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PROPOSED BIENNIAL DECLARATION, AN ANTI CORRUPTION TRAGEDY

The Statute Law (Miscellaneous Amendments) Bill, 2006 proposed changes to the Public Officers Ethics Act 2003, which now requires wealth declaration forms to be submitted every two years instead of annually, what is your observation?

The method of amending laws through Statutes Law (Miscellaneous Amendment) Bill, is extremely dangerous, and more often it is used mischievously to sneak in laws that escape the attention of the lawmakers and the public. Changing the duration for wealth declaration forms from one to two years is mischievous, and I take great exception to this.

When we drafted and passed the Public Officer Ethics Act in May 2003, we designed it in a way to echo the theme of zero tolerance, by allowing public officers to file wealth declarations annually. Two years down the line, the government is finding it impossible to sustain the momentum to fight corruption; a confirmation that it has lost the war on graft. Sneaking in amendments to sections (26) of the Act, which changes the word annually to biennially through the bill that seeks to amend thirty other statutes; makes it impossible for busy MPs and the public to understand, and follow the legal theory behind the amendments.

In your opinion as a shadow Justice Minister, what do you think the government hopes to achieve when the amendment pass?

Changing the exercise to biennial means that public servants will declare their wealth twice in five years. This suggests that the intention is to allow public servants to collect wealth in the first year: then hide the ill-gotten wealth overseas or even passing it on to friends or dummy companies. So, at the end of the second year public officers declare status quo in the forms.

When you are out to loot your country you do not require two years: one year is enough, and therefore this was a very important safeguard for protecting the Kenyan taxpayer against mercenaries and marauders who want to use their offices for their own gain. You can imagine the window that is going to be created for corruption should this amendment pass. This amendment will undermine the very concept of the law that was much believed to be a tool to fight rampant corruption practiced by public officers in government.

How effective has the Act been since inception in 2003?

I am afraid; the law has not been effective at all. If it had, by now we would have seen people arraigned in courts, charged and convicted under its elaborate provisions. Already, you can see those mentioned in Anglo Leasing scam like my learned friend Kiraitu Murungi are on war path campaigning for President Kibaki's re-election. It is unlikely that the President will allow his very worthy lieutenants to be arrested and prosecuted.

You can imagine the window that is going to be created for corruption should this amendment pass.

PROPOSED BIENNIAL DECLARATION OF WEALTH contd...

You have also seen the fiasco at the Kenya Anti Corruption Commission (KACC), where the third ranked officer Mr Hussein Were, was shacked in unclear circumstances: he is the chief forensic investigator and now he is being denied the opportunity to investigate and interrogate. I do not have any personal grudge against anybody in government, but all who were mentioned in John Githongo dossier, and are public servants must allow to be interrogated by the chief forensic officers of KACC.

> The Act should be extended to cover wider areas of public expenditure if the fight against corruption is to be achieved....the scope of the Act to cover CDF, the Kenya Roads Board funds and LATF

My view is that the Act is not working. A good example is the recent by-elections where government ministers openly used government resources, military choppers and public officers to campaign in total violation of Public Officers Ethics Act: nobody has been arrested. Therefore, it suggests to me that the law is purely a window dressing created by the current administration to satisfy donors and development partners.

Does the law give provisions to investigations on how wealth was acquired? And how is the government dealing with vague declarations?

There are sufficient mechanisms in the Public Offie ers Ethics Act that deal with vague declarations. The Act requires public officers to declare their assets and liabilities as well as those held by their spouses and children. Indeed, elaborate provisions guiding investigations as to how the wealth was acquired is in our laws, but again, lack of political will to enforce it has hindered investigations.

The courts have also contributed significantly to the blockage of investigations on how wealth is acquired. e.g the court of appeal recently blocked the KACC from compelling Dr Chris Murungaru to field the commission with his wealth declarations forms.

In my view, this is a highly complex thing that is done to protect political elites as opposed to the public coffers from being looted. One wonders, why, despite elaborate laws in place no one has been arrested and arraigned in a court to face prosecution on corruption. We should let the due process of law take its course. We therefore need to change rules in the constitutional reforms, appoint more judges and enforce the provisions of the law.

