

# THE PRIVATIZATION CHALLENGE IN GUYANA

*Elizabeth A. Reid\**

## I. INTRODUCTION

In recent years, a wave of privatization has reversed the trend of nationalization and state-owned enterprises characterizing many developing nations, particularly those making the transition from a centralized autocracy to a market economy, such as the Republic of Guyana. This high-level policy reversal can be partially explained by the nature of state enterprises. Historically, state enterprises are not as profitable as those within the private sector, are notoriously inefficient, and often stifle the development of private enterprises and thus overall economic growth. When nationalized industries failed to thrive domestically or internationally, national governments began looking for more productive alternatives, further motivated by the rapidly changing nature of the international economy.<sup>1</sup>

Although the fundamental concept of privatization is consistent throughout the world, the goals, procedures, and substantive challenges of the privatization process differ according to the needs of the particular nation. However, the variations within the privatization process seem to be delineated along lines corresponding to levels of industrialization. That is, developed nations face common privatization challenges that are very distinct from the difficulties of privatization encountered by developing nations. This Comment attempts to highlight some of the difficulties inherent in the privatization process of formerly autocratic developing nations, through the example of the Privatisation Unit of the Republic of Guyana.

## II. STRUCTURAL CHALLENGES OF PRIVATIZATION IN DEVELOPING NATIONS

Although privatization is generally regarded as a successful measure in developed, fully industrialized nations, the process has encountered major challenges common in many developing nations. Oftentimes, these difficulties

---

\* J.D. expected 2005, University of Georgia School of Law; B.A. 2001, Furman University. This Comment is the product of the author's experience clerking on privatization issues for the Minister of Legal Affairs in Georgetown, Guyana.

<sup>1</sup> Pierre Guislan, *The Privatisation Challenge: A Strategic, Legal, and Institutional Analysis of International Experience*, The World Bank, Washington, D.C., 7-8 (1997).

are the result of preexisting structural conditions that render the country particularly susceptible to the rigors of the requirements of privatization. Among the structural elements acknowledged to be necessary for a successful privatization process are: clear, consistent, and broad objectives articulated by the government; few initial limitations (external or internal) being placed on the privatization process; and a stable domestic economic structure that lends itself to the development of the private sector. Further political and legal challenges center around the need for specific legislation that clearly defines the rules of privatization; a system authorizing and regulating the entire process of privatization; a clear institutional framework to conduct the transfers; and an acknowledgment of sector-specific difficulties. Like many developing nations, Guyana has struggled in some of these areas, sparking concerns about the foundation upon which its wave of privatization is built.

Clear statements articulating the fundamental goals of a nation's privatization process are not as readily available as one might think, especially in nations that historically operated under command economy principles and are transitioning from the strictures of a socialist economy into a market democracy. In such an environment, the government was not required to articulate any economic policies to the population at large, let alone provide justifications and rationales for their actions, to the extent necessary in a market democracy. However, the move toward market democracies has encouraged the governments of developing nations to increase the transparency of government plans as well as accountability to the people. In Guyana, the recently promulgated National Development Strategy (NDS) has provided a clear objective: to "privatize everything," although this strategy has yet to be adopted in such broad terms in internal legislation or government statements.<sup>2</sup>

The process of privatization will also suffer if, at the outset, external and internal limitations exist that may hinder the process. External limitations may consist of bilateral or multilateral treaties with other nations or international entities. In the case of Guyana, external entities such as the Carter Center, the World Bank, and IMF have encouraged privatization; in fact, it is often a prerequisite measure Guyana must meet before receiving international aid. Internal limitations can be constitutional or statutory. The Constitution of Guyana states that "[t]he existence of privately owned economic enterprises is recognized. Such enterprises must satisfy social needs and operate within

---

<sup>2</sup> National Development Strategy of Guyana, *available at* <http://www.guyana.org/NDS/NDS.htm>.

the regulatory framework of national policy and the law.”<sup>3</sup> While hardly a strong display of support for private enterprise, it appears to pose no legal limitation on the privatization of state enterprises in Guyana. To date, no explicit statutory limit exists on the privatization efforts of the Government of Guyana.

