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PRIVATIZATION OF STATE PARASTATALS: THE NEED FOR THE PROMOTION AND PROTECTION OF THE PUBLIC INTEREST IN THE PROCESS OF PRIVATIZATION

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DECLARATION

I, NDUATI JOAN herby declare that the work submitted herein to Strathmore University, is my original work and has not been previously to my best knowledge, been submitted to any other institution for the award of a degree or a diploma. All work relied on hereunder has been accordingly referenced.

SIGNED: JWN

Date: 15th February 2024

This dissertation has been submitted with my approval as Supervisor.

SIGNED:

Dr. Fancy Chepkemoi Too

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LIST OF ABBREVIATIONS

RVR- Rift Valley Railways Concession

PIC- Public Investment Committee

KQ- Kenya Airways

M&A- Mergers and Acquisitions

PPP's- Public-Private Partnerships

SIA- Social Impact Assessments

WASREB- Water Services Regulatory Board

LIST OF CASES

STATURORY INSTRUMENTS

The Constitution of Kenya 2010

The Privatization Act 2023

Sessional Paper no. 10 of 1965 on African Socialism and its Application to Planning in Kenya

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ABSTACT

The research explores the regulatory framework surrounding privatization in Kenya, primarily governed by the Privatization Act, and highlights its significance in economic policymaking. It delves into the imperative of safeguarding public interest throughout the privatization process, examining elements such as transparency, accountability, social welfare, and economic stability. Emphasizing the importance of transparency and public participation, the paper argues for alignment of privatization policies with societal goals. Additionally, it scrutinizes the role of regulatory frameworks in mitigating adverse effects on vulnerable populations and preventing monopolistic practices post-privatization. Through comparative analysis and case studies, the study identifies international best practices and lessons to inform policymakers and stakeholders, aiming to manage challenges and ensure public interest protection during privatization. Ultimately, it advocates for a comprehensive approach prioritizing citizen welfare, sustainable economic development, and principles of justice and equity in privatization endeavours.

CHAPTER 1

I. BACKGROUND

Privatization is the alteration of the status of a business or industry from a public control of ownership to a private control of ownership.[1] Nationalization entails the governmental acquisition of a privately owned corporation, typically with or without compensation, aimed at averting unfair exploitation, minimizing extensive labour layoffs, and ensuring equitable distribution of funds derived from national resources.[2] This research paper will specifically deal with privatization.

Privatization of the public sector has been one of the defining policies of the world economy dating back to the 1970's.[3] The neoliberal theory that "the market" is more rational and better able to manage enterprises is what has facilitated the sale or even transfer of state-owned utilities and monopolies to the private sector.[4] The origin of the term privatization is attributed to Peter Ducker but Germa Bel disputes this.[5] Government is by nature an awful manager and therefore has no other option but to allow the civil servants most of the times decide on important issues that ought to actually go down in Parliament.[6] In the sphere of representative democracy, elected members are responsible for protecting the public interests since they were nominated by the electorate to represent their personhood.[7]This obligation entails a determination to genuinely consider and serve the public interests through protecting, developing, and safeguarding the interests of the public.[8] Thus focusing on the core values of a democratic rule and represents an obligation for all elected officials to serve their constituents' interests.[9]

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[1] Webster's Third New International Dictionary of the English Language Unbridged, p. 1805

[2] Black's Law Dictionary 2nd ed

[3] Wills M, Roots of Privatization, JSTOR Daily, 2018.

[4] Friedman M. Capitalism and Freedom. Chicago Press, 1962

[5] Bel, Germá. 2006. "Retrospectives: The Coining of "Privatization" and Germany's National Socialist Party." *Journal of Economic Perspectives*, 20 (3): 187-194.

[6] Drucker P, Age of Discontinuity: Guidelines to our Changing Society William Heinemann Limited, London, 1968, p 229

[7] Dahl, Robert A. "Polyarchy: Participation and Opposition." Yale University Press, 1971.

[8] Pitkin, Hanna Fenichel. "The Concept of Representation." University of California Press, 1967.

In democratic governance, elected officials are entrusted with the responsibility to serve the best interests of their constituents, embodying the concept of popular sovereignty where power originates from the people. One key reference supporting this assertion comes from the seminal work of political philosopher Jean-Jacques Rousseau. In his treatise "The Social Contract" (1762), Rousseau emphasizes the idea of the social contract, whereby individuals in a society willingly give up some freedoms to a governing authority in exchange for protection of their fundamental rights and interests. This underscores the foundational principle that elected officials derive their legitimacy from the consent of the governed and are duty-bound to act in accordance with the will of the people. Freedom, equality, and the government's role in protecting the rights and liberty of citizens are some of the themes addressed in "The Social Contract." Rousseau argues that real freedom can be realised only through the effect of contributing to the participation in the creation of laws that express the collective will.

The same also detests forms of governments that are based on inequality and suppression, preferring a democratic state in which every citizen can have a direct say in the decision-making framework of politics. Rousseau's ideas have shaped political thought and helped the development of modern democratic theory. His theory of the social contract is still discussed among scholars, politics makers, and activists as a way of clarifying the rationale of just power and the attitude that citizens should have in the democratic state. Governments in general are not a doer hence there should be an adoption of a systematic policy of using other non-governmental institutions for the actual doing i.e. for execution and performance of operations.[10] The role of governments should be facilitation and regulation, leaving operational duties to non-governmental entities. The research notes that it is crucial to address the imbalance that occurs during the privatization process, and the practicality of these measures that are in place for one can have all the rules and regulations but if one does not implement them or come up with a framework to ensure that they are implemented then it is all null and void.

Additionally, even in privatized industries, regulatory agencies tasked with oversight may be influenced or controlled by powerful interests. This can result in regulatory capture, where regulatory agencies often become captures by the industries that they are supposed to regulate thus leading to policies that serve the interests regulated firms rather than the public.[11]

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[9] Manin, Bernard. "The Principles of Representative Government." Cambridge University Press, 1997.
[10] Drucker, Age of Discontinuity, William Heinemann Ltd. 1969. 234

Parastatals[12] were first established in Kenya by the colonial government and they controlled things that the private sector could not be able to provide.[13] The need for privatization is due to the failure of the state ,as the majority shareholder, of these enterprises to motivate businesses so that they can see and realise the competitive business standards.[14] In Kenya, after independence the establishment of the parastatals was driven by a national desire to; promote foreign investments through joint ventures, Redress regional economic imbalances, Promote indigenous entrepreneurship, Accelerate economic social development, Increase Kenyan Citizen's participation in the economy.[15]

Government and people in government should not run parastatals they should leave that duty to non-governmental people for they should focus more on the facilitation and regulation of businesses and ensure that the parastatals are doing what they ought to do[16] The two lending agencies in 1980, World Bank and IMF urged the Kenyan Government to adopt systems that would help reduce the government's participation in most activities.[17] The government seeks to privatize some selected services and give priority to the local investors rather than the foreign investors[18] hence the enactment of the Privatization Act of 2005 which seeks to involve the private sector in order to improve on the public services.[19]

For example in Kenya the privatization[20] of Water Services has resulted in the private sector focusing more on the provision of its services in the urban areas due to the large amounts of profits gained and since the profits are guaranteed.[21] The Pareto efficiency, an economics

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[11] Stigler, George J. "The Theory of Economic Regulation." The Bell Journal of Economics and Management Science, vol. 2, no. 1, 1971.

[12] Parastatals can also be called, state corporations or semi-autonomous government agencies. See Report of The Presidential Taskforce on Parastatal Reform, presented to His Excellency Hon. Uhuru Kenyatta, CGH. President and Commander-in-Chief of the Defence Forces of the Republic of Kenya, 2013.

[13] See Grosh Supra Note 3 at 11

[14] Estrin S, State Ownership, Corporate Governance and Privatisation, in Corporate Governance, State owned Enterprises and Privatization, Paris, 1989

[15] Sessional Paper No. 10 of 1965 on African Socialism and its application to Planning in Kenya

[16] Report of the Presidential Taskforce on Parastatal Reforms

[17] cline of the sector, as Kenya's produce has not competed effectively with foreign produce. See Matin J. Keng'ore, Why We Should be Wary of the World Bank, IMF, E. APR. STANDARD (Kenya), Oct. 1, 2001, at 7

[18] See Muna Wahome, World Bank Goes Easy on Privatization, Daily Nation (Kenya), Feb. 18, 2003; see also Tread Softly on Parastatals, Daily Nation (Kenya), June 20, 2003; Go Slow on Privatization, Daily Nation (Kenya), June 19, 2003.

[19] Privatization Act (2005) Cap 2 Kenya no. 2 of 2005.

[20] a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation but excludes sale of new shares to existing shareholders through a rights issue or any balance sheet reorganization which may lead to dilution of the percentage of shares held by a public entity. See the Privatization Act Cap 485 no. 2 of 2005.

