

KENYA LAW REFORM COMMISSION



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and Date



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NAIROBI, KENYA

.....14th May, 2014.....

Mr. Charles Nyachae
Chairperson
Commission for Implementation of the Constitution
NAIROBI

Dear *Chairman*

RE: GOVERNMENT OWNED ENTITIES BILL AND NATIONAL WEALTH
SOVEREIGN MANAGEMENT BILL

Reference is made to a letter dated 2nd May 2014 addressed to you and copied to us by the Attorney-General (annexed for ease of reference). Attached to the letter under reference were copies of Government Owned Entities Bill, 2014 and the National Sovereign Wealth Fund Bill, 2014.

Pursuant to section 6 of the Kenya Law Reform Commission Act, 2013 and paragraph 5(6)(b) of the Sixth Schedule to the Constitution, our Commission is in the process of undertaking a detailed interrogation of the aforementioned Bills with a view to making its contributions at the Roundtable to be convened by your Commission. Owing to the urgency intimated in the letter under reference, KLRC herewith submits its preliminary views on the Bills. Please note that a detailed presentation and proposals will be discussed and submitted during the Roundtable meeting, since we believe the Bills will be subjected to the agreed constitutional process of generating Bills required to implement the Constitution.

It is noted that the two Bills have been developed in pursuance of the dictates of the Report of the Task Force on the Reform of Parastatals and a Draft Policy, which is supposed to guide the implementation of the report of the Task Force. We note that the Draft Policy and the Bills have not been subjected to public participation process as required by the Constitution.

The Draft Policy is intended to provide “a new legal and institutional framework to provide an enabling environment for a more efficient and effective governance sector” through the enactment of a single “overarching law” to “supersede all current legislation governing State Corporations”.

The draft policy blames the current State Corporations Act cap. 466 for providing “a rigid control and regulatory regime which tends to defeat the principle of operational autonomy, flexibility result orientation and accountability”. The Draft Policy critiques the State Corporations Act for adopting a very broad definition of a State Corporation which “puts together commercial entities, regulatory bodies, and service providers, universities, training institutions and research institutions without taking into account their mandates and operational requirements and subjects them to a uniform regulatory regime.” The policy, also seeks to establish a Sovereign Wealth Fund whose objective is to secure the Nations current resources for future generations.

Indeed the objectives of the Draft Policy are noble and commendable. However, the Bills, and in particular the Government Owned Entities Bill, 2014, formulated in pursuance of the draft policy fail to deliver the nobility perceived in the Policy. Below is our preliminary assessment of the Bills.

I The National Sovereign Wealth Fund Bill, 2014

The aforementioned Bill is well drafted. We however propose that the same be subjected to public consultations as required under the Constitution.

II Government Owned Entities Bill, 2014

The Government Owned Entities Bill, 2014 (GOE Bill) raises fundamental issues of principle which, in our considered opinion, need to be addressed even before we interrogate technical issues of drafting.

The Bill seeks to deal with numerous issues, related and unrelated, as a result mixing up matters governed by private law, public law and regulatory law. It repeats the same mistakes the Draft Policy has so succinctly pointed out as the problem with the current State Corporations Act, which among others, raises apparent overlaps and contradictions.

The Bill provides for incorporation of commercial entities under the Companies Act and on the other hand assumes itself as a law superior to the Companies’ Act or any other law enacted by Parliament regulating operations of corporate/commercial entities, *inter alia*. The Companies Bill, 2014 and Insolvency Bill, 2014 are currently pending for

enactment by Parliament. The aforementioned commercial related Bills pending enactment contain very progressive and comprehensive provisions on corporate governance, which would be applicable to all companies incorporated under the Companies Act. Under the Companies Act, the Articles of Association are the forums under which the company's promoter provides the governance structures under which the promoter wants his or her company to be governed.