As a way of transparency do you think the government should let the wealth declaration form be accessible to public?

The government has created bureaucracy in this process. Section 30(1) of the amendment states that, "the content of a declaration or clarification under this act shall be accessible to any member of the public upon application to the responsible Commission in the prescribed manner". And also "no information obtained pursuant to subsee tion (1) shall be published or in any way made public except with the prior authority of the responsible Commission". Looking at that! they are hoodwinking Kenyans by pretending that wealth declaration forms will be made public.

In the case of MPs, they will go through a Parliamentary Service Commission (PSC), whom one may not get a response from. The amendment also states that one cannot publish the information without any written authority of the responsible Commission. This is a claw back provision that serves no value. It would have been sensible if the amendment said the wealth dee larations forms will be posted on websites of each Commission so that the public can access it.

Can Kenyans go beyond wealth Declaration forms as anti-corruption strategy?

Kenyans cannot go beyond this because of dynasties and political alliances that are being formulated each day. Although the proposed amendment to section (30) opens a window for anti-corruption agencies to access wealth forms of individuals; nobody has the nerve to investigate them because of obvious conflict of interest in the concerned bodies. .I feel vindicated on the position that I have taken and my feeling is that KACC will not be courageous enough to investigate and prosecute for obvious reasons. We can go beyond these forms if we are genuine in our desire to fight corruption.

In Uganda, President Yoweri Museveni introduced an element of transparency where he and his cabinet declared their wealth publicly. Kenya does not have the will to do so. No country can completely eliminate corruption, but what matters are the actions that are taken against those caught in corruption. Each country should therefore strive to establish pragmatic mechanisms to decisively deal with corruption and not just having good laws or filling forms.

The requirement that we fill forms every two years if the amendment is carried by parliament will be a waste of time. Kenyans must demand concrete commitment to fight graft by putting pressure on the government to prosecute the corrupt and implement the law.

Experts have said the bill is too wide and may not achieve its intention, do you think it should be narrowed down to be specific and to the point?

The bill is not wide enough. The net required to rein in corruption must be widened to catch sharks and fish. The Act should be extended to cover wider areas of public expenditure if the fight against corruption is to be achieved. I would have preferred amendments to enlarge the scope of the Act to cover the Constituencies Development Fund (CDF), the Kenya Roads Board funds and the Local Authorities Transfer Fund (LATF) among other areas in both public and private sectors.

What message do you have for Kenyans in regard to this issue?

We have all agreed that it is totally wrong to preside over corruption, and I urge you to speak to your leaders to remove daylight political fraud, robbery and plunder of resources.

WEALTH DECLARATION IN KENYA

Adapted from Wealth Declaration in East Africa By Brian Cooksey, Personal Active Member, Transparency International, 2003

Public Officer Ethics Bill was tabled before parliament in April 2002, during the last year of the Moi regime, but did not become the Public Officer Ethics Act until May 2003. The lengthy parliamentary debate surrounding the Bill during March-April 2003 focused on the issue of public declaration of assets. Members of the Legal and Administration of Justice Committee, including Paul Muite, argued strongly for public declarations. Muite argued as follows: 'Is the objective of this bill merely to comply with what the donors are asking us to do in order for us to begin to get aid? Or is the objective of the policy decision by us, as Kenyans, to truly confront corruption? If it is the latter, no case can be made for confidentiality.'

Kenyan law has never debarred public servants from involvement in the private sector for reasons of conflicts of interest, or required them to declare their personal and commercial assets. Consequently, senior members of the post-Independence governments of Jomo Kenyatta and Daniel arap Moi amassed fortunes through the acquisition of land, industrial and commercial property. The 1971 Ndegwa Commission proposed a code of conduct to regulate conflicts of interest. The code was made law, but never seriously implemented. From the late 1970s, the enormous abuse of public office for personal enrichment and political advantage became a major policy issue, particularly after the introduction of competitive politics in 1992. During the last decade of KANU rule, the opposition pushed for the declaration of assets, and Mwai Kibaki pledged that his new government would enact legislation that permitted the Kenyan people to know what the cabinet, parliamentarians and civil servants were worth.

