LEGISLATIVE MALICE AND INTIMIDATION: THE STATISTICS ACT; 2006, THE MISCELLANEOUS AMENDMENT BILL, 2006, FREEDOM OF INFORMATION AND THE FIGHT AGAINST CORRUPTION

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The war against corruption has generated intense debate among Kenyans as well as our development partners. NARC was elected on its promised commitment to 'zero-tolerance' on corruption and ability to restore integrity and accountability in the management of public affairs. Very early in its war against corruption, the government realized that the war could not be won without effective institutions to develop appropriate policies, conduct investigations, undertake prosecution, determine cases and create awareness against the vice. The government therefore immediately commenced the process of creating or strengthening anti-corruption institutions. It also started developing the enabling policy and legal environment for a sustained war against corruption(e.g., the Public Officers Ethics Act and the Anti-Corruption and Economics Acts). However, the very same government was to later go against the very same policies that they created as Cabinet ministers participated in *harambees*, use government resources in the referendum campaigns and engaged in corrupt practices (Anglo-leasing, etc).

The question that needs to be addressed, therefore, is how Kenya as a country can fight and counter corruption that pervades the fabric of its society. There are many factors including strong democratic structures and institutions created specifically to fight corruption, but there is one factor that does not get due attention and that is the right to '*information*'. If the public does not know what is going on, they will not have an opinion on it, let alone seek redress from the government. In order to obtain information, citizens (individually or in organized groups, such as NGOs or opposition political parties) and the press, need to have access to information. Coupled with freedom of association and freedom of the press to publish what they discover, access to information is what allows democratic institutions to operate in a manner that keeps democratic governments accountable to the public.

In Kenya, lack of transparency in government circles continues to be an obstacle to the institutionalization of an informed public. Since corruption and corrupt cartels thrive in the dark, freedom of information legislation can help to reduce corruption. With the appropriate partners, a country-based coalition promoting freedom of information legislation can form a basis for collective action in the fight against corruption through access to vital information which the government has but which they do not allow the public to access. We are of course here talking about non-classified information. It is against this background that we look at the Statistical Act and the Public Officer Ethics Act as two pieces of legislation that have the net effect of slowing down the fight against corruption as they have clauses that act as bottlenecks against the public's right to information.

The Statistics Act, 2006

The Statistics Act, 2006 provides for the establishment of the Kenya National Bureau of Statistics for the collection, compilation and dissemination of statistics information, and the coordination of the national statistical system, and for connected purposes.

Section 18(1) and (2) stipulates that "any agency other than the Bureau, wishing to conduct a census or survey at national, or local level shall seek the approval of the Board by submitting its plans to the Board three months before the intended survey, and the Board may approve or decline to approve such plans." This beats the essence of surveys most of which are conducted when there is a sensitive/pressing issue and having to apply and await clearance would defeat the purpose, timing and urgency of the survey. Furthermore, the Act is likely to be used to curtail freedom of information gathering and dissemination since the Bureau retains the right to approve or decline approval of a survey. This is done without any clear benchmarks regarding the application and approval process thus living room for the officer concerned to Act with impunity. The bottomline is that you cannot do a survey without approval.

There is also a high likelihood that institutions and individuals considered hostile or critical of the government will not be guaranteed of approval even if they follow the stipulated procedures. This, for example, has been the case in the registration of political parties and

there is all likelihood that the Statistics Act can be use to silence critical voices of the government of the day. This will go against the very tenet of democratic governance that require a free media and the right of the public to access information. By this Act the government is denying the populace the access to information on public matters.

Section 19(2) states that "a person required to provide information shall, to the best of his knowledge, information and belief, complete such forms, make such returns, answer such questions and give such information in such manner and within such time as may be specified by the authorized officer."

Section 19(3) an authorized officer may require any person or establishment to supply him with particulars either by interviewing the person or posting to his last known address a form having thereon a notice requiring the form to be completed and returned in such manner and within such time as shall be specified in the notice.

While section 19(4) provide that where any particulars are, by any document issued by an authorized person, required to be supplied by any person, it shall be presumed until the contrary proved that the particulars may lawfully be required from that person in accordance with the Act.

The net effect of these provisions is that the government is given a broad leeway to censure information that individuals posses which in turn creates room for intimidation. Furthermore, these stipulations have the unintended effect of giving the government the merit to determine the information which finds its way into the public, and therefore, this will be a setback in the fight against corruption since the government will be in a position to determine what kind of information is released to the public.

