Citizenry Protection and Participation in Privatisation of Public Enterprises: A Survey of the Legal Situation in Tanzania

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Abstract: During the period from the late sixties to the nineties Tanzania embraced state monopoly of the economy with the state acting as owner and entrepreneur.[1] This period saw the expansion of the public sector at the expense of the private sector. Public enterprises were the major policy instrument and as such people were made to contribute for their promotion and development. However, inefficiency and poor performance led to the need for wide economic reforms and in particular far deep reaching reforms in the public sector. As a result, laws were reformed to give way to the restructuring and divestiture of the public enterprises. The government had felt the budgetary strain. The public enterprises had, on the most, become a burden and not an asset. However, there has been growing concern among citizens that the legal environment within which the reform policy is implemented is not well suited to afford protection and participation of the citizenry. This paper surveys briefly the legal environment under the following main theses. That, throughout the establishment, management and operation of public enterprises, the State was more pre-occupied with politico-economic interests of the ruling cadre at the expense of the citizenry. That, the creation of the legal environment for the divestiture and privatisation of public enterprises has not been tailored with attendant legal measures providing for the protection of the interests of the citizenry and full public participation in the process.

BACKGROUND

At independence Tanzania had an almost fully privatised economy, but the independence government thought that the private sector was too small to spearhead national economic development.[2] This was coupled with concerns relating to the foreign domination of the economy.[3] It was hoped that a strong public sector economy, characterised by dominance of public enterprises will lead to efficiency in the allocation of resources; the increase in technological adoptionand adaptation; improvement of income distribution in favour of the disadvantaged section of the society; rise in the level of savings and investment; and maintenance of high levels of employment and thus inducement and sustenanceof accelerated growth of the economy.[4] Based on this line of thinking, action was taken to realize the targeted aim.

THE ARUSHA DECLARATION AND THE OWNERSHIP OF PUBLIC ENTERPRISES

The promulgation of the Arusha Declaration in 1967, which underscored, *interalia*, the need for self-reliance and the placement of the so called "commanding heights of the economy"(major means of production) under public ownership and control, was the turning point in the subsequent development and resultant expansion and growth of the public sector economy.

In addition to the nationalised private investments, which were put under the control and ownership of the state in the form of public enterprises, the following years saw the formation and establishment of new public enterprises. Consequently, public enterprises in Tanzania became the most important economic actors and instruments for the implementation of the state

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1 Moshi, H.P.B. 'The Commercialisation and Privatization of Public Enterprises in Tanzania: Successes, Problems and Prospects' in Bagachwa, M.S.D. and A.V.Y. Mbele(eds) Economic Policy under Multiparty System, DUP, Dar, 1993: pp.75 and 76.

2 URT, *Parastatal Privatization and Reform Master Plan* Government Printer, Dar, Aug.,1993 p. iv

3 *Ibid*

4 Moshi, H.P.B. *op.cit* p.75

policies and state control and management of the economy.[5]

FORMATION AND REGULATION OF PUBLIC ENTERPRISES

The institution of public enterprises in Tanzania was made up of three groups of enterprises. Namely, those nationalised companies, which were registered and remained under the Companies Ordinance, Cap. 212. Those enterprises established by specific Acts of Parliament, and finally those established by order of the President of the United Republic of Tanzania made under the Public Corporations Act,1969[6] and published in the Official Gazette. Each group of enterprises was regulated by the specific piece of legislation under which it was established.

The Public Corporations Act,1969 was enacted with the intention of legalising the spirit of the Arusha Declarartion of 1967. It was intended to provide guidelines on the regulation and operation of public enterprises with a view to ensuring the smooth implementation of national plans and for setting a more efficient government control and supervision mechanism.[7] It was expected to be the main legislative instrument governing the process of establishing public enterprises in the post-Arusha Declaration era. It was envisaged to shade the procedural niceties and avoid difficulties in establishing public enterprises whenever deemed necessary to do so. Its eventual operationalisation vested almost all sectors of the economy into public corporations; from service, financial, education and agriculturalIt was envisaged to shade the procedural niceties and avoid difficulties in establishing public enterprises whenever deemed necessary to do so. Its eventual operationalisation vested almost all sectors of the economy into public corporations; from service, financial, education and agricultural to industrial and manufacturing sectors; with various boards being established to oversee marketing, research and promotional activities, whose economic viability is still questionable to date. According to Mihyo, defenders of this Act argue that the Act suited the developmental needs of the country by allowing the government to act swiftly when needs arise and not only when the parliament was in session.[8] It is noteworthy that all rigorous requirements were set aside if not neglected. Although the Companies Ordinance requires all registered companies to submit to the Registrar of Companies an account of their annual returns, profits, losses and capital structures, none of these provisions were put in practice by the public enterprises registered under the Ordinance. Rather, the enterprises were required to comply with non-legal controls involving informal returns to the Registrar of Treasury, and the Accounts Committee of the Parliament.[9]

Salient Features of the Public Corporations Act, 1969

Under this Act the executive through the President was empowered to establish, reorganise and dissolve public corporations through orders published in the Gazette without parliamentary scrutiny and sanction. S.5 (2) of this Act vested in the President the power of determining the composition and appointment of members of boards of directors. Moreover, the president could under S.6 of the Act direct the board of directors of a public corporation how to exercise its functions and the board was required to comply

[5] Ghai, Y. "Law and Public Enterprises in Tanzania" in Ghai,Y.(ed.) *Law in the Political Economy of Public Enterprises*, Scandinavian Institute of African Studies, Upsalla, 1977 p. 211-212.

