of subsidies<sup>1035</sup>, the National Electric Power Policy curiously notes that based on experience, many Nigerians, including villagers are willing to pay higher rates for more efficient services.<sup>1036</sup> To some extent, this indicates that the policy does not fully factor in the acute level of poverty in the country, of which the Guidelines on Privatisation of Government Enterprises notes that about 70 per cent of Nigerians live below the poverty line of US\$1 dollar a day.<sup>1037</sup> With a current estimated population of about 148 million, that means that up to 100 million Nigerians are living in abject poverty in a country that

---

Paper — National Economic Empowerment and Development Strategy' (Report)(December 2005) IMF Country Report No 05/433 61, 62; IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 2, 3, 14, 16, 111; National Electric Power Policy paras 4.2.5, 6.1, 6.2. Also see AO Popoola, 'Consumer Protection within the Framework of Economic Liberalisation: The Impact of Privatisation, Commercialisation and Deregulation on Consumers' in IA Ayua and DA Guobadia (eds), *Political Reform and Economic Recovery in Nigeria* (NIALS, Lagos 2001) 392, 417; IO Bolodeoku, 'The Search for Global Capital: What has Privatisation Got to do with it, What are the Challenges for Nigeria' (2003) 23 JPPL 93, 107-108 .

<sup>1032</sup> CM Haanyika, 'Rural Electrification Policy and Institutional Linkages' (2006) 34 Energy Pol'y 2977, 2985-2986.

<sup>1033</sup> H Nagayama, 'Effects of Regulatory Reforms in the Electricity Supply Industry on Electricity Prices in Developing Countries' (2007) 35 Energy Pol'y 3440, 3453-3454. Also see M Grimston, 'Generating Profits? Can Liberalized Markets Fit the Electricity Bill?' [2005] IELTR 127, 129-130.

<sup>1034</sup> O Arowolo, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] IELTR 163, 169; A Adefulu, 'How Can Nigeria Develop a Domestic Market for its Gas?' [2000] IELTR 99, 102.

<sup>1035</sup> National Electric Power Policy paras 2.2(1), 4.4(v), 6.3, 7.0.

<sup>1036</sup> *Ibid* para 6.0.

<sup>1037</sup> Guidelines on Privatisation of Government Enterprises para 9.4. Also see IMF, 'Nigeria: Poverty Reduction Strategy Paper—Progress Report' (Report) (August 2007) IMF Country Report No 07/270 1.

does not have a functional social security system.<sup>1038</sup> Poor people potentially face exclusion including non-connection or disconnection for non-payment, however as Kate Bayliss notes, even when poor people are able to pay for essential utilities, the tariff could consume a significant amount of household income, and this could drive them into deeper poverty.<sup>1039</sup> This point may not be immediately apparent in reports that indicate that increased prices have not resulted in reduced demand for a vital utility product.<sup>1040</sup>

One of the functions assigned to the NERC under the Electric Power Sector Reform Act 2005 is to maximise electricity access for consumers in both rural and urban areas and ‘ensure that prices charged by licensees are fair to consumers and are sufficient to allow the licensees to finance their activities and to allow for reasonable earnings for efficient operation.’<sup>1041</sup> Such price regulation as earlier noted, is especially important to prevent market abuse when full competition is not immediately feasible.<sup>1042</sup> To ensure predictability of tariffs, NERC has produced a Multi-Year Tariff Order that presets tariffs for a five year period<sup>1043</sup>, and prepayment meters are being introduced all over

---

<sup>1038</sup> AO Obilade, ‘Poverty and the Legal System: The Laws’ Response to Poverty in Nigeria’ in DA Guobadia and E Azinge (eds), *Poverty, The Nigerian Economy and The Law* (NIALS, Lagos 2004) 210, 218, 220.

<sup>1039</sup> K Bayliss, ‘Water and Electricity in Sub-Saharan Africa’ in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008) 109-115, 118-120. Also see H Nagayama, ‘Effects of Regulatory Reforms in the Electricity Supply Industry on Electricity Prices in Developing Countries’ (2007) 35 *Energy Pol’y* 3440, 3461; S Karekezi and L Majoro, ‘Improving Modern Energy Services for Africa’s Urban Poor’ (2002) 30 *Energy Pol’y* 1015, 1018; CW Price and K Pham, ‘The Impact of Electricity Market Reform on Consumers’ (2009) 17 *Utilities Policy* 43, 47-48; UNECA/UNEP, *Making Africa’s Power Sector Sustainable: An Analysis of Power Sector Reforms in Africa* (UNECA, Addis Ababa 2007) 77-78, 85-89, 101.

<sup>1040</sup> World Bank, ‘Using Markets in Infrastructure Provision’ in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol III* (Routledge, London 1996) 275, 276.

<sup>1041</sup> Electric Power Sector Reform Act 2005 ss 32(1)(b), 32(1)(d).

<sup>1042</sup> Chapter 2 para 2.3.1.2, 2.3.2.2; J Vickers and G Yarrow, ‘The British Electricity Experiment’ in G Yarrow and P Jasinski (eds), *Privatization: Critical Perspectives on the World Economy, Vol II* (Routledge, London 1996) 167; D Thompson, ‘Introducing Competition and Regulatory Requirements’ in VV Ramanadham (ed), *Privatisation in Developing Countries* (Routledge, London 1989) 129-130; G Yarrow, ‘The Regulation of a Privatised Electricity Supply Industry’ in VV Ramanadham (ed), *Privatisation in the UK* (Routledge, London 1988) 231-232.

<sup>1043</sup> Nigerian Electricity Regulatory Commission, ‘Multi-Year Tariff Order (MYTO) for the Determination of Charges and Tariffs for Electricity Generation, Transmission and Retail Tariffs for the Period 1 July 2008 to 30 June 2013’ <[http://www.nercng.org/Portals/\\_Rainbow/Documents/Draft%20Tariff%20Order%2012%20June%2008\\_revised%20by%20IT\\_.pdf](http://www.nercng.org/Portals/_Rainbow/Documents/Draft%20Tariff%20Order%2012%20June%2008_revised%20by%20IT_.pdf)> accessed 30 September 2008 34-38.

the country.<sup>1044</sup> It has been noted however that poor utility consumers do not necessarily gain most from regulatory reforms that may benefit other consumers generally, necessitating the provision of subsidies.<sup>1045</sup> In this regard, the Electric Power Sector Reform Act 2005 provides for the establishment of a Power Consumer Assistance Fund for providing subsidies to underprivileged and special customers.<sup>1046</sup> Ordinarily this is a good provision that would help in ensuring the need-based supply of a vital infrastructural service like electricity, however one of the key concerns here is that it is the power Minister that determines who an underprivileged power consumer is, and will also give policy directions to the NERC on contribution rates and disbursement from the fund<sup>1047</sup> Such targetting of subsidies, which is also endorsed by the National Electric Power Policy is quite difficult.<sup>1048</sup> A World Bank report, while making the case for more effective targetting of subsidies admits that:

Many of the infrastructure subsidies in developing countries are very poorly targeted. As a result poor people and other vulnerable groups capture only a small share of these subsidies<sup>1049</sup>

The social-political context of implementing government policies in Nigeria, which includes concerns about ethnic or other cultural favouritism as seen in this chapter as well as Chapter 4<sup>1050</sup>, means that such wide ambit of powers and discretion is clearly

---

<sup>1044</sup> A Godwin, 'Prepaid Metering System a Rip-Off, say Consumers' *The Punch* (Lagos 14 March 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 14 March 2006.

<sup>1045</sup> O Chisari, A Estache and CW Price, 'Access by the Poor in Latin America's Utility Reform: Subsidies and Service Obligations' in C Ugaz and CW Price (eds), *Utility Privatization and Regulation: A Fair Deal for Consumers?* (Edward Elgar, Cheltenham 2003) 50-51.

<sup>1046</sup> Electric Power Sector Reform Act 2005 ss 84 – 87.

<sup>1047</sup> *Ibid* ss 84(4), 85(1).

<sup>1048</sup> National Electric Power Policy paras 2.2(1), 4.4(v), 6.3, 7.0. For similar problems in other African countries, see K Pfeifer, 'How Tunisia, Morocco, Jordan and even Egypt became IMF "Success Stories" in the 1990s' [1999] (210) Middle East Report 23, 26.

<sup>1049</sup> IN Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004) 266-267. Also see 20-21, 67-68, 268-269.

<sup>1050</sup> Chapter 4 para 4.2,3,3; NI Ikpeze, CC Soludo and NN Elekwa, 'Nigeria: The Political Economy of the Policy Process, Policy Choice and Implementation' in CC Soludo, O Ogbu and H Chang, *The Politics of Trade and Industrial Policy in Africa: Forced Consensus?* (Africa World Press/ International Development Research Centre, New Jersey 2004) 353-355.



open to abuse in absence of adequate transparency safeguards.<sup>1051</sup> Another instance of wide discretion that could be abused in absence of transparency safeguards is the provision that empowers NERC to differentiate customers for the purposes of electricity pricing, premised on a number of grounds including location within the country.<sup>1052</sup> Such differentiation could ultimately be done on extraneous grounds and could give rise to geopolitical friction and allegations of bias. Besides the concept of targeting presupposes that few people will benefit from a measure relative to the rest of the country, however given that up to 100 million Nigerians may need support, it would appear more prudent to provide for broadbased subsidisation that applies across the board as opposed to discretionary targeting. The government has however informed the IMF of its intention of scaling down public subsidies, and phasing them out of urban areas.<sup>1053</sup> In this regard, it has been noted that ‘distribution of income in most countries in Africa shows that most urban households are poor’<sup>1054</sup>, which raises doubts about the propriety of any strategy that leads to the exclusion of urban areas from subsidies.

Also to note is that with the absence of a competition law and competition authority<sup>1055</sup> and the earlier noted concern about NERC ability to play the role of an interim competition authority as envisioned under the National Electric Power Policy<sup>1056</sup>, the benefits of privatisation to power consumers in Nigeria are constrained both with regard to choice and cost of provision.<sup>1057</sup> Also to note is that the expenses incurred under expensive power purchase agreements which may not have been

---

<sup>1051</sup> For similar concerns about potential abuse of wide discretionary powers in other African countries, see FO Boadu and T Olofinbiyi, ‘Regulating the Market: Competition Law and Policy in Kenya and Zambia’ (2003) 26 *World Competition* 75, 96.

<sup>1052</sup> Electric Power Sector Reform Act 2005 s 76(5).

<sup>1053</sup> IMF, ‘Letter of Intent of the Federal Government of Nigeria’ (July 2000) <[www.imf.org/external/NP/LOI/2000/nga/01/Index.htm](http://www.imf.org/external/NP/LOI/2000/nga/01/Index.htm)> accessed 6 June 2005.

<sup>1054</sup> S Karekezi and L Majoro, ‘Improving Modern Energy Services for Africa’s Urban Poor’ (2002) 30 *Energy Pol’y* 1015, 1019.

<sup>1055</sup> L Azubuike, ‘Privatization and Foreign Investments in Nigeria’ (2005-2006) 13 *Tulsa J Comp & Int’l L* 59, 88.

<sup>1056</sup> National Electric Power Policy para 4.3.4(v).

<sup>1057</sup> Regarding the complementary role of competition and regulation, see A McHarg, ‘The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter’ [1992] *PL* 385, 386; D Parker, ‘The Competition Act 1998: Change and Continuity in U.K. Competition Policy’ [2000] *JBL* 283, 283, 297-298.

efficiently negotiated is eventually passed on to consumers, who have little choice in the matter.<sup>1058</sup>

The National Electric Power Policy also notes the need for ‘developing a strategy for the equitable treatment of NEPA’s employees during the reform process’<sup>1059</sup>, and also notes that ‘Government will have due regard for the interest of the staff of the companies to be privatised within the provisions of their conditions of service.’<sup>1060</sup> On the other hand, according to Nigeria’s poverty reduction strategy paper, up to 15 percent of the NEPA workforce will need to go.<sup>1061</sup> The power sector labour unions, whose members may have some insights into the problems of the sector and possible solutions, appear to have largely been left out of the loop on the reform plans and have noted the need for a special body to undertake a diagnostic study of NEPA problems and recommend appropriate solutions, rather than an uncritical pursuit of privatisation.<sup>1062</sup> Also with a labour force of up to 30,000, a 15 percent reduction of the workforce will be considerable, which may be part of why the workers are resisting privatisation, especially given the experiences of other workers that have been laid off from other enterprises without clear plans for disengagement benefits.

#### **5.2.4. IS THE PRIVATISATION PROCESS ACCOUNTABLE, TRANSPARENT AND FREE FROM CORRUPTION?**

As noted in Chapter 4, despite assurances from the Nigerian government that the privatisation programme will be transparent and despite safeguard provisions in the privatisation law and guidelines aimed at ensuring transparency, allegations of

---

<sup>1058</sup> NA El-Rufai (BPE Director-General), ‘The Privatisation Of Nigeria’s Electricity Supply Industry’ (The Future of Nigeria’s Power Sector Conference, 2002) <[www.bpeng.org](http://www.bpeng.org)> accessed 16 October 2003. See generally C Markus, ‘Stranded Costs of Former Electricity Monopolies under E.U. law: Part 1’ [2000] IELTR 144, 149-150, 172; MW White, Joskow PL and Hausman J, ‘Power Struggles: Explaining Deregulatory Reforms in Electricity Markets’ (1996) Brookings Pap Econ Act 201, 242-244..

<sup>1059</sup> National Electric Power Policy para 5.2(vii).

<sup>1060</sup> Ibid para 5.6.

<sup>1061</sup> IMF, ‘Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy’ (Report)(December 2005) IMF Country Report No 05/433 61.

<sup>1062</sup> C Nwachuku, ‘NEPA Privatisation: Workers Reject BPE, NCP’ *Thisday* (Lagos 22 March 2005) <<http://www.thisdayonline.com/nview.php?id=12472>> accessed 22 March 2005; F Awowole-Brown, ‘NUEE Warns against Privatisation of NEPA’, *Sunday Champion* (Lagos 27 March 2005) <<http://www.champion-newspapers.com/>> accessed 27 March 2005.

corruption and cronyism have surfaced in the course of the programme's implementation.<sup>1063</sup> A World Bank report notes the corruption that sometimes beclouds electricity contractual arrangements between governments and private investors.<sup>1064</sup> Regarding the power sector reforms in Nigeria, allegations of corruption currently pervade the entire sector as widely reported in the media. Despite considerable expenditure in the sector, especially over the past decade, power outages are still very regular, with crippling effect on the economy.<sup>1065</sup> According to reports, the national parliament recently conducted probes into suspicious power sector contracts that were awarded by the last government and privatisation concessions awarded to some members of that government<sup>1066</sup>, but the parliament itself is also now embroiled in corruption allegations, including the parliamentary committees on power.<sup>1067</sup> In addition to the above, it was noted earlier that the regulatory commissioners of NERC were recently suspended from office based on corruption allegations and even the power ministry that oversees the NERC appears complicit in some of these corrupt transactions.<sup>1068</sup> This is the environment in which key power sector reforms that will culminate in privatisation are being undertaken.

While allegations, arrests and investigations do not represent cast iron proof of corruption, in absence of criminal conviction, it does appear that there is ample scope for malfeasance in the electricity sector of which the regulatory and oversight

---

<sup>1063</sup> Chapter 4 para 4.2.4.

<sup>1064</sup> World Bank, 'Deterring Corruption and Improving Governance in the Electricity Sector' (Sourcebook) (April 2009) <<http://siteresources.worldbank.org/INTENERGY2/Resources/WBelectricitysourcebookpub.pdf>> accessed 15 May 2009 71.

<sup>1065</sup> V Ahiuma-Young, 'Over 100 factories Shut down for Lack of Electricity' *Vanguard* (Lagos 5 May 2009) <<http://www.vanguardngr.com/>> accessed 5 May 2009.

<sup>1066</sup> J Ameh, 'Reps Probe Concessioning Deal with Atiku's Firm' *The Punch* (Lagos, 14 April 2008) <<http://www.punchng.com/>> accessed 14 April 2008; J Ameh and O Ezeobi, 'Power: Reps Uncover another N10bn Inflated Contracts' *The Punch* (Lagos, 19 March 2008) <<http://www.punchng.com/>> accessed 19 March 2008.

<sup>1067</sup> SM Tagi and WA Gazali, 'Bribery of Members of the Legislature in Nigeria: A Socio-Legal Perspective' (2003) 6 U Maid LJ 75, 75-76, 82-83; T Adisa, 'N6bn Electrification Scam: Suspect Threatens to Expose Presidency Official' *Nigerian Tribune* (Lagos 19 May 2009) <<http://www.tribune.com.ng/>> accessed 19 May 2009.

<sup>1068</sup> P Ibe 'NERC: FG Suspends Owan, Six Others' *Thisday* (Lagos 19 February 2009) <<http://www.thisdayonline.com/>> accessed 19 February 2009; AM Ali and B Olatunji, 'N6bn Scam: EFCC arrests Power Ministry's Perm Sec' *Thisday* (Lagos 6 May 2009) <<http://www.thisdayonline.com/>> accessed 6 May 2009.

mechanisms for delivering key benefits of electricity privatisation also appear compromised. Regulatory controls designed to achieve public interest objectives have often been used to extract gatekeeping fees and rents in the country.<sup>1069</sup> A multinational electricity contractor was recently fined in another country for bribing public officers in a number of countries including Nigeria<sup>1070</sup>, but there is no evidence that Nigeria has also investigated or punished the recipients of these bribes.

Regarding the various contractual arrangements for attracting private sector participation, including sale to core/ strategic investor, IPPs and Rehabilitate, Operate and Transfer (ROT) contracts, as seen in Chapter 4, government officials involved in negotiating or approving such expensive contracts in Nigeria sometimes regard it as an opportunity to maximise their rents or to award such contracts to companies they have personal interest in, regardless of procedural requirements for transparency.<sup>1071</sup> In fact, the former president in 2005, announced the award of an IPP licence among other incentives to a newly-formed company without any track record in building or maintaining power plants, but in which he had considerable shareholding, raising serious doubts about the transparency of the entire transaction and whether he acted in the country's best interest in granting this licence.<sup>1072</sup>

Regarding NERC, it may be difficult to abstract it from the corruption that exists within the political system under which it acquired regulatory powers, and where electricity regulators and those empowered to exercise oversight regarding their operations are involved in corruption, actualising the economic development objectives of electricity privatisation would be a very daunting task. On this issue, it has been noted that:

---

<sup>1069</sup> PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 JAL 173, 188.

<sup>1070</sup> J Williams, 'Foreign Corrupt Practices: A Comparative Review of Law and Enforcement' [2008] IELR 261, 261.

<sup>1071</sup> Chapter 4 para 4.3.4; CA Malgwi, 'Fraud as Economic Terrorism: The Efficacy of the Nigerian Economic and Financial Crimes Commission' (2004) 12 JFC 144, 158; NS Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13 JFC 2006 92, 93; AY Shehu, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 JFC 69, 77; T Odunlami, 'Pentacope: The Conspirators' Messy Deals', *The News*, 13 March 2006 <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 13 March 2006. Also see S Karekezi and J Kimani, 'Status Of Power Sector Reform in Africa: Impact on the Poor' (2002) 30 Energy Pol'y 923, 936, 937.

<sup>1072</sup> Editorial, 'Obasanjo Holdings and Transcorp PLC' *Daily Independent* (Lagos 16 August 2006) <<http://www.independentngonline.com/news/102/article/9005/2006-08-16.html>> accessed 16 August 2006.