The Act also circumvents s. 79(1) of the Kenyan constitution which stipulates that "except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person

or class of persons) and freedom from interference with his respondents." The government should let information compete and the truth will win. By the Act the government simply wants to censure what comes to the public domain by simply deciding what is released and to whom. The government wants to arrogate to itself the role of the sole determinant of what is true and what is false in the eyes of the citizenry. One only needs to look at the government-leaning pronouncements that emanate from the Office of the Government Spokesman to appreciate the gravity of the situation.

Section 24(2) of the Act provides that any person who willfully fails to give any information or particular as required under this Act commits an offence and shall be liable on conviction to a fine not exceeding Kshs. 100,000 or to imprisonment for a term not exceeding six months, or to both. Section 26 also criminalizes any person who knowingly compiles for issue any false statistics or statistical information. The Act unilaterally creates some offences under this section, without (i) stipulating how the term 'knowingly' is qualified, and (ii) stipulating who determines false, is it the surveyor or the Bureau. Furthermore, the information contained in s. 26(c) is too sweeping and could end up in the punishment of a third party. The Act should, in the first place, facilitate the dissemination of information which has been secured using public resources.

Coming on the eve of an election year, the move is seen as an effort to keep pollsters and other research institutions on a tight leash and keep political opinion polls from the public when it is not in the government's favor.[1] This case would also apply to statistics on the level and extent of corruption within government. The government might block release of statistics which paints it negatively. The key to assessing the accountability of government agencies and hence, the success of the legislation, is in the type and quantity of "policy" information that is released or withheld from the public

The Public Officer Ethics Act

The Public Officer Ethics Act (POEA) came into force alongside the Anti-Corruption and Economic Crimes Act (ACECA). The Act was heavily modeled upon the Public Officer

[1] *The Standard*, September 27, 2006, p. 1.

Ethics Bill, 2002. The purpose of POEA is ensconced in its preamble, which declares the Act 'an Act of Parliament to advance the ethics of public officers by providing for a code of conduct and ethics for public officers and requiring financial declaration from certain public officers and to provide for connected purposes.'

The problem of corruption is related to the issue of ethics. Corruption tends to thrive where there are no acknowledged ethical standards to guide conduct. It has been established that taming corruption and economic crime is impossible without a Code of Ethics.

Without doubt, the POEA is a pacesetter in the area of wealth declaration with the view of subjecting to questioning unexplained wealth. The erstwhile administrative regulations with regard to public officers had few penal sanctions and no requirement for wealth declaration. Section 26-34 of the Act give details about when declarations must be made, the need to provide correct information, which information is to be kept confidential. Wealth declaration helps in discovering whether the official concerned has unexplained wealth, which would attract the sanctions of the provisions of ACECA. Upon the conviction on the offence of illegally acquiring wealth, the officer is barred from holding public office.

It is noteworthy that under Part III, the Act sets out the basic general Code of Conduct and Ethics for all public officers. The scope of the Code, just like the Act in general, covers all public officers. Section 2 of the Act defines a 'public officer' broadly so as to include employees of the National Assembly, local authorities, public corporations, cooperative societies, and public universities, regardless of their terms of service—permanent, temporary, contractual, part-time or voluntary.

Further, the Act criminalizes conflict of interest among public officers. POEA requires public officers to observe political neutrality in the performance of their duties. The Act makes it obligatory for a public officer to take reasonable care of property that is entrusted on him (Sec. 15), failing to do which he may be held personally liable for the attendant losses. This provision provides an important safeguard against misappropriation or lack of due care of public resources by public officers, which is seen as a form of corruption. In this

respect, the provision echoes s. 45 of ACECA, which declares such conduct as tantamount to economic crime.

Under s. 5 (i) of POEA, each responsible Commission is required to establish a specific Code of Conduct and Ethics for public officers for whom it is responsible. The codes established by the Commission are applicable alongside the one set out under Part III of the Act. Thus the Code when established becomes part and parcel of the Commission's legal framework and every employee of the Commission is supposed to be sensitized about the code via internal circulars, meetings and posters.

The Act provides for strict enforcement mechanisms and sanctions. Section 35 (i) empowers the responsible Commission to conduct investigations (any other body, with the consent of the Commission, may conduct such investigations on behalf of the responsible Commission) to determine whether a public officer has contravened the Code of Conduct and Ethics. On the basis of such investigation, the responsible Commission could invite KACC to conduct appropriate investigations. Thereafter, the responsible Commission can mete out disciplinary action against the public officer.

