



KENYA NATIONAL ASSEMBLY

NINTH PARLIAMENT – THIRD SESSION (2004)

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**DEPARTMENTAL COMMITTEE ON FINANCE,
PLANNING AND TRADE**

REPORT ON THE

PRIVATISATION BILL, 2004

NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
NAIROBI

MAY 2004

FINANCE, PLANNING AND TRADE COMMITTEE REPORT ON PRIVATISATION BILL, 2004

Pursuant to Standing Order No. 162(2) the Finance, Planning and Trade Committee presents to the House its Report on the Privatisation Bill, 2004.

The Committee was constituted at the commencement of the Eighth Parliament pursuant to the provisions of Standing Order No. 151 and has executed its mandate in strict compliance with the provisions of the said Standing Order.

The Bill was committed to the Committee pursuant to Standing Order No. 101A(i). Members deliberated on all its clauses and arrived at decisions by consensus.

Members of the Committee are:-

- | | | | |
|-----|----------------------------------|---|----------------------|
| 1. | The Hon. Soita Shitanda, MP | - | Chairman |
| 2. | The Hon. Henry O. Obwocha, MP | - | Vice Chairman |
| 3. | The Hon. Mutahi Kagwe, MP | | |
| 4. | The Hon. (Dr.) Adhu Awiti, MP | | |
| 5. | The Hon. Jakoyo Midiwo, MP | | |
| 6. | The Hon. John Mutinda Mutiso, MP | | |
| 7. | The Ho. (Dr.) Oburu Oginga, MP | | |
| 8. | The Hon. Kyalo Kaindi, MP | | |
| 9. | The Hon. Sasura T. Abdi, MP | | |
| 10. | The Hon. Chrysanthus Okemo, MP | | |
| 11. | The Hon. Simeon S. Lesrima, MP | | |

PRIVATISATION BILL, 2004

INTRODUCTION

(1) Structure of the Bill:-

It is acknowledged that this Bill is proposed as a significant piece of statute; it has been laid out quite simply and characterised by brevity and a fair degree of clarity. However, the arrangement of the clauses of the Bill does not aid

coherence because the institutions established under it are vested with duties before their composition and structure is stated. The practice of arrangement usually requires that the institution should be defined and its composition stated before the duties are set out. For instance, the specific functions performed by the Privatisation Commission and the procedures for its duties are set out well before the composition of the Commission is stated. Neater arrangement would demand that the institution's composition should precede the articulation of its duties.

Proposed Amendment:-

PART IV – The Privatisation Commission should be PART III.
(Set the Commission then lay out what it can do).

This should be followed the renumbering of the parts as suggested.

Clause 4(2)(f) Ought to be split into two parts so as to enable every privatization to broaden the base of ownership and enhance capital markets rather than achieve either at the expense of the other.

An amendment is therefore proposed that all the words after the words Kenyan economy under 4(2)(f) should be deleted and a new clause 4(2)(g) be inserted in place thereof with the following words:

“The enhancement and development of the capital market”.

Public Policy Context

Given the assertion that the process of privatisation is part of the most fundamental economic reforms that the country would need to undergo, it is a matter of concern that the guiding policy behind this massive undertaking has not been issued by the Government. In the absence of a Sessional Paper, the Minister needs to make a policy statement on

objectives of the anticipated privatisation to allay Parliament's fears that this is a homegrown and not a foreign driven Bill. In this way, Parliament may debate these issues and ensure public buy-in and achieve wider public acceptance.

Public Participation and Disclosure Requirements

Privatisation law is necessary in order to facilitate divestiture by the Government from State Corporations. A number of privatisation initiatives have previously been undertaken in various ways. The experiences from the earlier exercises in privatisations indicate that they have been conducted in very opaque and sometimes even illegal ways. Some exercises in privatisation have been conducted precisely in ways that render the Government and the general populace on one hand hostage to the devious machinations of a select group of politically connected oligarchs. Thus Government divestiture from some State Corporations have been ridden with claims of among others, asset-stripping.

As a result, the general populace has developed hostility to privatisation in the belief that it is merely a channel by which public assets are dished out to associates of Government officials for less than fair value.

The Privatisation Bill, 2004 makes an endeavour to compel disclosure but the disclosure in the Bill as drafted is not sufficient.

Proposed Amendment

Clause 9(2) - The Commission shall submit each privatisation proposal to the Minister for approval by the Cabinet.

Amendment is proposed that the words "**further approval by the Committee of Parliament and onward transmission to Parliament for final approval**" be inserted immediately after the word Cabinet appearing on the third line.