By super-imposing the GOE Bill, over the Companies Act or any other related law, the drafters commit the same sin for which they have condemned the authors of the State Corporations Act. They create a multiplicity of laws, both under private and public law, through which commercial companies, state agencies, public universities and research institutions will be required to navigate.

Further, by proposing a generic and an "over-arching" law superior to the Companies Act to govern companies incorporated under the Companies Act, the GOE Bill introduces jurisprudence hitherto unknown to Kenyan or common law in which there is a hierarchy of Acts of Parliament. The current hierarchy of Kenya law is as contained in Article 2 of the Constitution and section 3 of the Judicature Act. The Constitution is the supreme law of the land followed by Acts of Parliament and then subsidiary legislation. All Acts of Parliament have equal status. If Parliament intends a new law to apply in an area it has previously legislated, then Parliament may repeal the existing law and enact a new law. In the circumstances, the GOE Bill cannot purport to override the Companies Act when the issues being legislated upon fall within the purview of company law and or other law. To do so will create contradictions and uncertainty in the law. Further the proposed approach is not supported in the drafting principles applicable in the entire common law. It is a principle of law that all laws in the Statute Book complement each other.

The Bill if enacted in the state it stands will attract enormous unnecessary litigation resulting in unwarranted wastage of public resources. We recommend that a proper audit/ impact assessment of the proposed changes be urgently undertake prior to its enactment.

State Agencies

As the Draft Policy rightly presupposes, there are other State Agencies established outside the mainstream Civil Service for regulatory purposes or service delivery. They have mostly been incorporated by statute. Since the promulgation of the Constitution in 2010, our two Commissions and the office of the Attorney-General have worked very closely to review most of the laws establishing these State agencies to ensure their compliance with the Constitution. In the process of such review, our respective Commissions have ensured, to provide for the best practices in corporate governance for such Executive agencies, independent regulatory agencies, Public Universities and

tertiary institutions. Such reformed laws have adopted governance structures and personnel recruitment procedures best suited to such institutions and that meets the constitutional demands. These laws were subject to the widest possible stakeholders' consultation before they were enacted.

Additionally, paragraph 2.1 of the Draft Policy is a condemnation of regulatory regime adopted by the current State Corporation's Act, where "state corporations are lumped together and required to conform to generic governance principles, which have not been helpful in facilitating achievement of specific goals of State Corporations.

We regret to note that the GOE Bill as drafted adopts the same "generic governance principles" contained in the current State Corporations Act.

As pointed out above, the various statutes establishing State executive or regulatory agencies enacted since 2010 have adopted international best practices in terms of composition of the office holders, the selection processes and accountability to the people of Kenya. The generic governance structures and principles which the GOE Bill purports to super-impose on this existing legislation are much more inferior. It does not meet the best practices and accountability to the people of Kenya. In fact the GOE Bill is an attempt to claw back on the gains made by Kenyans when the reformed legislation were enacted.

Establishment of Oversight Office

When the State Corporations Act was enacted in 1986, many developing countries were undertaking Public Enterprise Reform, largely supported by the World Bank and IMF, aimed at freeing State Owned Enterprises from the shackles of over-arching government controls so that they would be market oriented in their operations.

In most of academic and professional discourses, the Kenyan statute was a case study on retrogressive Public Enterprise Reform. The draft policy has already acknowledged that the State Corporations Act was in fact a step in the wrong direction and largely contributed to the poor performance of the Kenyan State Owned Enterprises, due to its intrusive interference in the management of the State Corporations.

Despite the foregoing, section 19 of GOE Bill establishes the Oversight office as the successor to the State Corporations Advisory Committee and the Inspector-General (Corporations) established under sections 18-26 of the State Corporations Act and now proposed to be repealed.

Section 20 of the Bill provides for the functions of the Oversight Office which are substantially the same functions carried out by State Corporations Advisory Committee and the Inspector-General (Corporations) under the State Corporations Act. Are we not putting new wine into old wineskins? What reforms does the GOE Bill expect to achieve?

