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ASSAULT ON WHISTLE BLOWING AND THE FREEDOM OF INFORMATION; WHAT OPTIONS FOR CIVIL SOCIETY?

A paper presented at the CLARION and NASCON Conference held on the 14th October2006 at the Panafric Hotel.

In this short paper a snapshot analysis is made of the following statute and Bills; (a) The Statistics Act, 2006,(b) The Witness Protection Bill,2006 and (c) The Statute Law (Miscellaneous Amendments) Bill, 2006. However, in the context of the latter, it's more in relation to the proposed amendments to the Public Officer Ethics Act.

(A) The Statistics Act, 2006.

In the month of July 2006 the Parliament passed the new law, which obtained Presidential Assent on 23rd August 2006.

The Preamble of the Act states its purpose and object to be thus;

"An Act of Parliament to provide for the establishment of the Kenya National Bureau of Statistics for the collection, compilation, analysis, publication, and dissemination of national statistical and the co ordination of the national system, and for connected purposes."

The object of the Act therefore is really to establish the bureau as an active institution in the business of statistics and NOT as a REGULATOR.

The matter of concern however, will be found in sections18 to 26 of the Act. The provisions in these sections have been adequately dealt with in the paper by Dr Adams Oloo hence no need to reproduce them here save to say that they are the sections that purport to make the KNBS a regulator of any other person who may want to conduct research that disseminate such research findings to anybody. What is more distressing is the fact that the Act creates criminal offences relating to any other research carried out in contravention of the Act.

It's my humble view that the Act is UNCONSTITUTIONAL as it contravenes the basic law.

Section 79 of the Constitution provides that every person has a right to receive information and disseminate the ideas and even to communicate freely to the public generally or to any individual. Research, its analysis and dissemination thereof is a core function of the right as in sec 79 of the constitution hence Parliament acted in grave error to seek to limit that right by this law.

Secondly, even in regular course of things, a person (natural and juridical) cannot reserve unto themselves the monopoly of information. The pretentious manner the Act seeks to vest the sole discretion to the bureau is inimical to freedoms.

Thirdly, even if the bureau were to have any legitimate power to control research, the Act violates the rule of Natural Justice by suggesting that in the case of declining to grant the **"license**" under the Act the bureau has no duty to explain its decision. The notorious principle that no person shall be condemned without being heard is clearly violated with inexplicable impunity by parliament. Of course, we know that the High Court has original jurisdiction to hear any complaints but why expose any person to unnecessary expense and inconvenience?

Lastly on the Statistics Act, the penalties suggested are outrageously high. Why should any one conducting research without a requisite permit be sent to prison for a year or a fine of Kenya Shilling one hundred thousand, which is about USD 1388? A time tested scientific and academic process is being criminalized much in the same category of chicken theft!

(B)**The Witness Protection Bill 2006**

The object and purpose of the proposed law is found in the Preamble as well as the explanatory notes at the back known as the Memorandum of Objects and Reasons. The preamble states thus**: "AN ACT of Parliament to provide for the protection Of witnesses in criminal cases and other proceedings**"

Under the Memorandum of objects and Reasons, the Attorney General, being the mover of the Bill, proposes to establish a scheme to protect witnesses and to run it on behalf of the Police and other law enforcement agencies.

Its widely understood that the Witness Protection Bill is a response by the AG to the demands to enact a law that would be used to protect Whistle-blowers especially those that blew the cap off Corrupt dealings more particularly, Grand Corruption. In this category of course would fall any whistle-blower on any other serious crime e.g. Drug Trafficking and matters related thereto.
In very ordinary parlance, a whistle blower is one who on discovering that a crime or something highly untoward is in the process of being committed such person would blow the whistle on the act. Indeed the whistle-blower need not be a witness or willing to testify.