It is a common feature in Nigeria that individuals and institutions prefer to subvert laid down rules rather than comply with them. The assurance being that even when they fail to comply, officials from the regulatory institutions will always compromise their positions. This brings to the fore the pervasiveness of corruption in the country as such officers are often “settled” ... to overlook non-compliance with statutory provisions. ... The end result is inadequate or ineffective enforcement of the rules, to the detriment of the Nigerian society. ... a good legislation can be meaningless if not properly enforced.<sup>1073</sup>

Even if NERC commissioners want to be effective, it may be difficult to effectively press for improved service quality and reasonable pricing or punish regulatory breaches in furtherance of the public interest and the development objectives of the privatisation programme, when so doing would reduce the profit margins of enterprises owned by top political leaders or their cronies.<sup>1074</sup> A final comment has to do with the issue of public sector remuneration. Given that regulation involves constant interaction between public officers and private investors who may sometimes be prepared to offer huge bribes<sup>1075</sup>, the low remuneration of public officers in Nigeria need to be re-examined<sup>1076</sup>, and even if the regulatory commissioners are paid well, those working under them also need adequate remuneration to reduce the risk of illicit conduct.

---

<sup>1073</sup> NS Okogbule, ‘Combating Money Laundering in Nigeria: An Appraisal of the Money Laundering Prohibition Act 2004’ (2007) 28 Stat LR 156, 163 and 164.

<sup>1074</sup> See generally AY Shehu, ‘Combating Corruption in Nigeria - Bliss or Bluster?’ (2004) 12 JFC 69: ‘If one takes a look at the board membership/directors of most of the banks for instance, it would be discovered that they are owned by senior retired military and civilian officers or their cohorts. This presents a major constraint on effective regulation because a bank that is owned by powerful people cannot be penalised if it is involved in malpractice.’

<sup>1075</sup> AY Shehu, ‘Combating Corruption in Nigeria - Bliss or Bluster?’ (2004) 12 JFC 69, 77.

<sup>1076</sup> NS Okogbule, ‘An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria’ (2006) 13 JFC 2006 92, 102.

## CHAPTER SIX: CONCLUSION

In this research, the aim has been to examine the link between privatisation legal reform and economic development, specifically with respect to Nigeria, and more broadly, Africa. It has been noted that:

Africa continues to face difficult socio-economic conditions and ... the effective implementation of privatization programmes in Sub-Saharan Africa could be key to increasing the region's competitiveness, increased growth, higher income levels and hence, reduced poverty.<sup>1077</sup>

However, despite the fact that privatisation has been implemented in the continent for several years now, actualising economic development and reducing poverty and inequality remains a key challenge for many African countries, including Nigeria. The hypothesis or central argument of this research is that the replacement of the policy and legal framework for public ownership of enterprises with the new policy and legal framework for their private ownership and/or control as a result of privatisation is not sufficient in itself to deliver certain economic development benefits that have been associated with privatisation, of which the research considers whether privatisation will yield benefits to the public sector of a country, will be beneficial to the privatised enterprises, will contribute to overall private sector development in the country, will be beneficial to its citizens and finally, will be a conduit for beneficial foreign investment inflow to the country. The focus here is not on whether some of these benefits can be achieved but rather whether they can be collectively achieved, of which some of the benefits are economic in nature while some are social in nature. The privatisation challenge from the economic development perspective is to be able to harness both sets of benefits, and this has been a difficult challenge to address in some of the developing countries that have implemented privatisation, including African countries.

The research considered that in Nigeria specifically and more broadly in Africa, the inability of privatisation to yield expected benefits may not simply be for want of laws and regulations but that certain challenges of implementation that have arisen in these countries should also be factored in. This is not to minimise the role of law in

---

<sup>1077</sup> F Pamacheche and B Koma, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1, 2 and 17.

actualising the benefits of privatisation, but rather, laws and regulations appear to constitute only a sub-set amongst a wide range of issues that could affect the outcome of privatisation in a country. The research created an analytical framework for analysing some of these issues and focused on policy and legal inadequacies in Nigeria specifically and Africa generally in addition to some implementation inadequacies. Regarding the implementation inadequacies, a number of questions were framed and addressed namely is the national environment conducive to embarking on privatisation and attracting private investments?; is the institutional framework for implementing and monitoring the outcome of privatisation robust?; will the strategic approach to the implementation of privatisation lead to the realisation of set policy objectives?; and is the privatisation process accountable, transparent and free from corruption? It is considered that the outcome of privatisation will depend on how the above questions are answered in the specific context of implementing privatisation in Nigeria and other African countries. Thus while it is not disputed that privatisation could possibly yield benefits, the context of its implementation also needs to be factored in. It is important to articulate how the analytical framework of the dissertation views the potential for realising key economic development benefits of privatisation in Nigeria and Africa.

## **6.1. Designing an Effective Policy and Legal Framework**

### **6.1.1. The Policy Framework of Privatisation**

Regarding the policy framework of privatisation, the research identified three viewpoints of privatisation policy in Africa namely, the conviction viewpoint, the coercion viewpoint and the self interested viewpoint of which the key issues are whether privatisation is primarily driven by the conviction of national political leaders as to its economic development potential, whether various African countries have been coerced by the IFIs into implementing privatisation or whether the implementation of privatisation may have been influenced by the vested interest of political leaders in a country in personally deriving some illicit benefits through privatisation. Evidence that points to each of these viewpoints can be seen in the implementation of privatisation in Nigeria and Africa more broadly, of which the research notes that these viewpoints are not in separate compartments, and considers that where privatisation is not primarily driven by conviction, it is less likely that it would have been well thought out from a

policy perspective or that it adequately addresses the specific economic development challenges facing a particular country.

### **6.1.2. The Legal Framework of Privatisation**

Regarding the legal framework for implementing privatisation, it was noted that where there are certain inadequacies in the body of laws that pave way for privatisation or regulate the market place, potential privatisation investors may be concerned that their investments will not be adequately protected, and if they fail to invest, all the key benefits of privatisation will not materialise in the first place. Where the laws contain insufficient transparency and accountability safeguards, this could pave way for corruption to seep into the privatisation process which could mean that public enterprises may not be taken over by those best suited to run them efficiently and hence the enterprise may still continue to underperform and the citizens may continue to put up with inefficient services. In some cases the problem is one of absence of certain laws, such as competition laws as is the case with Nigeria, which could mean that privatisation may give rise to private monopolies in which case it will not contribute to broad-based private sector development and the citizens may also lose out and may have to put up with monopoly inefficiency and monopoly rates for goods and services.

### **6.2. Ensuring Proper Implementation of Privatisation**

Regarding the implementation concerns arising from privatisation, the view taken in the dissertation is that while inadequacies in the policy and legal framework of privatisation might have affected the implementation process and outcomes, there are some other issues that could have impact on the outcome of privatisation even if the country has very good laws in the statute books. Although four key implementation questions were framed to facilitate the analysis, it is important to note that the dissertation did not consider these as the only possible issues that could affect the outcome of privatisation of which other scholars may focus on a different set of issues. However that where the four implementation questions are not answered in the affirmative, the view taken is that privatisation will be less likely to facilitate economic development in the country of implementation.



### **6.2.1. Is the National Environment Conducive to Embarking on Privatisation and Attracting Private Investments?**

Regarding the above implementation question, the view taken is that investors, especially foreign investors may fail to make privatisation investments where certain underlying issues in Nigeria or other African countries undermine the investment climate. Key issues addressed in the thesis include whether there are socio-political concerns that arise as a result of the implementation of privatisation such as massive protests by workers or citizens. In some cases, other sources of instability may exist in a country and could affect the outcome of privatisation, for instance Nigeria that has a problem with militant activities in the Niger Delta region of the country. In addition, in Nigeria and some other privatising African countries there are pre-existing systemic problems that affect the private business sector which would bother prospective privatisation investors including inadequate utility/infrastructural services and an unpredictable law and policy environment where taxes and regulations could suddenly change.

Where local or foreign investors fail to invest due to concerns about the underlying investment climate in a country, the various possible benefits of privatisation to the government, the enterprises, the business sector in the country and the citizens may fail to materialise.

### **6.2.2. Is the Institutional Framework for Implementing and Monitoring the Outcome of Privatisation Robust?**

Where the institutional framework for implementing economic reforms like privatisation and monitoring their outcome is not robust, it creates room for possible implementation flaws that may result in the non-realisation of the policy objectives that underpin legal reforms. This includes the administrative body charged with implementing privatisation and various institutions charged with different responsibilities in a market system. The administrative body may lack the capability to undertake proper due diligence on prospective investors as was noted with regard to Nigeria, resulting in failed transactions or enterprises being taken over by those not best suited to manage them, which would not be in the best interest of the government, the privatised enterprises or the citizens that utilise their services. Regulatory capture for instance may result in regulatory bodies not functioning as initially envisioned, which

could undermine some of the benefits of privatisation for the citizens that are hinged on effective regulation. Tax authorities may lack the capability to collect taxes due to the government from various private enterprises including the privatised enterprises, which would reduce the amount of funds available to the government to address various social development needs of the citizens.

### **6.2.3. Will the Strategic Approach to the Implementation of Privatisation Lead to the Realisation of Set Policy Objectives?**

The research focused on 5 strategic issues that could have impact on the outcome of privatisation namely the pace and sequencing of privatisation, the strategy for engaging foreign investors, the approach to socio-cultural issues in privatisation, weighing the cost of implementing privatisation against the expected benefits and balancing the economic and social issues in privatisation in the interest of the citizens. How each of these strategic issues is addressed will have impact on the realisation of key benefits of privatisation for the public sector, the privatised enterprise, the overall development of the private sector and the citizens of the country. For instance, where there is unbalanced risk allocation between the government and foreign investors as was noted with regard to private participation in the utility/infrastructural sector in Nigeria and some other African countries, the government may end up making substantial payments to the foreign investor, which could be at variance with the privatisation objective of reducing government expenditure and attracting foreign investors that will make substantial investments of their own funds that would facilitate economic development in the country. Also, where the implementation of privatisation is influenced by socio-cultural issues within a country including ethnic and geopolitical considerations, rather than being an instrument for actualising key benefits for the entire country and the citizens in general, privatisation could end up being a means of advancing the interests of only selected cultural groups in a country at the expense of others. Where this contributes to social instability in a country, it could undermine the investment climate, making it more difficult for the country to attract sustainable long term investments, both local and foreign and potentially undermines privatisation's use as a contributory tool for overall private sector development in the country. Citizens, including workers may not enjoy some of the potential benefits of privatisation where there are insufficient arrangements for broad based participation in the privatisation programme through share purchase schemes or where workers are laid off without adequate consideration of

issues such as alternative job openings and severance benefits.

#### **6.2.4. Is the Privatisation Process Accountable, Transparent and Free from Corruption?**

The research took the view that if the political leaders in a country lack the political will to prevent corruption from infiltrating the privatisation process or have vested interest in using privatisation as a means of advancing their personal interests and a tool for patronage. This is the vested interest viewpoint of privatisation earlier identified in the analysis of privatisation policy and some evidence indicates that this has had some influence in the implementation of privatisation in Nigeria as well as some other African countries. Within this scenario, benefits of privatisation may materialise primarily for a few politically-connected persons at the expense of broad based benefits for the country and its citizens. Also, in this context, the proceeds of privatisation may not be adequately accounted for, or effectively utilised in addressing the social development challenges facing the citizens of the country. Qualitative foreign investors may also decline to participate in a non-transparent privatisation programme, which could affect foreign investment inflow to the country and as well as the calibre of investors that take over public enterprises.

### **6.3. Case Study of the Nigerian Electricity Sector**

Using the above analytical framework, the implementation of electricity reforms in Nigeria was analysed, of which the reforms are expected to culminate in privatisation of the country's power utility, PHCN. Policy inadequacies were analysed of which the reforms do not appear to be fully grounded in conviction about the merits, which as earlier noted is vital for actualising the economic development objectives of privatisation.<sup>1078</sup> Indeed recent news emanating from Nigeria indicates that the country may be on the verge of suspending the implementation of electricity privatisation, with the government increasing its role in the power sector.<sup>1079</sup> Some of the inadequacies of the framework for electricity regulation, which is vital for realising the benefits of

---

<sup>1078</sup> Chapter 2 para 2.3.1.1; Chapter 3 para 3.1.1; Chapter 4 para 4.1.1; Chapter 5 para 5.1.1.

<sup>1079</sup> Editorial, 'PHCN's Return to Full State Ownership' *The Punch* (Lagos 1 August 2008) <<http://www.punchng.com/>> accessed 1 August 2008.

privatisation were analysed, of which the monolithic nature of the regulatory framework, geopolitical considerations in its staffing, the interface between the power minister and the regulatory body, limitations in seeking redress through the courts against acts or omissions of the regulatory body, and inadequate penalties for regulatory breach are all key factors that could undermine the benefits of electricity privatisation for the country and its citizen. The benefit of privatisation as a tool for facilitating foreign investments in the power sector could also be undermined where potential investors are concerned about undue limitations to the avenues for seeking legal redress, which could increase regulatory risk.

The implementation of electricity reforms leading up to privatisation faces some key challenges that could undermine the policy objective of facilitating economic development through electricity privatisation. While some of the general concerns about the implementation of privatisation in Nigeria would invariably affect electricity privatisation, there are also some issues of specific concern to electricity privatisation, for instance, the fact that many of Nigeria's power plants are located in the Niger Delta region of Nigeria that is prone to the activities of militants, and also the issue of potential legal liability for environmental damage partly resulting from these power plants. The benefits of electricity privatisation to the country as a whole would be adversely affected where these issues prevent investors, particularly foreign investors, from participating in the power sector. Key institutional constraints could undermine the country's ability to effectively negotiate some of the key contracts that are utilised in the power sectors, undertake adequate due diligence on power sector investors, or regulate the power sector, of which some evidence points in this direction. The potential benefits of privatisation to the power sector could be undermined as a result, and the benefits to the citizens would also be adversely affected where privatisation does not deliver expected efficiency benefits due to regulatory inadequacies.

Some of the reform strategies adopted in the power sector could create key economic development constraints. For instance undertaking electricity privatisation at a time when Nigeria does not yet have a competition law or competition authority would limit the benefits of privatisation for the citizens. Engaging private power investors through contractual arrangements that result in extensive foreign exchange outflow from the public purse could undermine the privatisation benefit of attracting private resources to the power sector and limiting the government's expenses in the sector. It would also

have impact on the resources available to the government for social development initiatives. Inadequate regulation, including insufficient consideration of the ability of citizens to afford power tariffs could mean that electricity privatisation may make the actualisation of economic development objectives such as poverty and inequality reduction even more daunting, an issue that will be further elucidated on later in this chapter.

#### **6.4. Key Ideas Distilled from the Implementation of Privatisation in Nigeria and Africa**

Some key ideas can be distilled from the way this dissertation analysed the adoption of privatisation in Nigeria and Africa, which are key contributions to the existing body of work/ knowledge in this area.

As noted in Chapter 1, the research does not necessarily dispute that privatisation legal reform could possibly play a role in facilitating the realisation of key economic development benefits, based on key benefits for the public sector, the privatised enterprises, contribution to overall private sector development, benefits for citizens and conduit for foreign investments into Nigeria and other African countries. However, what emerges from the work is that a lot of caveats need to be inserted into the discourse on privatisation and economic development based on certain policy and legal as well as implementation variables that could affect the outcome of privatisation in specific countries or regions. The research analysed some of these variable factors using the analytical framework created in the dissertation, which is an important contribution to the existing frameworks for privatisation analysis.

No doubt some further legal reforms may be necessary in actualising the economic development objectives of electricity reforms in Nigeria, for instance to address some of the noted flaws of the Electric Power Sector Reform Act 2005, and enact a competition law, which the National Electric Power Policy recognises as a necessary complement to successful electricity privatisation. In the broader African context, some further legal reforms may be necessary in some countries to address some social issues, for instance enforceable legal or constitutional provisions that guarantee certain core rights to the citizens including workers, premised on which they can pursue legal challenge where the implementation of privatisation conflicts with their welfare, of which African countries like Malawi and South Africa have toed this line. Also, in the face of

regulatory inadequacies noted in the dissertation including issues pertaining to political interference and the potential for regulatory capture, which may possibly not be addressed soon in some African countries, laws that enhance consumer rights and create mechanisms for directly seeking legal redress against regulated enterprises without the intermediary of the regulator, may be necessary.

However, unlike the earlier Law and Development movement that appeared to place considerable faith in what could be achieved through legal reforms alone, this research contributes to the growing body of work that seeks to identify other issues that could affect the realisation of developmental objectives in countries that have undertaken legal reforms.<sup>1080</sup> Although the implementation issues identified and analysed in this dissertation may not necessarily be viewed the same way by other privatisation researchers, the four implementation questions framed within the analytical framework would greatly assist policy and law makers in understanding potential hurdles that stand in the way of realising the objectives of policy and legal reforms and devising ways of addressing these issues.

It should be noted that these implementation issues may not necessarily present themselves in the same way or to the same extent in various African countries, of which the research does not seek to make a broad generalisation about the reality of privatisation in Africa. Nigeria for instance, may not currently have a competition commission, but this is not the case with some other African countries like Kenya, although these institutions may still have their peculiar problems in the countries where they exist.<sup>1081</sup> Also, the cultural concerns in the implementation of privatisation in Nigeria may manifest differently within the specific national contexts of various other African countries and their potential impact on privatisation will depend on the peculiar cultural dynamics in these countries. Equally the prevalence and impact of corruption may differ amongst African countries. Thus the research considers it necessary that a 'law plus x' approach should be adopted to the implementation of privatisation in Nigeria and Africa, of which the 'x' represents certain peculiarities of each country that

---

<sup>1080</sup> Note for instance KE Davis and MJ Trebilcock, 'Legal Reforms and Development' (2001) 22 TWQ 21, 25-33 pp 32-33; AL Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 Yale LJ 1, 19, 20, 21.

<sup>1081</sup> Also see M Cave, 'Does the Competition Commission Care Enough about Competition?' (2006/2007) 16 Util LR 151, 151-152.

may not be adequately reflected in the broader discourse on privatisation, some of which were analysed using the analytical framework of the dissertation. For instance, while some have suggested that greater parliamentary scrutiny may be a way of ensuring the political accountability of regulators<sup>1082</sup>, in the specific case of Nigeria where the parliament as earlier noted<sup>1083</sup>, has been embroiled in serious allegations of bribery and corruption, including the parliamentary committees on electricity, rather than being a source of accountability, parliamentary oversight may possibly be a source of regulatory capture. Similarly, although statutory consumer bodies may be effective accountability mechanisms in some jurisdictions as noted in Chapter 2<sup>1084</sup>, the legal and institutional structure for consumer protection was noted to be weak in Nigeria.<sup>1085</sup> Adopting a 'law plus x' approach to these issues may require identifying or developing institutions that have local legitimacy from the perspective of Nigerians citizens, including non-governmental organisations, which could be conferred relevant powers to undertake key oversight tasks in the public interest. John Hatchard has suggested the office of the ombudsman as a key accountability mechanism especially in developing countries<sup>1086</sup>, however, it would be important to consider whether there are institutional or other constraints in particular countries that could prevent effective functioning of the office, for instance whether some of the cultural considerations noted in this research may affect the way the ombudsman responds to particular complaints from some members of the public.<sup>1087</sup>

A vital point to note is that the issues analysed using the analytical framework of the dissertation represent only some but not all possible issues that could affect the outcome of legal reforms in a country. Attempting to encapsulate all possible issues may not be feasible given that many of these issues go well beyond the limits of legal research and

---

<sup>1082</sup> Chapter 2 para 2.3.2.2; N Buttle, 'Privatisation and Ethics' in D Braddon and D Foster (eds), *Privatization: Social Science Themes and Perspectives* (Dartmouth, Aldershot 1996) 36.

