POLICY BRIEF ON CAMPAIGN FINANCING IN KENYA

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INRODUCTION

Campaign finance is understood as all monetary and in-kind contributions and expenditures collected by and incurred by candidates, their political parties or their supporters for electioneering. Campaign finance regulation covers rules on contribution and expenditure limits, the reporting and disclosure obligations of electoral contestants to provide information about the origins of received contributions, the nature of incurred expenditures, and the enforcement of campaign finance rules by an oversight body.

Throughout the world, there are a variety of campaign finance systems, and campaign finance regulations need to be analyzed in reference to the broader legal framework and the political and cultural context. The interest in the issue of campaign finance is a relatively recent phenomenon, and its importance has increased in the last few years. Like all aspects of the electoral process, campaign finance needs to be assessed against international standards and good practices.

COMPARISON WITH OTHER JURISDICTIONS

United Kingdom

Legislation to prevent excessive spending by electoral candidates in the UK has been in place since the Corrupt and Illegal Practices Prevention Act 1883. The current law regarding campaign financing in the United Kingdom is contained in the Representation of the People Act 1983 (RPA) and the Political Parties Elections and Referendums Act 2000 (PPERA). The UK's system of regulating campaign financing focuses on limiting the expenditure of political parties and individual candidates, rather than limiting the donations that can be received by these parties and individuals.

The PPERA subjects political parties to campaign spending limits (known as "campaign expenditure") a year prior to a general election. As the date of a general election is typically not known until a few weeks prior, to comply with the law, political parties must continually maintain records of their expenditure and received donations. Spending by individual candidates on their election expenses is generally excluded from this definition of campaign expenditure and is regulated through the RPA, as amended by the PPERA.

The definition of campaign expenditure for political parties extends to "party political broadcasts, advertising, unsolicited material to electors, manifesto or other policy documents, market research and canvassing, media/publicity, transport, rallies or other events." The law also requires that any notional expenditure (incurred when another person pays the cost that the political party would have otherwise had to pay) be counted as a campaign expenditure incurred by the party.

The campaign spending limits of political parties is considerably higher than that of individual candidates. In the 2005 general election the national campaign expenditure limits were £30,000 (approximately US$42,000) per constituency contested. For all three major parties contesting seats nationwide, this amounts to around £19 million (approximately US$26 million).

In the 2005 general election the campaign expenditure of the Conservative Party was £17.85 million (approximately US$25 million), £17.94 million (approximately US$25 million) for the Labor Party, and £4.32 million (approximately US$6 million) for the Liberal Democrats. Additionally, the two main political parties combined expenditure in the twelve months prior to the election was approximately £90 million (approximately US$126 million).

Senegal

The funding of political parties is an old controversy that has not yet been resolved in Senegal. In 1984, the then-opposition politician Abdoulaye Wade had asked the Chair of the National Assembly to have the legislature initiate a law providing a formal status to the opposition and for the financing of political parties. Despite the eventual concession and good will of President Abdou Diouf in appointing Professor Elhadji M'Bodji (a prominent law professor) as Mediator (by decree no 98-657 of August 7, 1998) to attempt to favorably resolve the issue, and in spite of the often vigorous debates on the issue during Abdoulaye Wade's presidency, the funding of political parties in Senegal is still unregulated by any law.

The funding of political parties directly by the State is promoted as a way of introducing more transparency, fighting inequalities and the hidden or underground financing of political parties of both the ruling majorities and the opposition. The use of public money to fund political parties is supposed to cover the candidates' access to media during their electoral campaign, as well as posters and brochures produced for the electoral period, but all other activities should be self-funded from the parties' own resources. These resources normally accrue from membership fees, income-generating activities and other gains authorized by the law.

The reality is far from such a scenario. Some political parties in fact demonstrate that they dispose of significant financial resources, especially during election periods. The inadequacy of the resources authorized by law to cover the large expenses of political parties has led many to believe that political parties benefit from illicit funding. The opposition accuses the ruling party of using public finances, (especially discretionary funds earmarked for authorities) to fund their political activities, and opposition parties are often accused of benefiting from funding provided by lobbies or by other African heads of states who may not be on good terms with the Senegalese President.

In Senegal, The National Audiovisual Regulatory Council (CNRA) is responsible for supervising and controlling public and private audiovisual media and the written press during elections. This mission is carried out on the basis of the provisions of the Electoral Code, laws regulating the media, and regulations established by the CNRA itself. President Abdou Diouf created the High Council for Radio and Television (HCRT) by Law 92-26 of February 7, 1992 which was later replaced by the High Audiovisual Council (HCA), created by Law 98-09 of March 2, 1998. The HCA in turn was replaced by the National Audiovisual Regulation Council (CNRA), created by Law 2006-04 of January 4, 2006. This new institution in charge of regulating audiovisual activities, especially during election periods, saw its prerogatives strengthened in comparison to the HCA. CNRA members have a six-year term in office. Their mandate can neither be renewed nor terminated. These provisions concerning the terms of CNRA members aim at shielding them from pressure and granting them autonomy while they discharge their duties.

The CNRA has the mandate to regulate public and private audiovisual media. Its jurisdiction is extended to print media during electoral periods. Since its inception in 2006, CNRA has regulated the audiovisual media and the written press during all elections held in Senegal. Its jurisdiction includes guaranteeing fair access to state-owned media by all candidates, and balanced information in the private media. The CNRA uses a lottery to determine the order of appearance of candidates on the national television's *"Journal de la campagne*", (coverage of candidates' campaign activities), thus guaranteeing free and equal time to all presidential candidates and to all lists of candidates to legislative elections.