[21] Change Water Act to Encourage Investors, Daily Nation (Kenya), May 16, 2003.

concept that suggests that an allocation of resources is an Pareto efficiency if no one can be made better off without making someone else worse off.[22] When state-owned enterprises are privatized, they transition from entities accountable to the public through democratic processes to entities primarily accountable to shareholders and profit motives. This shift in accountability structures can diminish transparency and weaken mechanisms for public oversight and scrutiny. Without robust accountability mechanisms, privatized entities may prioritize profit-maximization at the expense of broader public interests.[23]The issue here is not whether an enterprise is held privately, or it is state-owned the issue is whether the managers that are put in place will be able to act in the interest of the public to promote and protect the public interest.[24]

Although the privatization process is carried out by the privatization commission established under section 3 of the Privatization Act.[25] The interest group will be created to sanction the sale of the state-owned enterprise, the interest group needs to be put in place so that it can ensure that if the state-owned institution is a critical industry for example our nation Airline, Kenya Airways, the Kenya Ports Authority or even a hotel like Hilton,[26] is not sold to foreign investors but to local investors. Another importance of the interest group is to also ensure that the state-owned institutions are not sold at unreasonably high prices so that the government can maximise on the profits and not too low but just the right price to ensure that the state-owned enterprise is sold for what it is worth. The interest group will also ensure that the state-owned corporation is sold to someone who is private in that they not a part of the government, hence they should not be a member of the executive arm nor the legislative arm nor the judicial arm of government. this interest group will also ensure that the process of privatization is not only concerned with the government making huge profits but that also the people's public interests are promoted and protected.

[22] Pareto, V. Manual of Political Economy. Oxford University Press. 2014.
[23] Dannin, E. "Privatization and the Public Interest: Conceptual Confusion, Political Necessity, Democratic Control." *Administrative Law Review* 48, no. 2 (1996).
[24] Goodman J and Loveman G, Does Privatization Serve the Public Interest? Harvard Business Review,1991
[25] The privatization Commission is established as a body corporate. See section 3 of the Privatization Act CAP 485 no. 2 of 2005.
[26] Countries also limit foreign investments in some industries such as airline and telecommunication for it is considered risky for them to be in the hands of the foreign investors.

1.1 STATEMENT OF PROBLEM

Neo-classical economists[27] argue that policies favouring privatization, despite potentially violating socio-economic rights and the standard of living of the public, are justified by the net gain they generate.[28] They contend that the benefits accruing to shareholders outweigh the losses incurred by workers and other stakeholders and this is considered to be beneficial since it is thought that those who gain more can compensate those who lose and still be left with more.[29] However, this perspective fails to prioritize the broader public interest, as it primarily benefits a select few. To address this imbalance, it is crucial to embed considerations of public interest within the privatization process itself, rather than as an afterthought. The study's primary objectives involve addressing threats to public interest in privatization processes by reviewing legal and regulatory frameworks, and proposing regulatory frameworks to enhance protection and promotion of the public interest throughout these processes.

1.2 RESEARCH OBJECTIVES

1. Explore the legal framework governing privatization while identifying key statutes regulations and policies guiding the privatization process.
2. To investigate if the legal safeguards in place maintain quality and accessibility of services during privatization.
3. To investigate whether the legislative arm of government sufficiently undertakes it role when it comes to the privatization process in ensuring public interest is promoted.
4. To provide recommendations that will improve the protection and promotion of public interest during the process of privatization.

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[27] Neoclassical economics is a broad theory that focuses on supply and demand as the driving forces behind the production, pricing, and consumption of goods and services. It emerged in around 1900 to compete with the earlier theories of classical economics. See Kenton W, Neoclassical Economics: What it is and why it is Important, Investopedia, 2023.

[28] This is referred to as the Kaldor-Hick's efficiency. See Hicks J, The Valuation of the Social Income, Econimica, 1940, p 105. See also Kaldor N, Welfare Propositions of Economics, and Interpersonal Comparisons of Utility, Ecomonica, 1939, p 549.

[29] Hicks, The Valuation of the Social Income, p 111 and Kaldor, Welfare Propositions of Economics and Interpersonal Comparisons of Utility, p 550

1.3 RESEARCH QUESTIONS

1. What is the current legal framework governing the privatization process?
2. How does the privatization process in Kenya ensure that public interest is protected and promoted?
3. Is the involvement of the legislature during the privatization process adequate ensure promotion and protection of the public interest?
4. What legal recommendations are necessary for fostering public interest during the privatization process?

1.4 HYPOTHESIS

The privatization of state parastatals raises concerns regarding the promotion and protection of the public interest throughout the privatization process. Despite the purported benefits of privatization, such as increased efficiency and competition, there exists a significant risk that the privatization of state-owned enterprises may neglect the broader societal welfare in favour of narrow economic interests. This is evidenced by the potential for privatization to lead to reduced access to essential services, loss of jobs, decreased transparency and accountability, and heightened inequality within society. Therefore, without adequate safeguards and regulatory mechanisms in place, the privatization of state parastatals may fail to prioritize and safeguard the public interest, ultimately undermining the intended benefits of privatization and potentially exacerbating socio-economic disparities.

1.5 JUSTIFICATION OF STUDY

Privatization of state-owned institutions has been on the rise. For decades governments around the world have increased their activities in that the magnitude and also the scope of the activities that the government is required to perform have been on the rise.[30] Hence in order to reduce the number of activities performed it opts for privatization which is good for now the government can only focus on facilitation and regulation of businesses they should leave the duty of running businesses to others more preferably non-governmental people.[31]

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[30] Goodman and Loveman, Does Privatization Serve the Public Interest? Harvard Business Review. 1991.

The neglect of public interest during privatization can result in significant advantages for shareholders while detrimentally affecting the broader population. This scenario often leads to various forms of corruption, misconduct, and a breach of trust between the government and its citizens. The current body of scholarly literature primarily focuses on analysing the outcomes of privatization after its completion, thereby overlooking the crucial aspect of safeguarding public interest throughout the privatization process itself.

Moreover, there is a noticeable lack of emphasis on prioritizing local investors over foreign ones in existing academic discourse. Additionally, the exclusion of all branches of government, rather than solely the executive, from involvement in privatization is an aspect that has received limited attention in scholarly works. To address these gaps, this study endeavours to provide comprehensive insights into the promotion and protection of public interest at every stage of the privatization process. By delving into these overlooked aspects, the research aims to offer valuable guidance for policymakers and practitioners. Ultimately, the study seeks to contribute to the development of more effective and equitable privatization strategies that prioritize the interests of the public and promote sustainable economic development.

1.6 LITERATURE REVIEW

1.6.1 On the issue of privatization and public interest

The ongoing academic literature involving privatization and public interest all discuss about things to do to ensure that the public interest is protected and promoted after the process is done and now the state-owned enterprise is now privately held.[32] The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya discusses how the initiatives adopted in order to make parastatals more efficient are inadequate and will not realize the intended objectives unless the chief executives of parastatals are hired on a competitive basis, given more autonomy and the government is committed not only to designing performance contracts that set realistic standards, but also enforcing them strictly. Mwaura K goes on to

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[31] See Report of the Presidential Taskforce on Parastatal Reforms, 2013.

[32] Mwaura K, The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya, Fordham International Law Journal, vol 31 issue 1, 2007.

discuss how there is a need to streamline the multiple regulations that govern parastatals and reform the corporate regulatory framework of the private sector to raise standards of corporate governance and, as a result, ensure that the privatized services are managed prudently.

Authors like Goodman B and Loveman G[33] argue that when it comes to privatisation and the public interest it is not a question of whether an institution will promote and protect public policy based on whether the institution is private or public but rather on the conditions that the managers will be able to work best in to promote and protect the public interest. Ensuring that the managers are up to task is to ensure that the chief executives of parastatals are hired on a competitive basis, give more autonomy to them and that the government is committed not only to designing performance contracts that set realistic standards, but also enforcing them strictly. The government should not run them let others run them.

When it comes to the promotion and protection of the public interest it should not only be applicable in the end after the privatization process has already happened but that public interest should be promoted and protected even during the process of privatization. For if during the process public interest is promoted and protected then it can be much easier to ensure that even at the end when the parastatal is now a private entity when it comes to its function it will carry them out in a way that the public interest is upheld.

1.6.2 On whether the involvement of the legislature during the privatization process is adequate ensure promotion and protection of the public interest.

The executive arm of government specifically the treasury is seeking to exclude parliament from approving the sale of state-owned enterprises, the treasury claims that if the parliament is excluded then it will shorten the approval process for the sale of the government assets.[34] Previously before this bill the Privatization Act stated that the parliament must approve before a state-owned enterprise is privatized. In that the cabinet secretary of the cabinet is required to submit a report in form of a sessional paper on a privatization proposal approved by the cabinet to the national assembly. This bill will offer more powers to the executive specifically the treasury when it comes to the sale of the parastatals.