The AG seems only interested to provide for witnesses who would have either testified before a court of law or Commission of Enquiry or willing to do so. This, in my view, seems to defeat the object. There are instances where a whistle-blower need not testify. An example is where a person obtains information through informal communication or obtains it under cover but proceeds to make it known to others thus halting the illegal transaction. Investigative journalism is one such way. In addition, there are so many Kenyans who file information with CSOs instead if the police or other known law enforcement agency. More often than not, whistle blowing leads to formal investigation thus obviating the need for the whistle-blower to testify.

The point being made here is that the classification of who should be admitted to the scheme is narrow and limiting. Infact its likely to benefit those who should not be candidate therefore. The openness in the definition makes it liable to corrupt abuse.

Secondly, and perhaps more importantly, the protection ought to be provided to those whistle-blowers who may not necessarily face actual physical danger but whose life is made difficult beyond bear by the fact of their actions.

These should include people who lose their jobs and are hounded by the power of corruption to the extent they cannot make ends meet. A gallant example in the name of David Sadera Munyankei of the Goldenberg whistle-blower fame comes to mind. Whereas Munyankei was not hounded by gun totting gangsters, he was let to all elements without any assistance from the government even as it used the Goldenberg enquiry to settle at table with the community of nations purportedly fighting corruption.

Another issue worth speaking to in the Bill is the witness Relocation programme. This comes with the total change of identity of the witness. Kenya is such a small country that it's difficult to see how the programme will successfully be applied. In any event with communities that are culturally sensitive, its going to be difficult to use the assumption of death of a witness as a process of relocation since so many people may have to be involved to ensure its success.

What about the AG being the manager of the scheme? Without a new Constitution that will redefine the powers of the AG, its going to be difficult to trust that office to run the programme effectively. The AG is part of the executive and is himself a candidate for whistle blowing. How then can s/he be a protector of their tormentor?

The long and short of the Act is that its seeking to protect witnesses who agree to testify and in no way does it seek to support real whistle blowers hence it should be re assessed to enable it provide support and protection to the actual people.

(C)**The Public Officer Ethics Act, 2003**

Under this proposed amendment, its intended that the Wealth Declarations be made once every year instead of the current annually. Further the proposed law intends to make the declarations accessible by the Kenya Anti Corruption Commission and somewhat to the public though the latter have to seek judicial authorization first.

The rationale of making the declarations once every two years is not explained though one may hazard a guess that the government wants not to burden public officers with demands of accountability.

Whereas one is baffled by this once a year declaration it should be remembered that the public has been demanding that the wealth declarations should be made public and available to them on demand.

Such a situation will make it possible for all concerned to hold public officers accountable. It must be remembered that Public Officers execute public trust and therefore ought not to be treated like any other person in their private capacity.

(D) CONCLUSION AND RECOMMENDATIONS.

(B) From the foregoing it's clear that our Parliament ought to do more than its doing in terms of improving on the quality of their work. They ought to find ways of testing the veracity of the laws they enact against the Constitution.

(C) It's therefore recommended that every time the AG or other mover introduces a motion to parliament, there ought to be a precise statement on how such recommendation relates with the Constitution so as to avoid the situation of unconstitutional laws emerging therefrom.

(D) Further, the AG should find a way of routinely making available to the public and especially the stakeholders who would be directly affected, any proposed law to enable them to discuss and effectively contribute to it before parliament considers it.

(E) CSOs should find a working relationship with the various offices especially Parliament to ensure that they add value to the motions and Bills debated in parliament.

(F) The AG should cause the amendment of the Statistics Act 2006 to remove the offending portions.

(G) The AG should withdraw the Witness Protection Bill and create a suitable law to protect and provide for Whistle-blowers.

(H) The Public Officers should be made to declare their wealth annually and ensure that the forms are made available to the public at least inconvenience.

(I) Though not discussed above in any detail, the AG needs to cause the amendment of the Companies Act and the Capital Markets law to make it possible and mandatory to disclose beneficial owners of companies and shares in the Stock market and also to make capital nominees more accountable to the law and the people.

END Thank you, HMN