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PRIVATISATION AND DEREGULATION OF THE DOWNSTREAM SECTOR OF THE OIL AND GAS SECTOR: CHALLENGES FOR LABOUR

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PRIVATISATION AND DEREGULATION OF THE DOWNSTREAM SECTOR OF THE NNPC: CHALLENGES FOR LABOUR.*

THE BACKGROUND TO PRIVATISATION IN NIGERIA.

The privatisation of public corporations often referred to as State Owned Enterprises (S.O.Es)[1[1]], is a relatively recent phenomenon in Nigeria's political and economic history. Some of the basic economic advantages expected from the privatisation of S.O.Es. can be compressed into the need to improve their efficiency and productivity, reduce operating losses and deficits, prevent further grant of government subventions, enhance the repatriation of domestic capital flight, attract net foreign capital inflow and generally eliminate the existence of bogus state monopolies and the ancillary economic problems of corruption and exploitation that emanate from them.[2[2]] In order to capture the legal and socio-economic background to the Nigerian privatisation project, it is of necessity that the term "privatisation" be defined both contextually and conceptually. In the midst of these fundamental changes, the status of the Nigerian worker remains unchanged politically, economically and socially. Apart from the intensified pauperisation of the workers by governmental policies of privatisation and commercialisation of SOEs as well as the liberalisation and deregulation of select commercial and economic activities, ***problems associated with employee status, job security, and improved conditions of service remain largely unattended to***. The Nigerian worker, it seems, is being short-changed from all quarters. While wages and salaries have remained static over long periods of time, government officials continue to insist on implementing these schemes without first putting in place an efficient and revised pensions and social securities system, modalities for the adequate representation of employees in the management and boards of the newly privatised and commercialised SOEs and renewal of social and physical infrastructures[2a]

This paper shall attempt a review of the legal regime for the privatisation of Nigeria's public enterprises as well as the attendant economic deregulation and liberalisation issues and determine whether adequate measures have been taken to address the serious problems emanating from them[2b]. For this purpose special attention shall be paid to the downstream sector of Nigeria's Oil and Gas industry, and the consequences for labour.

The Public or Private Dichotomy.

The philosophical underpinnings that posit the current privatisation wave in proper context would expose the defects in structural and legal conceptions defining the concept of privatisation and questioning the very need for it, especially in an emerging market economy such as Nigeria. The relativity of the concept notwithstanding, the term

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1[1] A State-Owned Enterprise has been defined as an enterprise in which Government is the sole Shareholder, or in which only a small proportion of the share capital is for special reasons left in private hands on such conditions that the State can, if necessary, have these shares also at its disposal. See Friedmann, W. Ed., ***Public and Private Enterprise in Mixed Economies*** (London: Stevens and Sons, 1974) at 98.

2[2] See generally, Quale, A., "Privatisation/Divestiture of State Owned Enterprises" in ***Creating a Favourable Environment for Foreign Investment.*** (Proceedings of a United Nations Centre on Trans- national Corporations, Lagos, Nigeria 1991) at 117.

2a The need for a cheap and efficient transport system, power supply, and availability of replaceable energy ought to form the foundation of any sound policy on privatisation, deregulation and liberalization.

2b This paper does not propose any extensive definitional and theoretical analysis of some of the concepts of privatisation and insider dealing abuses that have evolved over the years.

public used adjectivally means, "*pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community…. Belonging to the people at large; relating to or affecting the whole people of a state, nation or community….*"[3] It is therefore imperative that something is public when it belongs to the whole rather than the part, open rather than closed, communal rather than private and the fundamental relationship between public and private is that they stand in opposition to each other perpetually, and a philosophical continuum is maintained at all times.[4]

The term *private* on the other hand has been defined simply as *"affecting or belonging to private individuals as distinct from the public generally. Not official; not clothed with office."*[5] In corporate and organisational senses, these may either be public or private.[6] A *public enterprise*, in the sense used here connotes any corporation, board, company or parastatal established by or under any enactment in which the Government of the Federation, a Ministry or Extra-Ministerial Department, or Agency has ownership, or equity interest and includes a partnership, joint venture or any other form of business arrangement or organisation.[7] This is fundamentally different from a *public company* within the meaning of the *Companies and Allied Matters Act*,[8] section 24 which refers to public limited companies and whose shares are traded in the open market.

Privatisation with reference to business units has come primarily to mean two things:

(a) any shift of activities or functions from the state to the private sector; or
(b) Any shift of the production of goods and services from public to private.

Invariably, privatisation is essentially the act of reducing the role of government, or increasing the role of the private sector, in a business activity or in the ownership of assets.[9] In this respect, privatisation would be ascribed a meaning similar to those of deregulation and liberalisation.[10]

The policy initiative for the legal framework of the Nigerian privatisation project appears to have taken some of these principles into consideration. In doing so however, several of the legal options adopted for the privatisation process in Nigeria appear not to accommodate purely market based and egalitarian approach to privatisation.[11] The legal, and socio-economic implications of this would become clear in the course of this work. The Nigerian approach has raised some pertinent questions bordering on market integrity, the integrity of the personnel in charge of the exercise, public confidence and accessibility, and the overall efficacy of the methods adopted for the privatisation exercise.