Officials must submit declarations when they join the public service, once a year while they are in the public service, and when they leave the public service. According to paragraph 32 of the Act: 'A person who fails to submit a declaration or clarification as required under this Part or who submits, in such a declaration or clarification, information that he knows, or ought to know, is false or misleading, is guilty of an offence and is liable, on conviction, to a fine not exceeding one million shillings [$12,000] or to imprisonment for a term not exceeding one year or both'.

The Act stipulates that declarations will not be held in a central repository but will be held by eight 'responsible Commissions'. 'National Assembly members, including the President, Speaker and Attorney-General will report to Parliament's ethics committee. Civil servants will report to the Public Service Commission. Judges and magistrates will report to the Judicial Service Commission'. Other state employees' declarations are held by the Parliamentary Service Commission, the Electoral Commission (local authority councilors), Teachers Service Commission, Defence Council and the National Security Intelligence Council.

In summary, although the assets declaration legislation has been hailed as a huge step in the right direction, it is rather vague on exactly what assets, liabilities, and interests' public officers must declare.

> ***...Kenyan law has never debarred public servants from involvement in the private sector for reasons of conflict of interest...***

SUMMARY OF WEALTH DECLARATION ISSUES IN EAST AFRICA

	Kenya	Tanzania	Uganda
Main legislation	Kenya Public Officer Ethics	The Public Leadership Code of Ethics 1995	The Leadership Code Of Conduct 2002
Who submits declarations?	660,000 civil servants and politicians	5,400 leaders under the union government	16,000 central and local government leaders
Regularity of declaration	Annually (The Statue Law (Miscellaneous Amendments) Bill, 2006 Propose declarations to be Every Two Years)	Annually	Annually
Who receives submissions?	At least eight existing Commissions	Ethics Secretariat, Office of the President	Inspectorate of Government (IGG)
Verification procedures	Fragmented between commissions	Checking that forms are properly completed	IGG has investigative powers
Degree of public access	Declarations are confidential (The Statute Law (Miscellaneous Amendments) Bill, 2006 Declarations to be accessible to the public upon application to the responsible Commission (2) No information obtain pursuant to subsection (1) shall be published or in any public except with the prior authority of the responsible Commission.	Individual access at discretion of commissioner	Declarations by President and ministers made public
Penalties for non- or false submission	One million shillings ($12,000) fine or imprisonment for up to one	Fine of 1-5million shillings ($1,000 to $5,000) or one year's imprisonment	Dismissal, forfeiture of assets
Prosecutions	Referral for possible civil or criminal proceedings	Commission has no powers to prosecute	IGG prosecutes with the authorisation of the DPP
Direct donor involvement	Little or none	Small training grants from Canada	Financing verification exercise (DFID, Danida)
Impact	Process still being put in place.	Virtually zero. Public access effectively blocked by Commission.	Significant. Declarations published and some acted upon.

Wealth Declaration in East Africa

East Africa is still waiting for a public official to be prosecuted for owning property incommensurate with his or her income. In Tanzania, the Ethics Secretariat is an insignificant bureaucratic entity with neither the capacity nor the mandate to take the fight to corrupt leaders.In present circumstances, it is inconceivable that a senior politician or government official could be the object of a public investigation into how he (or she) came to be so wealthy so quickly, despite the growing number of candidates for such investigations. Assuming that such an investigation was to take place, the next steps - forfeiture and/or imprisonment - are even more inconceivable.

In Kenya and Uganda things are rather different in the sense that the political process is more conflicting, so that assets declarations could be used by the powerful for political vendettas and blackmail. This possibility was mentioned in both countries.

In Uganda, the apparent victories of the IGG in terms of corruption control reflect complex and changing factional alliances and the Machiavellian tactics of the president. The verification process is likely to stall in the same way that other initiatives have stalled when they begin to threaten the interests of the rich and powerful. In neither country do we see the development of democratic checks and balances

and the separation of powers between the executive, the legislature and the judiciary.