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[33] Does privatization serve the public interest, Harvard Business Review, 1991

[34] Muiruri K, New Bill eliminates Parliament's nod in sale of Parastatals, Business Daily, 2023

The bill proposes that the cabinet secretary of the treasury is supposed to head the privatization process, identify and also include entities that he sees fit to take over that state-owned company that is up for sale.[35] Overriding the privatization debate scholars disagree on the proper role of government in a capitalistic economy.[36] The view is that the government is an unnecessary and costly drag on an otherwise efficient system, critics view government as a crucial player in a system in which efficiency can be only one of many goals. The new bill also state that the treasury will approve the sale of the parastatals together with the board of the privatization authority.[37] It is very easy for this process to not promote and protect the private interest for if there is no one representing the voice of the people then how can we be sure that the executive will promote and protect the peoples public interests.[38] The people of Kenya elect representatives for a reason and the reason is to ensure that their voices are heard, and one cannot simply sell the states, assets that belong to the people without considering the people's views and how are these views considered? By the representation of the parliament in such proceedings.

Ken Gichanga and economist at Mentoria Economies gives his view on this where he argues the parliament cannot be excluded from the approval process of the sale of the state-owned parastatals for the parliament acts as the voice of the people and not just the people of a certain area but the people of Kenya for each and every Kenyan is represented in the parliament.[39] The privatization process which involves the conversion of public assets to private assets means that the assets that once belonged to the people since the assets belonged to the state will no longer belong to the people of Kenya but rather to a specific group of individuals. Hence the privatization process and approval cannot be left entirely to the executive, the people need to be represented and to ensure that they are represented then the parliament need not to be excluded in the approval process for the sale of government, simply because the people need to be represented and the fact that they will be represented by the people that they chose means that their interests will be represented and thus in turn their public interests will be promoted and protected.[40]

1.7 METHODOLOGY

[35] Muiruri New Bill eliminates Parliament's nod in sale of Parastatals, Business Daily, 2003
[36] Goodman and Loveman, does privatization serve the public interest? 1991
[37] Muiruri New Bill eliminates Parliament's nod in sale of Parastatals, Business Daily, 2003

[38] Gichinga K, Mentoria economics, 2023.
[39] Muiruri K, New Bill eliminates Parliament's nod in sale of Parastatals, Business Daily, 2023.
[40] Gichinga K, Mentoria economics, 2023.

The nature of research in this study will be a doctrinal legal method. The main sources of data being secondary sources such as articles both self-published articles and newspaper articles, chapter in books, journals, books, and reports. The study will also use primary sources such as case laws and statutes such as the Privatization Act and the State Corporations Act.

The methodology focuses on exploring the intricacies and nuances of privatization and its implications to the public it will also enable a comprehensive understanding of the underlying factors and dynamics involved in the privatization of state-owned enterprises.[41] This will be achieved by reading primary materials and getting acquainted with the materials to understand the privatization field more. Thereafter the study will turn to secondary sources to strengthen and expound more on what the primary materials stated.

This methodology is suitable for it remains a foundational approach in legal scholarship and practice due to several compelling reasons such as, its precision and clarity. The doctrinal methodology emphasizes ~~on~~ clear and precise analysis of legal material which provides straightforward interpretation and application of the law which is essential for legal scholars in navigating and understanding complex legal issues.[42] Despite this legal methodology being criticized for its conservative nature it also plays a significant role in legal reform and policy development. It does this by identifying gaps and inconsistencies that exists in the legal framework thus the method informs discussions on legislative reform, judicial decision-making, and the development of new legal principles.[43]

1.8 CHAPTER BREAKDOWN

Chapter one of the study will be this research proposal which will serve as the introduction to this paper, as it details, among others, the background, research objectives and questions that the study will answer in subsequent chapters of the paper and the justification of the study, thus setting the foundation for the subsequent chapters.

Chapter two will entail the theoretical framework, and will use two theories to back up this study and show the relevance of the study.

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[41] Bhattacharyya, S. Privatization: Theoretical approaches and international case studies. Routledge. 2018.
[42] Glanville, L. Legal research, analysis, and writing. Wolters Kluwer Law & Business. 2015.
[43] Burton, M., Kagan, R. A., & Lehnert, K. Introduction to law and legal reasoning. Cengage Learning. 2015.

Chapter three will entail an outline of what privatization is, an examination of the current privatization process in Kenya by delving into relevant statutes and legislation shall undertake the investigation of whether the legal framework in place maintains quality and accessibility of services during the process of privatization.

Chapter four will then undertake to examine the role of the legislative arm in the process of privatization, and whether the body is sufficiently undertaking its role in the process of privatization to ensure that societal interests are promoted and protected. Furthermore, by examining the role of the legislative arm in the privatization process the study will seek to explain why it is important that the power be left to it and not to be conferred to the executive, by showing the risks and perils if the executive specifically the treasury is issued with the responsibility of overseeing the privatization process.

Chapter five which will be the final chapter of the study will provide conclusions and findings that will be derived from the study and thus seek to recommend a better approach to the privatization process to ensure that the public interest is promoted and protected.

CHAPTER 2

II. THEORETICAL FRAMEWORK

2.1 Introduction

This study specifically this chapter will focus and discuss two theories: the Chicago Theory and the Public Choice Theory. In the realm of political science and economics, the Chicago Theory and Public Choice Theory stand as pillars in understanding the complexities of decision-making processes within societies. Rooted in distinct intellectual traditions, these theories offer insightful perspectives on the role of individuals, institutions, and incentives in shaping public policy and governance. This chapter delves into the foundational principles, key tenets, and evolving discourse surrounding the Chicago Theory and Public Choice Theory, elucidating their implications for modern governance and policy analysis.

2.2 THE CHICAGO THEORY

The origin of the theory is the Chicago School of Economics which is a neo-classical economics school which believes that free markets best allocate resources in an economy which has minimal or even no government intervention in order to promote economic prosperity.[44] Regulations are primarily acquired by the industry and it operates for the sole purpose of that particular industry. For example, the Water Services Regulatory Board (WASREB).[45] But in as much as there are regulations and regulatory bodies[46] often these regulatory bodies end up being influenced by the same institutions that they regulate and, in some case, these regulatory bodies can place regulations that favour the industries thus defeating the whole purpose of regulating the institutions.

A key argument of the Chicago theory is the belief in minimal government intervention in the economy. The theory acknowledges the importance of certain government functions such as enforcing contracts, protecting property rights, and providing public goods.[47] However, the

[44] Ganti A, what is the Chicago School of Economics? Definition and Aspects, Investopedia, 2021.

[45] A parastatal established under the Water Act 2007 for sole purpose of regulating the Water industry to ensure that the interests and rights of the consumers are protected.

[46] Independent government bodies established by a legislative act to set standards in a specified field or activity.

[47] Stigler, J. "The Theory of Economic Regulation." The Bell Journal of Economics and Management Science. 1971.

theory advocates for limiting government intervention beyond these essential roles. The theory argues that excessive regulation, such as price controls, entry barriers, and licensing requirements, can stifle innovation, entrepreneurship, and competition, leading to suboptimal outcomes.[48]

Chicago economists highlight the potential for unintended consequences when governments intervene in markets. They argue that regulations intended to correct market failures or address perceived injustices often create new problems or exacerbate existing ones. For example, price controls may lead to shortages or surpluses, while regulations aimed at protecting incumbent firms may stifle competition and innovation.[49] Chicago economists highlight the concept of spontaneous order and market process as a tool for the harmonization of economic activity. They hold the view that the market, by means of the private actions of millions of individuals on their own behalf, can generate complicated and efficient results without a central authority or direction.[50]

In summary, the Chicago School's advocacy for minimal government intervention in the economy is grounded in its belief in the efficacy of free markets, the limitations of government knowledge and ability to regulate efficiently, and the potential for unintended consequences arising from regulatory interventions. These arguments have been influential in shaping economic policy debates and have informed discussions on the appropriate role of government in market economies.

Another key argument is that Chicago economists emphasize the role of dynamic competition in driving innovation and efficiency in markets. They argue that even in industries where monopolies appear to exist temporarily, competitive pressures incentivize firms to innovate, improve products, and lower costs to attract consumers. This dynamic process ultimately benefits consumers and limits the ability of monopolies to extract excessive profits over the long term.[51] The Chicago economists tend to be sceptical of claims about the harmful effects of monopoly power. They argue that competitive forces often constrain firms from exercising monopoly power in the long run, and they emphasize the importance of dynamic competition in driving innovation and efficiency in markets.[52]

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[48] Friedman, M. "Capitalism and Freedom." University of Chicago Press. 1962.
[49] Coase, R. "The Problem of Social Cost." The Journal of Law and Economics. 1960.
[50] Hayek, A. "Individualism and Economic Order." University of Chicago Press. 1948.
[51] Schumpeter, A. "Capitalism, Socialism and Democracy." Harper & Brothers. 1942
[52] Bork, R. "The Antitrust Paradox: A Policy at War with Itself." Basic Books. 1978.