[6] Act No. 17 of 1969.

[7] See for instance *Hansard Report: Parliamentary Debates*, 16th Session, March 1969 Debate on the Public Corporations Act, 1969

[8] Mihyo, P. *Non- Market Controls and Accountability of Public Enterprises in Tanzania*. Macmillan, 1994: 19

[9] Mihyo,P. *Ibid* pp. 18-19

with such direction. The boards of directors of public enterprises were largely constituted by representatives of the political stratum. These included regional commissioners, representatives of the ruling party and mass organisations affiliated to it. In fact, the directors of public corporations were more often than not appointed under political whims rather than proven managerial competence or background, as the Act did not provide for professional requirements or competence for one to be appointed to the board.[10]

As if the powers vested in the President under the 1969 Act were not enough, another legislation was passed to vest more powers upon the President. This was the *Corporation Sole (Establishment) Act*, 1974.[11] Under this legislation the President could turn public departments into public enterprises. Interestingly, neither the 1969 Act nor the 1974 Act reserved powers for the parliament to review or sanction the President's orders made under the Acts. Thus, parliament could not take part in the establishment, dissolution or control of the corporations for the interests of the voters (i.e. taxpayers). That is to say, there was no elaborate procedure through which the citizenry's wishes and aspirations could be incorporated and reflected in the establishment, management and dissolution of public corporations. In effect, the parliament through this legislation abdicated its legislative and representative functions to the executive.[12] Commenting on this point Mukandala[13] observes:

> Populists could no longer perform their representative function with regard to consideration of the pros and cons of establishing new parastatals, their norms, structures and the likes... Indirect ways of effecting input into the decision making process by the popular classes was therefore silenced.

Efficacy of Public Enterprises Under the Public Corporations Act, 1969

The wide powers vested upon the executive, the President in particular, with regard to public corporations made the ruling cadre to utilise the public corporations as a means for consolidating and perpetuation of state power and made the achievement of economic development of the citizenry a populist rhetoric.[14] They were being used as objects as well as subjects of political processes and practices. As noted earlier, the public corporations were established without prior consultation with the citizens and even worse without due regard to economic considerations. As a result a large number of public corporations were established notwithstanding the unavailability of actual or potential resources.[15] Interestingly also is the fact that the public corporations were established without adequate and proper structures to generate adequate or consistent pressure on their management to perform efficiently.[16]

The government used to inject liquidity in the form of grants, credits and subsidies to the enterprises in case of financial distress irrespective of their commercial viability. It is little wonder, therefore, that issues of mismanagement, under-capitalisation, lack of trained manpower, forex inavailability became topical in public corporations.[17] It was, therefore, not surprising that the public sector collapsed.

CITIZENRY CONTROLS OF PUBLIC ENTERPRISES

Since the Arusha Declaration, the state through the then ruling party's ideology of socialism and self reliance made the people to ostensibly believe

[10] Luoga,F.A.D.M "Duties of Company Directors in Tanzania :TheNeed for Reform"*East Africa Law Review* Vol.18 Dec.,1991 No.2 p.266.

[11] Act No. 23 of 1974.

[12] Mihyo,P.B "Parliamentary Control and Accountability of Public Enterprises in Tanzania." *Ph.D.* Thesis, UDSM,1987: 168.

[13] Mukandala, R.S. "The Political Economy of Parastatal Enterprises in Tanzania and Botswana." Ph.D. Thesis,University of Carlifornia, 1988: 91

[14] Mukandala,R.S *Ibid* p.1

[15] Moshi,H.P.B *Op.cit* p.77

[16] Mukandala,R.S *Op.cit* p.1

[17] Moshi,H.P.B. *Op.cit* p.77

that they were the owners and controllers of public enterprises. Although people were made to contribute towards the development and promotions of public enterprises through their taxes, they were not afforded an adequate opportunity to ventilate their opinion in favour of or against a proposed nationalisation, establishment or dissolution of a public corporation or economic activities in the public corporation.

There were in place only some apparent participatory measures to secure control of the public corporations by the citizens. Most of these measures were ineffective for lack of legal sanction. A good example of this is the Parliamentary Committee on Parastatals, established by a resolution of Parliament in March 13th 1978. The Committee, made up of the representatives of the citizens, was intended to effect control over the management of public corporations, which had become inefficient. The Committee was vested with the power to examine parastatals' accounts and report to the parliament. But the Committee proved ineffective for lack of legal provisions to enforce its work.[18] Another example is the Workers' Councils established under *Presidential Circular* No.1 of 1970. Through workers councils, business or production targets of the parastatals as well as progress on their fulfillment were to be made known to the workers. All parastatals were therefore directed to establish workers councils so as to make the workers greatly and directly responsible for the well being and welfare of the parastatals. The workers councils were also expected to advise boards of directors on such matters as planning and enterprise organisation. Just like the Parliamentary Committee, the councils lacked legal sanction to enforce their work.

The Workers Committees (now field Branches) established under S.5 of the Security of Employment Act, 1964 (Cap. 574) were charged with among their functions, discussing with the employer at regular intervals and at least once every three months, means of promoting efficiency and productivity.[19] It seems, however, that this was merely a cosmetic provision, since if at all there were such consultation or discussions, they were basically based on the welfare of the employees rather than promotion of efficiency and productivity. Indeed, the Act did not provide for a mechanism whereby such discussions could be enforced where the employer seemed to ignore the same to the detriment of the business undertaking.[20] In fact, all these measures had a political agenda rather than a genuine economic motive.[21] They were apparently intended to create an impression on the citizens that they were the controllers and beneficiaries of the public corporations.