<sup>1083</sup> Chapter 5 para 5.2.4.

<sup>1084</sup> Chapter 2 para 2.3.2.2; C Graham, 'The Regulation of Privatised Enterprises' [1991] PL 15, 18.

<sup>1085</sup> Chapter 5 para 5.1.2; BB Kanyip, 'Reflections on Consumer Protection Law in Nigeria' in IA Ayua (ed), *Law, Justice and the Nigerian Society: Essays in Honour of Hon Justice Mohammed Bello* (NIALS, Lagos 1995) 303-304.

<sup>1086</sup> J Hatchard, 'Developing Governmental Accountability: The Role of the Ombudsman' [1992] Third World Legal Stud 215, 215-217, 219-221, 222. Also see Chapter 2 para 2.3.2.2.

<sup>1087</sup> Chapter 3 para 3.2.3.3; Chapter 4 para 4.2.3.3; Chapter 5 para 5.2.3.3.

may also be viewed differently by different scholars as noted above, who may accord greater or lesser importance to some issues depending on their specific perspective on the issues. Besides, so doing may appear too prescriptive, and still fail to capture all the local variables that exist within different countries.

In addition to the above issues, another key point to note is that the conventional approach to issues pertaining to privatisation and market reforms has often been to seek to lay the blame for poor adoption and outcome on the IFIs, or to blame the state for not correctly implementing the reforms or to blame the reforms for being inadequate or inappropriate for the implementing countries. These approaches however could inadvertently marginalise or obscure some implementation realities that may not neatly fit into the framed moulds of criticism, and thus an attempt was made to undertake a nuanced analysis of privatisation in this dissertation. In framing three different policy viewpoints of privatisation in Africa generally and Nigeria specifically (i.e. conviction, coercion and vested interest)<sup>1088</sup>, which is an important contribution to research in this area, the research sought to show that it may not be accurate to simply apportion blame without fully appreciating the dynamics of the local context in which privatisation has been adopted and implemented. The point was also made that the three viewpoints are not in clearly distinct or rigid compartments and it is possible that different combinations of elements of conviction, coercion and/or vested interest could be distilled to varying degrees from the privatisation programmes of some African countries, including Nigeria. In the same vein, the development policy framework of the African Union NEPAD (New Partnership for African Development 2001), was discussed within the context of the African chapter to show that the African Union has also endorsed privatisation as well as partnership with the IFIs in the pursuit of economic development.

In instances where privatisation has failed to produce desired results there is need for closer scrutiny of the surrounding issues. Sometimes the problem is not with the privatisation policy per se but with how it is implemented of which the research examined these implementation issues using the analytical framework created. While the research noted some instances where the IFIs' preferred approach to some aspects of implementation could be criticised, untangling such approach from the pre-existing

---

<sup>1088</sup> Chapter 3 para 3.1.1; Chapter 4 para 4.1.1, Chapter 5 para 5.1.1.



disposition of national political leaders in an implementing country may be difficult in practice. For instance while the IFIs may prefer some haste in the implementation of privatisation, such haste in Nigeria may also possibly result from the vested interest viewpoint of privatisation, where privatisation could be an avenue for personal enrichment or political patronage. In this regard, corruption was analysed in some detail with regard to Nigeria and Africa because no matter how good the privatisation policy is, where those implementing it in a particular country do not appear to have the political will to fully implement it in a transparent and accountable way, there may be little that the IFIs can effectively do to ensure good outcomes.<sup>1089</sup>

It is also important to note that in the same way laws and regulations only constitute a sub-set of the factors that determine the outcome of privatisation, they also constitute only a subset of possible solutions to the obstacles confronting the implementation of privatisation in Nigeria specifically, and Africa in general. For instance, while laws can be adopted to tackle privatisation-related corruption in a country, it has been argued that corruption laws alone cannot effectively resolve the problem of corruption where it is embedded in:

... the larger mix of social and political problems that afflict the country.  
... Once it is recognized that the social environment is the proper arena of engagement, then the relatively limited place of law in the grand scheme of things becomes evident.<sup>1090</sup>

Accordingly, while this research has sought to make some contributions to greater understanding of the gap that exists between privatisation and economic development in Nigeria and some African countries, all possible considerations in the plugging of this gap cannot be fully articulated within the confines of a law thesis, however the dissertation has played a key role in framing some of the key issues that should engage the attention of law and policy makers seeking to advance economic development.

---

<sup>1089</sup> Chapter 3 para 3.2.4; Chapter 4 para 4.2.4; Chapter 5 para 5.2.4.

<sup>1090</sup> PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 JAL 173, 184. Also see 185.

## 6.5. Suggestions for Future Research

There are 2 key suggestions that will be made for further research on the issue of actualising economic development through the adoption and implementation of privatisation, namely, the issue of subsidies for those that cannot afford higher rates charged for utility services in the privatised era and secondly, the issue of possibly reexamining some of the the economic development underpinings of privatisation in the light of recent government bailout of troubled private companies.

Regarding the first issue, Chapter 5 flagged up some of the key concerns in actualising the economic and social ends of privatisation specifically with regard to the commercial pricing of electricity services in countries like Nigeria with disproportionately high number of poor people (about 70 percent living below poverty line of US\$1 dollar per day).<sup>1091</sup> Over a decade ago, World Bank staff acknowledged that ‘most privatisation success stories come from high- or middle-income countries. It is harder to privatise in low-income settings ...’<sup>1092</sup> This difficulty is clearly evident in Nigeria. It should be noted that some have made the case for possibly discontinuing privatisation where it appears inconsistent with social or other considerations in an implementing country<sup>1093</sup>, however, it is important to point out that many utilities were already performing very poorly in some African countries like Nigeria, of which continuation of public provision may not particularly serve the interests of the poor. As noted in a publication, ‘There is plenty of evidence in Africa that state economic controls have had little to do with ensuring basic needs provision or promoting development of the local economy’.<sup>1094</sup>

Continuing with privatisation on the other hand, without effectively addressing the key concerns about potential social exclusion may not augur well for overall economic

---

<sup>1091</sup> Chapter 5 para 5.2.3.5.

<sup>1092</sup> S Kikeri, J Nellis and M Shirley, ‘Privatisation: The Lessons of Experience’ in JL Upper and GB Baldwin (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995) 256.

<sup>1093</sup> P Pineau, ‘Electricity Sector Reform in Cameroon: Is Privatization the Solution?’ (2002) 30 *Energy Pol’y* 999, 1009-1010.

<sup>1094</sup> R Bush and M Szeftel, ‘The Struggle for Resources in Africa’ [1991] (51) *Rev African Polit Economy* 3, 6-7.

development and may lead to increase in inequality. As noted in Chapter 5, current solutions emanating from the IFIs and also articulated in Nigeria's policy documents that deal with electricity echo the same solution of targetting subsidies to those that need it most. But the point was made that the idea of targetting presupposes that few people need assistance relative to the rest of the population, of which in Nigeria for instance, the 70 per cent estimate of people living below poverty line equates to more than 100 million people in a country of about 148 million people. Besides, such targetting within the cultural context of implementing privatisation in Nigeria and some other African countries could pave way for favouritism in the disbursement of the subsidies. Most poor African countries however may not be able to sustain subsidies for the entire country due to their current economic situation, of which privatisation is meant to contribute to improvement of economic performance, but to the extent that privatisation itself may not be well implemented as seen in the dissertation, it may not be able to play an effective role in addressing these challenges. Further research is therefore needed on legal and other strategies for ensuring that poor countries with disproportionately high number of very poor people are able to meet their utility needs whilst retaining the benefits of private provision. A further consideration is the extent to which any necessary increase in tariffs can be undertaken in a country like Nigeria where power blackouts are still prevalent, in which case those paying higher tariffs may still continue to receive poor services until such a time as overall efficiency in the power sector can be achieved.

The second issue to consider is the extent to which privatisation especially when it involves key national industries may need to be re-examined from the policy perspective. Although the tenor of this research did not involve an analysis of whether or not privatisation is a better economic development policy tool relative to state ownership, but rather focused on an analysis of factors that could affect privatisation's outcome, the current spate of government bailouts especially in Europe and the United States, which in some cases has involved the acquisition of major ownership stake in key private enterprises<sup>1095</sup>, raises key questions about reliance on the private sector as a source of greater efficiency and productivity. It has been noted that the IMF 'has urged

---

<sup>1095</sup> N Hood, 'European Bank Bailouts — If at First you don't Succeed, Just Keep Throwing Money at it' (2009) 2 CR & I 63; A Cohen, 'Market Movements' (2009) 5 JIBFL 299; A Clark, 'General Motors declares bankruptcy – the biggest manufacturing collapse in US History' Guardian (London 2 June 2009) <<http://www.guardian.co.uk/business/2009/jun/01/general-motors-bankruptcy-chapter-11>> accessed 6 June 2009.

national governments to take “bolder steps” to shore up financial institutions, including nationalisation if necessary.’<sup>1096</sup> It is remarkable that an organisation that has promoted privatisation over the years should recommend nationalisation even in this limited circumstance. Some of the key issues that need to be addressed in future research include what limits if any, should be placed on such government intervention and what are the likely implications of such intervention where the company is foreign-owned but the government considers it necessary to nationalise it due to concerns about the systemic implications of its collapse which could set back economic development efforts. Finally, if privatisation is meant to stimulate new private investments, what is the guarantee that some of the companies currently being privatised will not be nationalised again in the future within the context of government bailouts which necessitate new public investments in such enterprises?

---

<sup>1096</sup> A Cohen, ‘Market Movements’ (2009) 5 JIBFL 299.

## BIBLIOGRAPHY

### BOOKS AND JOURNALS

Abbamonte GB, 'Market Economy Investor Principle: A Legal Analysis of an Economic Problem' (1996) 17 ECLR 258.

Abbott AF, 'Competition Policy and its Convergence as Key Drivers of Economic Development' (2008-2009) 28 Miss C L Rev 37.

Abibo JE, 'Independence of the Nigerian Judiciary: How Feasible?' (2000) 7 ABULSJ 81.

Abrokwa CK, 'Africa 2000: What Development Strategy?' (1999) 29 J Black Stud 646.

Abubakar D, 'Ethnic Identity, Democratization, and the Future of the African State: Lessons from Nigeria' (2001) 29 (1/2) African Issues 31.

Abugu JEO, 'Nigeria's Evolving Legal Framework for Pensions and Pension Fund Administration' (2006) 17 ICCLR 345.

Adaralegbe AG, 'Are the Energy Laws of Nigeria Sufficient to Promote and Preserve Competition?' [2003] IELTR 251.

Adda W, 'Privatisation in Ghana' in Ramanadham VV (ed), *Privatisation in Developing Countries* (Routledge, London 1989).

Adefulu A, 'How Can Nigeria Develop a Domestic Market for its Gas?' [2000] IELTR 99.

Adefulu A, 'Nigerian Privatisation Legislation and its Implications for the Nigerian Energy Industry' [2000] IELTR 219.

Adell J, 'Spain: Privatisation' (1995) 6 ICCLR C107.

Adenikinju AF, 'Electric Infrastructure Failures in Nigeria: A Survey-Based Analysis of the Costs and Adjustment Responses' (2003) 31 Energy Pol'y 1519.

Adeyemo DO, 'Public Enterprises Reform in Nigeria: A Review' (2005) 10 J Soc Sci 223.

Adeyemo DO and Salami A, 'A Review of Privatization and Public Enterprises Reform in Nigeria' (2008) 4 CMR 401.

Agbakwa SC, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights (2002) 5 Yale Hum Rts & Dev LJ 177.

Agoro B, 'The Nigerian Oil Industry Privatisation Process: An Alternative' [2000] IELTR 225.

Ajayi O, 'Internationalisation of a Domestic Capital Market: The Nigerian Experience' (1993) 8 JIBL 70.

Ajayi O, 'Checking Unethical Market Practices in Nigeria' (1995) 6 ICCLR 169.

Akinla OO, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 BC Third World LJ 19.

Akivaga SK, 'Anti-Corruption Politics in Post-KANU Era' in Chweya L, Tuta JK and Akivaga SK, 'Control of Corruption in Kenya: Legal-Political Dimensions 2001-2004 (Claripress, Nairobi 2005).

Akpan GS, 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' [2006] IELTR 1.

Akpotaire V, 'The Legal Regime for Privatisation in Nigeria and the Crisis of Confidence' (2004) 25 BLR 200.

Akpotaire V, 'The Nigerian Indigenisation Laws as Disincentives to Foreign Investment: The End of an Era' (2005) 26 BLR 62.

Akpotaire V, 'The Nigerian Privatisation Laws, Insider Dealing Abuses, and the Regulatory Authorities' (2002) 23 BLR 291.

Akume AA, 'The Legal Status of Foreign Companies in Nigeria' (2000) 7 ABULSJ 46.

Alegimenlen OAO, 'Structural Adjustment and Nigerian Development: A Third World Angle' (1996-1998) 4 & 5 Nigerian Current Legal Problems 28.

Al Khalifa HR, 'Negotiating and Arbitrating against Government Entities' (2003) 19 Const LJ 258.

Alexander M, 'Privatisation in Africa' in Ramanadham VV (ed), *Privatisation in Developing Countries* (Routledge, London 1989).

Amadi S, 'Contextualizing NEEDS: Politics and Economic Development' in Amadi S and Ogwo F (eds), *Contextualizing NEEDS Economic/Political Reform in Nigeria: Report of Civil Society Policy Dialogue on the National Economic Empowerment and Development Strategy (NEEDS)* (HURILAWS/CPPR, Lagos 2004).

Amao OO, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89.

Amuwo K, 'Military-Inspired Anti-Bureaucratic Corruption Campaigns: An Appraisal of Niger's Experience' (1986) 24 J Mod Afr Stud 285.

Anaeto E, 'Privatisation – What Role for the Media?' in E Onyekpere (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003).

Anan K, 'Kofi Anan on Africa's Development Problems' (1998) 24 Popul Dev Rev 411.

Anderson RD and Kovacic WE, 'Competition Policy and International Trade

Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' [2009] PPLR 67.

Andrews-Speed P and Pritchard R, 'Eight Principles of Electricity Industry Reform' [2001] IELTR 11.

Anifalaje JO, 'The Corporate Structure and Main Features of the Companies and Allied Matters Decree 1990' (1993) 1(1) NCLJ 28.

Animashaun O, 'Compensation for Damage Arising from Oil Operations: Shell Petroleum Development Company of Nigeria v Ambah revisited - a rejoinder' (2002) IELTR 164.

Appiah-Kubi K, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197.

Ardo B, 'Causes of and Remedies for Court Congestion' in Osinbajo Y and Kalu AU (eds), *Law Development and Administration in Nigeria* (The Federal Ministry of Justice, Lagos 1990).

Arowolo O, 'Nigeria's Downstream Sector Deregulation Crisis: What are the Unresolved Issues?' [2005] IELTR 10.

Arowolo O, 'Nigerian Power Sector Reform: Why Distribution Requires a Clear Strategy' [2005] IELTR 163.

Arowolo O, 'Licensing of Electricity Business in Nigeria: Issues and Comments' [2006] IELTR 29.

Arowolo O, 'Eti-Osa Local Government v Jegede: A Fillip for Responsible Tax Administration in Nigeria' (2008) 19 ICCLR 25.

Arowolo OF, 'In the Shadows of the EFCC: Is the ICPC Still Relevant?' (2006) 9 JMLC 203.



Arrowsmith S, 'Deregulation of Utilities Procurement in the Changing Economy: Towards a Principled Approach?' (1997) 18 ECLR 420.

Auby J, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40.

Ayittey GBN, 'How the Multilateral Institutions Compounded Africa's Economic Crisis' (1998-1999) 30 Law & Pol'y Int'l Bus 585.

Ayua I, 'The Problem of Tax Evasion and Avoidance in Nigeria' in Ayua IA (ed), *Nigerian Commercial Laws: Problems and Perspectives* (Department of Commercial Law, Ahmadu Bello University, Zaria 1984).

Azfar O, Lee Y and Swamy A, 'The Causes and Consequences of Corruption' (2001) 573 Annals Am Acad Pol & Soc Sci 42.

Azubuike L, 'Privatization and Foreign Investments in Nigeria' (2005-2006) 13 Tulsa J Comp & Int'l L 59.

Babai D, 'The World Bank and the IMF: Rolling Back the State or Backing its Role?' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988).

Badcoe P, 'Public Private Partnerships in Local Government: The Legal, Financial and Policy Framework' [1999] PPLR 279.

Baer W and Birch M, 'Privatization and the Changing Role of the State in Latin America' (1992-1993) 25 NYU J Int'l L & Pol 1.

Bagu C, 'Efficient Allocation of Resources or Looting the Patrimony – A Critical Review of Privatisation in Nigeria' in Onyekpere E (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003).

Bala JJ, 'The Impacts of Privatization on Distributional Equity in Nigeria' in Ramanadham VV (ed) *Privatization and Equity* (Routledge, London 1995).

Baldwin R and Cave M, *Understanding Regulation: Theory, Strategy and Practice* (OUP, Oxford 1999).

Baldwin R, *Rules and Government* (Oxford, OUP 1995).

Ballonoff P, 'Brief Summary of the Revised Georgian Law on Electricity and Natural Gas, as Applied to the Power Sector of Georgia' [2007] IELTR 58.

Bantekas I, 'Sociological Implications Arising from World Bank Projects and their Impact on Sub-Saharan Indigenous Peoples' (2005) 1 Int JLC 143.

Bailey C and Turner J, 'Social Security in Africa: A Brief Review' (2002) 14 Journal of Aging & Social Policy 105.

Baradat LP, *Political Ideologies: Their Origins and Impact* (Prentice Hall Inc, New Jersey 1979).

Barnard R and J Cooper, 'Is Ofgem Still Fit for Purpose?' [2008] IELR 158.

Bauman RW 'Foreword' (2000) 63(4) Law & Contemp Probs 1.

Bayliss K, 'Privatization and Poverty: The Distributional Impact of Utility Privatization' (2002) 73 Ann Public Coop Econ 603.

Bayliss K, 'Utility Privatisation in Sub-Saharan Africa: A Case Study of Water' (2003) 41 J Mod Afr Stud 507.

Bayliss K, 'Tanzania: From Nationalization to Privatization - and Back?' in Bayliss K and Fine B (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008).

Bayliss K, 'Water and Electricity in Sub-Saharan Africa' in Bayliss K and Fine B (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008).

Beesley ME and Littlechild SC, 'The Regulation of Privatised Monopolies in the United Kingdom' in Yarrow G and Jasinski P (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996).

Bello EG, 'Evolving a Legal and Institutional Framework for Combating Corruption and Other Economic Crimes in Nigeria' in Kalu AU and Osinbajo Y (eds), *Perspectives on Corruption and Other Economic Crimes in Nigeria* (The Federal Ministry of Justice, Lagos, 1991).

Belot I, 'The Role of the IMF and the World Bank in Rebuilding the CIS' (1995) 9 *Temp Int'l & Comp LJ* 83.

Bennel P, 'Privatization in sub-Saharan Africa' in Parker D and Sall D (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003).

Beretta O, 'Country Brief – Argentina' [2008] *IELR* 134.

BJ Berman, 'Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism' (1998) 97 *Afr Aff* 305.

Beveridge FC, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 *ICLQ* 302.