Critique of the Public Officer Ethics Act[2]

Although POEA has a sufficient legal and institutional framework for ensuring integrity and ethical conduct in the public service, the Act has some inherent weaknesses that may water down its effectiveness. A number of weaknesses are identified hereunder and some of their effects assessed.

Declaration of Income, Assets and Liabilities

There is need to broaden the scope of income, assets and liabilities in respect of each public officer in order to go beyond the income of the officer and that of his/her spouse and children to cover friends, partners, members of the extended family, proxies, nominee

[2] The discussion in this section benefits a lot from Chweyya, L., *et al.*, *Control of Corruption in Kenya: Legal and political Dimensions, 2001-2004*, Nairobi: CLaripress Limted.

companies or accounts and generally associates in business or otherwise. Those are 'places' where a public officer can hide his property beyond the reach of the Act, thereby defeating the intentions of the Act.

The declaration form prescribed under s. 26 of POEA and set out more clearly in the Schedule of the Act does not specify how much information and officer should disclose.

Section 26(1) deals with declaration. It states that "every public officer shall, annually and as otherwise prescribed by section 27, submit to the responsible Commission for the public officer a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years." The proposed amendment is to delete the word 'annually' and substitute with the words 'once every two years.' What this proposal means is that crafty permanent secretaries working in cahoots with corrupt Cabinet ministers can acquire wealth through corruption in their first year, hide it somewhere while looking for market, and dispose of it within two years before the end of the second year, they will have nothing to declare. This is a worrying proposal taking into account that the Kenyatta, Moi and Kibaki regime have failed to tether the corruption monster. Giving the corrupt people more in government more time to operate without declaring their wealth is suicidal.[3]

Disclosure of Information

The Act calls for the confidentiality of information in the declaration forms. Such information gathered is only to be disclosed to the authorized staff of the responsible Commission, the police/other law enforcement agency or a legally authorized person under a High Court order. Members of the press, the public and other stakeholders who may provide useful information with regard to the veracity of the information in some of the declaration forms have no access to the information in the forms, unless they have first sought an order from the High Court. It is no easy task getting such an order. No guidelines are given in what reasons, if any, should be given while applying for the court order. Further, no procedure is prescribed by the Act on how such applications are to be made.

[3] *The Daily Nation*, October, 4, 2006.

Distinct political support is vital for the freedom of media and a successful fight against corruption. There seems to be no will for such support. It is the duty of political and public representatives to clearly state their attitude about the fight against corruption before entering political elections. They should set an example by publicly declaring: their assets and income, that any potential conflict of interest is regulated and that they understand that the public has a right to be informed about their work and private property. They should furthermore invest personal effort into creating a transparent environment for political and other public institutions.

Curiously, the penalty for publication of information contained in the wealth declarations is a fine not exceeding two million shillings or to imprisonment for a term not exceeding two years or both (s. 30). On the other hand, the penalty for making a false declaration is less severe, that is, a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or both (s. 32). In a word, at its worst the wealth declaration exercise becomes more of a register of secrets with little or no provision for meaningful scrutiny. There is thus an urgent need for the contents of the declarations to be treated as public information since public officers are trustees of a serious kind and must bear the onus of a public disclosure to foster public rust in officials entrusted with their welfare. This situation obtains in Uganda and Zambia.

There are many merits for the publication of information contained in the declarations. The fight against corruption would benefit from information disclosures. Publication would also bring to an end the likelihood of making false declarations, as members of the public will be able to verify the truth or otherwise of the same. Public access to declarations facilitates public scrutiny of government and government officials, backs up enforcement of the declaration requirements, and promotes public confidence in the declaration system and the government.

Furthermore, internal review, inspection, and verification are especially crucial when officials' asset disclosures are not open to public scrutiny. Unfortunately, the Public Officer Ethics Act does not establish any mechanisms for review of declarations and does not

require responsible Commissions to include review mechanisms in their administrative procedures. Also, it is not clear whether the various responsible Commissions have the capacity, resources, or independence needed for effective administration of asset-disclosure systems.

Commissions should establish internal procedures for reviewing asset declarations. Reviews should adhere to set timetables to ensure that they are completed in a reasonable time and that problems are resolved quickly. They should follow clear, rule-based procedures that limit individual discretion; clear procedures are necessary to prevent inconsistent enforcement and abuse of the disclosure system for personal or political reasons.