In summary, Chicago economists' scepticism toward claims about the harmful effects of monopoly power is grounded in their belief in the resilience of competitive forces, the importance of innovation, and the limitations of regulatory intervention in fostering efficient market outcomes. While they acknowledge the potential for market imperfections, they argue that dynamic competition and entrepreneurial activity are more effective mechanisms for promoting consumer welfare than government intervention in most cases.[53]

Critics argue that the Chicago Theory's scepticism towards market power and reluctance to intervene overlooks the potential for market failures, such as monopolies, oligopolies, and externalities. Market failures occur when the allocation of goods and services by a free market is not efficient or does not lead to socially desirable outcomes.[54] Studies show that monopolies can indeed distort markets, restrict competition, and harm consumer welfare by setting prices above competitive levels. Without adequate regulation or antitrust enforcement, these market structures can lead to allocative inefficiency and reduced consumer surplus.[55] While the Chicago School's emphasis on free markets and limited government intervention has influenced economic policy debates, critics argue that it tends to underestimate the significance of market failures and the potential benefits of targeted regulation to address them. Critics also argue that while the Chicago School's emphasis on free markets and deregulation has shaped economic policies in many countries, critics argue that it has also contributed to financial instability and crises by neglecting the importance of effective regulation and oversight in financial markets.[56]

In respect to this study the Privatization Programme which is established under the privatization act of 2005 was established in order protect privatization systems in Kenya and ensure that they do exactly as the law says, but this programme is formulated by the Privatization Committee and is approved by the Cabinet, and this fact clearly shows that the cabinet has power over the programme and thus might force the programme to place regulations that favour the cabinet thus defeating the whole purpose of their existing a programme in the first place. Arthur Bentley and David Truman state that interest groups

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[53] Stigler, J. "The Theory of Economic Regulation." The Bell Journal of Economics and Management Science. 1971.

[54] Tirole, J. The theory of industrial organization. MIT Press. 1988.

[55] Posner, R. The social costs of monopoly and regulation. Journal of Political Economy. 1975.

[56] Rajan, R. Fault lines: How hidden fractures still threaten the world economy. Princeton University Press. 2010.

should be established for they are important when it comes to the formation of public policy.[57] While the intentions of creating a regulatory body to regulate the institutions is noble the monopolistic and bureaucratic system in which government staff work in is what make the institutions inefficient. The system is the major problem and not the workers.

The Chicago theory helps this study in that the theory shows that regulation by any government does not protect the public hence in turn does not protect the public interest of the people the government has the power hence can get a sense that it can do anything it wants to so even when it comes to the privatization process since the parastatals are state-owned then the government might feel as if they have the right to sell it at whatever price that they want no matter the effect their actions have on the peoples' public interest.

2.3 PUBLIC CHOICE THEORY

The Public Choice Theory was developed primarily by James M. Buchanan and Gordon Tullock.[58] Public choice theory is a framework that applies economic principles to the analysis of political decision-making.[59] This theory posits that individuals within government institutions act in their self-interest, just like actors in the private sector.[60] They respond to incentives, seek to maximize their utility, and often engage in rent-seeking behaviour, where they pursue benefits for themselves at the expense of societal welfare.[61] Privatization, within the framework of public choice theory, can be understood as a response to the perceived inefficiencies and rent-seeking tendencies prevalent in government-run enterprises. This study by use of the public choice theory will demonstrate the potential for rent-seeking behaviour among bureaucrats, where they seek to maximize their own welfare or that of their department at the expense of societal welfare.

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57 Posner R, Theories of economic regulation, The Bell Journal of Economics and Management Science, Autumn, 1974, Vol. 5, No. 2, 1974.

58 Buchanan, J. , & Tullock, G. The Calculus of Consent: Logical Foundations of Constitutional Democracy. University of Michigan Press. 1962.

59 Buchanan M., and Gordon T. "The Calculus of Consent: Logical Foundations of Constitutional Democracy." University of Michigan Press, 1962.

60 Buchanan M., and Gordon T. "The Calculus of Consent: Logical Foundations of Constitutional Democracy." University of Michigan Press, 1962.

61 Buchanan M., and Gordon T. "The Calculus of Consent: Logical Foundations of Constitutional Democracy." University of Michigan Press, 1962.

These behaviours can manifest in various forms, such as lobbying for increased funding, resisting organizational changes that may threaten their positions, or engaging in patronage and favouritism.[62] The public choice theory will offer this study with insights into the design and outcomes of public policies. It highlights the importance of understanding the incentives facing policymakers and the potential for unintended consequences, such as regulatory capture or special interest influence.[63]

While public choice theory has gained considerable attention and influence in economics and political science, it has also faced criticism from various quarters. Critics of public choice theory raise several concerns regarding its simplistic assumptions, methodologies, and implications for public policy. As noted above the public choice theory criticizes the political leaders by arguing that they will always strive to achieve their personal interests and disregard the public needs however critics are keen to note that public choice theory relies on overly simplistic assumptions about human behaviour, particularly its assumption of rational self-interest. Critics contend that individuals may not always behave rationally or pursue their self-interest in a narrow economic sense,[64] and that the theory's focus on individual rationality and self-interest may not always accurately capture the complexities of political decision-making.[65] This criticism helps to show how we are quick to focus on the negative aspects by having a bias against government intervention and public sector activities they argue that public choice theory tends to emphasize the failures of government while overlooking the potential benefits of collective action and public provision of goods and services.[66]

Conversely, Public Choice Theory offers valuable insights into the political dynamics and institutional incentives shaping the privatization process. By analysing the behaviour of policymakers, bureaucrats, and interest groups, Public Choice Theory highlights the complexities of decision-making within political institutions. Issues such as regulatory capture, rent-seeking behaviour, and distributional effects emerge as critical considerations in the design and implementation of privatization policies.

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[62] Niskanen A. "Bureaucracy and Representative Government." University of Chicago Press, 1971.
[63] Tullock G. "The Welfare Costs of Tariffs, Monopolies, and Theft." Western Economic Journal, 1967.
[64] Elster J. "Rational Choice History: A Case of Excessive Ambition." American Political Science Review, 1995.
[65] Green P., and Ian S. "Pathologies of Rational Choice Theory: A Critique of Applications in Political Science." Yale University Press, 1994.
[66] Steinmo, S. "Bucking the Trend? The Rise of Publicly Funded and Privately Provided Health Care in the United States." World Politics, 2002.

2.4 Conclusion

This study examines privatization through the lenses of the Chicago Theory and Public Choice Theory, emphasizing its significance in institutional reform, and governance. Privatization is portrayed as a pivotal step in redefining the state-market relationship to enhance efficiency, foster competition, and optimize resource utilization. It underscores the importance of integrating economic and political knowledge for informed policymaking. Policymakers are urged to comprehend the complexities of privatization for effective decision-making. The enduring relevance of the Chicago Theory and Public Choice Theory is highlighted as invaluable resources for policymakers, scholars, and practitioners navigating contemporary global challenges. Embracing principles of economic freedom, individual liberty, and institutional analysis is advocated for fostering prosperous, innovative, and equitable societies.

CHAPTER 3

III. PRIVATIZATION IN KENYA

3.1 Introduction

The term privatization describes the process of assigning rights to a government asset or service and giving it private control. This may include privatization of state-owned enterprises, contracting out public services to the private sector or other means of shifting the control from a sphere outside personal interest into an arena directed at it.[67] A classic treatise on privatisation is the Road to Serfdom by Friedrich Hayek (1944). According to Hayek, privatization improves the economic efficiency of an economy by letting competitive forces in the market allocate resources more efficiently than centralized government control.[68] Another outlook comes from Joseph Stiglitz, author of "Globalization and Its Discontents" (2002), showing concerns about reckless privatization with the important role that policies must play, which need to be properly designed in order to guarantee equity as well as public welfare.[69] The legal aspect of privatization involves a mixture between laws, regulations and contracts. Several legal scholars including Paul Starr in the work 'The Meaning of Privatization' (1988) have looked at different aspects that are legally attributable to privatizations, such as property rights contracts and state regulation over entities.[70] In this chapter we will look at: the pros and cons of privatization, the privatization process in Kenya and who oversees the privatization process in Kenya.

3.2 Pros and Cons of Privatization

Public policy can be defined as "the principled guide to action taken by the administrative executive branches of the state with regard to a class of issues in a manner consistent with law and institutional customs".[71] Privatization is a complex and debated topic in various fields, including economics and public policy. According to Vickers and Yarrow (1991), evidence-based decision making lies at the heart of effective policy.[72] Additionally

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[67]Starr, P. The Meaning of Privatization. Yale Law & Policy Review. 1989

[68] Hayek, F. A. (1944). The Road to Serfdom. University of Chicago Press.

[69] Stiglitz, J. E. (2002). Globalization and Its Discontents. W. W. Norton & Company.