Two other sets of concerns further underline this rather gloomy prognosis. In all three countries,
donors have actively promoted anti-corruption initiatives such as assets declaration as technical means of addressing high-level corruption. I have already underlined the donors' inability to factor themselves into the corruption equation.

What would happen, for example, if it was discovered that a senior politician had enriched himself through embezzling donor money? Or that a donor employee was involved in collusive corruption that enriched both him and his local development partners? Given the implicit conspiracy of silence that ultimately conjoins aid givers' and aid recipients' interests, it is highly unlikely that either side would want to go down this rather risky road for very long.
Finally, assuming that none of the above caveats mattered, the practicalities of snaring the guilty through assets declarations are still daunting. The most corrupt will take care to disguise their assets in multiple ways. Including spouses' and dependent children's assets still does not account for assets or interests held by public officials' grown children, extended family members, and trusted friends and associates. The proceeds of grand corruption are stashed in foreign bank accounts or in 'blind trusts'.

De facto polygamy is widespread among African elites and the imperative to support multiple households is a major determinant of how they distribute their income, whether licit or illicit.
Declaration may require the inclusion of assets owned or shared with more than one wife, as in the Kenyan case, but it is easy to avoid declaring property owned by common law wives, mistresses and concubines.[1]

Proving that assets have been under-declared is one thing; bringing a successful prosecution that requires witnesses to testify under oath is another. The IGG frequently loses corruption cases because witnesses turn hostile in court as a result of receiving threats or inducements from the accused or his family. As I pointed out earlier, there is no legislation protecting whistle-blowers, and nobody would trust it even if there was.

Perhaps the comment by the Kenyan deputy minister during the debate on assets declaration in the Kenyan parliament is worth repeating by way of conclusion: obliging leaders to publicly declare their wealth is simply 'un-African'.

> ***... donors have actively promoted anti-corruption initiatives...I have already underlined the donors' inability to factor themselves into the corruption equation.***

Proposed Changes to Ethics Act are a sham!

By Philip Kichana

The Attorney General(AG) through The Statute Law (Miscellaneous Amendments) Bill, 2006, has proposed to amend section 26 which provides that a declaration of income, assets, and liabilities by public officers shall be "once every two years" from annual declaration. Now this is a curious development. One wonders whether there is too much paper work for the concerned Commissions or there is a scheme to relax the rules for some interested party, or that the government has lost the momentum in its "war" against corruption. With the salaries that members of some of the Commissions earn (for example MPs & Commission members), it is entirely possible to acquire property and sell it off within a period of two years without having to declare it! As this proposed change comes just before an election year, one wonders whether it is meant to give respite to some 'donors' to political party campaign kitties in the forthcoming general election. Taken together with the Finance Minister's budget proposal that donations of up to one million shillings to a political party, by individuals and corporations alike, will be treated as a charitable (not taxable) expenditure. It is not far fetched to extrapolate that a door is being opened for a select few to escape the rigors of declaration of assets, income and liabilities and therefore accountability.

The AG proposes to amend the current section 30(1) by providing that "the contents of a declaration or clarification under this Act shall be accessible to any member of the public upon application to the responsible Commission in a prescribed manner". This provision seeks to remove the general rule of confidentiality regarding declarations explained elsewhere above. Indeed, it does seem at first glance as if the AG is proposing a general rule of access by the public, which naturally includes the media, to declarations by public servants.

Any thoughts of such unlimited access are however quickly thwarted by the succeeding provisions. The proposed section 30(2) provides that information obtained pursuant to the proposed section 30(1) "shall not be published or in any way made public without the prior written authority of the responsible Commission". It is ludicrous that the AG can grant the public access to declarations by public servants and in the same breadth stop the said public from publishing them-for the antonym of publish is to keep secret. What is the purpose of access then-personal knowledge?