The Concept of Privatisation in Nigeria

The *Privatisation and Commercialisation Act*[12] defines "privatisation" as:

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3 See ***Black's Law Dictionary***, 6th Ed.

4 P. Starr " *The Meaning of Privatisation*" (1988) 6 Yale Law and Policy Rev. at 6.

5 ***Black's Law Dictionary***, 6th *Ed*.

6 The distinction is as between state owned corporations and private companies properly so-called as against the distinction between publicly quoted private companies and restricted ones.

7 See the Public Enterprises (***Privatisation and Commercialisation***) [Act], 1999, section 34 thereof. This definition equally applies to State Government owned corporations.

8 *Cap*.59 ***Laws of the Federation of Nigeria*** (LFN), 1990.

9 See E. Savas, "*Privatisation: The Key to Better Government*" (1987) but cited in P. Starr, *loc.cit.*

10 The concepts of deregulation and liberalization are discussed *in extenso, infra*.

11 The process for nominating '*core investors'* or '*strategic investors'* by the Bureau of Public Enterprises is not quite transparent and therefore appearing to be pre-determined.

12 Formerly *Decree* No. 25, 1988. See the *Constitution of the Federal Republic of Nigeria*, 1999, section 315 on the status of existing laws.

> *… the relinquishment of part or all of the equity and other interests held by the Federal Military Government*[13][13] *or its agency in enterprises whether wholly or partly owned by the Federal Military Government, and 'privatise' shall be construed accordingly.*[14][14]

The foregoing definition appears to be functional only and does not reveal the context and the concept of privatisation. A perusal of the *Public Enterprises (Privatisation and Commercialisation) Act*[15][15] does not help the situation much. It rather assumes the meaning of the term privatisation in its provisions. This approach leaves substantial ambiguity in the law, which is often reflected in the problems and crises of implementation and the overall assessment of the success index of the privatisation scheme.

A reliance on the above-mentioned pieces of legislation therefore provides little or no assistance in understanding the concept and scope of privatisation in Nigeria. Recourse to political economy is therefore proposed. To some experts[16][16] privatisation is a hazy concept evocative of sharp political reactions, the term having been used to cover a range of policies from those of governmental disengagement and deregulation to the sale of publicly owned assets.[17][17] At its broadest and most symbolic level, privatisation has been described thus:

> *… a counter-movement to the growth of government that has characterised much of the post-World War II period in industrial and developing countries. It may mean reducing all forms of state control over resource allocation.*[18][18]

To adopt this description is to posit the concept of privatisation as necessarily encapsulating the peripheral and sometimes, incidental concepts of economic deregulation and liberalisation. Nothing can be further from the truth. The three concepts capture fundamentally distinct principles that must function within the same economic terrain.

What appears to be a more appropriate definition comes from another source[19][19] to the effect that privatisation is *"the transfer of operational control of an enterprise from the government to the private sector."* Although "operational control" can be placed in private hands through leases, concessions, or management contracts, control is most often secured by majority ownership. Consequently, privatisation refers to any transaction in which government cedes or transfers its ownership control of a public enterprise by depressing its equity participation from above 50 percent to less than 50

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[13][13] Federal Military Government should now read "the Government of the Federation of Nigeria" effective from 29th May 1999. See the *Constitution of the Federal Republic of Nigeria*, 1999, section 14(3).

[14][14] See *Privatisation and Commercialisation Act*, 1988 section 14.

[15][15] Formerly Decree No. 28 of 1999.

[16][16] See generally Starr, P. "The Meaning of Privatisation" (1988) 6 Yale Law Policy Rev., at 6.

[17][17] See Hemming, R. and Mansoor, M. *Privatisation and Public Enterprises* (Washington, D.C.: International Monetary Fund, 1988) being Paper No. 56.

[18][18] Bienen, H. and Waterbury, J. "The Political Economy of Privatisation in Developing Countries", C. Wilber and K. Jameson, ed., 5th ed. (New York: McGraw-Hill Inc., 1992) at 376.

[19][19] White, O. and Bhatia, A. Privatisation ***in Africa*** (Washington, D.C.: The World Bank, 1998) at 10.

percent.[20][20] The concept of privatisation appears by this definition to aggregate that of divestiture, which however legally connotes a process of complete downloading of government securities in erstwhile State Ownerd Enterprises (SOEs).

Privatisation and Divestiture Distinguished

A thin line however exists between the concept of privatisation and that of divestiture. While the term "privatise" appears to import a process of total withdrawal of government from business activities, its adaptation in Nigeria[21][21] and several parts of the globe[22][22] suggests the exact opposite. The governments desire to privatise is propelled by two conflicting and compelling economic principles of development and profit. The privatisation scheme put in place in Nigeria is intended to insure and insulate government from the losses in companies owned by it and arising from the inefficiency of the bureaucracy set up to manage them, while ensuring that it benefits from business profits magnified by ceding management and control to private investors.

The Nigerian variant of the privatisation process seems to be a hybrid between privatisation and divestiture, the latter as it were amounting to a complete withdrawal of the State from business ventures. The objective of government however appears not to have been adequately underscored by the legal regime available for the implementation of the scheme.[23][23]

The Context of Nigeria's Privatisation Scheme

A definitional approach to an understanding of the concept of privatisation is an endless exercise that would not only create further confusion but also equally reveal that it is indeed a term of relative application.[24][24] Probing the context in which the Nigerian privatisation project came about appears to be a more useful legal investigation.