EARLY ATTEMPTS TO REFORM PUBLIC ENTERPRISES

The use of public corporations to meet political ends greatly contributed to poor performance in the public corporations in Tanzania. Intensive and extensive interference by the government and the ruling party in the day to day operations of the public corporations and ineffective control structures also contributed to the poor performance. More often than not funds were diverted from being utilized commercially or productively to being used by the Government or ruling party for political undertakings. Indeed, the public corporations were seen as another source of financing the government or ruling party activities rather than to further the economic activities for which they were established.

18 Mihyo,P.B "Parliamentary Control and Accountability of Public Enterprises in Tanzania." *Ph.D.* Thesis, UDSM,1987: 365-372.

19 See section 6(2)(b) of the Security of Employment Act,1964

20 Talking of employer by then was basically talking of the government or public corporations as they were the major employers of the day.

21 Mukandala,R.S *op.cit* p.30

The management and board of directors had no say on the way the finances of the corporations were going to be utilized, since, at the end of the day, they formed part of the same clique of the politics in power, being the appointees of the political system in power.

Many attempts were made to reform the public corporations with a view to increasing their efficiency.[22] These included the establishment of the Standing Committee on Parastatal Organization (SCOPO) in 1967, the establishment of the Office of Commissioner for Public Investments in 1974 and the establishment of the Hamad and the Nsekala Commissions in 1984 and 1987 respectively. It is however important to note that all these early attempts centred only on operational and organisational issues without touching on the environment under which such enterprises operated, or on ownership structures of the enterprises.[23] In spite of these efforts, the performance of public corporations continued to deteriorate instead of improving. For instance, the number of public corporations making profits did not exceed that of those making losses. The Tanzania Audit Corporation (1990) reported that out of the 461 accounts audited, 191 annual accounts disclosed profits and 239 annual accounts disclosed losses or excess of expenditure.[24] As a consequence, critics and the Government itself questioned the rationale of continuing to maintain a huge public enterprise sector which burdened the national economy. It is against this background that a policy for privatisation of public enterprises became necessary.

PRIVATISATION OF PUBLIC ENTERPRISES

Since mid 1980s Tanzania has been implementing measures towards the establishment of a free market economy. Since the1990s the strategy toachieve that goal has involved, among others, the privatisation of public corporations. This has been effected through the direct sales of the public corporations to private investors, leasing them out, entering into management contracts or the contracting out of functions heretofore undertaken by public agencies.[25] The reform exercise differs fundamentally from the previous reform attempts which did not change ownership structure of the public enterprises.

The Policy

The privatisation policy was officially adopted in January 1992. The policy statement issued advocated for *inter alia* the need to reform the laws guiding the activities of the public enterprises and the establishment of a powerful Parastatal Sector Reform Commission to provide a focal point for the implementation and monitoring of the reform of the parastatal sector.[26]

The policy marked the culmination in general policy shift that began in the early 1980s with the adoption of the National Economic Survival Programme (NESP),[27] and more particularly in 1986 after the government had signedan agreement with the IMF on economic reforms. The agreement required Tanzania to adopt and implement macro-economic reforms and adjustments embodied in the Economic Recovery Programme (ERP) of 1986 which has with it the requirement for privatisation of state-owned enterprises. The objective of the policy is interalia to improve the performance of companies that have been in the public sector so that they contribute more to the growth and development of the economy.[28] This would entail withdrawal

[23] Mukandala, *Ibid* p.77 and 78

[24] Tanzania Audit Corporation (TAC) 1990, 22nd Annual Report and Accounts for the year ended 30th June, Dar es salaam.

[25] See Mallya, E.T. 'Privatisation in Tanzania: The Politics of Policy Reform,' Ph.D Thesis, University of Manchester, 1994

[26] Moshi, H.P.B *op.cit* p. 78

[27] Stein, H. "The Economics of the State and the IMF in Tanzania" *TAAMULI*, Vol.1 No. 1&2, 1990 p.8

[28] Tanzania, "Parastatal Rector Reform Commission, 1994 Review and Action Plan For 1995 and Beyond." p.7

from majority ownership of enterprises and promotion of sound private sector business by ensuring the existence of competition from others at home or abroad. Such a move was expected to increase overall economic and business operational efficiency through a competitive atmosphere and to also facilitate effective utilisation of resources for the development of the people. However, it is important to note that these decisions and policy measures were not an outcome of an informed consultation and consensus with the populace at large. This is in spite of the far reaching implications to the citizenry and the fact that the latter are in reality the legitimate owners of the corporations.

Implementation of the Policy

Implementation of the policy was made possible by the enactment of the *Public Corporations Act*,1992[29] which repealed and replaced the Public Corporations Act, 1969. The 1992 Act was however amended later by the *Public Corporations (Amendment) Act*, 1993[30] which in fact constitutes the main divestiture machinery.