[70] Starr, P. The Meaning of Privatization. Yale Law & Policy Review, 6(1), 6-41. 1989

[71] Anderson, J. E. Public Policy-Making. New York: Praeger Publishers. 1975

understanding the potential negative social impacts of privatization, such as inequality and access issues, allows policymakers to design policies that mitigate these concerns.[73] Thus, a more detailed approach to pros and cons of privatization in the public policy is required toward developing policies that are politically attractive while fulfilling objectives of efficiency, equity, transparency on services.

Some of the pros are; the efficiency and cost savings, Privatization advocates state that the private companies usually tend to have more efficient performance when compared with government agencies and the argument that private companies tend to operate more efficiently than government entities, leading to cost savings and improved services, has been a focal point in the privatization discourse. Vickers and Yarrow highlight the role of market competition as a driving force behind the efficiency of private companies. In competitive markets, businesses strive to outperform each other, leading to innovation, cost reduction, and overall efficiency gains. The study suggests that the profit motive inherent in private enterprises incentivizes them to find more efficient ways to deliver services.[74] Privatization advocates also believe that the idea of privatization allows governments to focus their attention on core functions by outsourcing non-core activities to private entities. This concept aligns with the principle of specialization, and studies on public-private partnerships (PPPs), such as the one conducted by the World Bank in 2014, support this perspective.[75] Privatization proponents argue that governments have limited resources, and by focusing on core functions, they can strategically allocate their resources to areas where their direct involvement is most essential additionally The concept of specialization posits that when governments concentrate on core functions, they can do so more efficiently and effectively. By avoiding the burden of managing non-core activities, governments can direct their attention and resources toward areas where they have specialized expertise and a direct responsibility to the public. And when it comes to the collaboration between public-private partnership PPs the PPs They provide a model of cooperation that utilizes the best features found in both sectors. The private sector provides efficiency, innovation, and resources while the government oversees it to make sure that their partnership serves a greater purpose for

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[72] Vickers, J., & Yarrow, G. Economic Perspectives on Privatization. Journal of Economic Perspectives, 5(2), 111-132. 1991.

[73] Cookson, R. Public Services, Private Finance: New Directions in Public Policy. London: Blackwell Publishing. 2005.

[74] Vickers, J., & Yarrow, G. (1991). Economic Perspectives on Privatization. Journal of Economic Perspectives.

[75] World Bank. Public-Private Partnerships Reference Guide Version 2.0. Washington, DC: World Bank Group. 2014.

society. The point I am trying to put across is that the argument that privatization enables governments to focus on core functions while outsourcing non-core activities is supported by the concept of specialization. Studies on public-private partnerships, such as the one conducted by the World Bank in 2014, may provide empirical evidence and insights into how collaborative approaches between the public and private sectors can be structured to achieve efficiency, innovation, and improved service delivery. And lastly another key benefit of privatization is the financial relief that it provides to the government. Since sale of state-owned assets through privatization can generate revenue for governments facing fiscal challenges.[76]

In as much as privatization benefits the government with funds it can also lead to loss of government control over essential services and this can potentially compromise public accountability, this is a con for it is important for there to be a regulatory framework.[77] Making of profits is good until it consumes you and that is all you think about, it consumes you to the point where you forget about the needs of the disadvantaged and your only focus becomes targeting groups that can profit you and benefit the company. One of the key arguments against privatization is that private companies, driven by the profit motive, may prioritize financial gains over ensuring equitable access to essential services. Social injustice is an essential issue addressed within the scope of research; for instance, Cookson (2005) writes that privatization may cause social inequality because it strives to increase profits rather than ensure equal service provision even in disadvantaged communities. Such view focuses on possible negative social implications that may arise from privatization of public services.[78] Another concern is that in cases of high barriers to entry, privatization may result in the consolidation of market power by a single dominant firm. This monopolistic result manifests itself when a private actor is granted exclusive rights to provide some specific good or service, which restricts the range of consumer choice and competition. And with a monopoly in the market it reduces competition in the market in that the shift from public to private ownership can sometimes result in a reduction in the number of competitors within an industry. A lack of competition may lead to higher prices, reduced innovation, and diminished incentives for companies to improve efficiency and quality of service.[79] And all

[76] Megginson, W. L., & Netter, J. M. From State to Market: A Survey of Empirical Studies on Privatization. Journal of Economic Literature, 39(2), 321-389. 2001.

[77] Estache, A., & Martimort, D. (2003). Politics, Transaction Costs, and the Design of Regulatory Institutions. World Bank Policy Research Working Paper No. 3073. 2003

[78] Cookson, R. Public Services, Private Finance: New Directions in Public Policy. London: Blackwell Publishing. 2005.

this will just create a toll on the public and more specifically the disadvantaged groups. Yes privatization is good but we have seen that it can also be bad so the decision to privatize public services involves weighing these pros and cons, taking into account the specific context and objectives of the government.

3.3 Examining the Privatization Process

Vickers and Yarrow's, "privatization decision" model is a pioneer contribution to the understanding of determinants affecting policymakers in their process towards privatizing state-owned enterprises.[80] The model provides a broad range of factors that are viewed as being vital for influencing the process of decision-making. The framework put singles out a number of critical elements, such as an economic aspect with regard to efficiency; market structure in terms of both competitive rivalry intensity and the presence or absence thereof alongside mergers & acquisitions (M&A); while also factoring into consideration regulatory issues concerning price control. Policymakers weigh the advantages of privatization in terms of greater efficiency and productivity, as well as increased production on a private level. The model highlights the need for a competitive market structure as an impetus towards better performance and innovation. In addition, Megginson and Netter's meta-analysis provides a broader perspective on the consequences of privatization.[81] Their comprehensive analysis of economic and financial measures in several countries adds empirical evidence to the privatization debate. The meta-analysis allows researchers and policymakers to assess the effect of privatization on variables, namely firm performance, capital investment, economic development as a whole. Megginson and Netter's work not only corroborates some of the theoretical hypotheses that Vickers and Yarrow have formulated but also extends this discussion with empirical data on various results achieved through privatization endeavours around the world. The analysis strengthens the idea that privatization outcomes are contextual and driven by country-specific economic and institutional features. In summary, Vickers and Yarrow's model as well as Megginson and Netter's meta-analysis together provide a strong basis for understanding the privatization decision process. Vickers and Yarrow provide a

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[79] Parker, D., & Saal, D. S. The Impact of Privatisation and Regulation on the Water and Sewerage Industry in England and Wales: A Translog Cost Function Model. Journal of Regulatory Economics, 23(3), 309-333. 2003.

[80] Vickers J., Yarrow G., Economic Perspectives on Privatization. American Economic Association Vol. 5 No.2 1991.

[81] Megginson W., Netter J., From State to Market: A Survey of Empirical Studies on Privatization. American Economic Association. Vol 39, No.2 2001.

theoretical framework that summarizes the main issues, while Megginson and Netter offer empirical evidence which further enhances our understanding of diverse consequences arising from privatization across the world.

3.4 Privatization Process in Kenya.

The process of privatization in Kenya typically follows a series of legal and procedural steps which are guided by the Privatization Act and the process is overseen by the Privatization Committee is a government agency mandated to formulate, manage, and oversee the privatization process of state-owned enterprises and assets. It is an autonomous body established under the Privatization Act No.11 of 2023 to advise the government on all aspects of Privatisation of public entities by informing them of the privatization policy identifying enterprises suitable for privatization, and formulating strategies for the implementation of privatization programs.[82] The steps of privatization in Kenya according to the privatization committee are;[83]

Undertake due Diligence. In this step, the committee reviews or analyses the performance of the entity to be privatized to confirm facts or details including but not limited to financial performance, legal and tax status, and asset value. The next step is the Preparation of proposal the proposal is prepared by the committee, and they submit the said proposal to the cabinet secretary national treasury for submission to the cabinet. Thereafter there is the approval of privatization proposal where the proposal is considered by the cabinet and it can either be denied or accepted. But the question we must ask is "if the committee is autonomous why does it need to take the proposal to the cabinet to approve or deny?" and the answer to this question is" The requirement for the Privatization Commission to take privatization proposals to the cabinet for approval or denial is often part of the governance and decision-making process in many countries, including Kenya. While the Privatization Commission is an autonomous body, its proposals need to go through a broader government approval mechanism to ensure transparency, accountability, and alignment with overall government policies." By seeking cabinet approval, the Privatization Commission ensures that its decisions are in line with the overall governance structure, legal framework, and national development goals. This approach enhances accountability and transparency in the privatization process in Kenya. Lastly, transactional implementation takes place where if the

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[82] The Privatization Committee.

[83] The Privatization Committee

proposal transaction is approved then the transaction is implemented and the transaction is closed.