Nigeria's privatisation effort is essentially a product of economic and social needs borne out of the dwindling revenues of government, huge amounts of subventions required for the sustenance of SOEs, the unexplainable and embarrassing financial losses suffered by these enterprises and the massive corruption and inefficiency engendered by their continued operation as public enterprises. The background to this state of affairs may be summarised as a product of post-independent legislative action meant to stimulate and accelerate national economic development and industrialisation among others.[25][25] Thus, the impetus for state participation in business activities in post-independent Nigeria, in the first place, are discernible, not only from questions of national pride and resistance to economic neo-colonialism, but also from purely developmental needs and the desire to break foreign monopolies doing business in Nigeria. The *Nigerian Second National Development Plan*[26][26] spelt out these objectives in very unambiguous terms to the effect that state owned companies became increasing tools of public intervention in the development process. According to the plan:

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[20][20] Id.

[21][21] See Owasanoye, B. and Yagba, T., "Legal Framework for Privatisation of Banks in Nigeria", in I. Ayua and B. Owasanoye ed., ***Privatisation of Government Owned Banks and the Issue of Ownership and Control*** (Lagos: Nigerian Institute of Advanced Legal Studies, 1996) at 8-11.

[22][22] White, O. and Bhatia, A. op.cit, at 10-11.

[23][23] The observable lapses in the legal regime for the privatisation scheme in Nigeria includes paucity of concept, procedural and policy inconsistency, and inadequate checks against market rigging by officials responsible for the project. Other details are discussed infra at 44-51.

[24][24] See Owasanoye, B. and Yagba, T. op.cit at 9.

[25][25] Quale, A., loc.cit.

[26][26] 1970-74 Rolling Plan, at 75 cited in Obadan, M. ***Privatisation of Public Enterprises in Nigeria,*** (Ibadan: National Centre for Economic Management and Administration, 2000) at 7.

> *Their primary purpose is to stimulate and accelerate national economic development under conditions of capital scarcity and structural defects in private business organisations. There are also basic considerations arising from the dangers of leaving vital sectors of the economy to the whims of the private sector often under the direct and remote controls of foreign large-scale industrial combines.*[27][27]

The Nigerian Government thereafter proceeded to take legislative action for indigenisation of foreign private corporations,[28][28] the proliferation of state owned public enterprises,[29][29] and the exclusion of private participation in considered key areas of the economy.[30][30] Surprisingly, the *Nigerian Investment Promotion Act*[31][31], sections 17, 18 and 32 still retains vestiges of these exclusive business interests reserved for government participation. The situation persisted, in spite of all pretences at the deregulation, and liberalisation of the Nigerian economy. The emergent economic chaos and crises created by the failures of public enterprises in meeting its original objectives of accelerated national development, and the loss of foreign direct and portfolio investments in the economy actually propelled state policies towards the privatisation of these public corporations.[32][32] A similar view was thus expressed:

> *On the whole, public enterprise was designed to meet the standard market failures associated with developing economies. Unfortunately… this objective was never accomplished by the parastatals set up to prevent failure instead, they became involved in too many activities in which they did not enjoy comparative organisational advantage. The resulting inefficiency led to widespread efforts in the 1980s and 1990s to privatise state enterprise…*[33][33]

Some of these failings may however be due to poorly conceived legislation meant to open up the economy. The desire to privatise public enterprises in Nigeria is therefore borne out of the original objective of government to profit from business enterprises without a corresponding liability of losses emanating from the inefficiency associated with wholly owned government companies. Consequently, the legal regime for

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27[27] *Id*.

28[28] See The *Nigerian Enterprises Promotion Act*, 1972 and the amendment of 1977 for the legal regime that governed indigenisation and state expropriation of foreign business interests in Nigeria.

29[29] While companies such as the Nigerian Airways Limited, the Nigerian National Press Limited, the Nigerian National Shipping Lines Limited, and the Nigerian External Telecommunications Limited (some of which are now extinct o metamorphosed) were incorporated under the now moribund *Companies Act, Cap. 37, Laws of the Federation, 1958* and later the Companies Act, 1968, quite a number of other wholly owned state corporations existed vide some kind of charter in their enabling statutes: see *the National Insurance Corporation Decree*, 1969.

30[30] See the ***Constitution of the Federal Republic of Nigeria***, 1979, section 16(1)(b) and (4) thereof that provided for the exclusive right of the state to participate in major sectors of the economy. Similar sections have preserved this right in the Constitution of the Federal Republic of Nigeria, 1999.

31[31] Formerly *Decree No. 16 of 1995* which essentially excludes the production of arms and ammunition, production of narcotics and other psychotropic substances, petroleum enterprises, and such other items to be determined by the Federal Executive Council from time to time.

32[32] See Owasanoye, B. and Yagba, T. loc.cit.

33[33] *Id.*

privatisation in Nigeria appears to be premised within this context. The subsequent prognosis of the question, whether or not, an adequate legal regime for privatisation exists in Nigeria, would therefore depend largely on these primary objectives and the developmental needs of encouraging foreign investments.