Besides the *Public Corporation Act*,1992 and its subsequent amendments, there are other pieces of legislation which constitute the legal machinery for privatisation of the economy as a whole. These were, by and large, enacted to create a conducive and enabling environment for the privatisation process and include the *National Investment (Promotion and Protection) Act*, 1990[31] which has now been repealed and replaced by the *Tanzania Investment Act*,1997,[32] the *Banking and Financial Institutions Act*,1991[33] and the *Foreign Exchange Act*,1992[34]

[29] Act No. 2 of 1992
[30] Act No. 16 of 1993
[31] Act No. 10 of 1990
[32] Act No. 26 of 1997
[33] Act No. 12 of 1991
[34] Act No. 1 of 1992

LEGAL UNDERPINNING OF CITIZENRY PROTECTION AND PARTICIPATION

The Ideal

Public corporations are a part of public property belonging to the citizenry through the trusteeship of the government. The equities therein arise from tax monies contributed by the citizens and from other financial arrangements undertaken through the citizenry guaranteeship, including loan financing repayable by the general public.As such, privatisation touches on very sensitive and basic issues relating to ownership rights, as well as other rights as to participation in decision making as guaranteed by the Constitution. To be specific, these rights include the right to work,[35] the right to own property,[36] the right to participate in national public affairs,[37] and ancillary thereto, the duty to protect public property.[38]

Basic Safeguards

The implementation of the privatisation policy thus required putting into place satisfactory mechanisms that will guarantee extensive consultation with the citizens to obtain consensus and also to determine the modalities for privatisation. For instance, citizen access to share-ownership of privatised enterprises; protection of rights and interests of the workers of the parastatals in the case of total change of ownership and such other attendant matters needed to be addressed. Such mechanisms must "assume the form of jurists motive in order to receive legal sanction,"[39] and thus guaranteeing a consensus between the government and the citizens as well as successful reform. Absence

[35] Art. 22 of the Constitution of United Republic of Tanzania
[36] Art. 23 *ibid*
[37] Art. 21 *ibid*
[38] Art. 27 *ibid*
[39] Engels, F. "Ludwing Feuerbach and the End of Classical German Philosophy" in Marx, K & Engels, F. *Selected Works* Vol.III, Progress Publishers, Moscow 1970: 371.

of such mechanisms may lead to discontent among the citizens and thus chaos, which may in turn impede speedy and successful reform which may, as a result discourage potential investors. Lessons from Poland, Turkey and China as regards the manner in which they deal with citizen interests in the privatisation process is worth noting albeit in passing. In Poland, the privatisation law places a duty on the body entrusted with privatisation to consult and co-operate with civil associations like trade unions, chamber of commerce and with other bodies of state administration and local government.[40] This is intended to secure wishes and interests of the citizenry in the privatisation process.

In Turkey, the privatisation law contains provisions, which give priority to domestic investors and Turkish workers before other investors are considered.[41] In China, the privatisation process is backed by legal safeguards to protect laid off workers.[42] The machinery provides schemes which enable the laid off employees to receive 70-80 yuan (about $14) per month to cover minimum living expenses.

TANZANIA'S LEGAL FRAMEWORK

An examination of the existing legal environment in which the privatisation policy is being implemented in Tanzania clearly reveals that the government has only been pre-occupied with privatisation of the economy and more particularly with the divestiture and disposal of the public enterprises. As a result, it has apparently consciously ignored putting into place adequate safeguards to protect citizen rights and interests in the privatisation process. The following brief review of some important legislation reveals this fact.

The Constitution

The current Constitution of United Republic of Tanzania 1977, despite being the basic law of the country, is not a result of an agreement by the Tanzanian people as a whole, but a decision of a few members of the ruling class. The Constitution still maintains old policies, which sought to place enormous powers on the executive, without corresponding safeguards to protect citizen rights. Although the Constitution attempts to guarantee certain rights for the citizens, the inclusion of widely phrased claw-back clauses leaves a lot to be desired. It lacks certain guarantees, which are important especially during this time, when the country is in the transition period from centralised economy to privatised economy.

The missing basic rights include: the right of citizens to be consulted before adoption and implementation of policies touching sensitive and basic issues of citizens, right of a citizen to directly call to question governmental policies or actions which affect them or which are injurious and wasteful of the economy.[43] Arguing on this point Luoga laments:

> It is absurd that a tax-paying citizen, who contributes to the maintenance and support of the government, can not institute proceedings to restrain the government from implementing policies or decisions which are outright harmful, or are a mere drain of the meagre national resources.[44]

Or to add to Luoga, where the decisions are clearly calculated for selfish ends.

The privatisation policy and incidental matters thereto are not exceptional in this regard. The constitutional amendments effected since the

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40 See United Nations, *Legal Aspects of Privatisation in Industry*, ECE/TRAPE/180, UN Publications, New York 1992 p.115.

41 See Act No.3291 of 1986 as summarised in Dereli, T. et al "Public Sector Industrial Relations on the Eve of Mass Privatisation in Turkey" *International Labour Review* Vol.132, 1993, No.5-6: 697.

42 China, "Unemployment Scheme to Aid Public Sector Restructuring." *International Labour Review* Vol.132, 1993, No.5-6: 550-551.

43 Luoga, F.D.M. "Conditions for the Functioning of a Democratic Constitution in Tanzania" in Mtaki,C.K and M.Okema eds *Constitutional Reforms and Democratic Governance in Tanzania* p.44

44 Ibid p.44

commencement of the privatisation process have mostly focussed on political changes, ignoring the current economic changes.

Private Investment Protection and Promotion Legislation

In a bid to create an enabling environment for private investment in the country, more particularly from foreign investors, the government enacted the *National Investment (Promotion and Protection)* Act, 1990.[45] The legislation repealed and replaced the *Foreign Investment Act*, 1963[46] which, with the adoption of economic reforms policies, was thought to be inadequate.

The 1990 Act, now repealed and replaced by the Tanzania Investment Act 1997,[47] established the legal and institutional framework in which investors would operate and a comprehensive package of incentives and guarantees to investors.While the Act puts in place comprehensive guarantees and incentives in terms of tax holidays in favour of investors, it did not put in place commensurate duties on them, which could safeguard protection of citizen rights and interests. For instance, the duty to employ a certain percentage of local citizenry and gradual localisation of management and the duty to protect environment.[48] In a bid to attract foreign investors, Tanzania has been losing 120bn/= per year by granting wasteful tax holidays and exemptions.[49] This is actually contrary to wishes of the citizens who suffer a lot for the lack of essential social services.