One way of publishing or making known is by word of mouth. Does the AG intend to sanction whether or not people exchange information they see in the declarations on the streets, offices and other places? How about information that may be published on the internet? And what would the AG do anyway if the media broadcast such information on radio and television in the public interest? We think it is important that any changes in law focus on real issues. Declaration of wealth is an accountability mechanism meant to assist the government fight corruption from its ranks. If an amendment in law attempts to give wananchi access to information in declarations of assets, income and liabilities made by public servants; and then requires them to forever shut up about what they have seen in the declarations; it retains the status quo, because the said information though accessed remains confidential as publication attracts punishment.

Our argument is the requirement of a written authority from the responsible Commission is at best superfluous as the reputation of persons is well protected by libel and defamation laws. Enjoining the responsible Commission as a gatekeeper to give authority will merely expose the tax payer to litigious public servants for no good reason.

Amazingly the offence of unauthorized disclosure is treated more severely than that of failure to disclose or clarify information in a declaration. A person who cheats thus is liable to "a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both", which is exactly half the punishment, a whistle blower would suffer for letting the public know what is contained in a given declaration and its accuracy or falsity.

Conclusion

The Attorney General has for some time been using the devise of Miscellaneous Amendment Bills to rectify flaws in existing legislation. While the devise has worked in certain areas, the so called war against corruption behooves the AG to come through the front door with proposed changes. This way the people will be able to assess for themselves, whether corruption is being fought, whether the law used against corruption can work or is working, and many other things. Presenting amendments through miscellaneous amendment bills is like presenting to Kenyans the old style budget to read and arrange their affairs on its basis.

Nothing in the Act as constituted currently or as it would stand if Parliament were to amend per the AG's proposals, convinces a reader that the purpose of the declaration of income, assets and liabilities is to net individuals who have lied in their declarations by understating what they own; or by having acquired more assets than is possible without corruption, given their remuneration and other emoluments; or indeed by overstating their debts so that they appear to have a low net worth than they actually do. As long as public servants continue to defy the general rule ; then cosmetic amendments such as those proposed by the AG can be enacted any time. Just don't expect anything new.

MP'S SAY ON PROPOSED ETHICS ACT AMENDMENTS

By Peter Opondo

As Parliament took a two months recess on June 3 rd 2006, it had just begun debating on the Statute Law (Miscellaneous Amendments) Bill, 2006. This is a wieldy Bill from the Attorney General's department that seeks to make various amendments to over 20 Acts of Parliament in one sweep.

Two questions arise as a result of these proposed changes: What has necessitated these changes? And what will be their implications? To answer the first question, one has to be alive as to the reason why the Public Officers Ethics Act 2003 was enacted in the first place.

The whole purpose of asset and financial declarations as set out in the Act was to promote accountability in the public sector by ensuring that public officials, their spouses and dependants do not illegally and fraudulently accumulate wealth at the expense of the people.

It was with this in mind that while launching the Asset or Liability Declaration forms in August 2003, President Mwai Kibaki declared that he expected that "the public sector would be transformed into an effective and courteous organization whose primary goal shall be to serve Kenyans."

Exactly three years after this law came into force, has the public service been transformed into an "effective and courteous" organisation? It is difficult to answer this question in the affirmative. The apparent ineffectiveness of the law arises from the secrecy of the information contained in the wealth declaration forms. We talked to various MP's and leaders on what they thought of the biennial proposal to declaration of wealth and this is what they had to say;

Hon. Mutula Kilonzo, the Shadow Minister for Justice and Constitutional Affairs, sees some mischievous hand in the provision. He wonders why, for example given the same logic, the Minister for Finance should not be required to make his budget statement after every two years. "It defeats logic, if the Minister for Finance, Auditor and Controller General submit their reports annually, why shouldn't public officers do the same?"

Mr. Maina Kiai, the chairman of the Kenya National Commission on Human Rights (KNCHR), a government body sums up the issue this way: "it makes no sense to have public servants declare their wealth then the information is kept under lock and key, it is a waste of time."