The basic economic structure of the nation will also directly affect the success of privatization efforts. If a nation has not developed rules defining and protecting ownership and ensuring fair competition among economic actors, privatized enterprises are not likely to succeed. Potential investors, both domestic and foreign, will be wary of participation in economic ventures, particularly those that were barely profitable under the protection of the state.<sup>4</sup> In Guyana, recent economic reforms, such as a structured tax incentive system, have improved the economic stability and investor potential in the country. Independent entities like the Guyana Office of Investment (GOInvest) encourage the development of new business ventures, and courts are quickly gaining experience with corporate matters and privatization procedures. Further reforms encouraging the development of a strong private sector are anticipated; if enacted, they will greatly ease the privatization process as well as Guyana’s full transition to a market democracy.

### III. *SINGH V. ATTORNEY GENERAL OF GUYANA*

Such challenges to the privatization process are common to many developing countries. However, in analyzing the difficulties unique to Guyana, it is helpful to consider a current case that raises many issues in the ongoing privatization initiatives in Guyana. In the summer of 2003, the case of *Singh v. Attorney General of Guyana*<sup>5</sup> surfaced in the Ministry of Legal Affairs. The case involved the privatization of the Guyana Pharmaceutical Corporation (Old GPC), and exemplifies many of the difficulties faced by developing nations struggling to legitimize and successfully execute their privatization processes.

In 1982, the Government of Guyana ordered the compulsory acquisition of a family-owned building known as Sijan Plaza.<sup>6</sup> At the time, Sijan Plaza was

---

<sup>3</sup> GUY. CONST., chap. 2, art. 17.

<sup>4</sup> Guislan, *supra* note 1, at 45.

<sup>5</sup> Action No. 2733 of 1997 (still pending).

<sup>6</sup> Under the Acquisition of Lands for Public Purposes Act, the government is entitled to acquire any property so long as it is a defeasible estate to be used for a public purpose and the owner received a hearing and adequate compensation. In the instant case, the government seized

leased to the state-owned Old GPC, on whose behalf the government seized Sijan Plaza. Before the disputed takings claim was resolved, the government formally transferred Sijan Plaza to the direct ownership of the tenant Old GPC. The Privatization Unit of Guyana then initiated privatization proceedings on Old GPC. The state enterprise Old GPC was dismantled and eventually reincorporated as the private, share-owned New GPC. Under the procedures of the Privatisation Unit, all assets of Old GPC, which included Sijan Plaza, were to be transferred to a government holding agency, the National and Industrial and Commercial Investment, Limited (NICIL), until arrangements could be made for New GPC to formally acquire the property. Under the rationale of the Privatisation Unit, New GPC would therefore be able to claim Sijan Plaza as a corporate asset from its inception, thus boosting its initial public offering.

Thus, beyond the basic eminent domain claim, the plaintiff sought determination on whether the government, in the form of the Privatisation Unit, could seize property based on the public interest in successfully privatizing a state enterprise. Furthermore, the plaintiff questioned the legitimacy and authority of the procedures of the Privatisation Unit in transferring disputed assets of a previously state-owned enterprise to a third party (NICIL) without the consent of any of the parties involved. Although the Privatisation Unit eventually sought the permission of the Attorney General of Guyana for the transfer of Sijan Plaza to NICIL, such a measure did not diminish the significance of the issues raised. The case questioned the very authority of the Privatisation Unit, along with the legitimacy of its procedures and substantive guidelines; thus, it provides a useful framework for analyzing the difficulties in the privatization process in Guyana.

#### IV. THE PRIVATIZATION CHALLENGE IN GUYANA

##### A. *Political Challenges*

One of the most critical aspects of privatization is the institutional framework implementing the privatization process and the supporting governmental structures. In Guyana, the Privatisation Unit is an executive agency, technically a branch of the Ministry of Finance. The Unit is housed

---

the property for the public purpose of privatizing a state enterprise; the plaintiff then brought suit claiming deficient grounds of acquisition and questioning the constitutionality of the government's valuation process.

in a separate structure several blocks from the Ministry of Finance, although its director answers to the Minister of Finance. The Privatisation Unit operates with some degree of autonomy, although it works in close conjunction with NICIL, which holds and operates all industrial estates in Guyana, including the assets of state enterprises.