The *Tanzania Investment Act*,1997, which was enacted at the late stages of the privatisation process, establishes the Tanzania Investment Centre to act as a "one stop facilitation centre" for investors. By virtue of section 6 of the 1997 Act, the centre is duty bound to assist all investors to obtain all necessary permits, licences, approval consents, authorisation, registrations and in the fulfillment of all legal requirements pertaining thereto.

Unlike the previous investment legislation, the 1997 Act does not specify areas in which foreign investors can not invest in nor does it reserve areas for local investors and strategic areas for public investment through the government. Just like its predecessor, the 1997 Act is inadequate on the duties of investors other than registration requirements and the reporting of commencement of business. Investors are given a range of incentives and rights but very minor duties are placed on them, not even the primary duty of obeying the laws of the host country.[50]

The Banking and Financial Institutions Act, 1991

The Act sets new standards, margins of solvency and general conditions upon which banks and other financial institutions may open and/or carry on their specialised business in Tanzania. Apart from allowing the establishment of private banks, the Act required the then existing banks and financial institutions to clear their balance sheets and restructure both their core capital and mode of operations in a way that would ensure economic viability and solvency of the banks and their sustainability.[51]

With these changes, it is becoming a fact that the banking industry now tends to concentrate more in well to do urban ares. The rural sector, which has over 80% of the Tanzanians, is being

45 Act No. 10 of 1990
46 Act No. 40 of 1963
47 Act No. 26 of 1997
48 Peter,C.M. *Foreign Investments in Tanzania: The Mainland and Zanzibar*, Friedrich Ebert Stiftung, Dar,1994 p.72
49 See *Business Times*,April 25-May1,1997: 1. It is important to note that tax holidays were abolished with the coming into force of the Tanzania Investment Act,1997. The new concept now is capital allowance deductions.
50 See Peter,C.M. *op.cit* p.72
51 See part III of the Banking and Financial Institutions Act, No 12 of 1991, sections 12-16.

left with no or with inadequate banking and financial facilities. The co-operatives which could have been expected to fill the gap by establishing co-operative banks and other credit and saving facilities are in a dilapidated state following the three decades of their parastatalisation. Powers to licence a bank or close it are vested in the Governor of the Bank of Tanzania as well as supervisory powers. But upon closure the populace is given no prior alert to avert the inconvenience of having their money locked in for a long time Apparently all these are contrary to the expectations and wishes of the people.

Industrial Relations Legislation

While legislation was enacted to permit growth and expansion of private capital, there were no corresponding positive reforms that were effected in industrial relations legislation to improve safeguards for protecting workers in the privatisation process. Most operative laws were enacted, in the colonial days or immediately after independence. They are no doubt outdated and thus inadequate to accommodate the new developments. The minor reforms so far effected are apparently not in favour of employees. Rather, they are part and parcel of the integrated strategy to attract private investors by *inter alia* imposing restrictions on employees' right to strike. Such minor reforms as elaborated hereunder are insignificant in so far as protection of employees is concerned.

Trade Unions Legislation

In 1991 the state enacted the *Organisation of the Tanzania Trade Unions Act,* 1991.[52] The legislation now repealed and replaced by the Trade Unions Act,1998,[53] compelled workers to reorganise through the Organisation of Tanzania Trade Unions (OTTU), the state controlled organisation. The existence of this legislation, enacted amid the reform process, not only rendered the registration of free trade unions impossible but also continued to make the Trade Unions Ordinance,Cap.386 redundant. Needless to say, citizens were denied opportunity to organise free and independent trade unions which could have been instrumental in protecting citizenry's rights and interests and in particular workers rights. The diverse and far reaching implications of the reform policies to the masses necessarily calls for strong and independent peoples' organisations that can stand up to protect the interests of the people.[54]

It is a pity that the Trade Unions Act,1998 which seeks to promote the establishment of free trade unions was enacted about ten years after the commencement of the reform process, when a large number of employees had already lost their employment.

The Industrial Court (Amendment) Act, 1993

Equally, although the *Industrial Court (Amendment) Act,*1993[55] was enacted during the reform process, it still maintains procedures which severely restrict the workers right to strike irrespective of the fact that, strike is a legitimate method through which the workers in a civil society can collectively enforce their rights.[56] Even worse, the Act reintroduces the essential services provisions in the industrial relations legislation. The essential services enumerated are water services, electricity services, fire services, air traffic control and civil aviation, telecommunications, meteorological services and the transport services necessary to the operation of the foregoing services. The provisions

[52] Act No.20 of 1991

[53] Act No. 10 of 1998

[54] Bahroon,S.A. "The Role of Civil Organisations in a Constitution Order" in Mtaki,C.K and M.Okema *op.cit* p.166

[55] Act No.2 of 1993

[56] See sections 11-14 of Act No. 2 of 1993

completely bar certain essential services' employees from resorting to strike as a means of pressing for their demands. The provisions are supplemented by the *National Security Act*, 1970[57] which also provides a list of necessary services some of which are identical to those listed as essential services by the *Industrial Court of Tanzania (Amendment) Act*,1993.They include any service to provide electricity supply or distribution, fire service, rubbish disposal and sanitation services, health or ambulance services, service relating to the production, supply or distribution of water, fuel or food. In addition, the President can declare any other service or facility to be a necessary service.[58] By implication, the President may thus declare any service whatsoever, a necessary service for the purpose of outlawing a strike action. Intriguingly, the Industrial Court of Tanzania (Amendment) Act,1993 does not provide for a separate and efficient procedure for settlement of disputes arising from the so-called essential services sectors.