3.5 How The Privatization Process In Kenya Seeks To Protect And Promote Public Interest.

The privatization process in Kenya is a multifaceted endeavour aimed at balancing economic efficiency with the protection and promotion of public interest. Through various mechanisms and strategies, the government seeks to ensure that essential services remain accessible, affordable, and of high quality even after the transfer of state-owned assets to private entities. For instance, the government of Kenya has established regulatory bodies such as the Privatization Commission and sector-specific regulators in Kenya which play a crucial role in overseeing privatization transactions and regulating the behaviour of private entities involved in various sectors. These regulatory bodies enforce compliance with laws, standards, and regulations aimed at protecting public interest in several key areas, including consumer rights, environmental standards, and fair competition. The Privatization Commission of Kenya is a key regulatory body tasked with overseeing privatization transactions and ensuring compliance with relevant laws and regulations.[84] The commission plays a central role in promoting transparency, accountability, and fairness in the privatization process, thereby safeguarding public interest. A body like the Consumer Protection Authority (CPA) ensures that privatized entities adhere to consumer protection laws, regulatory bodies help maintain fair and transparent business practices, thereby safeguarding public interest.[85] During privatization the Competition Authority of Kenya, monitors mergers, acquisitions, and anti-competitive practices to prevent market dominance and ensure a level playing field for businesses. By promoting fair competition, the authority protects consumer choice, innovation, and market efficiency.[86] By enforcing compliance with the above provisions regulatory bodies in Kenya contribute to the protection of the public interest during the process of privatization. In the subsequent chapter we will see if these provisions live up to their expectations in the practical sense or not.

Transparency and accountability is another way that the Kenyan government endeavours to ensure that public interest is promoted and protected during privatization. The government's commitment to transparency is demonstrated through the disclosure of information regarding privatization transactions, bidding processes, terms of agreements, and financial outcomes to the public. This transparency plays a crucial role in building trust, fostering accountability,

[84] Privatization Commission of Kenya, 2019.
[85] Consumer Protection Act 2019.
[86] Competition Act 2002.

and ensuring that privatization decisions align with the public interest. The Kenyan government actively discloses information related to privatization initiatives through various channels, including official websites, reports, and public announcements. This information encompasses details about the assets being privatized, the bidding process, evaluation criteria, and the selection of winning bidders. By making this information accessible to the public, the government promotes transparency and allows stakeholders to scrutinize the privatization process, thereby enhancing accountability.[87] Transparency is closely linked to accountability. By making privatization-related information available to the public, the government creates opportunities for accountability mechanisms to function effectively. Stakeholders can hold policymakers, government agencies, and private entities accountable for their actions, decisions, and performance during the privatization process. This accountability helps prevent misconduct, corruption, and malpractices that may undermine public trust and confidence.[88] By promoting transparency and accountability in the privatization process, the Kenyan government strengthens democratic principles, enhances governance practices, and reinforces public confidence in the management of public assets and resources.

In several of the public sector companies serving the people in areas like healthcare, education, and utilities, the Government of Kenya imposes regulatory mechanisms and contractual commitments aimed at ensuring that both the minimum quality and affordability of the services get offered to all citizens. These limitations are necessary and vital to protect against monopolistic actions, price gouging, and service cut-offs, thus protecting people's interests. For example the Water Services Regulatory Board (WASREB)[89] oversees the licensing, performance standards, and tariff-setting processes of private utility companies.[90] These regulatory mechanisms and contractual obligations are designed to protect public interest by ensuring that essential services in healthcare, education, and utilities remain accessible, affordable, and of high quality for all citizens.

Social impact assessments (SIAs) are essential evaluation tools the Kenyan government uses in examining the possible transformations in the lives of workers, consumers, and residents after the adoption of a privatization decision. Such surveys provide the policy makers with an idea of a variety of long-term influences of privatization on public, employment, and social

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[87] World Bank Group. - *Public Expenditure Review: Enhancing Public Financial Management for Equitable Growth and Development.* Kenya. 2013.
[88] Transparency International Kenya.
[89] WASREB is established by the Water Act, 2002.
[90] Water Act 2002.

options. It helps mitigate the adverse outcomes and enables promotion of public interests.[91] Social impact assessments aim to comprehensively analyse the potential social, economic, and environmental consequences of privatization initiatives. They assess how privatization may affect various stakeholders, including employees who may face job losses or changes in working conditions, consumers who may experience changes in service quality or affordability, and communities that may be impacted by shifts in service provision or economic activity.[92] By understanding these impacts, policymakers can anticipate potential challenges, identify opportunities for mitigating negative effects, and design interventions to enhance positive outcomes. In essence, social impact assessments hold a significant position in empowering the privatization exercises in Kenya by assessing the social, economic and environmental implications on the stakeholders and community. This integration of social thinking into economic decision-making can contribute to the protection of community interest, equality and sustainability in the medium term privatization objectives.

From the above discussion we have seen that the Kenyan government has put in place legal mechanisms like regulatory bodies to ensure that public interest is promoted and protected during the privatization process but in the subsequent chapter this study will try to investigate the practicality of these mechanisms, and see if they apply or not.

[91] World Bank Group. *Kenya - Public Expenditure Review: Enhancing Public Financial Management for Equitable Growth and Development.* Kenya. 2013.

[92] World Bank Group. *Kenya - Public Expenditure Review: Enhancing Public Financial Management for Equitable Growth and Development.* Kenya. 2013.

CHAPTER 4

IV. THE LEGISLATIVE FRAMEWORK IN KENYA

4.1 Introduction

The privatization process, characterized by the transfer of state-owned enterprises and assets to the private sector, represents a pivotal mechanism for economic reform and development in many countries worldwide. While privatization endeavours are often pursued with the aim of enhancing efficiency, stimulating investment, and fostering economic growth, the extent to which they uphold and promote the public interest remains a subject of critical inquiry. Central to this discourse is the role of the legislative arm of government in overseeing privatization initiatives and ensuring that they align with broader societal objectives. This chapter embarks on an investigative journey to assess whether the legislative branch sufficiently undertakes its role in safeguarding and advancing public interest during the privatization process. Through a comprehensive analysis of legislative actions, oversight mechanisms, transparency measures, and outcomes of privatization endeavours, this study seeks to elucidate the effectiveness and challenges encountered by legislative bodies in fulfilling their mandate to promote the public interest in the context of privatization.

4.2 The Legislative Framework

The legislative framework is the cornerstone for oversight and regulation of the privatization programs in the nation. It dictates the extent of the legislature's competence and jurisdiction and sets the limits within which the privatization processes should be carried out to safeguard the public interest.[93] One of the primary functions of legislative frameworks is to provide clarity regarding the goals and objectives of privatization efforts.[94]

The legislative frameworks usually set out the processes for initiating, approving, and implementing the privatization initiatives.[95] Comprehensive guiding procedures allow for concretization of privatization practices, reduction of bureaucratic barriers and the

[93] Williamson E.Corporate Finance and Corporate Governance. *The Journal of Finance, 43*(3), 567-591. 1988.
[94] Hodge A., & Greve, C. Public-Private Partnerships: An International Performance Review. *Public Administration Review, 67*(3), 545-558. 2007.
[95] Hellowell, M. Health Care Reform: Controlling Spending and Increasing Efficiency. *OECD Economics Department Working Papers*, No. 367. 2003.

introduction of consistency in decision making. In addition to delineating procedural requirements, legislative frameworks may incorporate provisions for public consultation and stakeholder engagement.[96] The legislative framework needs to also have transparency measures, for transparency is paramount in ensuring accountability and public trust throughout the privatization process.[97]

Additionally in the process of privatization, appropriate executive and legislative systems that help to avoid excess of power and mitigate abuses are indispensable.[98] The political environment should also be considered for the impact of political environment cannot be overstressed when it comes to the effectiveness of legislative action in the process of privatization. The political will, the intraparty dynamics, and the interbranch relations play the key role in forming the legislative agenda and in how public interest is regarded.[99] In scenarios of political polarization or instances where vested interests exert undue influence, legislative oversight may be compromised, thereby lowering the quality and integrity of privatization endeavours.

In conclusion the adequacy of the legislative involvement in the privatization process is contingent upon several factors like, the strength of the legislative system. A strong legislative system provides the legal basis for regulating privatization processes and ensuring that they align with broader public interest objectives.[100] This framework may include laws, regulations, and guidelines that establish the scope of privatization, delineate decision-making procedures, and define the roles and responsibilities of relevant stakeholders. Another factor is the robustness of the transparency measures that are in place.

Transparent processes enable stakeholders to scrutinize privatization deals, identify potential conflicts of interest, and ensure that decisions are made in the public interest.[101] The third factor is to include a legislative oversight, judicial review and independent regulatory bodies

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[96] Brounen, D., & Eichholtz, P. Corporate Finance and Corporate Governance. *The Journal of Finance, 56*(2), 539-580. 2001.

[97] Kikeri S. Nellis J. Shirley M. Privatization: The Lessons of Experience. The International Bank for Reconstruction. 1992.

[98] Lijphart, A. Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries. New Haven, CT: Yale University Press. 1999.

[99] Norris, P. Why Electoral Integrity Matters. Cambridge: Cambridge University Press. 2015.