The structure of the executive branch of government with which the Privatisation Unit interacts further affects the legal process of privatization. Most government ministries (including the Privatisation Unit) do not directly employ any attorneys. Thus, the parliamentary and state counsel within the Ministry of Legal Affairs are charged with acting both as internal legal advisor to each ministry and as a legal check on other ministries and branches of the government. This conflict of interest often creates tension between the Ministry of Legal Affairs and other government ministries, since the state attorneys at the Ministry of Legal Affairs are required to advise and protect government ministries as their "clients," and yet also to discover and prosecute legal violations within the government.<sup>7</sup>

This particular problem was evident in the Singh case. The Privatisation Unit sought to legitimize its transfer of Sijan Plaza to NICIL and New GPC after the fact, via permission from the state counsel at the Ministry of Legal Affairs. When the request was formally conveyed, the Ministry of Legal Affairs faced a direct conflict of interest. While the Ministry of Legal Affairs is charged with providing sound legal advice to the Privatisation Unit as official government counsel, many of the attorneys felt that the Privatisation Unit was abusing its grant of authority from the Ministry of Finance, thereby creating too strong of an executive branch of government. Under the current Guyanese Constitution, the doctrine of separation of powers is not a strongly established tradition. Therefore, in many instances, the Ministry of Legal Affairs provided the only check on the growth of executive power. However, in order to exercise this check, state attorneys are forced to ignore their duty to serve as effective legal counsel to other ministries. When compelled to choose between the two courses of action, the officials of the Ministry of Legal Affairs opted to fight what they perceived as the unconstitutional growth of an executive agency—thereby depriving the Privatisation Unit of internal legal

---

<sup>7</sup> However, in reality, the Ministry of Legal Affairs is rarely consulted before employees of other ministries officially act on behalf of the Government of Guyana, including entering into contracts, signing treaties, and incurring international obligations. Thus, the Ministry of Legal Affairs usually provides legal advice to other ministries after a problem has arisen. This situation contributes further to the tensions between the various executive branches of government.

counsel that would fight for its objectives within the government. Such institutional, and inherently political, challenges pose a distinct obstacle to the privatization process.

### *B. Legal Challenges*

One of the primary legal privatization challenges that the Government of Guyana has faced is establishing the proper legal authority for the Privatisation Unit. The Constitution of Guyana, as amended, does not explicitly provide for the creation of a Privatisation Unit; it does, however, authorize the establishment of various executive ministries. The Privatisation Unit thus exists as a semi-independent agency under the strictures of the Ministry of Finance, created by the Ministry of Finance, and answering to the Minister of Finance.

In addition, the establishment of clear substantive laws that determine the rules for the privatization of state enterprises and resolve any legal questions that may arise during the privatization process is essential. This stability, consistency, and predictability is crucial for the success of privatization. This issue arose in the *Singh* case when the Privatisation Unit attempted to unilaterally transfer Sijan Plaza to NICIL. When challenged by the plaintiff, the Privatisation Unit sought the permission of the Attorney General. However, in the course of this inquiry, major questions arose regarding the applicable law and thus the legitimacy of the action.

The Privatisation Unit sought to act solely on the executive authority inherent from its creation within the Ministry of Finance. Under this view, the consent of the Attorney General (which was not mandated in the Constitution, the Laws of Guyana, or under any legal precedent) served as the only legal authority for the transfer. This more flexible, results-oriented approach would allow the Unit considerable unsupervised authority on the transfer of assets of a state enterprise, and, more generally, on all privatization procedures, while rendering the Attorney General susceptible to any claims arising out of the privatization measures. The Privatisation Unit asserted that such flexibility and adaptability of the law for the sake of the national public interest in privatization was worth a short-term sacrifice of consistency and predictability in the law.

The Ministry of Legal Affairs claimed that traditional company law, governing the winding-up of any corporation, was the relevant body of law,

and thus sought to apply the Public Corporations Act.<sup>8</sup> Despite the daunting and unique political, economic, and legal difficulties facing Guyana, the Ministry of Legal Affairs argued that the British common law system upon which the legal system of Guyana is based required application of the relevant company law precedent, even if such application hindered the privatization process. Under the Public Corporations Act (PCA) investigation, the state attorneys at the Ministry of Legal Affairs discovered some discrepancies in the transfer process.<sup>9</sup> Under the PCA, the process of privatization should begin as any other winding-up of a corporation, state-owned or otherwise: with the official appointment of a liquidator. Only such a liquidator of Old GPC would have the authority to transfer the corporate asset of Sijan Plaza first to an escrow account (that the building might be properly valued for the purpose of compensating the plaintiff) and then to NICIL, which could effect the transfer to New GPC at its discretion. Here, no liquidator was appointed; the only acting authority was the Privatisation Unit.