THE CONCEPT OF ECONOMIC LIBERALISATION AND DEREGULATION

Economic liberalisation and deregulation has emerged from the ashes of the crises of confidence and the failure of a regulated economy where state intervention in every economic sphere was the sin-qua-non. The era of economic regulation in Nigeria witnessed legislative action in such areas as exchange control,[34][34] tax administration,[35][35] banking regulation,[36][36] petroleum and defence industries,[37][37] marketing boards and other trading and business activities.[38][38]

The evolution of such statutes as the *Exchange Control Act*,[39][39] *Petroleum Act*,[40][40] the *Nigerian Enterprises Promotion Act*[41][41], and the *Industrial Development Co-ordination Committee Decree*[42][42] constituted identifiable benchmarks in the regulatory regime of various governments in post-independent Nigeria. Thus, the recent efforts at economic liberalisation and deregulation in Nigeria are fallouts of several decades of government regimentation of different segments of the Nigerian economy.

The policy framework for liberalisation and deregulation, which began to emerge in the 1980s, was therefore inevitably anchored on the dismantling of the various laws that entrenched economic regulation in the first place.[43][43] These efforts manifested early in the deregulation of the foreign exchange market,[44][44] the liberalisation of foreign direct and portfolio investment,[45][45] the commercialisation and privatisation of the Banking sector,[46][46] and lately, the deregulation of the downstream oil and gas sector. The *Second Tier Foreign Exchange Market Decree*[47][47] for example introduced a foreign exchange market in Nigeria where convertible currencies, travellers' cheques, bank drafts, mail or telegraphic transfers, and foreign bank notes and coins are freely transferred. Foreign currencies and other instruments traded at the market were protected against expropriation, and participants were not required to disclose their sources of funds.[48][48] While this inquiry have so far revealed some of the legal and

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[34][34] The *Exchange Control Act,* No. 16 of 1962 was an amalgam of the very strict pre and post- independence legal regime for the regulation of currency exchange and aspects of the financial market. See also the repealed *Exchange Control (Anti-Sabotage) Act,* 1977.

[35][35] See generally, the *Industrial Development (Income Tax Relief) Act*, Cap. 57, *Laws of the Federation,* 1958 and its Amendment Act No. 22 of 1971 where tax holidays were granted to companies having Pioneer Status, and period of tax holiday is extended to 7 years if an industry with a Pioneer Status is sited in economically disadvantaged areas of the country.

[36][36] See the *Banking Act,* 1969, and the *Banks and Other Financial Institutions [Act]*, 1991 for the various efforts at ensuring that financial and banking transactions were not left to the vagaries of market forces.
The *Petroleum [Act],Cap.* 350 Laws of the Federation of Nigeria (LFN), 19990 have since 1969 vested ownership and control of all petroleum in, under or upon any lands in Nigeria in the State. See section 1(1) thereof.

[38][38] See for example, the *Securities and Exchange Commission [Act],* Cap. 406 Laws of the Federation of Nigeria, (L.F.N.), 1990, section 7(1) thereof which restricted and regulated trading in the securities of companies with alien or foreign participation,

[39][39] *Op.cit*, n. 25.

[40][40] *Op.cit*, n. 28.

[41][41] Cited *op.cit*, n. 19.

[42][42] No. 36, 1988 since repealed by the *Nigerian Investment Promotion Commission [Act]*, 1995.

[43][43] The *Foreign Exchange (**Monitoring and Miscellaneous Provisions**) [Act],* 1995 and the *Nigerian Investment Promotion Commission [Act],* 1995 are examples of Statutory efforts at dismantling economic regimentation and introductory fragments of market propelled economic reforms in Nigeria.

[44][44] See the ***Second-Tier Foreign Exchange Market Decree*** No. 23 of 1986.

[45][45] Id., section, 2(1) and (2).

[46][46] Id., section, 3(1).

[47][47] *Id*

[48][48] Id., section.3 (1).

economic manifestations of the economic liberalisation and deregulation, they have however failed to expose their conceptual framework. Such an exposure would put in perspective the application of these principles in Nigeria.

A conceptual approach to the fundamental questions of liberalisation and deregulation is more likely to put into context some of the manifest indicators so far discussed. The terms economic liberalisation and deregulation have been used inter-changeably in the Nigerian context to portray the opening up of economic activities to private domestic and foreign participation.

The Origin of Economic Deregulation

In its original application, the return to market propelled economic policies began to gain currency in the mid-1970s in the United States of America, the United Kingdom, Australia, and to a lesser extent in Germany, France, Canada, Japan, Denmark and Austria[49][49]. In each of these countries, the deregulation option was chosen for the failures of regulation. These views have been succinctly expressed *inter alia*:

> *With the exception of the dismantling of wartime controls, the essentially uniform trend throughout the twentieth century had been toward more detailed and extensive regulation of business. …Nevertheless the rise of a broad deregulation movement, affecting a wide range of programs in several countries, mainly reflected intellectual and political developments. Academic economists had concluded by the 1960s that much regulation was unnecessary or ill conceived and, in particular, that public utility-type regulation of pricing and entry in multiform industries was almost always unwarranted.* [50]***[50]***