Bhattacharya A, Montiel PJ and Sharma S, 'How Can Sub-Saharan Africa Attract More Private Capital Inflows?' (1997) 34(2) *F & D* 3.

Bieganski L, 'Adoption of European Competition Law by Countries in Transition: Problems and Solutions' (2007) 28 *ECLR* 501.

Bienen H, 'The Politics of Trade Liberalization in Africa' (1990) 38 *Econ Devel Cult Change* 713.

Biersteker TJ, *Multinationals, the State, and Control of the Nigerian Economy* (Princeton University Press, Princeton 1987)

Biersteker TJ, 'Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions' (1990) 34 Int Stud Quart 477.

Bishop M, Kay J and Mayer C, 'Introduction: Privatisation in Performance' in Bishop M, Kay J and Mayer C (eds), *Privatization and Economic Performance* (OUP, Oxford 1994).

Black B, Kraakman R and Tarassova A, 'Russian Privatization and Corporate Governance: What Went Wrong? (1999-2000) 52 Stan L Rev 1731.

Black J, 'Talking about Regulation' [1998] PL 77.

Black J, 'Tensions in the Regulatory State' [2007] PL 58.

Blake RC, 'The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development' (2000) 3 Yale Hum Rts & Dev LJ 158.

Boadu FO and Olofinbiyi T, 'Regulating the Market: Competition Law and Policy in Kenya and Zambia' (2003) 26 World Competition 75.

Bolodeoku IO, 'The Search for Global Capital: What has Privatisation Got to do with it, What are the Challenges for Nigeria' (2003) 23 JPPL 93.

Bolodeoku IO, 'Corporate Political Contributions: A Comment on Nigeria's Electoral Act 2006' (2007) 18 ICCLR 107.

Bolodeoku IO, 'Centralization of Tax Administration in Nigeria: The Legal and Efficiency Considerations' (2008) 37 CLWR 175.

Bonollo A and Anderson G, 'The South Australian Model of Electricity Privatisation' [2001] IELTR 107.

Borrie G, 'The Regulation of Public and Private Power' [1989] PL 552.

Botchway FN, 'Privatisation and State Control – the Case of Asanti Goldfields Company' (2004) 22 J Energy & Nat Resources L 201.

Boubakri N, Cosset J and Guedhami O, 'Privatisation in Developing Countries: Performance and Ownership Effects' (2008) 26 Development Policy Review 275.

Bovis C, 'An Impact Assessment of the European Public Procurement Law and Policy' [1999] JBL 126.

Boycko M, Shleifer A and Vishny RW, 'A Theory of Privatisation' (1996) 106 Econ J 309.

Branston JR, 'The Price of Independents: An Analysis of the Independent Power Sector in England and Wales' (2002) 30 Energy Pol'y 1313.

Brautigam DA, 'What Can Africa Learn from Taiwan? Political Economy, Industrial Policy, and Adjustment' (1994) 32 J Mod Afr Stud 111.

Brazier R, 'Government and the Law: Ministerial Responsibility for Legal Affairs' [1989] PL 64.

Brune N, Garrett G and Kogut B, 'The International Monetary Fund and the Global Spread of Privatization' (2004) 51 IMF Staff Papers 195.

Burgess R and Stern N, 'Taxation and Development' (1993) 31 J Econ Lit 762.

Buschardt KP and Sievers WK, 'Privatisation in Poland' (1994) 5 ICCLR 128.

Bush R and Szeftel M, 'The Struggle for Resources in Africa' [1991] (51) Rev African Polit Economy 3.

Butare T and Kaseke E, 'Social security in Africa: Inherited Burdens, Future Priorities' (2003) 56 (3-4) Int'l Soc Sec Rev 3.

Butler SM, 'Changing the Political Dynamics of Government' (1987) 36(3) Proceedings of the Academy of Political Science 4.

Butler S, 'Privatization for Public Purposes' in Gormley WT Jr (ed), *Privatization and its Alternatives* (The University Of Wisconsin Press, Wisconsin 1991).

Buttle N, 'Privatisation and Ethics' in Braddon D and Foster D (eds), *Privatization: Social Science Themes and Perspectives* (Dartmouth, Aldershot 1996).

Campbell B, 'Governance, Institutional Reform & the State: International Financial Institutions & Political Transition in Africa' (2001) 28 Rev African Polit Economy 155.

Campbell GP, 'Foreign Investment and Company Laws of Selected Central Eastern European and Central Asian Republics' (1994) 5 ICCLR 366.

Carr I, 'Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?' [2007] JBL 111.

Cass R, 'Privatization: Politics, Law and Theory' (1987-1988) 71 Marq L Rev 449.

Cass RA, 'The Optimal Pace of Privatization' (1995) 13 BU Int'l LJ 413.

Cave M, 'Does the Competition Commission Care Enough about Competition?' (2006/2007) 16 Util LR 151.

Chabal P, 'The Quest for Good Government and Development in Africa: Is NEPAD the Answer?' (2002) 78 Int'l Aff (UK) 447.

Chatterjee C, 'The Reality of Risks in Private Foreign Investment' (1996) 7 ICCLR 22.

Chatterjee SK, 'The European Bank for Reconstruction and Development' (1992) 7 JIBL 64.

Chibundu MO, 'Law and the Political Economy of Privatization in sub-Saharan Africa' (1997) 21 Md J Int'l L & Trade 1.

Chibundu MO, 'Law in Development: On Tapping, Gourding, and Serving Palm-Wine' (1997) 29 Case W Res J Int'l L 167.

Chigaga GG, 'Foreign Investment in Africa: 1' (1988) 16 Int'l Bus Law 185.

Chinkin C, 'A Critique of the Public/Private Dimension' (1999) 10 EJIL 387.

Chirwa DM, 'A Full Loaf is better than Half - The Constitutional Protection of Economic Social and Cultural Rights in Malawi' (2005) 49 JAL 207.

Chisari O, Estache A and Price CW, 'Access by the Poor in Latin America's Utility Reform: Subsidies and Service Obligations' in Ugaz C and Price CW (eds), *Utility Privatization and Regulation: A Fair Deal for Consumers?* (Edward Elgar, Cheltenham 2003).

Chua AL, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 Yale LJ 1.

Clapham C, 'Governmentality and Economic Policy in Sub-Saharan Africa' 17 TWQ 809.

Coffee JC Jr, 'Privatization and Corporate Governance: The Lessons from Securities Market Failure' (1999-2000) 25 J Corp L 1.

Cohen T, 'Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation' (2003) 47 JAL 65.

Cohen A, 'Market Movements' (2009) 5 JIBFL 299.

Collier P, 'Living down the Past: Redesigning Nigerian Institutions for Economic Growth' (1996) 95 Afr Aff 325.

Concanon A, 'Investment in the Russian Federation' (1997) 12 JIBL 214.

Cook P and Kirkpatrick C, 'The Distributional Impact of Privatization in Developing Countries: Who gets what, and why' in Ramanadham VV (ed) *Privatization and Equity* (Routledge, London 1995).

Cook P and Kirkpatrick C, 'Assessing the impact of Privatization in Developing Countries' in Parker D and Sall D (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003).

Cooper J, 'A New Approach to Regulation? The Utilities Bill and the New Regulatory Duties' (2000) 11 Util LR 23.

Craig J, 'Evaluating Privatisation in Zambia: A Tale of Two Processes' (2000) 27 Rev African Polit Economy 357.

Craig P, 'Public Law, Political Theory and Legal Theory' [2000] PL 211.

Craig PP, 'Constitutions, Property and Regulation' [1991] PL 538.

Cramer C, 'Privatisation and Adjustment in Mozambique: A "Hospital Pass"?' (2001) 27 J S Afr Stud 79.

Cremades BM, 'Promoting and Protecting International Investments' (2000) 3 Int ALR 53.

Daintith T, 'The Constitutional Protection of Economic Rights' (2004) 2 ICON 56.

Dajkovic I, 'Competing to Reform: An Analysis of the New Competition Law in Albania' (2004) 25 ECLR 734.

Dankota Y, 'Socio-Economic Costs of Corruption to the Nigerian State' [1996] Nigerian Current Law Review 256.

Dankofa Y, 'Law as a Tool for Societal Development: The Islamic Law Option' (1997) 4 ABULSJ 128.



Dauda B, 'Industrial Policy and the Nigerian Bureaucracy, 1900-1988' (1993) 21 African Econ Hist 73.

Davies M, 'Foreign Investment Trends in Central and Eastern Europe' (1992) 7 JIBL 163.

Davies R, 'Contracting Out and the Retention of Employment Model in the National Health Service' (2004) 33 ILJ 95.

Davis DM, 'Socioeconomic Rights: Do They Deliver the Goods?' (2008) 6 ICON 687.

Davis KE and Trebilcock MJ, 'Legal Reforms and Development' (2001) 22 TWQ 21.

De Espinosa Abarca ML, 'The Need for Substantive Regulation on Investor Protection and Corporate Governance in Europe: Does Europe Need a Sarbanes-Oxley?' (2004) 19 JIBLR 419.

De Rosso P, 'Argentina: Competition Law – Regulation' (1997) 8 ICCLR C171.

Del Carril DV, 'Argentina's Privatisation Programme: A Stage Completed' (1994) 22 Int'l Bus Law 68.

Dewatripont M and Roland G, 'The Design of Reform Packages under Uncertainty' (1995) 85(5) Amer Econ Rev 1207.

Diamond L, *Class, Ethnicity and Democracy in Nigeria: The Failure of the First Republic* (Syracuse University Press, Syracuse 1988).

Dimgba N and Okeke LO, 'Nigeria: Telecommunications – Privatisation' (2000) 6 CTLR N124.

Doeh D, 'Oil, Law and Politics in Russia' [2005] IELTR 205.

Doherty B, 'Competition Law and Sector-Specific Regulation' (2001) 7 CTLR 225.

Du Vall M and Barta J, 'Privatisation of State Enterprises in Poland' (1991) 2 ICCLR 310.

Dunleavy P, *Authoring a PhD: How to Plan, Draft, Write and Finish a Doctoral Thesis or Dissertation* (Palgrave Macmillan, Hampshire 2003).

Easterly W, 'Can Institutions Resolve Ethnic Conflict?' (2001) 49 Econ Devel Cult Change 687.

Ebeku KSA, 'Compensation for Damage Arising from Oil Operations: Shell Petroleum Development Company of Nigeria v Ambah Revisited' [2002] IELTR 155.

Ebeku KSA, 'Appraising Nigeria's Niger Delta Development Commission Act 2000' (2003) 25 Stat LR 85.

Eberlein R, 'On the Road to the State's Perdition ? Authority and Sovereignty in the Niger Delta, Nigeria' (2006) 44 J Mod Afr Stud 573.

Echard A and Billot P, 'Privatisation in France in 1993' (1993) 4 ICCLR 406.

Edozien J and Adeoye SO, 'Privatisation in Nigeria' in VV Ramanadham (ed), *Privatisation in Developing Countries* (Routledge, London 1989).

Editorial, 'Shareholder Power and Active Citizenship' (1989) 10 Comp Law 201.

Elebiju A, 'The Investment and Securities Act of 1999: An Overview of Anti-Trust Considerations in the Regulation of Mergers in Nigeria' (2001) 3 JIFM 272.

Ekundare RO, 'The Political Economy of Private Investment in Nigeria' (1972) 10 J Mod Afr Stud 37.

Ekwueme KUK, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49 JAL 177.

Emmons III WM, 'Implications of Ownership, Regulation, and Market Structure for Performance: Evidence from the U.S. Electric Utility Industry Before and After the New Deal' (1997) 79 Rev Econ Statist 279.

Estrin S, 'Competition and Corporate Governance in Transition' (2002) 16(1) J Econ Perspect 101.

Evans A, 'Privatisation and State Aid Control in E.C. Law' (1997) 18 ECLR 259.

Ewing KD, 'Social Rights and Constitutional Law' [1999] PL 104.

Ewing KD, 'The Politics of the British Constitution' [2000] PL 405.

Eyoh D, 'From Economic Crisis to Political Liberalization: Pitfalls of the New Political Sociology for Africa' (1996) 39(3) Afr Stud Rev 43.

Ezeala-Harrison F, 'Structural Re-Adjustment in Nigeria: Diagnosis of a Severe Dutch Disease Syndrome' (1993) 52 Amer J Econ Sociology 193.

Fahey and J Davies J, 'Country Brief: Australia' [2008] IELR 136.

Fantaye DK, 'Fighting Corruption and Embezzlement in Third World Countries' (2004) 68 JCL 170.

Fatula O, 'Critical Issues in Privatisation, Commercialisation and Competition in Nigeria' (2004) 7 U Maid LJ 109.

Fatula O, 'Constitutional Issues in Nigerian Federalism' (2003) 6 U Maid LJ 84.

Fazio S, 'Corporate Governance, Accountability and Emerging Economies' (2008) 29 Comp Law 105.

Fearon JD, 'International Financial Institutions and Economic Policy Reform in Sub-Saharan Africa' (1988) 26 J Mod Afr Stud 113.

- Feeley MM, 'Three Voices of Socio-Legal Studies' (2001) 35 *Isr L Rev* 175.
- Filippozi EM, 'Brazil - Privatisation Programme and Foreign Capital' (1994) 5 *ICCLR* C8.
- Filippozi EM and Noronha Goyos D, 'The Brazilian Constitutional Review and the Privatisation Programme - An Overview' (1994) 5 *ICCLR* 243.
- Fine B and Bayliss K, 'Rethinking the Rethink: The World Bank and Privatization' in K Bayliss and B Fine (eds), *Privatization and Alternative Public Sector Reform in sub-Saharan Africa: Delivering on Electricity and Water* (Palgrave Macmillan, Hampshire 2008).
- Flanary R and Watt D, 'The State of Corruption: A Case Study of Uganda' (1999) 20 *TWQ* 515.
- Forrest T, 'The Political Economy of Civil Rule and the Economic Crisis in Nigeria (1979-84)' [1986] (35) *Rev African Polit Economy* 4.
- Foster D, "'Necessity Knows No Law!" – *LG&E v Argentina*' (2006) 9 *Int ALR* 149.
- Foster D, 'Umbrella Clauses - A Retreat from the Philippines?' (2006) 9 *Int ALR* 100.
- Foster D and Braddon D, 'An Inter-Disciplinary Approach to the Analysis of Privatisation and Marketisation' in Braddon D and Foster D (eds), *Privatization: Social Science Themes and Perspectives* (Dartmouth, Aldershot 1996).
- Freedland MR, 'Government by Contract and Public Law' [1994] *PL* 86.
- Freedland M, 'Public Law and Private Finance - Placing the Private Finance Initiative in a Public Frame' [1998] *PL* 288.
- Frenkel WG, 'Analysis of the Russian Regulations on Holding Companies: State Monopoly During Market Reform and Privatisation' (1993) 4 *ICCLR* 226.

Frenkel WG, 'New Developments in Russian Privatisation Law' (1993) 4 ICCLR 28.

Garbett J, 'Contaminated Land - Liability for Historic Gas Contamination' [2007] IELTR 122.

Garner JF, 'After Privatisation: Quis Custodiet Ipsos Custodes?' [1990] PL 329.

Geddes R, 'Case Studies of Anticompetitive SOE Behavior' in R Geddes (ed), *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Hoover Institution Press, California 2004).

Geo-Jaja MA and Mangum G, 'Structural Adjustment as an Inadvertent Enemy of Human Development in Africa' (2001) 32 J Black Stud 30.

George L, 'Expropriation' [2002] IELTR 46.

Girod J and Percebois J, 'Reforms in Sub-Saharan Africa's Power Industries' (1998) 26 Energy Pol'y 21.

Gluck G, 'Privatisation: The Hungarian Example' (1993) 4 ICCLR 286.

Goodhue RE, Rausser GC and Simon LK, 'Privatization, Market Liberalization, and Learning in Transition Economies' (1998) 80 Amer J Agr Econ 724.

Gordon D, 'Privatization in Eastern Europe: The Polish Experience' (1993-1994) 25 Law & Pol'y Int'l Bus 517.

Gormley WT Jr, 'The Privatization Controversy' in Gormley WT Jr (ed), *Privatization and its Alternatives* (The University Of Wisconsin Press, Wisconsin 1991).

Graham C, 'Company Law: "All that Glitters..." - Golden Shares and Privatised Enterprises' (1988) 9 Comp Law 23.

Graham C, 'The Regulation of Privatised Enterprises' [1991] PL 15.

Graham C, 'Taking Politics out of Regulation and Competition' (1999) 10 Util LR 87

Graham C, 'The Process of Utility Reform' (2000) 11 Util LR 71.

Graham C, 'Methods of Privatisation' in Parker D and Sall D (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003).

Graham C and Prosser T, 'Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques (1987) 50 MLR 16.

Graham C and Sukhtankar S, 'Does Economic Crisis Reduce Support for Markets and Democracy in Latin America? Some Evidence from Surveys of Public Opinion and Well Being' (2004) 36 J Lat Am Stud 349.

Grimston M, 'Generating Profits? Can Liberalized Markets Fit the Electricity Bill?' [2005] IELTR 127.

Grozdanovic J, 'Czechoslovakia: Privatisation' (1991) 2 ICCLR C155.

Gully-Hart P, 'The Risk of Being Sued by those Damaged by Regulatory or Enforcement Action: Over-Regulation of Financial Services?' (2005) 12 JFC 246.

Guobadia A, 'Guarding the Guards: CAMA and Investigation of Companies in Nigeria' (1996) 7 ICCLR 364.

Guobadia DA, 'The Rules of Good Corporate Governance and the Methods of Efficient Implementation: A Nigerian Perspective' (2001) 22 Comp Law 119.

Haanyika CM, 'Rural electrification policy and institutional linkages' (2006) 34 Energy Pol'y 2977.

Haile-Mariam Y and Mengistu B, 'Public Enterprises and the Privatisation Thesis in the Third World' (1988) 10 TWQ 1565.

- Haley G, 'PFI Contractors: Some Emerging Principles' (1999) 15 Const LJ 220.
- Hall D, 'Privatisation, Multinationals and Corruption' (1999) 9 Development in Practice 539.
- Hall D, Lobina E and de la Motte R, 'Public Resistance to Privatisation in Water and Energy' (2005) 15 Development in Practice 28.
- Hanke SH, 'Privatization: Theory, Evidence, and Implementation' (1985) 35(4) Proceedings of the Academy of Political Science 101.
- Hanlon J, 'Power without Responsibility: The World Bank & Mozambican Cashew Nuts' (2000) 27 Rev African Polit Economy 29.
- Hanlon J, 'Debate Intensifies over Adjustment & Press Freedom in Mozambique' (2002) 29 Rev African Polit Economy 113.
- Hanlon J, 'Do Donors Promote Corruption?: The Case of Mozambique' (2004) 25 TWQ 747.
- Harden I, 'The Approach of English Law to State Aids to Enterprise' (1990) 11 ECLR 100.
- Harker M and Waddams Price C, 'Introducing Competition and Deregulating the British Domestic Energy Markets: A Legal and Economic Discussion' [2007] JBL 244.
- Harlow C and Rawlings R, *Law and Administration* (Butterworths, London 1997).
- Harris DR, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 Legal Stud 315.
- Harrison G, 'Clean-Ups, Conditionality & Adjustment: Why Institutions Matter in Mozambique' (1999) 26 Rev African Polit Economy 323.

Harrison G, 'Bringing Political Struggle Back in: African Politics, Power & Resistance' (2001) 28 Rev African Polit Economy 387.

Harsch E, 'Accumulators and Democrats: Challenging State Corruption in Africa' (1993) 31 J Mod Afr Stud 31.