As the named defendant in the *Singh* case which would be liable for any damages awarded, the Attorney General's Chambers clearly could not sanction such an avoidance of the dictates of the law. However, the Ministry of Legal Affairs also did not possess the legal authority to formally sanction the Privatisation Unit, mandate a change in its actions or policies, or even dictate the applicable law. Thus, the Ministry of Legal Affairs took two actions: first, recommending that the Privatisation Unit seek the permission of the National Assembly for its action,<sup>10</sup> and second, requesting that NICIL and/or the Privatisation Unit be substituted as a defendant in the *Singh* case for the Ministry of Legal Affairs. In this manner, the issue of the substantive law to apply in privatization cases as well as the scope of the authority of the Privatisation Unit, was put before the National Assembly, the most democratic government institution in Guyana.

The *Singh* case also illustrates another legal difficulty in the privatization process in Guyana. Since privatization is a relatively new endeavor in Guyana, there is inevitably some uncertainty regarding the nature, scope, and enforcement of privatization law. Thus, it is an area within which government corruption is able to thrive, often a holdover from the days of autocracy. Since

---

<sup>8</sup> LAWS OF GUY., ch. 19:05 (1988) (as amended 1991).

<sup>9</sup> Personal notes of the author.

<sup>10</sup> This request was pursuant to § 9 of the Public Corporations Act (Act No. 21, 1988), which states that "[t]he Minister may by order, which shall be subject to negative resolution of the National Assembly, dissolve a corporation."

the Ministry of Legal Affairs often serves as the primary investigator of the government, it is often policing the actions of the very ministry it is required to advise on the same matter. In the *Singh* case, the Ministry of Legal Affairs discovered disturbing facts about the privatization of Old GPC. Although New GPC was ostensibly a private corporation, share-owned by the Guyanese people, further investigation revealed that ninety percent of the shares of New GPC were in fact held by Queens Atlantic Investment, Inc., a foreign corporation that was outside the jurisdiction of Guyana. Although incorporated outside of Guyana, Queens Atlantic Investment, Inc. was owned by the same handful of Guyanese investors that controlled the shares of NICIL that were offered publicly in order to increase governmental transparency and accountability to the people of Guyana. In the view of the Ministry of Legal Affairs, the transfer of Sijan Plaza from Old GPC to NICIL to New GPC was a transfer in name only; the building never actually left the control of the same group of government officials. Thus, the uncertainties inherent in the complexities of privatization often provide loopholes for government corruption which the Ministry of Legal Affairs is not always authorized to handle. Such illegal activity undermines the legitimacy of the process as well as its eventual success.

### *C. Practical Challenges*

These substantive challenges would be difficult to overcome in any legal environment; however, this process is even more challenging in an under-resourced developing country. The Ministry of Legal Affairs is primarily charged with providing legal guidance to the Government of Guyana. However, only a few CD-ROMS of the Laws of Guyana (promulgated by the Carter Center) exist in the Ministry and no recording system exists for the compilation of judgements and establishment of precedent. The Ministry's policing of other executive agencies, although not its primary focus, is of great importance both with the government and the nation. Here again, however, these duties are rendered significantly more challenging by the lack of investigative resources, the holdover attitude from earlier regimes against interagency cooperation, and lack of transparency throughout the government. Administrative resources are also at a premium, such as computers, printers, runners, copy machines, and human resources. These practical challenges affect both the Privatisation Unit as well as the Ministry of Legal Affairs, which inevitably affects both the substantive functioning of the Privatisation Unit and the Ministry of Legal Affairs.



## V. CONCLUSION

Despite these immense challenges, the Government of Guyana has successfully privatized many of its national industries. Among the most prominent recent privatization examples are the Guyana Sugar Corporation (Guysuco) and the telecommunications sector (GT&T). The litigation surrounding the privatization of Old GPC, which is still pending, will be a critical test of the both the Privatisation Unit itself and the privatization process in Guyana.