Capital Market Legislation

The Capital Markets and Securities Act,1994[59] establishes a capital markets and securities authority for the purpose of promoting and facilitating the development of an orderly, fair and efficient capital market and securities industry in Tanzania, and make provisions regulating stock exchanges, stock brokers and other persons dealing in securities. Although the Act was enacted in 1994, it is only recently that serious measures have been taken to familiarise members of the public and educate them on the logistics and other matters pertaining to stock exchanges. That, notwithstanding, many people, in both rural and urban areas have no access to the stock exchange and do not know what a stock exchange is all about. Nevertheless, although the *Capital Markets and Securities (Amendment) Act*,1997[60] introduces the concept of collective investment schemes as a viable means of mobilisation of capital from the citizens, nothing significant has so far been effected to pave way for the establishment of the schemes. Economic and social infrastructures are still underdeveloped and the general public is still not accessible to adequate credit facilities.

In view of the above, the remaining question is whether or to what extent the Public Corporations Act,1992 as amended by the Public Corporations (Amendment) Act,1993 enacts the basic safeguards to protect citizenry rights as well as providing for their participation in the process of privatisation. This subject is examination hereunder.

The Divestiture Mechanism

The *Public Corporations Act*,1992 which repealed and replaced the *Public Corporations Act*,1969 gave legislative effect to the government's decision regarding public sector reform. However, the *Public Corporations Act*,1992 was criticised in that it was not only ambiguous but also inadequate as a reform instrument. The *Public Corporations (Amendment) Act*,1993 (hereinafter referred to as the Amending Act) was therefore enacted to provide for a more comprehensive legal mechanism for restructuring public corporations.

The essential part of the Amending Act is the establishment of a very powerful organ of state for purposes of directing the restructuring process, the Presidential Parastatal Sector Reform Commission (PSRC).[61]

Power and Functions of the Commission

The power and functions of the commission as found under the Amending Act are very detailed and enormous such that during the parliamentary

57 Act No.3 of 1970.
58 See sections 2 and 3 of Act No.3 of 1970
59 Act No.5 of 1994
60 Act No.4 of 1997
61 See section 22 of the Public Corporation (Amendment)Act, 1993

debate on the Bill for this Act the Commission was nicknamed as another "big ministry" and "a government within the government." Sections 22 and 39 of the Amending Act enumerate some of powers and functions of the Commission to be:

- The Commission is vested with the mandate to implement the policies and programmes of the government on parastatal sector reforms; including developing operating policies, procedures, guidelines and detailed plans for re-structuring,
- To prepare a list of all public corporations and to make recommendations to the government on restructuring options,
- Formulation and execution of detailed plans for restructuring of all specified public corporations i.e. corporations earmarked for restructuring,
- To act as official receiver and liquidator where corporations to be divested are insolvent. This includes determining whether the corporations should be liquidated or not.

The powers of the Commission in respect of a particular corporation become effective once such corporation is declared to be a "specified public corporation."[62] In the discharge of its duties the Commission is accountable to the President who has the final say.[63]

The Commission's Consultation Requirement

The Commission under S.22(3) is required not to enter into any agreement relating to the privatisation of a public corporation without first making consultation with the Treasury, responsible Minister and the Attorney-General. However, the Commission may proceed with its action over a public corporation if 21 days elapses without a reply from the parties to be consulted. The Commission is to give consideration to the suggestions and opinion of those who are consulted. However, if the Commission wishes to pursue an action different from that suggested by the parties to be consulted, it is required to refer the matter to the President whose decision is final (S.22(3)(c)). The Amending Act also requires the Commission to seek approval of the government where restructuring involves a change in the ownership structure before entering into any agreement (S.40).

Shortcomings of the Divestiture Mechanism

It was thought that the Public Corporation (Amendment) Act 1993, unlike the principal legislation, would contain elaborate provisions containing adequate safeguards relating to citizenry protection and provide for its participation in the decision making process in the privatisation of public corporations. And quite importantly, to provide for an effective scheme through which the masses could acquire shares in the privatised corporations. That however has not been the case.

Safeguards to Protect Workers

While the divestiture mechanism as set by the Amending Act contains elaborate procedures for disposing of public corporations, it lacks legal procedures for safeguarding rights and interests of workers in the privatisation exercise. For instance, the Amending Act lacks provisions establishing compensation packages and safety nets to protect employees who might be adversely affected by the restructuring or privatisation process. There is also absence of clear guidelines regarding the transfer of employees of former state-owned enterprises to privately owned successors. This has led to a situation where the fate of employees has become a subject of negotiation between the Commission and a prospective buyer. It has also led to lack of uniformity in the manner in which and the scope to which the laid-off employees are being

[62] Section 22(a)*ibid*
[63] Section 39(1)*ibid*

retrenched and paid. This, by implication, amounts to dividing and ruling the workers who are to be retrenched. More significantly, the safety net and compensation packages if given to the laid off employees are given as privileges and not as of right.

Furthermore, the privatisation of public corporations has since proven to result into massive retrenchment of employees. In the case of Williamson Diamond Mines Ltd, about 647 workers were laid off.[64] Interestingly, however, the Amending Act does not compel the Commission to effect consultation with employees in matters relating to the fate of their employment in the privatisation of a particular public corporation. The only relevant provision in the Act is section 39(2)(g) which gives the Commission discretion to decide whether or not to hold discussions with employees of any specified public corporation or their representatives with a view to achieving a fair, reasonable and harmonious restructuring.