Harsch E, 'The Global Coalition for Africa: Towards a Broader Dialogue?' (1996) 23 Rev African Polit Economy 67.

Harsch E, 'Burkina Faso in the Winds of Liberalisation' (1998) 25 Rev African Polit Economy 625.

Hassan MB, 'The Utilities Act 2000: Impact on the Electricity Industry' [2000] IELTR 231.

Hatch J, 'Privatisation and the Consumer' in Ramanadham VV (ed), *Privatisation in the UK* (Routledge, London 1988).

Hatchard J, 'Developing Governmental Accountability: The Role of the Ombudsman' [1992] Third World Legal Stud 215

Hatchard J, 'The Development of New National Institutions in Commonwealth Africa' (1995) 21 Commw L Bull 1313, 1317.

Head JW, 'For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks' (2003-2004) 52 U Kan L Rev 241.

Herbst J, 'The Politics of Privatisation in Africa' in Upper JL and Baldwin GB (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995).

Herbst J and Soludo CC, 'Nigeria', in Devarajan S, Dollar D and Holmgren T (eds), *Aid and Reform in Africa: Lessons from Ten Case Studies* (World Bank, Washington DC 2001).



Hodd M, 'Africa, the IMF and the World Bank' (1987) 86 Afr Aff 331.

Holtom D, 'The Challenge of Consensus Building: Tanzania's PRSP 1998–2001' (2007) 45 J Mod Afr Stud 233.

Hood N, 'European Bank Bailouts — If at First you don't Succeed, Just Keep Throwing Money at it' (2009) 2 CR & I 63.

Hufbauer G and S Stephenson, 'Services Trade: Past Liberalization and Future Challenges' (2007) 10 JIEL 605.

Hunja R, 'Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines' [1997] PPLR 217.

Hunt PC, 'Statutory Framework for State Economic Development Programs' (1973-1974) 11 Harv J on Legis 703.

Hutchinson T, *Researching and Writing in Law* (2<sup>nd</sup> edn Lawbook Co, Pymont 2006).

Idornigie PO, 'The Impact of Insider Trading on the Nigerian Business Environment: An Overview' (1996) 1 JPPL 14.

Igbuzor O, 'Privatisation in Nigeria: Critical Issues of Concern to Civil Society' in Onyekpere E (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003).

Iheme E, 'The Legal Regulation of Privatisation in Nigeria' in Onyekpere E (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003).

Ikeme J and Ebohon OJ, 'Nigeria's Electric Power Sector Reform: What should Form the Key Objectives?' (2005) 33 Energy Pol'y 1213.

Ikpe UB, 'Public Culture and National Integration in Multi-Cultural States: Comparative Observations from the United States and Nigeria' (2004) 2 Comparative American Studies 91.

Ikpeze NI, Soludo CC and Elekwa NN, 'Nigeria: The Political Economy of the Policy Process, Policy Choice and Implementation' in Soludo CC, Ogbu O and Chang H, *The Politics of Trade and Industrial Policy in Africa: Forced Consensus?* (Africa World Press/ International Development Research Centre, New Jersey 2004).

Isokun MI, 'Law and Development in Nigeria: A Contextual Definition' (1991/92) 1(1) Bendel State University Law Journal 121.

Iyayi F, 'The Primitive Accumulation of Capital in a Neo-Colony: The Nigerian Case' [1986] (35) Rev African Polit Economy 27.

Jackson PM and Price CM, 'Privatisation and Regulation: A Review of the Issues' in Jackson PM and Price CM (eds), *Privatisation and Regulation: A Review of the Issues* (Longman, London 1994).

Johnson, G 'Why Privatise?' in JL Upper and GB Baldwin (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995).

Juwah L, 'Privatisation of Nigerian Telecommunication (NITEL) PLC: The Perspectives and Challenges' (2003) 9 CTLR 229.

Juwah LI, 'Securities Regulation: Issues of Ethics and Compliance in the Capital Market Of Nigeria' (2005) 20 JIBLR 193.

Kachikwu EI, *Nigerian Foreign Investment Law and Policy* (Mikzek Law Publications Limited, Lagos, 1988).

Kagina A, P Gordhan and D Hartnett, 'The Case for African Tax' [2008] (951) Tax Journal 13.

Kangave J, 'Improving Tax Administration: A Case Study of the Uganda Revenue Authority' (2005) 49 JAL 145.

Kanyip BB, 'Reflections on Consumer Protection Law in Nigeria' in IA Ayua (ed), *Law, Justice and the Nigerian Society: Essays in Honour of Hon Justice Mohammed Bello* (NIALS, Lagos 1995).

Karekezi S and Kimani J, 'Status of Power Sector Reform in Africa: Impact on the Poor' (2002) 30 *Energy Pol'y* 923.

Karekezi S and Majoro L, 'Improving Modern Energy Services for Africa's Urban Poor' (2002) 30 *Energy Pol'y* 1015.

Kay JA and Thompson DJ, 'Privatisation: A Policy in Search of a Rationale' in Yarrow G and Jasinski P (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996).

Kennedy P, 'Barriers to African Capitalism' (1994) 32 *J Mod Afr Stud* 191.

Kikeri S and Nellis J, 'An Assessment of Privatization' (2004) 19 *World Bank Res Observer* 87.

Kikeri S, Nellis J and Shirley M, 'Privatisation: The Lessons of Experience' in Upper JL and Baldwin GB (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995).

King SJ, 'Structural Adjustment and Rural Poverty in Tunisia' [1999] (210) *Middle East Report* 41.

Kirkpatrick C, 'The UK Privatisation Model: Is it Transferrable to Developing Countries' in Ramanadham VV (ed), *Privatisation in the UK* (Routledge, London 1988).

Klemperer P, 'Bidding Markets' (2007) 3 *JCL & E* 1.

Kolo A, 'Managing Post-Privatisation Political and Regulatory Risks in Nigeria – a Law and Policy Perspective' (2004) 22 *J Energy & Nat Resources L* 473.

Kraus J, 'Capital, Power and Business Associations in the African Political Economy: A Tale of Two Countries, Ghana and Nigeria' (2002) 40 J Mod Afr Stud 395.

Laffont J, *Regulation and Development* (CUP, Cambridge 2005).

Lamont S, 'The New TUPE Regulations: A Review of the Potential Impact on PPP/PFI Schemes' [2006] PPLR NA133.

Lang A, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry' (2004) 7 JIEL 801.

Larson KD, 'Sparking a Spread?: Regulatory Efforts to Stimulate Independent Power in Nigeria' (2008) 3 Tex J Oil, Gas & Energy L 151.

Laslett J and Franzosi M, 'Legal Aspects of Privatisation in Italy' (1994) 5 ICCLR 425.

Lawson N, 'The Retreat of the State in Economic Management' in Seldon A and others (eds), *The Retreat of the State* (Canterbury Press, Norwich 1998).

Lazarev N, 'On Certain Issues of the Modern Corporate Governance Reform in Russia' (2006) 17 ICCLR 143.

Lewis PM, 'State, Economy, and Privatisation in Nigeria' in Upper JL and Baldwin GB, *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995).

Lewis P, 'From Prebendalism to Predation: The Political Economy of Decline in Nigeria' (1996) 34 J Mod Afr Stud 79.

Lewis P, 'Nigeria's Economy: Opportunity and Challenge' (1999) 27(1) Issue: A Journal of Opinion 50.

Lock R, 'Financing of Private Power Development and Power Sector Reform in Emerging Nations: An Essential Nexus?' (1995) 23 Energy Pol'y 955.

Logue AM, 'Liberalisation of the Energy Market in the European Community' (1992) 3 ICCLR 248.

Longley D and Lewis N, 'Ethics and the Public Service' [1994] PL 596.

Lopez-de-Silanes F, 'Determinants of Privatization Prices' (1997) 112 QJ Econ 965.

Loxley J, 'Structural Adjustment in Africa: Reflections on Ghana and Zambia' [1990] (47) Rev African Polit Economy 8.

Loxley J and Seddon D, 'Stranglehold on Africa' (1994) 21 Rev African Polit Economy 485.

Lugalla JLP, 'Development, Change, and Poverty in the Informal Sector during the Era of Structural Adjustments in Tanzania' (1997) 31 Can J Afr Stud 424.

Lundqvist LJ, 'Privatization: Towards a Concept for Comparative Policy Analysis' (1988) 8 Jnl Publ Pol 1.

Machoka P, 'The Need for Efficient and Effective Secured Transactions Regimes in Sub-Saharan Africa: The Case for Kenya' (2005) 20 JIBLR 395.

MacMillan F, 'Making Corporate Power Global' (1999) 5 Int TLR 3.

Majone G, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 Jnl Publ Pol 139.

Malgwi CA, 'Fraud as Economic Terrorism: The Efficacy of the Nigerian Economic and Financial Crimes Commission' (2004) 12 JFC 144.

Malherbe R, 'Privatisation and the Constitution: Some Exploratory Observations' (2001) J S Afr L 1.

Manuel TA, 'Africa and the Washington Consensus - Finding the Right Path' (2003) 40(3) F & D 18.

Mares A, Martinkova I and Zothova I, 'Czech Republic: Electricity and Gas Industry Privatisation' [2001] IELTR N39.

Markus C, 'Stranded Costs of Former Electricity Monopolies under E.U. law: Part 1' [2000] IELTR 144.

Marshall J, 'Structural Adjustment and Social Policy in Mozambique' [1990] (47) Rev African Polit Economy 28.

McHarg A, 'Regulation as a Private Law Function?' [1995] PL 539.

McHarg A, 'The Competition and Service (Utilities) Act 1992: Utility Regulation and the Charter' [1992] PL 385.

McKinney BM, 'Privatisation: Oman and Egypt' (1997) 25 Int'l Bus Law 126.

Megginson W, 'Privatization' [2000] 118 Foreign Pol'y 14.

Megginson WL, Nash RC and Van Randenborgh M, 'The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis' (1994) 49 J Fin 403.

Mercurio B, 'Growth and Development: Economic and Legal Conditions' (2007) 30 UNSWLJ 437, 438.

Metzger B, 'Law and Development: An Essential Dimension of Governance' (1998) 26 Int'l Bus Law 294.

Mistelis LA, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations' (2000) 34 Int'l Law 1055.

Monkaree A, 'The Problems of Tax Administration in Nigeria and Cameroon' (1994) 3 ABULSJ 68.

Morgan P, 'The Privatization and the Welfare State: A Case of Back to the Future?' in Morgan P (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995).

Morris GS and Fredman S, 'The Costs of Exclusivity: Public and Private Re-Examined' [1994] PL 69.

Morse GK, 'Government's "Golden Share" in BP not a Matter for the City Panel' [1988] JBL 165.

Mosley P, 'Policy-Making without Facts: A Note on the Assessment of Structural Adjustment Policies in Nigeria, 1985-1990' (1992) 91 Afr Aff 227.

Mowoe R, 'The World Bank and the IMF in External Debt Management' in Ayua IA and Owasanoye B (eds), *External Debt and Financial Management in Nigeria* (NIALS, Lagos 1997).

Muchlinski P, "'Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 ICLQ 527.

Muchlinski PT, *Multinational Enterprises and the Law* (2<sup>nd</sup> edn OUP, Oxford 2007).

Munro C, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' [2006] PPLR 352.

Musikali LM, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19 ICCLR 213.

Nagayama H, 'Effects of Regulatory Reforms in the Electricity Supply Industry on Electricity Prices in Developing Countries' (2007) 35 Energy Pol'y 3440.

Naim M, 'Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?' (2000) 21 TWQ 505.

Nchi SI, 'The African Environment and Sustainable Development' (1996) 1 JPPL 119.

Nellis J, 'Time to Rethink Privatization in Transition Economies?' (1999) 36(2) F & D 16.

Nelson JMP, 'Modernisation and Privatisation in Ecuador' (1994) 5 ICCLR 289.

Newbury MC, 'Dead and Buried or Just Underground? The Privatization of the State in Zaire' (1984) 18 Can J Afr Stud 112.

Ngenda BL, 'Privatisation in Zambia' (1993) 21 Int'l Bus Law 298.

Ngenda BL, 'Comparative Models of Privatization: A Commentary on the African Experience' (1995-1996) 21 Brook J Int'l L 179.

Ngugi JM, 'The World Bank and the Ideology of Reform and Development in International Economic Development Discourse' (2006) 14 Cardozo J Int'l & Comp L 313.

Nicolas SR, 'Privatizing South Africa's Industries the Law and Economics of a New Socialist Utopia' (1999) 30 Law & Pol'y Int'l Bus 721.

Nield S, 'The Polluter Pays: But who is a Polluter who Can Pay?' [2008] Conv 539.

Nnona GC, 'The Nigerian Investment and Securities Act: Delineating its Boundaries in Relation to the Registration of Securities' (2006) 50 JAL 24.

Norton JJ, 'International Financial Institutions and the Movement Toward Greater Accountability and Transparency: The Case of Legal Reform Programmes and the Problem of Evaluation' (2001) 35 Int'l L 1443.

Nwauche ES, 'Legal Mechanisms in the Deregulation of the Nigerian Economy: The Privatisation and Commercialisation Decree 1988' (1992) 1(1) The Journal of Jurisprudence and Contemporary Issues 21.



Nwosu EO, 'Petroleum Legislation and Enforcement of Environmental Laws and Standards in Nigeria' (1998-1999) 7 Nig JR 80.

Nzongola-Ntalaja G, 'The African Crisis: The Way Out' (1989) 32(1) Afr Stud Rev 115.

Obayomi O, 'Nigeria: Capital Market Reform' (1996) 11 JIBFL 291.

Obayomi O, 'Nigeria's New Investment Laws' [1997] JBL 593.

Obilade AO, 'Poverty and the Legal System: The Laws' Response to Poverty in Nigeria' in Guobadia DA and Azinge E (eds), *Poverty, The Nigerian Economy and The Law* (NIALS, Lagos 2004).

Oboarenegbe I, 'What is the Justification for the Proposed Renegotiations of Deep Offshore Production-Sharing Contracts in Nigeria?' [2008] IELR 196.

Ocheje PD, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 JAL 173.

Ocheje PD, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 LJIL 749.

Ogowewo TI, 'The Shift to the Classical Theory of Foreign Investment: Opening Up the Nigerian Market' (1995) 44 ICLQ 915.

Ogubunka NM, *Elements of Privatisation in Nigeria* (Rhema Enterprises, Lagos 2000).

Ogus A, 'Comparing Regulatory Systems' in D Parker and D Sall (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003).

Ojo O, 'Self Reliance as a Development Strategy' in Ake C (ed) *Political Economy of Nigeria* (Longman, London 1985).

Ojukwu-Ogba NE, 'Legal and Regulatory Instruments on Environmental Pollution in

Nigeria: Much Talk, Less Teeth' [2006] IELTR 201.

Okafor OC, 'The Precarious Place of Labour Rights and Movements in Nigeria's Dual Economic and Political Transition, 1999–2005' (2007) 51 JAL 68.

Okere BO, 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' (1983) 32 ICLQ 214.

Okogbule NS, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13 JFC 2006 92.

Okogbule NS, 'Combating Money Laundering in Nigeria: An Appraisal of the Money Laundering Prohibition Act 2004' (2007) 28 Stat LR 156.

Okogbule NS, 'Official Corruption and the Dynamics of Money Laundering in Nigeria' (2007) 14 JFC 49.

Okorodudu-Fubara MT, 'State Control and Intervention in Strategic Business and the Promotion of Private Investment' in Ayua IA and Owasanoye B (eds), *Privatisation of Government Owned Banks and the Issue of Ownership and Control (Legal and Economic Perspectives)* (NIALS, Lagos 1996).

Okukpon AO, 'Criminal Liability for Oil Pollution Damage in Nigeria' (1996/99) 3 University of Benin Law Journal 158.

Ola CS, 'A Critical Analysis of the Nigerian Tax System' in Sagay IE and Oliyide O (eds), *Current Developments in Nigerian Commercial Law: Essays in Honour of Chief Samuel Igbayilola Adebite* (Throne-of-Grace Limited, Lagos 1998).

Oladele OO, 'Disclosure in Secondary Securities Transactions in Nigeria' (2008) 19 ICCLR 254.

Oladele OO, 'Information Equalisation and Candour in Private Placement of Securities in Nigeria' (2008) 19 ICCLR 355.

Oladele OO, 'Information Equalisation and Candour in Public Offers of Securities in Nigeria' (2008) 19 ICCLR 311.

Oliver D, 'Common Values in Public and Private Law and the Public/Private Divide' [1997] PL 630.

Oliver D, 'Law, Politics and Public Accountability. The Search for a New Equilibrium' [1994] PL 238.

Olivier de Sardan JP, 'A Moral Economy of Corruption in Africa?' (1999) 37 J Mod Afr Stud 25.

Olowu D, 'Bureaucratic Morality in Africa' (1988) 9 IPSR 215.

Olukoju A, "'Never Expect Power Always": Electricity Consumers' Response to Monopoly, Corruption and Inefficient Services in Nigeria' (2004) 103 Afr Aff 51.

Olukoshi AO and Aremu I, 'Structural Adjustment and Labour Subordination in Nigeria: The Dissolution of the Nigeria Labour Congress Re-Visited' [1988] (43) Rev African Polit Economy 99.

Onuoha K, 'The Legal Regulation of Privatisation – A Critique' in Onyekpere E (ed), *Readings On Privatisation* (Socio-Economic Rights Initiative, Lagos 2003).

Onyeiwu S and Shrestha H, 'Determinants of Foreign Direct Investment in Africa' (2004) 20 Journal of Developing Societies 89.

Onyekpere E, 'Challenges for the Privatisation Programme' in Onyekpere E (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003).

Onyekpere E, *Privatisation in the Dock (A Case Study on the Privatisation of Nigerdock)* (Socio Economic Rights Initiative, Lagos 2005).

Oparaku OU, 'Photovoltaic Systems for Distributed Power Supply in Nigeria' (2002) 25 Renewable Energy 31.

Ortino F, 'Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model' (2005) 7 Int'l LF D Int'l 243.

Ortiz G, 'Latin America And The Washington Consensus: Overcoming Reform Fatigue' (2003) 40(3) F & D 14.

Osunbor OA, 'A Decade of Indigenisation in Nigeria: The Quest for Economic Self-Determination' in Omotola JA (ed), *Essays in Honour of Judge TO Elias* (Faculty of Law, University of Lagos, Lagos, 1987).

Out N, 'The Development and Growth of the Nigeria Police Force from a Social Context Perspective' (2004) 77 PJ 19.

Oyewunmi AO, 'Privatisation and the Concept of Corporate Democracy in Nigeria' in Akanki EO (ed), *Unilag Readings in Law* (Faculty of Law, University of Lagos, Lagos 1999).

Pakendorf K, 'South Africa: Electricity and Natural Gas' [2000] IELTR 202.

Palmer BB, 'European Bank for Reconstruction and Development' (1991) 6 JIBL 204.

Pamacheche F and Koma B, 'Privatization in Sub-Saharan Africa - An Essential Route to Poverty Alleviation' (2007) 1(2) African Integration Review 1.

Parker D, 'The Competition Act 1998: Change and Continuity in U.K. Competition Policy' [2000] JBL 283.

Parker D, 'Privatization and Regulation of Public Utilities: Problems and Challenges for Developing Economies' in Parker D and Sall D (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003).

Pedersen PO and McCormick D, 'African Business Systems in a Globalising World' (1999) 37 J Mod Afr Stud 109.

Peters C, 'Investment Obligations of the Energy System Operators in Germany' [2008] IELR 37.