The desire for strict regulatory economic regimes in most of post war Europe and America, with the exception of the communist bloc, which was incompatible with a capitalist market economy, was borne out of strong nationalist and protectionist feelings that were the immediate outcome of World Ward II.[51][51] For the purpose of this research however, deregulation as an economic term, may be defined as the exact opposite of regulation or control. To deregulate therefore means the gradual or complete withdrawal by government of all forms of regulation or rules of control in particular sectors of economic activities. In other words deregulation is an economic laissez-faire, which adopts the liberal philosophical doctrine.[52][52]

The move from a regime of economic regulation to deregulation is not without opposition and their attendant dangers. When France deregulated its broadcast industry in the 1980s, the principal opposition generally came from regulated industries and their unions, which sought to preserve protection from competition. In addition, opposition from consumer groups and business customers, who believed they received subsidised

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[49][49] Krieger, J. ed., ***The Oxford Companion to Politics of the World*** (New York: Oxford University Press, 1993) at 234.

[50][50] *Id.* at 233.

[51][51] Analogous nationalistic feelings and the urgent need for enhanced national development are equally observed in the regulatory regime of post-independent Nigeria.

[52][52] See Afeikhena, J. "Privatisation of Public Enterprises in Nigeria: Expectations Illusions and Reality" in Ademola A. ed., *Economic Reform and Macroeconomic Management in Nigeria*, (Ibadan: Centre for Public-Private Cooperation, 1996) at 79.

service under regulation, was also observed.[53][53] The French experience is not far removed from the anxiety and apathy that has welcomed the Nigerian deregulation efforts. The fundamental question however remains, whether or not the entire process is premised on a legal framework capable, not only of assuring its success, but also of averting some of the negative consequences of deregulation. [54][54]

Economic Liberalisation Defined

Economic liberalisation is a principle, which is inexorably linked with deregulation and privatisation. The term liberalisation derives from the term liberalism. In its original sense, this philosophical doctrine regards the individual as a free moral agent and therefore the individual right of choice is sacrosanct. In the view of one writer:

> *Liberalism may be morally neutral in regard to the ends people chose for themselves, but it is not morally neutral in its view that such individual choice is desirable and must be safeguarded from unwarranted interference from the state.* [55]***[55]***

From this viewpoint, liberalism is a worldview and therefore ideological, and forming the basis for economic laissez-faire which economic liberalisation typifies. Again the legal regime forming the plank upon which the liberalisation process is anchored in Nigeria, requires an assessment that would reveal its adequacy or shortcomings.

Conceptual Conflicts.

The concepts of privatisation and divestiture, liberalisation and deregulation have been shown to present some confusion both in usage and application. They however manifest perspective reflections of the fundamental doctrines of free market capitalism.[56][56] Whether or not, these reflections have been taken into consideration in the policy and legal framework for the implementation of the Nigerian version of these concepts is a matter of substantial doubt. While commenting on the legal and policy framework for the first series of privatisation of some banks under the *Privatisation and Commercialisation Act*, [57][57]the problems associated with their inadequacies were expressed thus:

> *…more problematic was the fact that government policy reactions to the perceived deficiencies in the legal regime only created new problems. The first was the promotion of shareholder associations as a means of organising and mobilising shareholders to exercise their constitutional right to take active part in corporate decision-making. The second was in the concept of core investors by which a set of investors were to be given sufficient shares to enable them exert some level of control in the affected companies. This latter measure looked like a means of institutionalising minority control in a manner that could undermine the*

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[53][53] See Krieger, J. ed., op.cit, at 233.
[54][54] A detailed resume of the legal framework for deregulation and liberalisation is discussed infra in chapter 6.
[55][55] See Krieger, J. ed., *op.cit* at 238 for some detailed discourse on the origin and philosophical underpinning of the concept of liberalism.
[56][56] Afeikkena, J. *loc. Cit.*
[57][57] Formerly *Decree* No. 25 of 1988.

underlying assumptions of corporate democracy. [58][58]

It will later become obvious that these problems are not only still with us, but have assumed quite alarming dimensions that ought to attract legislative action. No such activity however, appears visible. Where some semblance of legislative coordination is perceived, they appear often ad-hoc, and without any well thought-out policies and implementation strategy. The method of deregulation adopted in Nigeria appears to target areas considered by government as necessary for improving its revenue profile and therefore fit for deregulation. The recent efforts in the downstream oil and gas sector are quite informative. [59][59]

Policy Inconsistency

Primarily, the mode adopted for the privatisation of public corporations under the regime of the Privatisation and Commercialisation Decree No. 25 of 1988 was through the valuation and offer of shares to the public for subscription through the instrumentality of the Securities and Exchange Commission (SEC), the Nigerian Stock Exchange (NSE), and designated Issuing Houses[60]. The Technical Committee on Privatisation and Commercialisation (TCPC) was the agency in charge of the scheme. The primary objective of resorting to the Stock Exchange was to take advantage of rules of listing and quotation requiring full disclosure of financial and other price-sensitive information in order to prevent an abuse of the privatisation process by those charged with the responsibility for executing them.[61] Both local and foreign investors were expected, from this approach, to have some confidence in the Nigerian privatisation scheme as it was seen to achieve broad egalitarian principles, a measure of restriction in unfair market practices, and some consistency in the policy framework within which the scheme was expected to thrive[62].