Thailand, Uganda, and some other countries have established independent bodies to inspect public officials' wealth declarations. Parliament should consider legislation to provide for independent review of declarations by the Kenya Anti-Corruption Commission or another independent body.[4]

The Miscellaneous Amendments Bill, 2006 which is intended to ensure public access to these declarations fails to achieve that objective and simply supports the status quo. The amendment states that "the contents of a declaration or clarification under the Act shall be accessible to any member of the public upon application to the responsible Commission in the prescribed manner (30[1])" (which as we have stated above is a complex process; it is not easy to get an order from the High Court). The Act further stipulates that "no information obtained pursuant to subsection (1) above shall be published or in any way made public except with the prior authority of the responsible Commission.

In other words, the access being granted to the public is not meant for the public good but for individual curiosity. This beats the very logic why the Act was set up in the first place. Politicians and civil servants are public figures. In their daily work they come into contact with public funds though various means direct and indirect. The public needs to have faith that those whom they have entrusted with custody of public funds utilize them for public

4 Luh, J. 2003, "Public Officer Ethics Act Provisions for Declarations of Income, Assets, and Liabilities Evaluation and Recommendations,' Nairobi: Transparency International-Kenya.

good. It therefore follows that any citizen interested in a public office, political or bureaucratic, should be ready to open themselves to the public. They have the option of not taking such an office if they do not want to open themselves to public scrutiny. The Act is therefore mischievous and will in the end encourage corruption rather than deter it.

Retention of information

The Act provides for the retention of the information in the declaration forms for a period of 30 years after the person ceases to be a public officer. The number of public officers coming under the purview of s. 2 of POEA is well over a million. To insist that each of their declaration be kept during the subsistence of their employment and 30 years after leaving office, of course in addition to those of public officers who would be joining the public service from time to time, is a practical impossibility. At worst it may generate another industry for manufacturing corruption and at best it may cause a crisis in information storage and management.[5]

Punishment for Non-Compliance with the Act

The mode of verifying the veracity of the declarations under the Act is not foolproof. The requirement under s. 29 of POEA that the officer '…shall ensure that the information provided is correct to the best of his/her knowledge' is too casual to ensure that officers will feel obliged to tell nothing but the whole truth. This legal weakness is aggravated by the requirement of non-disclosure to third parties of the declared information. Although their exists the mechanisms of verifying declarations, the penalty described under s. 32 of the Act is not punitive enough, that is a fine not exceeding one million shillings or imprisonment for a term not exceeding one year or both. Obviously, an officer engaged in corruption worth billion of shillings would not mind paying such a fine. Corruption would be a necessary economic risk.

[5] Tuta, J.K., 2005, "Legal Framework for the Control of Corruption, in Chweyya, L., *et al.*, *Control of Corruption in Kenya: Legal and political Dimensions, 2001-2004*, Nairobi: CLaripress Limted.

Conflict of Interests and Harambees

Section 12(i) of the Act addresses the issue of conflict of interests, by providing that 'a public officer shall use his best efforts to avoid being in position in which his personal interests conflicts with official duties.' The use of the phrase 'shall use his best efforts' is very subjective and gives a public officer wide scope for circumventing the intentions of the Act in situations where conflict of interest may arise. Moreover the Act does not define what constitutes conflict of interest.[6]

Section 12 of the Public Officers Ethics Act states: "A public officer shall not preside over a harambee, play a central role in its organisation or play the role of the "guest of honour". Section 13 of the Act prohibits a public officer from using his office or place of work as a venue to solicit or collect harambee money. It is unclear whether public officers are thereby banned from conducting, presiding over, soliciting or actively in *harambee* fundraising outside their offices. On public collections, the Act prohibits a public officer from using his office or place of work as a venue for soliciting for *harambee* funds and from exerting any pressure on others to make contributions. The Act prohibits public officers from acting as guests of honour at *harambee* functions.

Cabinet ministers and MPs are holding harambees observing that harambees will not be banned. And this despite the existence of the Public Officer Ethics Act. Others have gone ahead and printed invitation cards complete with the coat of arms before biting their tongues at the blunder made. The Act does not provide for disclosure of the sources of these funds, especially where they surpassed known incomes of Cabinet ministers and MPs. Considering that the former head of state, for example, contributed Kshs.155 million in 635 *harambees*, an average of Kshs.244, 380 per *harambee*, there is need for the Act to deal on specifics in this regard.[7]

[6] Tuta, 2005.
7 Omore, C.O., and Gachucha, W., 2003, "Harambee: Patronage Politics and Disregard for Law," Adhili, Issue 50, Dec. 2003.