It is a pity that the place or involvement of employees in the negotiations for the sale agreement of a public corporation is not guaranteed, whereas such negotiations have far reaching implications for their rights and interests.[65] Yet, the Commission which conducts the negotiation is, under the Amending Act not bound to consult or hold discussion with employees of a public corporation to be privatised. Worse still, is the fact that as discussed earlier the industrial relations legislation which ideally should have dealt with the matters is outdated and to a great extent obsolete and therefore incapable of accommodating the new developments.

Duty of the Commission to Consult

The Amending Act only requires the Commission to consult the treasury, the Attorney General and a responsible minister before effecting any privatisation plan. Unlike in other jurisdictions, the law in Tanzania does not require the Commission to consult the citizens who are the legitimate owners of the public corporations, through for instance, their civil organisations. It is worth noting that even the role of the parliament has been sidelined and marginalised in the privatisation process. There is no any provision in the Amending Act which envisage, the place of the parliament in the privatisaiton process. The commission is only accountable to the president whose decision is final.

The other intriguing fact is that, though the Amending Act requires the Commission to consult the above mentioned parties, the Commission may as well proceed to implement its decision if 21 days lapses without a reply from the parties to be consulted.[66] There is also room for the Commission to take a different decision from that suggested by the parties to be consulted.[67]

Citizenry Participation in Corporate - Ownership

Public corporations are part of public properties belonging to the citizenry through the trusteeship of the government. One would have expected that elaborate legal machinery or clearly stated principles guaranteeing mass-ownership of the privatised public corporations would accompany the privatisation exercise, right from the start. Such principles should have stated in clear terms, for instance, that privatisation should not de-indigenise the national economy; should not contradict the social objectives of the government; should be preceded by such and such reforms. Unfortunately, that has not been the case. Moshi attributes this omission to the non-existence of a coherent and a comprehensive plan and strategy for the management of the privatisation process and the lack of foresight as far as issues of

[64] Kariwa,C.K. "Privatisation Process in Tanzania: The Impact on Industrial Relations and Employment Opportunities" *CHANGE* Vol.4 No.7-9 p.102

[65] Section 39(2)(i)&(j) of the *Public Corporation (Amendment) Act*,1993

[66] Section 22(3)(a)*ibid*

[67] Section 22 (3)(b)&(c)*ibid*

indigenisation, income distribution and the sequencing of events are concerned.[68] The Amending Act only contains elaborate provisions geared at facilitating speedy disposal of the parastatals. There are no corresponding provisions seeking to encourage and promote local entrepreneurs to buy public corporations or to acquire shares in the ones being privatised.

Additionally, it would seem that local entrepreneurs especially in the context of competition with foreign entrepreneurs could hardly meet the criteria adopted by the Commission in selecting appropriate buyers. The criteria include price; strategic fit between the company and the potential buyer; the contribution the bidder would make to the future performance of the company; and possession of necessary financial and technical capabilities.[69] This is worsened by the fact that in Tanzania, unlike other jurisdictions, there are no legal provisions requiring the Commission in certain circumstances to give priority to local entrepreneurs.

There are some cases where the government, through the Commission, has taken measures (i.e. outright sale of government shares in parastatals to indigenous, management buy out, management employee buy-out, etc) to fill this gap. In view of the absence of a statutory requirement in this regard, such measures have tended to be looked down upon as being mere privileges contrary to what it is, a citizen's right. It is interesting to note that these measures have been mostly effected in non-strategic and less viable corporations, some of which had been closed down for a long time.[70] An appropriate example is the Kisarawe Brick Factory Co. Ltd., where an indigenous owned company purchased 70% of the shares.[71] Theother example is that of Mbeya Ceramic Co. Ltd. (MBECECO), which was purchased by a company owned by indigenous Tanzanians. As such, the government has often proudly cited such cases to justify the argument that the government is determined to enhance citizen participation in corporate share ownership.

Utilisation of Privatisation Proceeds

The Amending Act under S.34 empowers the government to utilise the privatisation proceeds without consulting citizens much as the corporations belonged to them. It was thought that the government in consultation with the citizens would determine modalities of spending the monies. Unfortunately this has not been the case. The government has since been utilising the monies for its recurrent expenditure. For instance, the proceeds were spent on the 1985 national election.[72] The government has also been reported to have spent 108 bn/= to retrieve the government jet from Netherlands.[73]

Citizenry Response and Attitude Towards Privatisation

Dissatisfaction of the citizens and the apprehension that their interests and rights are being ignored in the privatisation process have made the citizens, particularly workers in a number of incidences to object the implementation of intended privatisation exercise.

Such incidences, which are in fact a reflection of the citizenry attitudes towards privatisation have often taken the shape of agitation, lock-outs and application for court actions to restrain implementation of privatisation exercise. All the reactions from the citizens are an outcome of the

[68] Moshi, H.P.B. op.cit p.87.See also Moshi,H.P.B. "Parastatal Sector Reforms and Privatisation in Tanzania" in *ESAURP Tanzania Tommorrow*, Dar es salaam, Tema Pub. Co. Ltd.,1996 p.318

[69] See P.S.R.C 1994 Review and Action Plan for 1995 and Beyond p.19 and the P.S.R.C's Parastatal Privatisation and Reform Master Plan, August,1993 p.17

[70] See P.S.R.C Action Plan op.cit p.3

[71] *Ibid* p.30

[72] This information was broadcast by Radio Tanzania from Parliamentary session in Dodoma on 03.02.1997

[73] See *Business Times*, April 25,1997.

policy measures which are not a result of an informed consultation and consensus building with the local people. It also explains the lack of clear safeguards to protect citizenry rights.