Another advantage of the 1988 regime of privatisation laws in Nigeria was that they were made to function within the purview of other pieces of legislation that regulated corporation law and practice such as the Companies and Allied Matters Act, 1990 (CAMA),[63] the Securities and Exchange Commission Act, 1988 (SECA)[64] as well as the laws and rules generally regulating the stock market. With the modest success recorded under the 1988 regime that witnessed the privatisation of several Banks in which the Federal Government held controlling equities,[65] it was hoped that this method would be

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[58][58] Owasanoye, B. and Yagba, T. *op.cit* at 12.

[59][59] The recently enacted Petroleum Products Pricing Regulatory Agency Act, 2003 appears to be more interested in petroleum products price fixing, rather than introduce market propelled policies that will open up the entire oil and gas sector. Contradictions are bound to emerge from this adhoc approach to liberalisation and deregulation, and in the law needs to be more pro-active in finding solutions.

[60] See section 4 (1) (a) –(n), Privatisation and Commercialisation Decree, 1988 highlighting the powers and functions of the Technical Committee on Privatisation and Commercialisation (TCPC).

[61] See Bolaji Owasanoye, "Legal Framework for Privatization of Banks in Nigeria" in I. A. Ayua and B. Owasanoye ed., **Privatisation of Government Owned Banks and the Issue of Ownership and Control** (Lagos: NIALS, 1996) pp. 11 and 12, for the expression of similar views on the privatisation of Banks under the regime of the 1988 Decree cited in n. 10 above.

[62] Ewubare, R. O., "Two sides of a Coin: A Comparative Assessment of Evolutionary Trends in the Regulation of Insider Dealing in the United Kingdom and the United States of America." (1995) 2 Lawyers Bi-Annual 45,discusses at length some of the principles of fairness and egalitarianism in the securities market.

[63] Cap. 59 Laws of the Federation of Nigeria (LFN), 1990 still remains the basic law regulating Companies Law and practice in Nigeria.

[64] Cap. 406 (LFN), 1990. This statute along with the CAMA in parts **XVI** and **XVII** provided a strong pedestal for the operations of the TCPC between 1988 and 1999.

[65] See J. O. Ekundayo, "Private vs. Public: Pre and Post Privatisation Appraisal of Performance in Privatised Banks in I. A. Ayua and B. Owasanoye (ed.) **Privatisation of Government Owned**

invigorated and sustained in an effort to build up investor-confidence and maintain some policy consistency in the privatisation efforts in Nigeria. The reverse regrettably appears to be the case.

In 1999, there appeared again, another fundamental shift in the privatisation policy. The legal regime for the scheme was not only completely overhauled, the agencies set up to implement the scheme equally witnessed a metamorphosis the impact of which is still reverberating in the investment world in Nigerian today. In the first place, the Public Enterprises (Privatisation and Commercialsiation) Decree[66] was promulgated to surplant the erstwhile Privatisation and Commercialisation Decree, 1988 without the latter being repealed. The 1999 Decree introduced two notable agencies or organs of privatisation in Nigeria namely: the National Council on Privatisation, and the Bureau of Public Enterprises. [67] These new agencies are now charged with implementing Nigeria's nascent privatisation scheme. The newly created National Council on Privatisation appears to constitute the policy formulation organ of government in the privatisation process. This is apart from providing general supervisory role over the new Bureau of Public Enterprises. This new organisation appears to envisage the removal of the direct personal involvement of the President of the Republic from the privatisation process without necessarily stifling his input into the scheme.

The "Core Investor" Syndrome.

A noticeable paradigm shift in the new dispensation however, is that Nigeria's privatisation now allows sale of shares of public enterprises by public issue or private placement. Section 2 of the 1999 Decree provides inter alia:

(1) "Subject to the provisions of section 11(f) of this Decree, an offer for the sale of shares of a public enterprise shall be by public issue or by private placement, as the case may be.

(2) Where the shares of an enterprise are not to be offered for sale by public issue of shares or private placement, the council may, approve that the shares be offered for sale through a willing seller and willing buyer basis or through any other means.

The new privatisation guidelines made pursuant to the provisions above now de-emphasises public issuance of shares of public enterprises through the stock exchange, and premiums the sale of shares through the so-called "strategic/core investor" option.[68] This new arrangement has not only lost the erstwhile advantages of a purely market based system of securities auction in the Nigerian privatisation process, but it has thrown up new problems in such areas as insider dealing abuses and other unfair market practices which appear to go on in large scale but apparently undetected[69]. There is therefore a need to create checks and balances in the privatization process

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Banks… cited in n. 15 supra showing a list of 12 government owned banks that have since been fully or partially privatised.

66 Decree NO. 28 of 1999 (now Act) of the Federal Republic of Nigeria.

67 See sections 9, 10, 11, 12, 13, 14 and of the Public Enterprises (Privatisation and Commercialisation) Decree, 1999 creating the National Council on Privatisation and the new Bureau of Public Enterprises.

68 The "strategic investor" approach has become fraught with danger for the investing Nigeria public as well as unwary foreign investors. The vast majority of the investing public has been excluded from the privatisation process thereby, and a number of new and sometimes unknown Nigerian and foreign companies have suddenly acquired the status of "core investor" in some specialized enterprises without any proof of prior expertise in these investment areas. The fear seem t be that these "core/strategic investors" are mere fronts for individuals with access to questionable sources of funding from within and outside Nigerian.