The fact that Members of Parliament declare their wealth to the Parliamentary Service Commission which then keeps the envelops sealed in a safe somewhere in Parliament is the same as them not declaring their wealth at all, some analysts have argued.

Hon. Paul Muite, Chairman of the Parliamentary Committee of Justice and Legal Affairs, blames this kind of "sneaked in" provision on the way Miscellaneous Amendment Bills are usually brought to the floor of the House. For example, the Statute Law (Miscellaneous Amendments) Bill, 2006 has various provisions to amend 22 Acts of Parliament. Many MPs would confess that by the time they pass through the amendments they have hardly had time to read, and comprehend the provisions and their implications.

And Muite has one final advice to his colleagues in Parliament: "Parliamentary Committees and legislators in general should be hawk-eyed to ensure the government does not use the Statute Law Bill to sneak in
questionable laws".

But just to put it in context, the issue of wealth declaration has not always been the easiest thing to implement even in developed countries.

Just last year, for example, when the Danish Prime Minister Anders Fogh Rasmussen announced that ministers and their spouses would be required to declare their private economic property as well as their membership in public and private institutions, the proposal ran into a wall of opposition.

Denmark being one of the countries where the rights of the individual are at the heart of the society's values, it was not surprising that the ministers, scholars and even journalists argued that this new regulation encroached on the individual and private freedom of ministers and in particular, of the their spouses.

In Kenya, it is believed that the proposed change on Section 35 of the Act, to give express powers to the Kenya Anti Corruption Commission (KACC) to "investigate and determine whether a public officer has contravened the Code of Conduct and Ethics" should add some teeth to the fight against corruption.

Kenyans can only hoped that when the debate resumes in October, parliamentarians will raise questions as to the exact motive of this provision.

> "Parliamentary Committees and legislators in general should be hawk-eyed to ensure the government does not use the Statute Law Bill to sneak in questionable laws".
>
> **Hon. Paul Muite**

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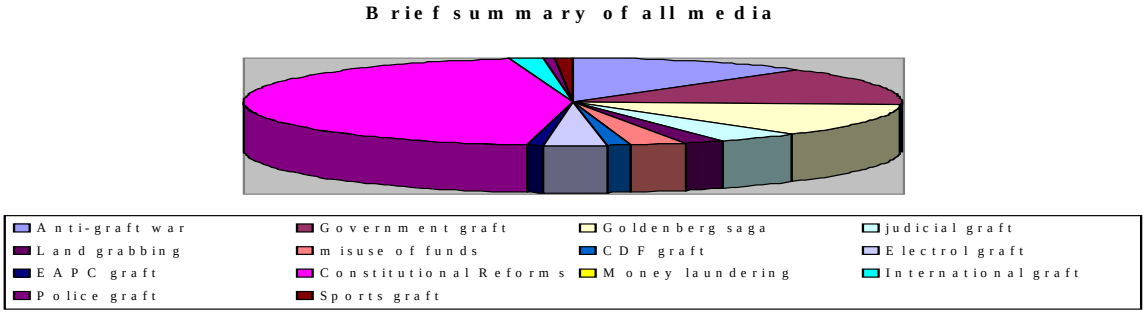

PRINT MEDIA TOPS IN UNEARTHING CORRUPTION STORIES

By Hilda Odero

According to Media Monitoring carried out by Transparency International-Kenya (TI-K), print media still tops in covering stories of corruption and governance. The latest media content analysis saw the total number of articles and clippings on corruption and governance registered at 1494. Of these, the print media covered a whooping 58%, compared to 24% and 18% on Radio and TV respectively.

As in our previous index, most of the stories covered in all media were on positive issues of corruption and governance. The story that got the widest coverage in all media was that on the recent calls for minimum constitutional reforms that gave the Goldenberg saga respite.

US, Senator Barrack Obama, visit to the country was also given a fair amount of coverage especially his sentiments on governance, corruption and tribalism, which he said was to blame for Kenya's slow development. Other international stories that featured considerably were that of South Africa's former Deputy President, Mr. Zuma, on trial for charges of graft, and corruption in Chad brought to light by Transparency International-Chad

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