[100] Megginson L., & Netter M. From State to Market: A Survey of Empirical Studies on Privatization. *Journal of Economic Literature, 39*(2), 321-389. 2001.

[101] Boardman E., & Vining R. Ownership and Performance in Competitive Environments: A Comparison of the Performance of Private, Mixed, and State-Owned Enterprises. *Journal of Law and Economics.* 1989.

so as to help prevent the abuse of power and ensure that privatization processes are conducted fairly and transparently.[102] These mechanisms serve as safeguards against undue influence, corruption, and the violation of legal and procedural norms. This will then ensure that the checks and balances are effective and efficient. Hence, tackling these factors is critical for guaranteeing the competence of legislative participation in privatization processes and ensuring that the interests of the public are considered. Through the development of strong legislation, adopting transparency measures, deploying suitable checks and controls, and considering the current political environment, the legislative bodies will oversee the compliance with the public interests in the area of privatization.

4.3 The Legislative Framework in the Kenyan Context

The National Parliament of the Republic of Kenya, including its pertinent departments such as the Public Investments Committee (PIC), oversees supervising the conduct of any privatization processes occurring in the country. As PIC plays a central role among institutions in the move towards the rule of law, its mandate is that of scrutinizing public investment, including privatization initiatives, to guarantee adherence to legal and procedural norms regarding transparency and accountability. Nevertheless, some roadblocks can limit the progress of legal watchdogs Kenya in the privatization attempts.

One of the roadblocks is political interference. Political interference, driven by partisan interests and patronage networks, presents a formidable obstacle to effective legislative oversight in Kenya, particularly concerning bodies like the Public Investments Committee (PIC)

In Kenya's political landscape, where party loyalty often carries significant weight, members of parliamentary committees may face pressure from their respective political parties to prioritize party interests over independent oversight functions. This pressure can manifest in various forms, including directives from party leadership, threats of reprisals, or promises of rewards for compliance.[103] Keeping in mind that the legislature is responsible for oversight of the privatization process, if the partisan pressure prevails then the members of parliament will

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[102] Djankov, S., La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. The Regulation of Entry. *The Quarterly Journal of Economics.* 2002.

[103] Kagwanja M. *Parliament in Kenya: From Basic Law to State Capture, 1963–2003*. *The Journal of Modern African Studies, 43*(1), 1-29. 2005.

make decisions favouring their parties instead of decisions that will favour the public leading to the promotion of public interest. When committee members succumb to partisan pressure, the independence and objectivity of oversight activities conducted by bodies like the PIC may be compromised. Instead of focusing on impartial investigations and holding government officials accountable, committee members may prioritize partisan interests, potentially undermining the effectiveness of oversight mechanisms.[104] This pressure will lead to the oversight insights being biased. When committee members are swayed by party interests, investigations may be biased, findings may be manipulated, and accountability measures may be diluted, resulting in a lack of meaningful scrutiny and accountability in the management of public investments and privatization processes.[105] Political meddling with the checks and balances system hinder democratic governance and accountability in the country. The rise of independent and objective parliamentary committees such as the PIC is well known to be crucial in lowering the risk of corruption, mismanagement, and inappropriate use of public resources ends up eroding democracy and decreasing the society's trust in the government.[106]

Another roadblock that can limit the progress of legal watchdogs Kenya in the privatization attempts is resource constraints. Parliamentary committees, including the PIC, often face budgetary constraints that hinder their ability to carry out oversight activities effectively. Insufficient funding may limit the committee's capacity to hire qualified staff, procure necessary resources, and conduct research or investigations into complex privatization processes.[107] The PIC members are required to have expertise in various fields like finance, law or even public administration, to effectively scrutinize privatization initiatives. However there maybe instances where the people selected to be in the committee have not been selected by merit basis but rather by their relations to the people in power. This will in turn hinder its ability to analyse complex financial documents, assess the legality of transactions, and evaluate the economic implications of privatization decisions.[108] Thus if the members of

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[104] Oyuke M., & Kochore K. *Legislative Oversight of the Public Finance Management in Kenya: The Case of the Public Investments Committee of the National Assembly*. *Journal of Public Administration and Governance.* 2015.

[105] Mwenda, K. *Democratization and the Challenge of Deepening and Sustaining Democracy in Kenya*. *Africa Today.* 2003.

[106] Cheeseman, N. *Democracy in Africa: Successes, Failures, and the Struggle for Political Reform*. New York, NY: Cambridge University Press. 2010.

[107] Oyuke M., & Kochore K. *Legislative Oversight of the Public Finance Management in Kenya: The Case of the Public Investments Committee of the National Assembly*. *Journal of Public Administration and Governance.* 2015.

[108] Mwenda, K. *Democratization and the Challenge of Deepening and Sustaining Democracy in Kenya*. *Africa Today.* 2003.

the committee are not people who have a vast knowledge in areas of importance then it may hamper the PIC's ability to coordinate inquiries, manage documentation, liaise with relevant stakeholders, and follow through on recommendations arising from its oversight activities.[109] The insufficiency of financial supports, technical skills and institutional capacities prevent the PIC to achieve the expected oversight results. This shows the weakness and the lack of honesty of parliamentary framework.[110]

Finally, in dealing with the drawbacks of oversight institutions like the PIC, one must adequately ensure the availability financing for their operations, capacity must be built technologically and institutional support has to be made a priority. Enhancing the PIC's capacities will be instrumental in fulfilling the mandate and promoting transparency and accountability in the privatization processes as well as safeguarding public interest. Should these challenges go unresolved, PIC may face difficulties in providing the necessary oversight, thus endangering democratic governance and rule of law.

4.4 Instances When the Kenyan Legislation Failed to Protect and Promote Public Interest in The Process Of Privatization.

Several instances in Kenya's history illustrate where legislative oversight failed to adequately protect and promote public interest during the privatization process. These instances often involved controversies, allegations of corruption, lack of transparency, and adverse consequences for the public. Here are some notable examples:

1. The Rift Valley Railways Concession (RVR) in 2006.

The RVR concession involved complex contractual agreements and operational arrangements between the government and the private operator. Understanding the intricacies of these arrangements and assessing compliance with contractual obligations required significant expertise and resources. Parliamentary committees tasked with oversight may have lacked the technical capacity and resources necessary to conduct thorough evaluations of the concession's performance.[111] Even when parliamentary committees identified shortcomings in

[109] Cheeseman, N. *Democracy in Africa: Successes, Failures, and the Struggle for Political Reform*. New York, NY: Cambridge University Press. 2010.
[110] Kagwanja M. *Parliament in Kenya: From Basic Law to State Capture, 1963–2003. The Journal of Modern African Studies.* 2005.

the RVR concession, their ability to enforce corrective actions or hold responsible parties accountable may have been constrained. The absence of robust enforcement mechanisms within the legislative framework limited the committee's capacity to compel compliance with recommendations or address deficiencies effectively.[112] Even when recommendations were made by parliamentary committees regarding the RVR concession, implementing reforms and operational changes within the railway system proved to be a complex and challenging process. Overcoming entrenched issues such as mismanagement, infrastructure deficiencies, and operational inefficiencies required coordinated efforts across multiple stakeholders beyond the scope of legislative oversight alone.[113]

In summary The concession of the Rift Valley Railways (RVR) faced challenges related to accountability and service delivery. The privatization process was marred by allegations of mismanagement, lack of investment, and deteriorating rail infrastructure, leading to public outcry and calls for intervention. Despite legislative oversight, the privatization failed to deliver the anticipated benefits to the public.[114] While parliamentary committees in Kenya may have engaged in oversight of the RVR concession and raised concerns about accountability and service delivery, translating these oversight efforts into tangible improvements faced significant challenges. Addressing these challenges requires strengthening the capacity and independence of oversight mechanisms, enhancing enforcement mechanisms, mitigating political interference, and providing adequate resources to support effective oversight of privatization initiatives.