69 For some of the Controversies into which the new Bureau of Public Enterprises has been thrown see generally the Guardian of Tuesday 17th April, 2001. The usual excuse for the core investor option is that Nigerian Stock Exchange lacked the depth to handle such large unbundling of privatised securities at a time. The current bank recapitalisation has shown that this excuse is indeed suspect.

such that sharp practices by personnel and other compromises can be minimized. There is no reason why the BPE should not be subject to the overall supervision of the Securities and Exchange Commission; or a purely market based option not adopted for the privatization process; or even why the privatization scheme should be removed from the general application of the *Companies and Allied Matters Act, 1990* and the *Investment and Securities Act, 1999.* There are several unanswered questions that the operators of the scheme and the President alone can provide answers to. It is suggested that government should avoid the multiplication of agencies responsible for the privatisation scheme in order to ensure policy consistency as well as nurture a hard core of operational bureaucracy with a gradually improving level of competence in its activities.

PRIVATISATION OF THE DOWN STREAM OIL AND GAS SECTOR.

The privatization and deregulation of the downstream oil and gas is indeed the same as privatizing the operations of the NNPC or, in fact disaggregating it. It is a fact that privatisation and commercialisation have been late in taking root in the oil and gas industry. This has been due largely to the stiff resistance of labour unions and their members in that sector. The emerging liberalisation and deregulation war by the government against the Nigerian worker and the citizens especially in the down stream sector of the oil and gas industry, and the attendant instability arising from workers resistance to the economic implications of the new policy has created a new imperative for the Nigerian worker and organised labour[70].

The insistence by government to deregulate and liberalise the economy, in order to assure any measure of success with minimal suffering for the workers and the masses, must be built upon well articulated policies of of social security and pension schemes, unemployment benefits, job security or employee status, and the overall advancement of socio-economic and physical infrastructure.

SOME CONSTITUTIONAL IMPERATIVES AND THE PRIVATISATION SCHEME.

The Constitution of the Federal Republic of Nigeria, 1999 section 43 provides *that every citizen of Nigeria shall have the right to acquire and own immovable properties anywhere in Nigeria.* This right however is somewhat restricted by section 44(3) of the same Constitution which provides thus:

> *Notwithstanding the foregoing provisions of this section,The entire property in and control of all minerals, mineral-oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.*

The consequences of this and the combined effect of the Land Use Act, 1978 (which now forms part of the Constitution vide section 315(5)(d)) the proprietary rights over all oil and gas resources are vested in the Federal Government by some un-negotiated fiat. The fallacy in this position is that the same Constitution declares that Nigeria is a Federation.[71] The Nigerian Government takes absolutely for free oil and gas resources belonging to several rural communities in the Niger-Delta and then claims a divine economic right to deregulate the downstream sector in the guise of removing

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[70] The new Labour Ammendment Bill, 2004 currently in the National Assembly may just be a fallout of Government determination to wipe out the NLC

[71] See section 2 thereof.

subsidies.[72] Deregulation has been the prime excuse for privatization over the years and one can only hope that this excuse and its effects are not abused as we witness an endless spate of petroleum price increases that never seem to wipe out the bogus subsidies that the government continues to resurrect.

THE IMPLICATIONS FOR LABOUR.

A review of employee status in privatised and deregulated SOEs reveals that agencies charged with the responsibility of giving effect to these schemes have paid lip service only to the questions of job security adequate pensions, and unemployment benefits. Problems associated with adequate remuneration for workers in both the public and private sectors equally needs to be addressed[73].

Employee status in privatised public corporations and parastatals refer to the fundamental question of whether or not such employee have a legal right to be protected from unjustified redundancies, forced retirement and disengagement without adequate compensation and remuneration. The legal status of employment contracts are adequately addressed by the ***Companies and Allied matters Act***[74] (CAMA) and the **Nigerian Investment and Securities Act**, (ISA)[75] whenever matters relating to schemes of arrangement, mergers and acquisition of companies are in issue.

I have stated elsewhere,[76] the general rule of law that contracts of employment or personal services are not transferable to the new owners of a privatised company. The situation is worse in SOEs that are privatised 100 percent. In ***Re Bendel Line Co. Ltd***[77] the Court per Ayinde, J. affirmed the law thus:

> …*While a scheme for amalgamation of companies contemplates a transfer of properties and liabilities….it does not include rights and obligations which are not transferable …contract of service is one of such rights and obligations.*

The new management of a privatised company could balkanize the company by changing its names and objects and at the same time streamline its work force through forced retirement, disengagement and redundancy. Where however, a privatisation scheme is carried out within the scope of the CAMA, section 591 (4) (b)[78] thereof empowers the courts to award adequate compensation to employees whose jobs are thereby affected. It is suggested that an effective way of ensuring job security for privatised SOEs is through a well articulated scheme of employee participation in the privatisation process. This will cure some of the perceived ills in the scheme and give assurances to labour. This would involve a complete liberatlisation of workers access to

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72 One wonders why the government would still cling to this outdated principle of capitalist exploitation when it could have provided the legal framework for the oil companies to use their own resources to negotiate exploration contracts with the oil bearing communities, pay adequate royalties to them, and pay assessed taxes to the Government?