The various reformed laws on State Agencies, Executive Agencies and Regulatory Agencies prepared by our two Commissions and the office of the Attorney- General provide for functional independence of the various State agencies and yet providing for operational and functional accountability to Parliament and the people of Kenya.

These laws are already in conformity with the Constitution. The attempt by the GOE Bill to super-impose another regulatory organ to oversee the operations of other State Agencies is a claw back to the functional and operational independence of the State Agencies already conferred on them by the reformed legislation and is unconstitutional.

A number of the Independent State Agencies, regulatory bodies and research institutions which are proposed to be subject to the Oversight Office are the local implementing agencies of the international covenants and protocols which Kenya has entered into under International Law.

The cardinal requirement is that agencies that implement international covenants and protocols should be independent and not subject to the direction of other governmental agencies. This is the only way they can retain credibility with their international counterparts. Subjecting these agencies to the Oversight Office compromises such independence.

OVERSIGHT ROLE OF CONSTITUTIONAL COMMISSIONS

The Constitution has assigned various oversight roles to different Constitutional Commissions such as the Public Service Commission, the Salaries and Remuneration Commission, the Auditor-General, the Controller of Budget, *inter alia*. The question, which then arises, is what role is the Oversight Office supposed to play since it cannot usurp the oversight functions of these Constitutional Commissions and Independent Offices?

The oversight body and the Bill generally seeks to take up functions of independent Constitutional Commissions and other independent offices, which are constitutionally obligated to undertake certain mandates. In an upshot, the Bill largely undermines principles and values enshrined in the Constitution. This, in our view is a violation of the Constitution and claw back on gains made so far under the Constitution.

Failure to take into account the devolved system of governance: County Corporations and County Agencies

Clauses 10, 11 and 33 of the GOE Bill purport to legislate on matters whose legislative competence falls on the county governments. This is an unconstitutional usurpation of the legislative power of County Governments.

Composition of Boards of GOEs

Sections 32-34 of the GOE Bill provides for the composition and appointment of members of the Boards of GOEs. It is noted that, the executive drives the appointments. This is a generic prescription for all boards of State Agencies, which does not take account of the specific requirements of the different State Agencies. Furthermore, as already pointed out above, most of the State Agencies established under laws enacted since 2010 have elaborate and constitutional provisions regarding appointment of members of the boards of such State Agencies. The GOE Bill therefore adds no improvement to the governance of the GOEs, to the contrary it claws back.

Automatic Termination of the Office of Board Members

The effect of clause 68 of the GOE Bill is to terminate the services of all the Board members of State Corporations, and State Agencies within 12 months after the GOE Act becomes law, and subsequent appointments be made at the discretion of the executive. Regrettably, the open and transparent selection procedures hitherto provided by the existing legislation, which are in line with the Constitutional demands, will be abolished by the GOE Bill.

Assuming that the GOE Bill will be subjected to public participation before being tabled before the National Assembly, it will not escape notice of the public and will rightly raise the suspicion that the real purpose of the GOE Bill is to use the Parastatal Reform Process to purge the Public Sector in order to create opportunities for the executive to reward its political supporters. It will be seen as a reinstatement of the cronyism associated with the past recruitment of personnel in State corporations and executive State Agencies.

Furthermore, this automatic termination of employment contracts without regard to the contractual rights of the current office holders is unconstitutional. It violates Articles 40 and 41 of the Constitution. Such a proposal is not tenable and it will give rise to a flood gate of litigation against the State.

The Kenya Law Reform Commission

We note that the Kenya Law Reform Commission is one of the few State Agencies targeted by the GOE Bill. A case has not been made in the Draft Policy why the KLRC should be targeted by Bill. This raises very serious suspicion of bad faith.

The Kenya Law Reform Commission has just recently been reconstituted under the Kenya Law Reform Commission Act, 2013. It has been given a highly visible mandate in Constitutional Implementation process and to provide a technical assistance to National and County Governments on law reform. Hence it does not only serve the National Executive but is instrumental in the legislative process of both levels of Government.