2. The sale of Kenya Airways shares in 1996

The privatization of Kenya Airways in 1996 indeed encountered significant criticism and allegations of irregularities, particularly regarding transparency and fairness in the sale of shares. Despite the existence of legislative oversight mechanisms, the concerns raised during the privatization process were not adequately addressed, leading to perceptions of favouritism and exclusion of the Kenyan public from the benefits of the privatization. Privatization

[111] Oyuke M., & Kochore. K. *Legislative Oversight of the Public Finance Management in Kenya: The Case of the Public Investments Committee of the National Assembly*. *Journal of Public Administration and Governance* 2015
[112] Cheeseman, N. *Democracy in Africa: Successes, Failures, and the Struggle for Political Reform*. New York, NY: Cambridge University Press. 2010
[113] United Nations Economic Commission for Africa (UNECA). *Assessment of the Implementation of the Public Private Partnership Policy and Legal Framework in Kenya*. 2016.
[114] United Nations Economic Commission for Africa (UNECA). *Assessment of the Implementation of the Public Private Partnership Policy and Legal Framework in Kenya*. 2016.

process in Kenya Airways was marked by the lack of transparency as the information about the shares trading and the choice of investors was limited to the public.[115] Critics argued that officials behind the process of the privatization did not disclose it openly which raised suspicions of favouritism and any kind of backroom deals with understood groups of investors.[116] Allegations of irregularities surfaced during the privatization of Kenya Airways, including claims of insider trading, manipulation of share prices, and conflicts of interest involving politically connected individuals and foreign investors.[117] Critics pointed to instances where the privatization process appeared to benefit a select few at the expense of broader public interests.[118] The fears were that, as a consequence, politically connected individuals and foreigners had the preference to purchase the Kenya Airways during the privatization process. Given their involvement, both locally and internationally powerful interests, questions arose about the fairness and inclusiveness of the privatization process, leading to bias and unwarranted inequality as far as access and investment opportunities are concerned.[119] Parliamentary scrutiny may have been limited in scope or effectiveness, allowing perceived irregularities to persist without meaningful intervention.[120] The incredibility, malpractices and impropriety of the privatization of Kenya Airways did not only lead to public condemnation but also deepened the spirit of exclusion amongst ordinary Kenyans and the citizens at large. A lot of them did not feel that they could also participate in the privatization and miss the benefit available to the country's national asset.[121] In conclusion, the privatization of Kenya Airways in 1996 underscored significant shortcomings in transparency, fairness, and accountability within the privatization process. Despite the existence of legislative oversight mechanisms, the concerns raised by critics and the public were not adequately addressed, highlighting the need for stronger safeguards and transparency measures in future privatization initiatives to ensure the equitable distribution of benefits and promote public trust in the process.

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[115] International Monetary Fund (IMF). *Kenya: Selected Issues and Statistical Appendix*. IMF Country Report No. 05/316. 2005

[116] Rwege S. *Financial Liberalization, the Reform Process and Financial Sector Performance in Sub-Saharan Africa: Evidence from Kenya*. University of Nairobi, Kenya. 2006.

[117] Lomme Rijke, J. *Privatization and Corporate Governance in Kenya: An International Perspective*. The Hague: Institute of Social Studies. 2001

[118] Lomme Rijke, J. *Privatization and Corporate Governance in Kenya: An International Perspective*. The Hague: Institute of Social Studies. 2001.

[119] Anyimadu A. *Kenya Airways and the Challenges of Privatization*. Journal of Management and Strategy, 4(1), 79-85. 2013.

[120] Mwangi, D. *The Politics of Economic Reform in Kenya: The 1990s and Beyond*. New York: Palgrave Macmillan. 2018.

[121] Mutuku M. *The Political Economy of Privatization in Kenya: A Critical Analysis*. Nairobi: University of Nairobi Press. 2007.

3. The Sale of Telkom Kenya Shares in 2007.

The privatization of Telkom Kenya was criticized for its failure to adequately protect public interests. The privatization process was perceived as favouring the interests of foreign investors over those of the Kenyan public.[122] Undervaluation claims surfaced in the shares sale to France Telecom by Telkom Kenya. The issue of undervaluation perceived amid the privatization process led stakeholders to ask questions concerning transparency and fairness.[123] The process of selling the Telkom Kenya was condemned for its lack of authenticity. Civic organizations and opposition groups pointed at the transparency challenges in the process and the void of the public validation. The lack of transparency only lowered the quality of public confidence in terms of fairness and suitability of the privatization process.[124] Although the scrutiny by different stake holders such as civil society organizations and opposition groups were held; legislative oversight measures was not able to effectively prevent irregularities perceived during the national sale of Telkom Kenya. The parliaments' committees in charge of monitoring the privatization operations may not have had enough power, funding, or political sides for the activities to be investigated fast enough.[125] The privatization of Telkom Kenya sparked public outcry and discontent among Kenyan citizens who felt that their interests were not adequately protected in the process. The perceived lack of transparency and fairness in the privatization process fuelled mistrust in government institutions and raised questions about the integrity of privatization initiatives.[126] The privatization of Telkom Kenya in 2007 was criticized for its failure to protect public interests adequately. The sale of shares to France Telecom faced scrutiny over allegations of undervaluation and lack of transparency in the bidding process. Despite concerns raised by civil society and opposition groups, legislative oversight mechanisms did not prevent perceived irregularities in the privatization process.[127] In conclusion, the privatization of Telkom Kenya in 2007 highlighted significant challenges in protecting public interests and ensuring transparency in the privatization process. Despite concerns raised by civil society and opposition groups, legislative oversight mechanisms were unable to prevent perceived irregularities and safeguard the integrity of the privatization initiative. The case underscores

[122] Wanyande P. *Telkom Kenya Sale Exposes Vices of Privatization*. Africa News. 2007.
[123] Gachiri, J. *Telkom Sale Exposed Kenya's Economic Warfare*. The East African. 2007.
[124] Karanja, J. *Telkom Sale Was a Sham*. Daily Nation. 2007.
[125] Mwiti, A. *Frustrated Parliament Vows to Review Telkom Sale*. The Standard. 2007.
[126] Kamau, W. *Parliament Must Ensure Transparency in Telkom Deal*. Business Daily. 2007.
[127] "Telkom Kenya Privatization Haunted by Questions." Business Daily Africa.2008.

the importance of strengthening transparency measures and accountability mechanisms in privatization processes to uphold public trust and promote equitable outcomes.

These instances of the privatization process in Kenya underscore the challenges and shortcomings in legislative oversight mechanisms, which have at times failed to effectively safeguard public interests. Despite the existence of regulatory frameworks and oversight mechanisms, the implementation and enforcement of regulations have often been inadequate, resulting in adverse outcomes for both the public and the economy. Public airing of the privatization of KQ and Telkom Kenya reported gaps in transparency, fairness, and accountability which the public questioned and the issue being tainted with allegations of irregularities. This illustration pointed to the necessity of better legislative accountability, more open measures, and larger involvement of the public in the privatization processes-related decision making. From the above illustrations the legislative oversight failed to adequately protect and promote public interest during the privatization process. In subsequent chapters this study will provide recommendations that can be used to ensure that history does not repeat itself so as to ensure that public interest is promoted and protected.

CHAPTER 5

V. RECOMMENDATIONS

5.1 Introduction

As this paper ends it is tasked with discussing a way forward on the protection and promotion of public interest during the privatization process, and whether this study proves to be useful for the Government to draw lessons from. As earlier discussed in chapter 4 there are legal mechanisms that the Kenyan government has put in place to ensure that the public interests are protected and promoted during the privatization process and this study does not dispute this. However after further research this paper has concluded that when it comes to practically applying these legal mechanisms that are in place the publics' interests are often forgotten or rather are not taken into account. One can argue that the publics interests are not the number one priority of the legislature in particular its committee the PIC. Political interests like the partisans interests and financial interests trump over the publics' interests. Yet this should not be the case, for the members of the legislature have been elected by the pe.ople of Kenya and they have been put in that position to ensure that the interests of the people who elected them to power are promoted and protected. Instead of focusing on impartial investigations and holding government officials accountable, committee members may prioritize partisan interests, potentially undermining the effectiveness of oversight mechanisms.[128]

5.2 Recommendations

This study recommends that the PIC members should be elected on a merit-based system instead of based on your political alliance. The committee Should comprise of people who have never and are currently not holding any government position. The committee members should also have knowledge on finance, law, and also public administration, for these are crucial areas. Members should not be drawn form various political parties represented in Parliament, but rather they should be elected from the public, for how can they hold the government accountable for its use of public funds and investments if they are members of the pollical parties represented in parliament. Hence why the members should be independent

[128] Oyuke M., & Kochore K. *Legislative Oversight of the Public Finance Management in Kenya: The Case of the Public Investments Committee of the National Assembly. Journal of Public Administration and Governance.* 2015.

parties from the public, and who do not hold any governmental seat. This is because in practice, the effectiveness and independence of parliamentary committees, including the PIC, may be subject to political pressures and the overall governance environment, yet this is what we want to avoid.

This study recommends that the PIC should be adequately funded. For if it is adequately funded then it will not be a roadblock limiting the progress of legal watchdogs. If it is adequately funded then the committee can be able to hire qualified staff, procure necessary resources, and conduct research or investigations into complex privatization processes. Additionally, if the committee is adequately funded then the committee can be able to pay its employees an appropriate amount and the members of the committee will not feel as if they have to source for money in other illegal activities like corruption.

This research also recommends that other arms of government, the executive and the judiciary, should be excluded from the privatization process. This study considers that if the judiciary is involved then they may just be interested in how much money they can acquire after they sell the state owed entity, instead of being concerned with the impacts that the privatization will have on the people, for the main aim is to protect and promote the publics' interests.

The aim is to have independent bodies with independent members of those bodies so as to ensure that they are free from political interference and pressure. This is important so as to ensure that the legal mechanisms that have been put in place by the government are actually practical and are being applied and are not just in place for show.

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