73 The government has continued to renege on the payment of the scheduled 25 percent wage increase for workers for over three years now. Even the renegotiated 12.5 percent increase accepted by government has not been implemented.

74 Cap. 159, Laws of the Federation of Nigeria (LFN) 1990.

75 Formerly Decree No. of 1999

76 See Akpotaire Vincent, Nigerian Company and Securities Law, (Akure: Sylva Publications, 1999). Pp. 280 –281.

77 (1979) 5 FRCR 19.

78 The general provisions dealing with mergers and take- overs in the CAMA have now been replaced by the provisions of the ISA, 1999. See generally, section of the Investment and Securities Act 1999.

funds for the acquisition of shares in privatised SOEs[79]. In other words, the current privatisation scheme which has utilized the "private placement' option in the valuation and sale of shares of SOEs, has created some myth in the selection process of the 'strategic or core investor "in such organisations.[80]

Pensions and Unemployment Benefits

Several of the SOEs slated for privatisation operated their workers pension under the **Pensions Act[81].** The erstwhile status of Nigeria's pensions administration relative to workers leave a sour taste in the month. The status of the workers upon privatisation is an unsettled question, which the protagonists and operators of the privatisation exercise need to explicate. Any government in Nigeria has never considered payments of unemployment benefits. While the Nigerian workers have been subject of various contributory schemes deductible from their wages at source, no government has considered the necessity of setting up any special scheme for the provision of unemployment benefits.

The disturbing question in the entire scenario is the efficacy of the law in ensuring that the Nigerian public and honest investors are not short-changed by an elaborate mismanagement of the government 's privatisation efforts. What role has the SEC played or failed to play in this unfolding scenario? The SEC is empowered among other responsibilities, to register securities to be offered for subscription or sale to the public; review, approve, and regulate mergers, acquisitions and all forms of business combinations; prevent fraudulent and unfair trade practices relating to the securities industry, and to disqualify unfit individuals from being employed anywhere in the securities industry. Why has the SEC been unable to use its wide ranging powers, and the various sanctions contained in the Investment and Securities Act of 1999 (ISA) in ensuring that sanity and some level of confidence is restored to the Nigerian privatisation project? These are unanswered questions agitating the minds of local and foreign investors interested in the privatisation scheme.

It is proposed that the SEC be stimulated to use effectively its policing powers over the securities market, to ensure that other primary agencies such as the BPE and the National Council on Privatisation carry out their duties without engaging in any form of market rigging or unfair market practice of any kind. It is imperative that some officials with less than impeccable records in the management of the privatisation scheme are ushered out using the instrumentality of the ISA. This way, some level of competence and sanity will be introduced into the privatisation process. Finally, it is suggested that the President 's overview powers over the BPE need a review. It is doubtful whether the President, with all his pressing political, state and international engagements, is able to monitor the activities of officials of the BPE. These powers could be effectively ceded to the Securities and Exchange Commission. These confidence-building measures should not only remove doubts from the minds of investors and the Nigerian public, but invoke the acclaim of the international community in the Nigerian economy generally.

PROPOSALS FOR REFORMS

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79 See the recent report in the Guardian Newspaper of Monday, 12th of August, 2002 at page 1, where the National Assembly queried the procedure adopted by the B. P. E. for privatising the NICON Insurance Corporation, Nigeria's single insurance underwriter.

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81 Cap 346 1990.

The privatisation of the NNPC will indeed be a test case for organized labour in Nigeria. In the first place, the NNPC Group comprises several autonomous and semi-autonomous corporations that will invariably become separate legal entities through privatization. The Labour Unions must now reposition themselves for an active participation in the privatization process in a manner beneficial to its members. The attitude of organized labour to privatization should therefore be one of constructive engagement of Government agencies charged with the deregulation exercise. This must be with the objective of ensuring adequate assessment of remunerations for workers. Furthermore Government needs to be told that the privatisation of the downstream sector of the oil and gas industry is not just enough, the upstream sector also deserves deregulation and privatisation. The Government must not assume its sacrosanct right to freely access our natural resources without a corresponding cost to them. The principles of deregulation, in order to succeed, must be made to cut across all strata of our national life.

Industrial Democracy.

A careful review of the existing legal framework for privatization does not contain any provision reserving any percentage of the shares of the privatizing firm for members of staff, either individually or as a union. The nearest thing to this may be found in the Schedules to the *BPE Act,* 1999 which reserves 20% of such shares for Nigerians. It is proposed that organized labour should introduce a Private Bill to the National Assembly amending the Act to reserve 10% of the shares of a privatizing enterprise for its staff members accessible individually or as a group. The branch unions in these enterprises can set up trust funds with management boards having responsibility to acquire and manage the 10% holding. This will also ensure that worker's representatives are on the boards of these firms. In order to ensure a stable industrial relation, labour should engage in renegotiation of wages and salaries in such a way that workers can absorb shortcomings in the provision of basic social amenities.

Finally, it is hoped that an active participation by labour in the privatization process will enable them negotiate the status of workers in such privatizing companies. Those not to be retained must have the option of their full wages up to retirement age and their pensions duly assessed and paid. Privatised companies on the other hand, having thereby become companies registered under the CAMA, must renegotiate wages and pensions with labour in order to harmonize their activities with private sector standards and rates.