Another significant term used frequently but which is not defined in the Act is benefit. It is necessary to define it, otherwise it would be difficult to prove some of the offences under the Act.

Further, the issue of misuse of public property is very pertinent, yet it is not given adequate attention under the Act. Whereas s. 15 demands of public servants 'to take all reasonable steps to ensure that property that is entrusted to their care is adequately protected and is not misused or misappropriated' failing to which the person would be liable for any resultant losses, it is not clear what constitutes 'public property.'

Section 45(3) of the ACECA defines 'public property' as 'real or personal property, including money, of a public body or under the control of, or consigned or dude to, a public body.' In a country where corruption and economic crime are largely synonymous with misappropriation, embezzlement, misuse or abuse and/or loss of 'public property' there is need for a comprehensive definition of 'public property.'

Enforcement Action

Regrettably, enforcement seems to be overlooked in the mission of POEA as stated in the preamble. The Act banks heavily on the goodwill of public servants and takes it for granted that the officers will comply with the Act with minimal supervision. The issue of enforcement is *sine qua non* for proper implementation of any law and that needs to be clear from the onset.

Section 36(1) of POEA vests the responsible Commission with a blanket discretion over the nature of disciplinary action it may take against wayward public officers. It provides that the Commission shall, *inter alia*, take the appropriate disciplinary action. There are no guidelines on what disciplinary action may be taken over the offences of commission or omission as set out in the Act. The nature and severity of the action will be as variable as the number and

personalities of the chairpersons of the responsible Commissions. This lends credence to the legal cliché that 'discretion is unruly horse which should never be mounted.'[8]

In essence, therefore, without formal guidelines, the Commission runs the risk of being bombarded with a plethora of constitutional objections and judicial purview applications. In Uganda, such discretion is well fettered under breach of the Code: confiscation and forfeiture to the government of excess or undeclared property, dismissal or vacation of office, forfeiture to the government or institution of benefit equivalent to any gift, hospitality or benefit and subsequent warning in writing, and dismissal or vacation of office.[9]

Furthermore, deadlines for submission of the declaration forms have been changed several times, whereas the Act is very clear on when they are supposed to be submitted. Further, although the government was initially aggressive in demanding compliance with the Act over wealth declarations, little has been heard of the forms after they were submitted to the responsible Commissions.

Concluding Remarks

The greater the information made publicly available and the more certain its source, the greater the chances for a transparent and truly accountable government. Without such access, confidence in public institutions is placed in jeopardy.

If the civil society is going to make a difference on the anti-corruption front, and be seen to make a difference, access to information becomes an essential element in that fight especially considering the fact that the civil society can only use moral power (name and shame) through publishing/exposing corrupt practices in government: partly these Acts intend to deny them the use of this moral power. Past attempts by civil society to use the legal power have been frustrated by the Attorney general who uses his power to take over the cases. It is therefore up to the civil society to build structured partnership and coalitions with other arms of government engaged in the fight against corruption—specifically the Kenya

[8] Tuta, 2005.
[9] Tuk 2003.

National Commission of Human Rights and the Kenya Anti-Corruption Commission—which have the technical and legal power to fight corruption: the civil society has to pressure these organizations into action. The civil society should further ensure that the National Commission uses its access to parliament to ensure that the various bills being debated in the House have their human rights content entrenched. This, for example, would have ensured that the Statistical Act and the amendments to the Public Officer ethics Act did not infringe on the right of the public to be freely and independently informed.

Overally, the civil society has to champion the cause of access to information as it allows the public to build a critical opinion on society they are living in and on authorities that govern it; it encourages the well-informed participation of persons/groups/communities to matters of public interest; it helps increasing the efficiency of administration, legislative and justice and keeping their integrity by reducing the risk of corruption; it contributes to legitimacy of administration as a public service and to increase confidence in public institutions and authorities. The access to information has the capacity to lead to institutional transparency, transparency in administration of public money, accountability of public servants, exposure of corruption, and, least but not last, it is satisfying the individual interests of persons seeking information of public interest. Practically, the real access of individuals and media to information of public interest essentially determines the evolution towards a stable democracy.