Pfeifer K, 'How Tunisia, Morocco, Jordan and even Egypt became IMF "Success Stories" in the 1990s' [1999] (210) Middle East Report 23.

Pfeifer K, 'Parameters of Economic Reform in North Africa' (1999) 26 Rev African Polit Economy 441.

Pillitteri R and Greco S, 'Italy: Privatisation - First Companies Named' 2 ICCLR C138.

Pineau P, 'Electricity Sector Reform in Cameroon: Is Privatization the Solution?' (2002) 30 Energy Pol'y 999.

Pirie M, 'Reasons for Privatization', in Morgan P (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd, Hants 1995).

Pitt E, 'Licences under the UK Telecommunications Act 1984 - the Fair Trading Condition' (1997) 18 ECLR 329.

Plank DN, 'Aid, Debt, and the End of Sovereignty: Mozambique and its Donors' (1993) 31 J Mod Afr Stud 407.

Popoola AO, 'Consumer Protection within the Framework of Economic Liberalisation: The Impact of Privatisation, Commercialisation and Deregulation on Consumers' in Ayua IA and Guobadia DA (eds), *Political Reform and Economic Recovery in Nigeria* (NIALS, Lagos 2001).

Pound R, 'Law in Books and Law in Action' (1910) 44 Am L Rev 12.

Price C, 'Privatisation in Less Developed Countries' in Jackson PM and Price CM (eds), *Privatisation and Regulation: A Review of the Issues* (Longman, London 1994).

Price CW and Pham K, 'The Impact of Electricity Market Reform on Consumers' (2009) 17 Utilities Policy 43.

Priess H, 'Privatisations and the E.C. Public Procurement Rules' [1998] PPLR 1.

Priest GL, 'The Aims of Privatisation' (1988) 6(1) Yale L & Pol'y Rev 1.

Pritchard R, 'The Transformation in Foreign Investment Law - more than a Pendulum Swing?' (1997) 8 ICCLR 233.

Pritchard R, 'The IPP Experiment' [2001] IELTR 29.

Pritchard R, 'Managing Electricity Industry Reform: Responding to the Challenge' [2003] IELTR 149.

Prosser T, 'Nationalised Industries as Instruments of Financial Policy: The Treasury Consultation Proposals' [1986] PL 18.

Prosser T, 'Regulating Public Enterprises' [2001] PL 505.

Prosser T and Graham C, 'Golden Shares: Industrial Policy by Stealth?' [1988] PL 413.

Prosser T and Moran M, 'Privatization and Regulatory Change: The Case of Great Britain' in Moran M and Prosser T (eds), *Privatisation and Regulatory Change in Europe* (Open University Press, Buckingham 1994).

Ravenhill J, 'Adjustment with Growth: A Fragile Consensus' (1988) 26 J Mod Afr Stud 179.

Reid DE, 'Employee Share Participation: Clauses 38-42' [1991] BTR 147.

Reisman K, 'The World Bank And The IMF: At the Forefront of World Transformation' (1991-1992) 60 Fordham L Rev S349.

Reno W, 'Old Brigades, Money Bags, New Breeds, and the Ironies of Reform in Nigeria' (1993) 27 Can J Afr Stud 66.

- Robertson A, 'The Reform of UK Competition Law - Again?' (1996) 17 ECLR 210.
- Robinson C, 'Privatisation: Analysing the Benefits' in Parker D and Sall D (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003).
- Roggenkamp MM, 'Ownership Unbundling of Energy Distribution Companies: The Netherlands' [2006] IELTR 240.
- Roland G, 'On the Speed and Sequencing of Privatisation and Restructuring' (1994) 104 Econ J 1158.
- Rose-Ackerman S, 'The Role of the World Bank in Controlling Corruption' (1997-1998) 29 Law & Pol'y Int'l Bus 93.
- Rutland P, 'Mission Impossible? The IMF and the Failure of the Market Transition in Russia' (1999) 25 Rev Int'l Stud 183.
- Ryan MH, 'Telecommunications: Regulation' (1996) 2 CTRLR T138.
- Sah M and Daintith T, 'Privatisation and the Economic Neutrality of the Constitution' (1993) PL 465.
- Salacuse JW, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 Int'l L 875.
- Salacuse JW, 'Corporate Governance in the New Century' (2004) 25 Comp Law 69.
- Salami L and Elebiju A, 'Investment Incentives for the Electricity Business in Nigeria' (2004) 22 J Energy & Nat Resources L 94.
- Salifu A, 'Can Corruption and Economic Crime be Controlled in Developing Economies - and if so, is the Cost Worth it?' (2008) 11 JMLC 273.

Salter M and Mason J, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, Essex 2007).

Sandbrook R, 'Bringing Politics Back in? The World Bank and Adjustment in Africa' (1995) 29 *Can J Afr Stud* 278.

Sanders JJ, 'The World Bank and the IMF: Fostering Growth in the Global Market' (2000) 9 *Currents Int'l Trade LJ* 37.

Sarie-Eldin H, 'Private Sector Participation in the Supply of Infrastructural Services: An Evaluation (Specific Focus on Egypt and North Africa' in J Faundez, ME Footer and JJ Norton (eds), *Governance, Development and Globalization: A Tribute to Lawrence Tshuma* (Blackstone Press Limited, London 2000).

Sas B, 'The RPI-X Formula: Economic Regulation of the Electricity Industry in the United Kingdom' (1992) 3 *ICCLR* 16.

Schwella E, 'Privatization in South Africa' in Parker D and Sall D (eds), *International Handbook on Privatization* (Edward Elgar, Cheltenham, 2003).

Scott C, 'Accountability in the Regulatory State' (2000) 27 *JL & Soc'y* 38.

Scott C, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *PL* 329.

Sebitosia AB and Pillay P, 'Energy Services in Sub-Saharan Africa: How Conducive is the Environment?' (2005) 33 *Energy Pol'y* 2044.

Selvam J, Meenakshisundararajan A and Iyappan T, 'Privatisation and Capital Accumulation: Empirical Evidences from Ethiopia' (2005) 12 *AJEP* 61.

Sender J, 'Africa's Economic Performance: Limitations of the Current Consensus' (1999) 13(3) *J Econ Perspect* 89.

Seriki H, 'Umbrella Clauses and Investment Treaty Arbitration: All Encompassing or a



Respite for Sovereign States and State Entities?' [2007] JBL 570.

Serres F, 'Public/Private Partnership for the Development of Public Infrastructure in Africa: The Possible Role of a Regulating Authority and the Guarantees of Fairness' (2000) Bus L Int'l 337.

Sharpe T, 'Predation' (1987) 8 ECLR 53.

Shehu AY, 'Combating Corruption in Nigeria - Bliss or Bluster?' (2004) 12 JFC 69.

Shihata IFI, *The World Bank in a Changing World: Selected Essays and Lectures, Vol II* (Kluwer Law International, The Hague 1995).

Shirley MM, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23.

Shleifer A, State Versus Private Ownership, (1998) 12(4) J Econ Perspect 133.

Shleifer A and Vishny RW, 'Politicians and Firms' (1994) 109 QJ Econ 995.

Shu Acquaye FB, 'Privatization as a Means of Corporate Governance; A Questionable Solution in Developing Countries: The Case of Cameroon' (1998-1999) 7 Tilburg Foreign L Rev 119.

Simutanyi N, 'The Politics of Structural Adjustment in Zambia' (1996) 17 TWQ 825.

Spahn E, 'International Bribery: The Moral Imperialism Critiques' (2009) 18 Minn J Int'l L 155.

Starr P, 'The Meaning of Privatization' (1988) 6(1) Yale L & Pol'y Rev 6.

Starr P, 'The Case for Skepticism', in Gormley WT Jr (ed), *Privatization and its Alternatives* (The University of Wisconsin Press, Wisconsin 1991).

Stewart F, 'Are Adjustment Policies in Africa Consistent with Long-run Development Needs?' (1991) 9 *Development Policy Review* 413.

Stiglitz J, *Globalization and its Discontents* (Norton and Company, New York 2003).

Stiglitz J, *More Instruments And Broader Goals: Moving Toward The Post-Washington Consensus* (UNU/WIDER, Helsinki 1998).

Stone RW, 'The Political Economy of IMF Lending in Africa' (2004) 98 *Am Polit Sci Rev* 577.

Stroeter Trench and Veirano, 'Brazilian Privatisation Plan' (1991) 9 *IBL* 408.

Stuber WD, 'Privatisation in Brazil' (1991) 9 *IBL* 429.

Sullivan RC, 'Privatisation in Ethiopia, Malawi and Uganda' in Ramanadham VV (ed), *Privatisation in Developing Countries* (Routledge, London 1989).

Sutcliffe F, 'Transfer of Undertakings: Are the Defences Down?' (1993) 14 *Comp Law* 220.

Szeftel M, 'Misunderstanding African Politics: Corruption & the Governance Agenda' (1998) 25 *Rev African Polit Economy* 221.

Szeftel M, 'Between Governance & Underdevelopment: Accumulation & Africa's "Catastrophic Corruption"' (2000) 27 *Rev African Polit Economy* 287.

Szeftel M, 'Clientelism, Corruption & Catastrophe' (2000) 27 *Rev African Polit Economy* 427.

Szeftel M, 'Globalisation & African Responses' (2000) 27 *Rev African Polit Economy* 353.

Tagi SM and Gazali WA, 'Bribery of Members of the Legislature in Nigeria: A Socio-Legal Perspective' (2003) 6 *U Maid LJ* 75.

Talus K, 'Long-term Gas Agreements and Security Of Supply - Between Law and Politics' (2007) 32 EL Rev 535.

Tangri R, 'The Politics of State Divestiture in Ghana' (1991) 90 Afr Aff 523.

Tanyi GB, *Designing Privatization Strategies for Africa: Law, Economics, and Practice* (Praeger, Westport 1997).

Taylor I and Nel P, "'New Africa", Globalisation and the Confines of Elite Reformism: 'Getting the Rhetoric Right', Getting the Strategy Wrong' (2002) 23 TWQ 163.

Taylor RJ, 'UK Competition Law and Procedures - An Overview' (1988) 9 ECLR 446.

Teichler SL and Levitine I, 'Long Term Power Purchase Agreements in a Restructured Electricity Industry' (2005) 40 Wake Forest L Rev 677.

Tether M and Mead G, 'Status of Privatised Utilities in the UK after Griffin v South West Water Services' (1994) 5 ICCLR 363.

Theobald R, 'Lancing the Swollen African State: Will it Alleviate the Problem of Corruption?' (1994) 32 J Mod Afr Stud 701.

Thioub I, Diop M and Boone C, 'Economic Liberalization in Senegal: Shifting Politics of Indigenous Business Interests' (1998) 41(2) Afr Stud Rev 63.

Thompson D, 'Introducing Competition and Regulatory Requirements' in Ramanadham VV (ed), *Privatisation in Developing Countries* (Routledge, London 1989).

Thornton J, 'Contaminated Land' (2008) 20 JEL 293.

Tite C, 'Port Privatisation: Managing Change within the Right Legal Framework' (1995) 6 ICCLR 166.

Tokunboh MA, *Public Enterprises: The Nigerian Experience* (Lantern Books, Lagos

1990).

Torres HR, 'Reforming the International Monetary Fund - Why its Legitimacy is at Stake' (2007) 10 JIEL 443.

Trubek DM, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972-1973) 82 Yale LJ 1.

Trubek DM and Galanter M, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States [1974] Wis L Rev 1062.

Tsie B, 'States and Markets in the Southern African Development Community (SADC): Beyond the Neo-Liberal Paradigm' (1996) 22 J S Afr Stud 75.

Udombana NJ, 'The Summer Has Ended and We Are Not Saved - Towards a Transformative Agenda for Africa's Development' (2005-2006) 7 San Diego Int'l LJ 5.

Turkson J and Wohlgemuth N, 'Power Sector Reform and Distributed Generation in Sub-Saharan Africa' (2001) 29 Energy Pol'y 135.

Ughanze NC, 'Privatisation in Nigeria – Key Issues and Principles for the National Assembly' in Onyekpere E (ed), *Readings on Privatisation* (Socio-Economic Rights Initiative, Lagos 2003).

Ukiwo U, 'Politics, Ethno-Religious Conflicts and Democratic Consolidation in Nigeria' (2003) 41 J Mod Afr Stud 115.

Upper JL, 'Introduction I: Restructuring and Privatisation of State-Owned Enterprises' in Upper JL and Baldwin GB (eds), *Public Enterprises: Restructuring and Privatization* (International Law Institute, Washington DC 1995).

Urban F, Benders RMJ and Moll HC, 'Modelling Energy Systems for Developing Countries' (2007) 35 Energy Pol'y 3473, 3474.

Valli A, 'Italy – Privatisation' (1994) 5 ICCLR C141.

Van Schilfgaarde E and Verkleij P, 'Netherlands Parliament Adopts Controversial Energy Legislation: Energy Companies will have to Split Up and Privatization of Networks is Unlikely' [2006] IELTR 170.

Veljanovski C, *Selling the State: Privatisation in Britain* (Weidenfeld and Nicholson, London 1987)

Vellas P, 'International Project Finance: Lenders' Protection against Expropriation and Force Majeure Risks' (2004) 19 JIBLR 432.

Vellas P, 'Price Regulation in Energy Project Finance: The Need for Comprehensive State Intervention' [2005] IELTR 61.

Vernon R, 'Introduction: The Promise and the Challenge' in R Vernon (ed), *The Promise of Privatization: A Challenge for US Policy* (Council on Foreign Relations, New York 1988).

Vickers J and Yarrow G, 'Privatization in Britain' in MacAvoy PW and others (eds), *Privatization and State-Owned Enterprises: Lessons from the United States, Great Britain and Canada* (Kluwer Academic Publishers, Boston 1989).

Vickers J and Yarrow G, 'Economic Perspectives on Privatization' (1991) 5(2) J Econ Perspect 111.

Vickers J and Yarrow G, 'The British Electricity Experiment' in Yarrow G and Jasinski P (eds), *Privatization: Critical Perspectives on the World Economy, Vol II* (Routledge, London 1996).

Voroniuk A, 'Ukraine: Monetary Thresholds of Concentration: Creation of Competitive Environment during Privatisation' (1995) 16 ECLR R54.

Wallace D, 'The Changing World of National Procurement Systems: Global Reformation' [1995] PPLR 57.

Wamugo E, 'Privatisation and Regulation in Sub-Saharan Africa: Issues for Consideration' (2001) 29 Int'l Bus Law 263.

Wass D, 'Checks and Balances in Public Policy Making' [1987] PL 181.

Watts M, 'Visions of Excess: African Development in an Age of Market Idolatry' [1991] (51) Transition 124.

Weitzman ML, 'How not to Privatize' in Yarrow G and Jasinski P (eds), *Privatization: Critical Perspectives on the World Economy, Vol IV* (Routledge, London 1996).

Weller J, 'Macedonia's New Energy Law' [2006] IELTR 191.

Wells LT and Gleason ES, 'Is Foreign Infrastructure Still Risky?' (1995) 73(5) Harv Bus Rev 44.

White MW, Joskow PL and Hausman J, 'Power Struggles: Explaining Deregulatory Reforms in Electricity Markets' (1996) Brookings Pap Econ Act 201.

Willett C, 'The Citizen's Charter' [1992] JBL 188.

Williams J, 'Foreign Corrupt Practices: A Comparative Review of Law and Enforcement' [2008] IELR 261.

Williams S, 'The Development of Defence Procurement Policy in Nigeria and the Case for Reform' [2005] PPLR 153.

Williams S, 'The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa' (2007) 51 JAL 1.

Williamson J, 'What should the World Bank Think about the Washington Consensus' (2000) 15 World Bank Res Observer 251.

Wilson III EJ, 'Strategies of State Control of the Economy: Nationalization and Indigenization in Africa (1990) 22 Comp Pol 401.

Witten EA, 'Arbitration of Venezuelan Oil Contracts: A Losing Strategy?' (2008-2009) 4 Tex J Oil, Gas & Energy L 55.

Wolde-Rufael Y, 'Electricity Consumption and Economic Growth: A Time Series Experience for 17 African Countries' (2006) 34 Energy Pol'y 1106.

Wolgin JM, 'The Evolution of Economic Policymaking in Africa' (1997) 87(2) Amer Econ Rev 54.

Woolf Lord, 'Droit Public - English Style' [1995] PL 57.

Woolf H, 'Public Law - Private Law: Why the Divide? - A Personal View' [1986] PL 220.

World Bank, 'Using Markets in Infrastructure Provision' in Yarrow G and Jasinski P (eds), *Privatization: Critical Perspectives on the World Economy, Vol III* (Routledge, London 1996).

Yarrow G, 'The Regulation of a Privatised Electricity Supply Industry' in Ramanadham VV (ed), *Privatisation in the UK* (Routledge, London 1988).

Yarrow G and others, 'Privatization in Theory and Practice' (1986) 1 Econ Policy 323.

Yerokun O, 'The Changing Investment Climate through Law and Policy in Nigeria' in Okonkwo CO (ed), *Contemporary Issues in Nigerian Law: Essays in Honour of Judge Bola Ajibola* (Taiwo Fakoyede, Lagos 1992).

Young P, 'Privatization around the World' (1987) 36(3) Proceedings of the Academy of Political Science 190.

Young RA, 'Privatisation in Africa' [1991] (51) Rev African Polit Economy 50.

Bourguignon F (World Bank Chief Economist), 'Comments' (Reforming Infrastructure - Privatization, Regulation and Competition Press Conference, 2004) <<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20212636~menuPK:34476~pagePK:34370~piPK:34424~theSitePK:4607,00.html>> accessed 27 October 2005.

Commander S, Dutz M and Stern N, 'Restructuring in Transition Economies: Ownership, Competition and Regulation' (Annual World Bank Conference on Development Economics, 1999) <<http://siteresources.worldbank.org/INTABCDEWASHINGTON1999/Resources/stern.pdf>> accessed 30 June 2005.

Dimgba N, 'The Regulation of Competition through Merger Control: the Case under the Investment and Securities Act 2007' (Nigerian Bar Association (NBA) Section on Business Law Conference, 2009) <<http://www.globalcompetitionforum.org/regions/africa/Nigeria/The%20Regulation%20of%20Competition%20through%20Merger%20Control%20and%20the%20ISA%202007.pdf>> accessed 30 April 2009.

El-Rufai NA (BPE Director-General), 'The Privatisation Programme - Status Report And Plans For 2001-3' (Nigerian Investment Summit, 2001) <<http://www.bpeng.org/cgi-bin/publications/presentations/nasir-ahmad%20el-rufai%20-%20nigerian%20investment%20summit-status%20report%20plans%20for%202001-3-%20sep%202001-%20london.ppt>> accessed 21 May 2006.

El-Rufai NA (BPE Director-General), 'The Privatisation of Nigeria's Electricity Supply Industry' (The Future of Nigeria's Power Sector Conference, 2002) <[www.bpeng.org](http://www.bpeng.org)> accessed 16 October 2003.

Kikeri S and Nellis J, 'Privatization in Competitive Sectors: The Record to Date', (2002) World Bank Policy Research Working Paper No 2860 <[http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/08/02/000094946\\_02072209183311/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/08/02/000094946_02072209183311/Rendered/PDF/multi0page.pdf)> accessed 20 April 2006.



Mckinley T, 'MDG-Based PRSPs Need More Ambitious Economic Policies' (2005) United Nations Development Programme Policy Discussion Paper <<http://www.undp.org/poverty/publications.htm>> accessed 24 October 2005.