In the *Secretary General of OTTU vs The Presidential Parastatal Sector Reform Commission*[74] for instance, OTTU on behalf of the then workers of Tanzania Cigarette Company Ltd.(TCC), then under divestiture unsuccessfully brought an action in the High Court against the Commission (PSRC) praying *interalia* for a declaration that the intended privatisation of TCC was prejudicial to the national interests and public policy and for an injunction restraining the Commission from selling and/ or disposing of the majority of the shares of TCC to R.J.Reynolds or any other foreign investors. Kyando J.(as he then was) dismissing this action in court stated:

> The plaintiff says that he can block the respondent's intended measures on grounds of national interest and public policy. But normally, in my view, it is the Government, which is the custodian of national interest. As to whether employees, or individuals, can stand up, as against their very own Government, in defence of national interest is a matter which, again requires investigation and I can not say here that the applicant has such a clear case, based on national interest and public policy....[75]

This effectively suggests that however much the employees may have constructive ideas of turning around the performance or operations of a particular public enterprise or a meaningful divestiture of the same once the said ideas are opposed to the position of the government, then the stand of the government must at any costs prevail.

In a bid to prevent further and complicated challenges which could seemingly frustrate the privatisation process for instance, from the very specified public corporations the state passed the *Public Corporations (Amendment) Act*, 1999.[76] Section 40A(1) of the Act prohibits any specified public corporation from instituting a suit intended to challenge or stop the Commission (PSRC) from proceeding with the divestiture of any specified public corporation without the approval of the Treasury Registrar. The amendment creates an offence which attracts a punishment of a fine not exceeding Tshs 1,000,000/- or a jail term not exceeding five years or both fine and imprisonment to any person or officer of a specified public corporation who contravenes the said provision. This is a curious provision as it bars citizens free access to courts of law to challenge a transfer or sale of a public corporation to an investor (however licentious or irresponsible).[77]

CITIZEN SHARE OWNERSHIP: REAL OR ILLUSORY?

The Privatisation Trust

In what could be seen as a manifestation of the government's determination to take seriously issues relating to the protection and participation of the citizenry in the privatisation process, it enacted, belatedly of course, the Privatisation Trust Act,1997.[78]

The legislation establishes a privatisation trust whose primary objective is to acquire shares in newly privatised enterprises for sale by public offering to achieve a wide distribution among citizens and to encourage and facilitate wider participation by citizens in the ownership of privatised enterprises.

Salient Features of the Act

In the first place, the legislation provides for the purchase of shares at market price and preferential terms like purchase of shares on credit, and

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74 Civil Case No.145 of 1995, High Court, Dar es salaam (Unreported)

75 *Ibid* p.5

76 Act No.17 of 1999

77 Mughwai,A. "Forty Years of Struggles for Human Rights in Tanzania" in Mchome,S.E. (ed.) *Taking Stock of Human Rights Situation in Africa*, Faculty of Law, University of Dar es salaam, 2002 p.62

78 Act No.7 of 1997

payment by installment are not guaranteed. Secondly, it is at the discretion of the Commission (PSRC) whether or not to grant shares to the trust for public offering. Thirdly, it is the special fund established under S.34 of the Amending Act that has to be utilised by the trust to acquire shares for public offering.

The attainment of the trust's objectives is constrained by a number of factors. The existing socio-economic conditions of employees and the majority of the citizens do not facilitate systematic saving from their income nor do their incomes suffice for their family's survival. Many people in Tanzania are still struggling to meet their basic needs and would thus be inclined to seek first, their shelter, clothing and food before they think about investing in companies' shares, even if banks were to assist financially in acquisition of such shares.[79] It would even be difficult for the rural people who constitute over 80% of the Tanzanian population to access the banks because most of these institutions are now concentrating in the urban areas. It is also unrealistic to expect the cooperatives to be a useful instrument in boasting wide-share ownership through collective purchase of shares by citizens in the rural areas.

Moreover, since the majority of Tanzanian citizens live in the rural areas, effective operation of this trust depends on how and the extent to which the rural population is involved. This also depends on how the rural population is educated on the logistics of the trust and share purchasing mechanisms. Co-operation of employers in assisting acquisition of shares by their employees is another crucial factor upon which effective operation of the trust largely depends. Last and most critical, since the government is utilising the special fund on recurrent expenditure, it is doubtful if the trust still has access to enough funds for acquiring shares for public offering.

CONCLUSION

This paper sought to show how the privatisation of public corporations is not supported by coherent basic legal safeguards to secure citizenry protection and participation in the privatisation process. The paper briefly surveyed the legal environment in which the privatisation exercise is implemented and observed that the State has only been pre-occupied with the creation of a legal framework for the speedy privatisation of public enterprises such that it overlooked or rather ignored the need to effect parallel legal measures to protect and guarantee citizenry rights and interests in the privatisation process. It is only recent that the State has belatedly attempted to put in place some of such safeguard measures. It is submitted that it is high time that the legal environment is thoroughly reviewed with a view to providing the necessary basic legal safeguards to secure protection and participation of all citizens.

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[79] See for instance Mwenda, K.O."Collective Investment Schemes and the Accommodation of Small Investors on the Stock Market" 11 *RADIC*(1999)497-498.