Clause 10(a) on privatisation proposals should also include:

- (i) Criteria for valuation.
- (ii) Privatisation preparation.
- (iii) The purpose to be served by the proposed privatisation and or divestiture of corporation enterprise.
- (iv) The purpose for the establishment and or existence of the corporation's assets or public enterprise.
- (v) The extent to which the purpose has been met hitherto including the adequacies and inadequacies thereof.
- (vi) The time frame within which the scheme is to be carried out.
- (vii) The expected benefits to Kenyan consumers and investors including the extent to which the proposals will achieve the original aim of the public asset and the funds to be directly accrued by the disposal of the asset.
- (viii) Any existing Acts that shall need to be amended, abrogated and or repealed in order for the proposal to be implemented.
- (ix) A citizen is entitled to disclosure of any information which he wishes disclosed.
- (x) Recipients of the proceeds of privatisation who should include the Consolidated Fund.
- (xi) How the proceeds of privatization will be audited.

Clause 11:-

Does not provide the criteria under which one or the other method of privatisation will be deemed first choice or mandatory. The loophole is that it leaves room through which sectarian rather than

national interests may be pursued. Provision (e) opens a window for underhand dealings both at the Commission and the Cabinet level.

Clause 13:-

Offers no **limit** for Constitution of the Steering Committee and may in fact consist of the entire Commission. The Committee ends up being dominated by Government bureaucrats who are again Members of the Commission.

Clause 16(a):-

Should be redrafted to avert the potential conflict it poses to Section 82 of the Constitution. Again the Minister should have no discretion in deciding the participation or otherwise of Kenyans.

Valuation of assets:-

There is no requirement of a disclosure of the valuation of the assets to be privatised as part of the notice to the Cabinet. There is therefore room for misrepresentation.

Role of the Legislature

In its design, the Bill does not contemplate the complete involvement of the public or Parliament in the privatisation process and thereby affords extreme discretion to the privatisation experience from several countries (e.g. Russia). This level of discretion without related responsibilities for disclosures is real danger to the entire process. For instance **Clause 50** of the Bill, specifically prohibits the employees of the Commission from passing out any information held by the Commission without the **Caveat**; that this should be subject to tests of, role in alerting the public or other public officers on corrupt practices that may be about to occur. That the Bill allows the Commission the discretion and format of releasing information regarding details of a completed transaction is definitely objectionable. There is a definite and undeniable public interest in knowing not only to which individual or corporation a public corporation has been handed to but also a

full financial disclosure on such terms of agreement. Parliament should expressly require the Minister to include this in the amendments to this Bill.

Clause 33(1):-

Puts the Commission under the Executive arm of the Government where out of the 13 Members only 7 will represent interests other than those of the Executive. Parliament has not been given the mandate to approve appointments to the Commission.

Clause 33(iii) delete the word “**Council**” and insert “**Members**”. Amendment is proposed that the word “**Council**” appearing on the first line should be deleted and the word “**Members**” be inserted in place thereof.

The Privatisation Fund:-

Since declaration of the proceeds of the privatisation process is a legitimate issue of public interest, this Bill does not make provision for explicit declarations apart from the public audit procedures. For this reason, the discretion to direct usage of funds by the Minister does not reflect correct principles for a public Fund of this magnitude. **Amendments** must provide the limits of the uses of the Fund, the nature and disclosures to which the public and legislature is entitled.

Amendments should reduce the ministerial discretion of the Fund, its custody and uses.

Clause 42(b):-

Gives the Minister room to allocate grants and donations, hence partly shielding the Commission from parliamentary control.

Clause 44(c):- Amendment is proposed that a new Sub-Clause 44(c) be inserted after 44(b) to read as follows:-

- (c) Statement of Assets and liabilities of the company being privatised.**

Clause 45:-

Sets out a Tribunal, which is wholly the creation of the Executive with no approval by the **relevant committee of Parliament**. Its independence from the Executive is therefore compromised.

Clause 48:-

Gives the Minister the authority and leeway to divert proceeds of privatisation to any other legal purposes. Such a Fund may be open to utilisation for patronage purposes.

Clauses 49, 50 and 51:-

Dealing with confidentiality of information should be done away with as this restricts whistle blowing. Parliamentary scrutiny and public participation. **Clause 50(2)** actually bars lawful disclosure.

Other issues which the Bill does not address

- The Privatisation Bill does not address other issues related to globalisation which under World Trade Organisation targets the service sector (GATTS). As it stands, the Bill may be used to dispose off any public enterprise or service including health facilities, security installations and educational institutions. Such services which are very important and strategic to our country.
- **Clause 51** should be reconciled with the Penal Code.

Potential Constitutional Barrier

The Committee takes the view that Clause 16 is a potential failure when subjected to strict Constitutional scanning. The said Clause permits the Minister to prohibit the participation of certain categories of Kenyans from participation in a privatisation process.

Parliament should call upon the Minister for Finance to rationalise the provisions of this Bill with the restrictive Trade Practices, Monopolies and Price Control Act (Cap 504). This statute is important because it is useful that the existing law be used to ensure that the disposal of assets is concluded in a competitive manner and the Commission should therefore benefit from the expertise of monopolies and prices commission.

SUMMARY:-

The Committee takes the view that almost every clause of the Bill should be amended. In view of the poor layout of the Bill and the many controversial views aired by the Members, the Committee recommends;

Thorough surgery of the Bill and withdrawal for redrafting.

Signed: _____

(CHAIRMAN)

Date: _____