Mohammed SA, 'Privatisation of the Iron and Steel Industry in Africa' (8th International Arab Iron and Steel Conference, 2008) <<http://www.afristeel.org/PRIVATISATION%20OF%20THE%20IRON%20AND%20STEEL%20INDUSTRY%20IN%20AFRICA.pdf>> accessed 1 August 2008.

Nellis J, 'The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis' (2002) World Bank OED Working Paper <[http://www.worldbank.org/oed/transitions/economies/docs/privatization\\_enterprise.pdf](http://www.worldbank.org/oed/transitions/economies/docs/privatization_enterprise.pdf)> accessed 6 June 2005.

Shirley MM and Walsh P, 'Public Versus Private Ownership: The Current State of the Debate' (2000) World Bank Policy Research Working Paper No. 2420 <[http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/09/15/000094946\\_00090605460293/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/09/15/000094946_00090605460293/Rendered/PDF/multi_page.pdf)> accessed 15 June 2007.

Stiglitz JE, 'Quis Custodiet Ipsos Custodes? – Corporate Governance Failures in the Transition' (Annual World Bank Conference on Development Economics in Europe, 1999) <<http://www.worldbank.org/research/inequality/sais/lecture1/stiglitz.pdf>> accessed 6 June 2005.

## **RESEARCH REPORTS AND POLICY DOCUMENTS**

Bayliss K and Hall D, 'Independent Power Producers: A Review of the Issues' (Public Services International Research Unit Report) (November 2000) <<http://www.psir.org/publicationsindex.asp>> accessed 13 November 2006.

Better Regulation Task Force, UK, 'Economic Regulators' (Report) (July 2001) <<http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/econreg.pdf>> accessed 20 July 2006.

Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* (Economic Commission for Africa, Addis Ababa 2002).

Economic Commission for Africa, *Economic Report on Africa 2003: Accelerating the Pace of Development* (Economic Commission for Africa, Addis Ababa 2003).

Economic Commission for Africa, *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (Economic Commission for Africa, Addis Ababa 2005).

Electric Power Sector Reform Implementation Committee, Nigeria, 'National Electric Power Policy' (October 2000) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/B3AE9394-8383-47E5-8199-CD1A325A265B/0/ElectricPowerPolicy.pdf>> accessed 6 September 2004.

Ellis-Jones M, 'States of Unrest III: Resistance to IMF and World Bank Policies in Poor Countries' (World Development Movement Report) (April 2003) <<http://www.wdm.org.uk/resources/reports/debt/statesofunrest319042003.pdf>> accessed 30 May 2006.

Energy Commission of Nigeria, 'National Energy Policy' (April 2003) <[http://www.energy.gov.ng/index.php?option=com\\_docman&task=cat\\_view&Itemid=&gid=19&orderby=dmdate\\_published&ascdesc=DESC](http://www.energy.gov.ng/index.php?option=com_docman&task=cat_view&Itemid=&gid=19&orderby=dmdate_published&ascdesc=DESC)> accessed 30 June 2006.

Federal Ministry of Industry, Nigeria, 'Industrial Policy for Nigeria: Targets, Policies, Incentives, Guidelines and Institutional Framework' (November 2001) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/E16B257D-99C8-46EA-B792-A339893D7107/0/IndustrialPolicy.pdf>> accessed 30 June 2006.

Hardstaff P, 'Treacherous Conditions: How the IMF and World Bank Policies tied to Debt Relief are Undermining Development' (World Development Movement Report)

(May 2003)  
<<http://www.wdm.org.uk/resources/reports/debt/treacherousconditions07052003.pdf>>  
accessed 20 May 2006.

ILO Sectoral Activities Programme, *Managing the Privatization and Restructuring of Public Utilities (Water, Gas and Electricity)* (ILO, Geneva 1999).

IMF, 'Memorandum on Economic and Financial Policies of the Federal Government of Nigeria for 1999' (February 1999)  
<<http://www.imf.org/external/np/loi/1999/022299.htm>> accessed 22 March 2006.

IMF, 'Letter of Intent of the Federal Government of Nigeria' (July 2000)  
<[www.imf.org/external/NP/LOI/2000/nga/01/Index.htm](http://www.imf.org/external/NP/LOI/2000/nga/01/Index.htm)> accessed 6 June 2005.

IMF, 'Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (Issues Brief) (December 2000) No 00/09.

IMF, 'Nigeria: 2001 Article IV Consultation—Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion' (Report) (August 2001) IMF Country Report No 01/131.

IMF, 'Guidelines on Conditionality' (September 2002)  
<<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>> accessed 20 March 2004.

IMF, 'Nigeria: 2004 Article IV Consultation—Staff Report; and Public Information Notice on the Executive Board Discussion' (Report) (August 2004) IMF Country Report No 04/239.

IMF, 'Nigeria: Poverty Reduction Strategy Paper — National Economic Empowerment and Development Strategy' (Report) (December 2005) IMF Country Report No 05/433.

IMF, 'Nigeria: Poverty Reduction Strategy Paper—Progress Report' (Report) (August 2007) IMF Country Report No 07/270.

IMF, 'Nigeria: Poverty Reduction Strategy Paper—Progress Report—Joint Staff Advisory Note' (Report) (August 2007) IMF Country Report No 07/271.

IMF, 'Nigeria: 2007 Article IV Consultation—Staff Report; Staff Supplement and Statement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Nigeria' (Report) (February 2008) IMF Country Report No 08/64.

IMF, 'IMF Conditionality' (Factsheet) (April 2009)  
<<http://www.imf.org/external/np/exr/facts/conditio.htm>> accessed 30 May 2009.

Kessides IN, *Reforming Infrastructure: Privatization, Regulation, and Competition - A World Bank Policy Research Report* (World Bank, Washington DC 2004).

National Council on Privatisation, Nigeria, 'National Electric Power Policy' (October 2000) <<http://bpe.dev.bsh-bg.com/NR/rdonlyres/B3AE9394-8383-47E5-8199-CD1A325A265B/0/ElectricPowerPolicy.pdf>> accessed 30 June 2006.

National Council on Privatisation, Nigeria, *Privatisation Handbook* (3<sup>rd</sup> edn BPE, Abuja 2001).

Nigerian Electricity Regulatory Commission, 'Multi-Year Tariff Order (MYTO) for the Determination of Charges and Tariffs for Electricity Generation, Transmission and Retail Tariffs for the Period 1 July 2008 to 30 June 2013' <[http://www.nercng.org/Portals/\\_Rainbow/Documents/Draft%20Tariff%20Order%201%20June%2008\\_revised%20by%20IT\\_.pdf](http://www.nercng.org/Portals/_Rainbow/Documents/Draft%20Tariff%20Order%201%20June%2008_revised%20by%20IT_.pdf)> accessed 30 September 2008.

Nigerian National Planning Commission, *Meeting Everyone's Needs: National Economic Empowerment and Development Strategy* (Nigerian National Planning Commission, Abuja 2004).

Organization of African Unity, 'Lagos Plan of Action for the Economic Development of Africa 1980-2000' <[http://knowledge.uneca.org/member-states/observatory-on-regional-integration/regional-economic-commissions-in-africa/african-union/african-economic-community/Lagos\\_Plan\\_Of\\_Action.pdf](http://knowledge.uneca.org/member-states/observatory-on-regional-integration/regional-economic-commissions-in-africa/african-union/african-economic-community/Lagos_Plan_Of_Action.pdf)> accessed 20 May 2006.

Organization of African Unity, 'The New Partnership for Africa's Development' (2001)  
<<http://www.nepad.org/2005/files/documents/inbrief.pdf>> accessed 10 January 2005.

Tims W, *Nigeria: Options for Long-Term Development - Report of a Mission Sent to Nigeria by the World Bank* (Johns Hopkins University Press, Baltimore 1974).

Tyler G, 'Nigeria: Public and Private Electricity Provision as a Barrier to Manufacturing Competitiveness' (2002) 221 Findings (World Bank)  
<<http://www.worldbank.org/afr/findings/english/find221.pdf>> accessed 2 December 2005.

UNECA/UNEP, *Making Africa's Power Sector Sustainable: An Analysis of Power Sector Reforms in Africa* (UNECA, Addis Ababa 2007).

Vision 2010 Committee, Nigeria, 'Vision 2010: Main Report' Vol 1 (Report) (September 1997)  
<[http://www.vision2010.org/downloads/main%20report%20\(vol1\).doc](http://www.vision2010.org/downloads/main%20report%20(vol1).doc)> accessed 7 February 2006.

World Bank, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (World Bank, Washington DC 1981).

World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership - A World Bank Policy Research Report* (OUP, New York 1995).

World Bank, *World Development Report 1997: The State in a Changing World* (OUP, New York 1997).

World Bank, *Can Africa Claim the 21st Century?* (World Bank, Washington DC 2000).

World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (OUP, New York 2004).

World Bank (International Development Association), 'Proposed Project Restructuring

and Amendment of the Credit Agreements For The Privatization Support Project (Cr 3520-Uni) And Community Based Urban Development Project (Cr 3654-Uni) in the Context of the Portfolio Restructuring and in Alignment with the Country Partnership Strategy for the Federal Republic of Nigeria' (Report) (June 2005) Report No 32425-NG.

World Bank, 'Deterring Corruption and Improving Governance in the Electricity Sector' (Sourcebook) (April 2009)  
<<http://siteresources.worldbank.org/INTENERGY2/Resources/WBelectricitysourcebookpub.pdf>> accessed 15 May 2009.

World Bank, 'Project Appraisal Document on a Proposed Credit in the Amount of SDR 134.4 Million (US\$200 Million Equivalent) to the Federal Republic of Nigeria Along with a Proposed Series of IDA Partial Risk Guarantees in the Amount of US\$400 Million in Support of Gas Supply and Aggregation Agreements of Shell Petroleum Development Company, Chevron Nigeria Ltd and other Oil Companies with Power Holding Company of Nigeria for the Nigeria Electricity and Gas Improvement Project' (Report) (May 2009) Report No 47945-NG.

World Bank/IFC, *Doing Business 2009: Comparing Regulation in 181 Economies* (World Bank/IFC/Palgrave Macmillan, Washington DC 2008).

## NEWSPAPERS

—— 'Aba Power Plant is a Model — Prof. Nnaji', *Vanguard* (3 August 2005)  
<<http://odili.net/news/source/2005/aug/3/327.html> > accessed 3 August 2005.

—— '346 Megawatts For National Grid Soon – NEPA' *Thisday* (Lagos 1 April 2005)  
<<http://odili.net/news/source/2005/apr/1/215.html>> accessed 1 April 2005.

Abdulsalami I, 'World Bank to Grant Aid via NEEDS' *The Guardian* (Lagos 26 July 2004) <<http://www.guardiannewsngr.com>> accessed 26 July 2004.

Abugu F, 'Report Disqualifies All NITEL Bidders' *The Guardian* (Lagos 22 May 2005) <<http://www.guardiannewsngr.com/news/article02>> accessed 22 May 2005.

Adams I, 'Atiku's Intels in the Eye of a Storm' *The Punch* (Lagos 23 December 2005) <<http://odili.net/news/source/2005/dec/23/402.html>> accessed 23 December 2005.

Adebayo S, 'Delta Steel Sacks 1,051' *The Punch* (Lagos 4 July 2005) <<http://www.punchng.com/main/article05>> accessed 4 July 2005.

Adejokun S, 'BPE Allots Highest NAHCO Shares to Lagos, Kano' *Daily Independent* (Lagos 2 February 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 2 February 2006.

Adejokun S, 'BPE Plans to Sell 21 Firms in 2005' *Daily Independent* (Lagos 14 April 2005) <<http://www.independentng.com/news/nnapr140504.htm>> accessed 14 April 2005.

Adejokun S, 'BPE Shuns Reps, Insists on ALSCON Sale to Rusal' *Daily Independent* (Lagos 4 May 2005) <<http://www.dailyindependentng.com/>> accessed 4 May 2005.

Adejokun S, 'Dangote takes over Benue Cement Four Years After' *Daily Independent* (Lagos 22 January 2004) <<http://www.dailyindependentng.com>> accessed 22 January 2004.

Adejokun S, 'FG to Sell NAFCON through Guided Liquidation, says BPE' *Daily Independent* (Lagos 19 May 2005) <<http://www.dailyindependentng.com/>> accessed 19 May 2005.

Adejokun S, 'NCP Opens New Bid for Mint Management Contract' *Daily Independent* (Lagos 2 June 2004) <<http://www.dailyindependentng.com>> accessed 2 June 2004.

Adejokun S, 'Nigeria Loses N100b to Tariff Waivers' *Daily Independent* (Lagos 25 February 2004) <<http://www.dailyindependentng.com>> accessed 25 February 2004.

Adejokun S and Bassey D, 'Zenith, IGI, Five Others Pre-Qualify for NICON' *Daily*

*Independent* (Lagos 1 August 2005) <<http://www.dailyindependentng.com/>> accessed 1 August 2005.

Ademuyiwa B, 'FG forms New Entity to take over PHCN Liabilities' *Businessday* (Lagos 21 September 2006) <<http://www.businessdayonline.com/?c=45&a=8656>> accessed 21 September 2006.

Aderinokun K, 'Bala Replaces El-Rufai as BPE DG, Bureau Begins Search for Core Investor for Afribank Today' *Thisday* (Lagos 23 July 2003) <<http://odili.net/news/source/2003/jul/23/203.html>> accessed 23 July 2003.

Aderinokun K, 'Orascom Telecom Wins NITEL with \$256m' *Thisday* (Lagos 30 December 2005) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 30 December 2005.

Adeyemi B, 'ALSCON commences sale of locally made aluminium products' *The Guardian* (Lagos 19 June 2009) <<http://www.ngrguardiannews.com/>> accessed 19 June 2009.

Adisa T, 'N6bn Electrification Scam: Suspect Threatens to Expose Presidency Official' *Nigerian Tribune* (Lagos 19 May 2009) <<http://www.tribune.com.ng/>> accessed 19 May 2009.

Ahiuma-Young V, 'Over 100 factories Shut down for Lack of Electricity' *Vanguard* (Lagos 5 May 2009) <<http://www.vanguardngr.com/>> accessed 5 May 2009.

Aihe O, 'Obasanjo Cancels \$256m Deal Offer for NITEL' *Vanguard* (Lagos 2 January 2006) <<http://odili.net/news/source/2006/jan/2/301.html>> accessed 2 January 2006.

Aihe O and Agande B, 'Forged Papers Gave Pentascope the NITEL Contract' *Vanguard* (Lagos 1 June 2005) <<http://odili.net/news/source/2005/jun/1/308.html>> accessed 1 June 2005.

Akintunde O, 'PDP is not a Political Party' *The Punch* (Lagos 6 April 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 6 April 2006.



Akintunde O, Nwankwo C and Isine I, 'BPE Paid \$41m to a Nigerian Firm for Share Scheme – CAC' *The Punch* (Lagos 18 March 2005) <<http://odili.net/news/source/2005/mar/18/512.html>> accessed 19 March 2005.

Akintunde O and Soniyi T, 'Eleme: FG, Creditors Reach Agreement over N28.6bn Debts' *The Punch* (Lagos 5 September 2005) <<http://odili.net/news/source/2005/sep/5/420.html>> accessed 5 September 2005.

Akwaya C, 'BPE Moves Directors, Others in Major Re-Organisation' *Thisday* (Lagos 10 April 2005) <<http://www.thisdayonline.com/nview.php?id=14153>> accessed 10 April 2005.

Akwaya C, 'FG Appoints Chigbue, BPE DG, Bala takes Removal Calmly, Hands over Today' *Thisday* (Lagos 8 March 2005) <<http://www.thisdayonline.com/nview.php?id=11319>> accessed 8 March 2005.

Akwaya C, 'NCP Voids Katsina's Bid for Steel Mill' *Thisday* (Lagos 31 December 2004) <[www.thisdayonline.com](http://www.thisdayonline.com)> accessed 31 December 2004.

Akwaya C, 'Power Sector: FG Seeks Foreign Experts for Regulatory Commission', Nnaji To Set Up Three IPPS' *Thisday* (Lagos 3 April 2005) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 3 April 2005.

Alechenu J, 'Senate Queries BPE over Ports Concession' *The Punch* (Lagos 9 October 2008) <[www.punchng.com](http://www.punchng.com)> accessed 9 October 2008.

Ali AM and Olatunji B, 'N6bn Scam: EFCC arrests Power Ministry's Perm Sec' *Thisday* (Lagos 6 May 2009) <<http://www.thisdayonline.com/>> accessed 6 May 2009.

Alli F, 'Privatised Firms are doing very well - BPE' *Vanguard* (Lagos 21 February 2008) <<http://www.vanguardngr.com>> accessed 22 February 2008.

Amaefule E and Akintunde O, 'NITEL: NCP Waives Deadline for Transcorp' *The Punch* (Lagos 14 August 2006)

<<http://www.punchontheweb.com/articl.aspx?theartic=art200608141542436>> accessed 14 August 2006.

Amaefule E, 'Foreign Investors Exit Caused Stock Market Crisis – Soludo' *Punch* (Lagos 4 October 2008) <<http://www.punchng.com/>> accessed 4 October 2008.

Ameh J, 'Reps Probe Concessioning Deal with Atiku's Firm' *The Punch* (Lagos, 14 April 2008) <<http://www.punchng.com/>> accessed 14 April 2008.

Ameh J and Ezeobi O, 'Power: Reps Uncover another N10bn Inflated Contracts' *The Punch* (Lagos, 19 March 2008) <<http://www.punchng.com/>> accessed 19 March 2008.

Aminu A and Aderinokun K, 'NITEL Board Orders Audit on Asset Stripping, Search for new MD begins' *Thisday* (Lagos 16 June 2009) <<http://www.thisdayonline.com/>> accessed 16 June 2009.

Anaro B, 'Firms Suffer as Power Holding Fails to Tackle Outages Problems' *Businessday* (Lagos 15 February 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 15 February 2006.

Anyikwa L, 'Sierra Leonean Firm Offers N47.2m for Abacha Refinery, Govt Loses N4.9b to American Firm over NAFCON' *The Guardian* (Lagos 9 March 2004) <<http://odili.net/news/source/2004/mar/9/15.html>> accessed 9 March 2004.

Awom U, 'Reps Raise Alarm over N43 Billion Privatisation Funds' *Daily Independent* (Lagos 9 April 2004) <<http://www.dailyindependentng.com>> accessed 9 April 2004.

Awom U and Oladeji B, 'Reps Override Obasanjo's Veto of Privatisation Bill' *Daily Independent* (Lagos 19 May 2005) <<http://www.dailyindependentng.com/>> accessed 19 May 2005.

Awowole-Brown F, 'NUEE Warns against Privatisation of NEPA', *Sunday Champion* (Lagos 27 March 2005) <<http://www.champion-newspapers.com/>> accessed 27 March 2005.

Basse O, 'Kidnapped UC RUSAL-ALSCON Director Feared Killed' *Thisday* (Lagos 1 January 2009) <<http://www.thisdayonline.com/nview.php?id=131981>> accessed 1 January 2009.

Binniyat L, 'FG Shops for New Investors for Ajaokuta Steel' *Vanguard* (Lagos 1 August 2008) <<http://www.vanguardngr.com/>> accessed 1 August 2008.

Chiahemen T, 'BPE Begins Fresh Privatisation of NITEL' *Daily Independent* (Lagos 1 August 2008) <[www.independentngonline.com](http://www.independentngonline.com)> accessed 1 August 2008.