The Kenya Law Reform Commission Act, 2013 is a very modern statute which meets the highest constitutional requirements in terms of governance. The Commission is structured like similar Law Reform Commissions of Commonwealth. Its governance structure is much more superior to the template generic governance structure being imposed by the GOE Bill.

The Chairman and the Commissioners of the Commission have just been sworn into office after having undergone a rigorous selection process. Prior to their appointment they were heavily involved in Constitutional Implementation process and are best suited to continue the ongoing Constitutional Implementation process. No case has been made for their removal from office under the provisions of the GOE Bill.

The attempt to compromise the independence of a Commission, with a constitutional and statutory mandate for constitutional implementation, through the enactment of an omnibus law that is supposed to deal with commercial matters, raises very serious doubts as to the government's commitment to continued constitutional implementation. This makes a strong case for anchoring the Kenya Law Reform Commission in the Constitution, as is the case in some other jurisdictions. This will give the KLRC protection from executive threats of disbandment when the Commission takes a principled stand on constitutional implementation and law reform issues.

In view of the important role that the Commission will continue to play in the Constitutional Implementation process, the Law Reform Commission should be exempted from the GOE Bill like the other bodies listed in section 4(2) of the GOE Bill

CONCLUSION

The GOE Bill is just a re-enactment of the State Corporations Act albeit, with the addition of more retrogressive provisions that will increasingly stifle the operations of the State Corporations and other public law entities. Further, adequate stakeholder consultation should be undertaken, especially with the independent State Agencies and Regulatory Authorities before they are subjected to unnecessary oversight by other bodies except the Constitutional Commissions established by the Constitution.

THE WAY FORWARD

The failure to enact the GOE Bill does not mean it is the end of the Parastatal Reform process. What needs to be done is for the National Government to fast track the enactment of the Companies Bill 2014 and the Insolvency Bill 2014 which the Office of the Attorney - General and this Commission have put in a lot of time and effort to develop. Any sustainable reform and restructuring of private and public enterprises in Kenya can only be achieved through the enactment of these long delayed statutes. It

cannot be achieved through ad hoc and knee jerk enactment of a GOE law which merely replicates the same centralized control system under the State Corporations Act which the draft policy has so eloquently described as the reason for the non performance of public enterprises. The new Companies and Insolvency legislation will enable the National and County governments to incorporate holding companies equivalent to the Government Investment Corporation and other subsidiary State Corporations which will provide a more superior legal framework for corporate governance for all businesses.

We highly recommend that the Task Force Report for the work they have put in developing the Draft Policy. However their recommendations should not be implemented in a manner that defeats the gains made by Kenyans in the Constitutional Implementation process. We hope that the GOE Bill be circulated to the affected institutions in order to ensure more informed contributions at the stakeholder consultations prior to the Roundtable meeting. We also recommend that a proper audit and impact analysis be undertaken prior to the finalization of this Bill. It is a constitutional demand that the laws formulated by the Executive and enacted by Parliament are reasonable, responsive to the needs of the people and meets values and principles enshrined in the Constitution.

Yours *Sincerely*

Mbaga N. Ng'ang'a
MBAGE N. NG'ANG'A
CHAIRMAN

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Attorney- General's Chambers
NAIROBI

The Hon. Speaker
The Senate
The County Hall
NAIROBI

The Hon. Speaker of the National Assembly
National Assembly
NAIROBI

Mr. Joseph Kinyua CBS
Chief Of Staff and Head of Public Service
Executive Office of The President
State House
NAIROBI

The Chairperson,
The Senate Committee on Justice and Legal Affairs
NAIROBI

The Chairperson,
The National Committee on Justice and Legal Affairs
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The Auditor-General
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The Chairperson
Salaries & Remuneration Commission
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Director of Public Prosecutions
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The Chairperson
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