In its role of supervision and control of the media during elections, CNRA has often issued injunctions and even sanctions against media sources that it deems to have violated the law governing the works of journalists, especially article LO.63 of the Electoral Code. These injunctions, however, reveal the limits of the CNRA; media organizations do not always comply with the injunctions issued, and worse, some of them denounce the decisions taken by CNRA against them. On March 18, 2012, the private television station TFM decided to re-broadcast a show featuring its owner, the noted singer Youssou N'Dour, who was campaigning for candidate Macky Sall in the second round of the presidential election. The station did not respect the requirement to feature a representative of the outgoing candidate, an example of the difficulties for the CNRA to enforce its decisions. Indeed, following the first broadcasting of the show on March 10, 2012, the CNRA had condemned the action and asked TFM to grant the same privileges to the other candidate, in order to fulfill the need to provide balanced time for the two campaigns. The purchase of media time during the electoral campaign is also strictly prohibited, however, the injunctions of the CNRA never prevented private TV stations from in fact doing so. To these deficiencies should be added the loopholes, and the silence of the law regarding the time between the first and second rounds of the election, as well as the lack of legal recourse when the media ignore the CNRA's decisions. All this points to the only relative efficacy of this body in charge of controlling and supervising audiovisual media and the written press during electoral competitions.

KENYAN CONTEXT

In Kenya, corruption and politics are interlinked and corrupt political financing, particularly campaign financing, has become more prevalent since the reintroduction of multiparty politics in 1991.

Elections is an avenue for citizens to express their freedom to choose the kind of leaders that they want to govern on their behalf. The main concern is how the candidates finance their campaigns. Election campaign financing is then an essential factor of any electoral process. Private funding is mainly derived from financial support from individuals, political parties, political party membership fees, organizations that finance political processes, party or candidate's fundraising activities such as social events. Public funding mainly consists of funding from exchequer, for example, as stipulated under Political Parties Act

Election campaign financing has the potential to create unequal level playing field among political competitors and hence it is important to regulate campaign financing. Consequently, most of the winners in the elections tend to have been the candidates that had a lot of money to finance their campaigns as opposed to those who may not have a lot of money, irrespective of their quality, to finance election campaign. To ensure integrity of elections, it is necessary to regulate election campaign financing through establishment of measures that promote transparency and accountability in elections financing to ensure that sources of election campaign funding as well as use of campaign resources are transparent and enhance democracy.

In order to increase resilience during elections, Kenya should;

- Acknowledge that there's a connection between the money being spent and the influence of special interests on the political process.
- Distinguish between the money necessary for a candidate's voice to be heard, and that being used to corrupt the political process. If money must be raised for campaigns in a transparent way, then regulations and laws governing campaign financing are crucial.
- The problem is a political system where political contributions come from a small number of individuals. Kenya must shift from this model of financing because it turns politics into a high-stakes game that very often turns violent.

Since campaign contributions are often associated with purchase of "goodwill" whose returns benefit a select group of political entrepreneurs, reducing their margin of influence is a step in the right direction.

Cost of Politics in Kenya

According to a recent article, in order to run for the presidency in Kenya, one should have at least ksh.200 billion for the campaign process begging the question, where does this money come from? This money can either be borrowed or stolen. The borrowed money will have to be returned and with interest. But if the money was stolen, it would be stretching of incredulity to expect the theft not to continue once in power. Once a thief, always a thief and one cannot stop stealing especially when they are in power.

In the 2017 elections, Kenya spent ksh.70 billion and the repeat elections making it Africa's most expensive election on a cost-per-voter basis in East Africa where Rwanda (US$1.05), Uganda (US$4), and Tanzania (US$5.16 per voter) and Kenya's cost per voter was US$25.40. The public and private spending were both at an all-time high, with both political parties and candidates spending hundreds of millions of dollars.

The Election Financing Bill, 2013

The Bill seeks to give effect to Article 88(4) (i) of the Constitution and section 4(i) of the Independent Electoral and Boundaries Commission Act, 2011 as well as provide for the regulation, management, expenditure and accountability od election campaign funds during election and referendum campaigns.

RECOMMENDATIONS

1. Regulation of Expenditures: Political party funds should be used for the intended and stated purpose. The regulations of political party expenditure generally concern two factors: the amount and the type of expenditure. To level the playing ground for political parties and candidates, it is important to establish a ceiling imposing the limits of expenditure parties should incur. Limits on the types of allowable political party expenditures can be applied through the definition section of the law.
2. Enforcement: Enforcement bodies are critical to the successful implementation and functioning of a political party funding system. There are significant variations to the role and powers that are given to the enforcement bodies in various countries. For instance, in Canada, the United States and South Africa, an independent enforcement body is combined with secondary administrative bodies within government. Each of these countries use an independent electoral commission, while the department responsible for finance distributes public funds.
3. Implement the Campaign Finance Bill, 2013: This would ensure that sources of election campaign funding as well as use of campaign resources are transparent and enhance democracy

CONCLUSION

Political parties are important institutions through which political power can be contested though not the only ones. Whereas the Political Parties Bill, 2004 provide a positive move of regulating political parties, political culture may not be legislated and thus a deliberate effort needs to be made to change Kenya's political culture from one of big man-small boys syndrome to policy and issue based politics with organic links to the communities.

The extent to which the Bill might succeed is perhaps dependent on other factors among them, economic and social transformation which might lead to a new society and political community in the long term.

REFERENCES

https://www.wfd.org/wp-content/uploads/2020/10/Cost-of-Parliamentary-Politics-in-Kenya.pdf

https://www.ndi.org/sites/default/files/1881_ke_cgdpolicybrief_5.pdf

https://theconversation.com/kenyas-election-jitters-have-roots-in-campaign-financing-its-time-to-act-81693

https://kwaela.co.ke/brave-yourself-were-paying-for-money-stolen-for-campaigns/