Duru N, 'Privatisation: Workers Seek One-Year Moratorium' *Thisday* (Lagos 31 July 2005) <<http://www.thisdayonline.com/nview.php?id=24035>> accessed 31 July 2005.

Ebimomi V, 'Receivers take over Daily Times' *Daily Independent* (Lagos 15 April 2005) <<http://www.independentng.com/news/nnapr150509.htm>> accessed 15 April 2005.

Ebiri K, 'NEPA to Begin Payment for Power from Rivers Turbine Station' *The Guardian* (Lagos 14 June 2004) <<http://www.guardiannewsngr.com/news/article13>> accessed 14 June 2004.

Cauvin HE, 'Privatization Snag in South Africa: Another Delay in Telkom Offering is Seen as a Sign of the Times' *The New York Times* (New York 2 November 2001) <<http://www.nytimes.com/2001/11/02/business/privatization-snag-in-south-africa.html>> accessed 30 June 2006.

Clark A, 'General Motors declares bankruptcy – the biggest manufacturing collapse in US History' *Guardian* (London 2 June 2009) <<http://www.guardian.co.uk/business/2009/jun/01/general-motors-bankruptcy-chapter-11>> accessed 6 June 2009.

— 'Community Warns Shell on Afam Power Station take over... Demands N2.5b Reparation', *The Port Harcourt Telegraph*, (Port Harcourt, 10 October 2005) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 10 October 2005.

Ebiri K, Chikwreuba R and Salau S, 'U.S. Firm Quits Nigeria as Militants Kidnap more Oil Workers' *The Guardian* (Lagos 11 August 2006) <<http://odili.net/news/source/2006/aug/11/52.html>> accessed 15 August 2006.

Ebosele M, 'Anxiety Grips Workers as Railway Begins Financial Autonomy' *The Guardian* (Lagos 1 January 2004) <<http://www.guardiannewsngr.com/news/article06>> accessed 1 January 2004.

Editorial, 'Integrity of ALSCON's Sale' *The Punch* (Lagos 12 May 2005) <<http://www.punchng.com/editorial/article01>> accessed 12 May 2005.

Editorial, 'Obasanjo Holdings and Transcorp PLC' *Daily Independent* (Lagos 16 August 2006) <<http://www.independentngonline.com/news/102/article/9005/2006-08-16.html>> accessed 16 August 2006.

Editorial, 'Proposed Mass Sack in Public Service' *The Guardian* (Lagos 24 March 2005) <<http://odili.net/news/source/2005/mar/24/25.html>> accessed 24 March 2005.

Editorial, 'Re-Investing Proceeds of the Privatisation Programme' *Daily Independent* (Lagos 31 May 2006) <<http://www.independentngonline.com/print.php?a=3593>> accessed 31 May 2006.

Editorial, 'Should the Sale of NITEL Stand?' *The Guardian* (Lagos 21 July 2006) <<http://odili.net/news/source/2006/jul/21/11.html>> accessed 21 July 2006.

Editorial, 'The Ikoyi Housing Scam' *Thisday* (Lagos 11 April 2005) <[http://www.nigerianmuse.net/nigeriawatch/officialfraud/?u=media\\_editorials\\_opinions\\_on\\_ikoyi\\_scandal.htm](http://www.nigerianmuse.net/nigeriawatch/officialfraud/?u=media_editorials_opinions_on_ikoyi_scandal.htm)> accessed 7 September 2006.

Editorial, 'Transcorp and NITEL' *Thisday* (Lagos 9 July 2006) <[http://www.thisdayonline.com/nview.php?id=52653&printer\\_friendly=1](http://www.thisdayonline.com/nview.php?id=52653&printer_friendly=1)> accessed 9 July 2006.

Editorial, 'Yobe Bars Non-Indigenes from Running Schools' *The Guardian* (Lagos 3 May 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 3 May 2006.

2006.

Edomaruse C, 'You Can't Sack any Worker, Labour tells FG, Fulfil Promise on Job Creation First' *Thisday* (Lagos 19 March 2005) <<http://www.thisdayonline.com/nview.php?id=12247>> accessed 19 March 2005.

Ehigiator K and Icheku A, 'Mobile Policemen take Possession of Airways' Premises, Fire Tear Gas at Workers' *Vanguard* (Lagos 30 September 2004) <<http://odili.net/news/source/2004/sep/30/308.html>> accessed 3 October 2004.

Ekpunobi C, 'Obasanjo Vetoes Privatisation Amendment Bill' *Daily Champion* (Lagos 16 March 2005) <[http://champion-newspapers.com/news/teasers/article\\_2](http://champion-newspapers.com/news/teasers/article_2)> accessed 16 March 2005.

Elendu J, 'Fraud at Daily Times: EFCC Petitioned', *Elendu Reports*, 1 March 2006) <[http://www.elendureports.com/index.php?option=com\\_content&task=view&id=179&itemid=33](http://www.elendureports.com/index.php?option=com_content&task=view&id=179&itemid=33)> accessed 1 March 2006.

Etakibuebu G, 'The Ports: Privatisation of Doom' *Vanguard* (Lagos 27 February 2004) <<http://www.vanguardngr.com>> accessed 27 February 2004.

Ezeobi O, 'Ajaokuta: FG moves to Retrieve Looted Equipment, Cash' *The Punch* (Lagos 26 September 2008) <[www.punchng.com](http://www.punchng.com)> accessed 26 September 2008.

Ezeobi O, 'FG may Cancel IPP Licences' *The Punch* (Lagos 20 January 2009) <[www.punchng.com](http://www.punchng.com)> accessed 20 January 2009.

Fanim D, 'Privatisation: Senior Workers Tackle BPE over Members' Welfare' *The Guardian* (Lagos 8 August 2005) <<http://www.guardiannewsngr.com/appointment/article01>> accessed 8 August 2005.

Faturoti G, 'Dangote Sacks Osogbo Steel Plant Workers' *Daily Independent* (Lagos 9 January 2006) <<http://www.independentng.com/news/njjan090607.htm>> accessed 9 January 2006.

Folasade-Koyi A, 'BPE Misled by Bad Experts, Advisers, says Chigbue' *Daily Independent* (Lagos 1 June 2005) <<http://www.dailyindependentng.com/>> accessed 1 June 2005.

Folasade-Koyi A, 'Senate Accuses BPE of Concessioning Port to Ghost Firms' *Daily Independent* (Lagos 9 October 2008) <<http://www.independentngonline.com/>> accessed 9 October 2008.

Gabriel O, 'Privatisation Blues in Nigeria, ALSCON Another NITEL in the Waiting' *Vanguard* (Lagos 5 July 2004) <<http://www.vanguardngr.com/articles/2002/business/b305072004.html>> accessed 5 July 2004.

Garba KA, 'Whirl Wind against the Soul of Daily Times' *The Guardian* (Lagos 10 January 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 10 January 2006.

Gbadamosi G, 'Foreign Firm Files Suit against Virgin Nigeria' *The Guardian*, (Lagos 4 October 2004) <<http://odili.net/news/source/2004/oct/4/28.html>> accessed 7 October 2004.

Gbadamosi G, 'BPE gets Report on Revised Privatisation Procedures' *The Guardian* (Lagos 15 September 2005) <<http://www.guardiannewsngr.com/business/article02>> accessed 15 September 2005.

Godwin A, 'Prepaid Metering System a Rip-Off, say Consumers' *The Punch* (Lagos 14 March 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 14 March 2006.

Iba L, 'Why We Can't Perform – PHCN' *The Punch* (Lagos 30 November 2005) <<http://odili.net/news/source/2005/nov/30/457.html>> accessed 30 November 2005.

Ibe P, 'NERC: FG Suspends Owan, Six Others' *Thisday* (Lagos 19 February 2009) <<http://www.thisdayonline.com/>> accessed 19 February 2009.

Igbikiowubo H, 'Alarm over Continued Asset Stripping at Ajaokuta, Monitoring Committee Damns Concessionaire' *Vanguard* (Lagos 29 August 2006) <<http://odili.net/news/source/2006/aug/29/315.html>> accessed 29 August 2006.

Igboanugo S, 'Community Threatens to Stop NNPC's Privatisation' *Daily Independent* (Lagos 13 May 2004) <<http://www.dailyindependentng.com>> accessed 13 May 2004.

Imisim E, 'BPE Privatises 24 Coys, Nets N43 Billion in 2005' *Thisday* (Lagos 23 January 2006) <<http://www.thisdayonline.com/nview.php?id=38845>> accessed 23 January 2006.

Imisim E, 'Kaduna FSFC Sold for N500m, Sunti Sugar N185m, as BPE Opens Bids for Calabar, Warri Ports' *Thisday* (Lagos 6 September 2005) <<http://odili.net/news/source/2005/sep/6/206.html>> accessed 6 September 2005.

Jackson D, 'Military Evict Eric Moore Residents in Lagos' *Daily Independent* (Lagos 9 December 2005) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 9 December 2005.

Jason P, 'Who Can Save Us from NEPA/PHCN Extortion?' *Vanguard* (Lagos 20 December 2005) <<http://odili.net/news/source/2005/dec/20/328.html>> accessed 20 December 2005.

Kekere-Ekun A, 'Implementation Record of Nigerian Privatisation Programme' *Thisday* (Lagos 28 October 2001) <<http://www.thisdayonline.com/archive/2001/10/28/index.html>> accessed 12 December 2004).

Kekere-Ekun A, 'Privatisation, Liberalisation: Who Benefits?' *Thisday* (Lagos 13 December 2004) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 13 December 2004.

Lohor J, 'NCP Asks FG to Sell Afribank Shares' *Thisday* (Lagos 5 April 2005) <<http://odili.net/news/source/2005/apr/5/208.html>> accessed 6 April 2005.

Maduforo O, 'Commercial Banks in Nnewi may Close Shop' *Daily Independent* (Lagos 5 June 2009) <<http://odili.net/news/source/2009/jun/5/403.html>> accessed 5 June 2009.

— 'NEPA to pay N700m Monthly for Agip Power Supply' *The Guardian* (Lagos 4 April 2005) <<http://odili.net/news/source/2005/apr/4/24.html>> accessed 4 April 2005.

— 'Nigerian Electric Privatisation Attracts Major Companies' *Alexander's Gas And Oil Connections* (Vooburg 4 March 1998) <<http://www.gasandoil.com/goc/history/>> accessed 2 December 2004.

Nse J, 'Privatisation: Bidders Seek Information on NICON's Audited Accounts' *The Guardian* (Lagos 30 August 2005) <<http://odili.net/news/source/2005/aug/30/46.html>> accessed 30 August 2005.

Nwachuku C, 'NEPA Privatisation: Workers Reject BPE, NCP' *Thisday* (Lagos 22 March 2005) <<http://www.thisdayonline.com/nview.php?id=12472>> accessed 22 March 2005.

Nwachukwu C, 'No Free Electricity for Host Communities – NERC' *The Punch* (Lagos 7 November 2006) <<http://www.punchontheweb.com/articl.aspx?theartic=art2006110765046>> accessed 7 November 2006.

Nwigwe P, 'BPE's Never Ending Battle with the Reps' *The Guardian* (Lagos 6 May 2005) <[http://www.guardiannewsngr.com/policy\\_politics/article01](http://www.guardiannewsngr.com/policy_politics/article01)> accessed 6 May 2005.

Obasola K, 'PHCN Defies Supplement...with over 200 Megawatts' Contribution by IPP, Lagosians say the State Government's Effort is not Being Complemented' *The Punch* (Lagos 22 November 2005) <<http://odili.net/news/source/2005/nov/22/433.html>> accessed 22 November 2005.

Oduniyi M, 'BPE Cancels Bids for PH Refinery, says Investors Fail Qualification Test' *Thisday* (Lagos 19 December 2005) <<http://www.thisdayonline.com/nview.php?id=36115>> accessed 19 December 2005.



Oduniyi M, 'FG Releases N25bn for New Power Plants' *Thisday* (Lagos 24 March 2005) <<http://www.thisdayonline.com/nview.php?id=12656>> accessed 24 March 2005.

Oduniyi M and Nzechi O, 'Agip's \$450m IPP takes Off, Boost Power Supply by 300mw' *Thisday* (Lagos 25 March 2005) <<http://www.thisdayonline.com/nview.php?id=12749>> accessed 25 March 2005.

Odunlami T, 'Pentascop: The Conspirators' Messy Deals', *The News*, 13 March 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 13 March 2006.

Odunuga Y, Akintunde O and Nwankwo C, 'Share Purchase Scam: "BPE Paid Us Only \$5.7m"' *The Punch* (Lagos 28 March 2005) <<http://odili.net/news/source/2005/mar/28/501.html>> accessed 29 March 2005.

Ogah D, 'We Can't Possess Our Terminals, Port Concessionaire Cries Out' *The Guardian* (Lagos 24 October 2005) <<http://www.guardiannewsngr.com/maritime/article01>> accessed 24 October 2005.

Ogbodo J, 'NCP, BPE Admit Error in ALSCON Privatisation' *The Guardian* (Lagos 14 June 2005) <<http://odili.net/news/source/2005/jun/15/17.html>> accessed 14 June 2005.

Ogbodo J and Daka T, 'Reps Probe Foreign Firms over Discrimination in Employment' *The Guardian* (Lagos 3 June 2009) <<http://odili.net/news/source/2009/jun/3/12.html>> accessed 3 June 2009.

Ogbu C, 'Transparency and Privatisation' *The Punch* (Lagos 25 March 2005) <<http://odili.net/news/source/2005/mar/25/524.html>> accessed 28 March 2005.

Ogugbuaja C, Alao T and Olumide S, 'NEPA, Still in Shock, Remains Prostrate' *The Guardian* (Lagos 8 February 2005) <<http://odili.net/news/source/2005/feb/8/27.html>> accessed 10 February 2005.

Oke B, 'Workers Threaten Employers over Casualisation' *The Punch* (Lagos 17 August 2005) <<http://odili.net/news/source/2005/aug/17/461.html>> accessed 17 August 2005.

Oketunbi T, 'Virgin Nigeria Faces Testy Regulatory Hurdle' *The Guardian* (Lagos 1 June 2005) <<http://www.guardiannewsngr.com/business/article01>> accessed 1 June 2005.

Okon E, 'NITEL Privatisation: BPE Must do what is Really Right' *The Punch* (Lagos 17 August 2005) <<http://odili.net/news/source/2005/aug/17/464.html>> accessed 17 August 2005.

Okpongete O, 'Refinery: Eleme Community Seeks N10bn Compensation' *Daily Independent* (Lagos 31 May 2004) <<http://www.dailyindependentng.com>> accessed 1 June 2004.

Okwe M, 'Dangote Buys Osogbo Steel Plant for N2.61b' *The Guardian* (Lagos 23 November 2005) <<http://odili.net/news/source/2005/nov/23/27.html>> accessed 23 November 2005.

Okwe M, 'Firms Buy Daily Times for N1.25b, ALSCON, N800m' *The Guardian* (Lagos 15 June 2004) <<http://www.guardiannewsngr.com/news/article02>> accessed 15 June 2004.

Oladeji B, 'Mass Purge of FG Workforce Begins - Yayale' *Daily Independent* (Lagos 25 January 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 25 January 2006.

Ologbondiyan K, 'Senate Wants MTN Tax Concession Reversed' *Thisday* (Lagos 28 July 2004) <[www.thisdayonline.com](http://www.thisdayonline.com)> accessed 28 July 2004.

Oloja M, Ogbodo J and Ashaolu A, "'Missing' Privatisation Fund Part of 2001 Budget, Says Govt' *The Guardian* (Lagos 1 April 2004) <<http://www.guardiannewsngr.com/news/article01>> accessed 1 April 2004.

Ombe I, 'Bayelsa Community Threatens to stop SPDC's Operations' *The Nation* (Lagos 22 October 2008) <<http://www.thenationonlineng.com/dynamicpage.asp?id=67027>> accessed 22 October 2008.

Onu E, 'Dunlop Shuts Down Factory, Records N2bn Loss' *Daily Independent* (Lagos 3 December 2008) <<http://www.independentngonline.com/>> accessed 4 December 2008.

Onuorah M and Anyikwa L, 'President Defends Privatisation, Eight Firms Bid for Afribank' *The Guardian* (Lagos 14 January 2004) <<http://www.guardiannewsngr.com/news/article06>> accessed 14 January 2004.

Onyeka-Ben V, 'Mixed Reactions, Worries Trail Sale of NITEL' *The Guardian* (Lagos 10 July 2006) <<http://odili.net/news/source/2006/jul/10/65.html>> accessed 10 July 2006.

Osae-Brown A and Olawunmi A, 'FG Bends Backwards for Rusal over ALSCON' *Businessday* (Lagos 17 February 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 17 February 2006.

Ossai A, 'N117bn Expected Privatisation Proceeds not Reflected in Budget' *Daily Times* (Lagos 2 February 2004) <<http://www.dailytimesofnigeria.com>> accessed 4 February 2004.

—— 'People Talking About Hidden Agenda Are Those With Hidden Agenda — Obasanjo' *Daily Independent* (Lagos 3 May 2005) <<http://www.dailyindependentng.com/>> accessed 3 May 2005.

Samuel I, 'Power Contract Scandal: How Contractors Collected N19bn, Abandoned Jobs' *Nigerian Tribune* (Lagos 1 April 2008) <<http://www.tribune.com.ng/>> accessed 1 April 2008.

Shadare W, 'Liquidator Ejects Ex-Airways Workers from Quarters' *The Guardian* (Lagos 13 August 2005) <<http://www.guardiannewsngr.com/news/article05>> accessed 13 August 2005.

Shadare W and Nwankwo B, 'Minister Decries Suit against Virgin Nigeria, says Govt Loses N2b Yearly' *The Guardian* (Lagos 1 June 2005) <<http://www.guardiannewsngr.com/news/article05>> accessed 1 June 2005.

Tolken J, 'Power Projects: Where will the Gas Come from?' *Businessday* (Lagos 20 March 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 20 March 2006.

Ugwu E, 'Privatisation: FG Urged to Drop Core Investor Policy' *Thisday* (Lagos 30 August 2004) <[www.thisdayonline.com](http://www.thisdayonline.com)> accessed 30 August 2004.

Ugwuanyi E, 'Rights Group Rolls Out Action Agenda on Privatisation' *Vanguard* (Lagos 26 February 2004) <<http://www.vanguardngr.com>> accessed 26 February 2004.

Ujah E, 'Afribank: BPE Insists on Core Investor Sale' *Vanguard* (Lagos 27 April 2004) <<http://www.vanguardngr.com/articles/2002/cover/f427042004.html>> accessed 27 April 2004.

Ujah E, 'FG U-Turns on ALSCON; Dumps BFIG, Invites Bid Losers Rusal' *Vanguard* (Lagos 18 June 2004) <<http://www.vanguardngr.com/articles/2002/nationalx/nr118062004.html>> accessed 18 June 2004.

Ukodie A and Adejokun S, 'NITEL: 7,144 Lose Job this Week' *Daily Independent* (Lagos, Nigeria 4 September 2006) <<http://www.nigeriamasterweb.com/paperfrmes.html>> accessed 4 September 2006.

Ushigiale J, 'Delta: Protest Threatens New IPP Project' *Thisday* (Lagos 3 April 2005) <<http://www.thisdayonline.com/nview.php?id=13537>> accessed 3 April 2005.

Wallis W and Mahtani D, 'Why A Messianic Obasanjo Is Pleased By Nigeria's Progress' *Financial Times* (London 17 April 2007) <[http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto041720071453362471&page=2](http://us.ft.com/ftgateway/superpage.ft?news_id=fto041720071453362471&page=2)> accessed 17 April 2007.