PROPOSAL FOR A MULTI-PRONGED STRATEGY TO THE TJRC

INTRODUCTION

Parliament and government ignored the representations of the MSTF and civil society. As a result the TJRC law, as passed by Parliament and signed by the President, is a highly flawed framework. Its centrepiece is a controversial amnesty recommending chapter. The shortcomings in the amnesty provisions and indeed the rest of the law have been pointed out by civil society in earlier critiques.

Now that the TJRC Bill is law, civil society has to consider what strategy to adopt. On the one end of the spectrum of possible options is a boycott of the TJRC coupled with a constitutional challenge to set aside the law. At the other end of the spectrum is an acceptance of the law with an attempt to work with it and ameliorate its many deficiencies. It may however be that there is an approach that fits between these opposing options. This approach involves civil society opposing the objectionable aspects of the law, while working with those parts that are less objectionable and which may serve the ends of truth and justice. The approach is mindful of the fact that the pursuit of truth and justice has suffered several false starts in Kenya and that if this opportunity is not seized there may not be another opportunity.

The twin pronged strategy would-

- involve a constitutional challenge in the courts to set aside the most problematic aspects of the law, namely its amnesty provisions. It would include a public campaign to neutralise this aspect of the law and to encourage the public and the commission itself to ignore and abandon the implementation of the amnesty chapter.

- However, the approach would also involve the active participation of civil society in the fact finding or truth seeking aspects of the law, as well steps aimed at promoting national reconciliation and healing; and the recommending of measures to prevent the repeat of conflict, promote the rule of law and achieve justice.

This would require a carefully orchestrated public and media campaign to ensure that the twin pronged approach is well understood.

I have set out below possible grounds for a constitutional challenge. Before bringing such a challenge the prospects of success must be carefully considered. Valid grounds for a challenge do not necessarily guarantee success. Questions to consider include: how independent of government and the prevailing political forces are the courts of Kenya? Is there a strong history of constitutional litigation in Kenya? How favourable is this history to the bringing of such a challenge?

If civil society opts for the twin pronged approach it will be important to take steps to ensure that good persons are appointed to the Commission, as commissioners and senior staff. This will require civil society to put up nominations of good and reputable persons and to engage in the necessary lobbying activities. Where there are good and capable people involved there is at least a fighting chance that a success can be made of a bad framework. Where the framework is bad and the key appointments are also inappropriate, the exercise is likely to fail.

CONSTITUTIONAL CHALLENGE

Violation of constitutional rights, freedoms and principles

1. The law is substantively unconstitutional and invalid in that the amnesty provisions infringe the principle of the rule of law by facilitating impunity for those responsible for human rights abuses, economic crimes and corruption. The principle of the rule of law is an underlying theme of the *Constitution of Kenya*, 1963 as amended in 1999, (the Constitution) and is encapsulated in the section 1A of which states that the Republic of Kenya shall be a multiparty democratic state. More particularly section 70(a) upholds the entitlement of every person in Kenya to the fundamental rights and freedoms of the individual including the protection of the law.

2. The Constitution provides no specific authority for the suspension of the rule of law or the denial of the rights to justice of victims in peace time. The amnesty provisions accordingly enjoy no constitutional authority. Article 3 of the Kenyan Constitution stipulates that any law or provision inconsistent with the Constitution is void. The amnesty chapter, which facilitates the denial of justice to victims, is inconsistent with several provisions of Chapter V of the Kenyan Constitution which enshrines fundamental rights and freedoms.

3. The amnesty chapter is directly inconsistent with the Constitution in that it violates, amongst other rights:

    3.1. The right to life, protected by articles 70(a) and 71 of the Constitution, since it facilitates an amnesty for perpetrators who committed murder, attempted murder and culpable homicide.[1]

    3.2. The right to the security of the person, protected by article 70(a) of the Constitution, since it facilitates an amnesty for perpetrators who have violated the freedom and security of people by committing acts of assault and other cruel and inhuman treatment.[2]

    3.3. The right to protection of property, protected by article 70(c) read with section 75 of the Constitution, since the amnesty provisions facilitate an amnesty to perpetrators who have violated this right through acts corruption, economic crimes, looting and arson.

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[1] Gross human rights violations may not be amnestied in terms of the latest amendments. While gross human rights violations are defined in the Bill, violations of human rights are not. This leaves it open to the Commission to provide its own interpretation. Although killings are listed under gross human rights violations it does not mean that such all such acts are necessarily excluded from violations of human rights. It is entirely possible that the Commission may view single killings or killings in mitigating circumstances and/ or negligent killings as violations of human rights rather than gross human rights violations.

[2] Since violations of human rights are not defined it will be up to the Commission to provide its own definition. While torture is listed under gross human rights violations there will always be a thin line between torture and serious assault.

3.4. The right to equal treatment, including equal protection before the law, as protected by articles 70(a) read with section 82 of the Constitution,, by discriminating against victims who were victims of crimes which are the subject matter of the Bill's amnesty provisions.

4. In the absence of specific constitutional authority for such far-reaching violations of human rights it is unlikely that the public interest exception contained in article 70 of the Kenyan Constitution will serve to justify such infringements. Such a ruling would have very serious implications for the administration of justice in Kenya.

5. Although there is no specific right to dignity enumerated in the Constitution it is submitted that Chapter V which sets out the protection of fundamental rights and freedoms implies protection for the fight of human dignity. It is submitted further that the amnesty provisions and procedures infringe upon the right to human dignity in that they:

5.1. serve to benefit the perpetrators of human rights at the expense of victims and the victims' families;

5.2. cause suffering to victims and victims' families by denying them justice;

5.3. dishonour the respect, dignity, value and acceptance of victims and victims' families in the wider community

5.4. demean Kenyan society as a whole by betraying the constitutional principle of the rule of law.

<u>Violation of International law</u>

6. Section 34(2) permits the recommending of amnesty to those who are "*liable to a penalty under any international treaty to which Kenya is a party*". This means that, with the exception of crimes against humanity, amnesty could be recommended for acts or omissions outlawed under treaties ratified by Kenya.[3] This provision places Kenya in direct breach of its international law obligations.

<u>The Attorney-General may not act outside his constitutional and statutory powers</u>

7. Section 38A of the version of the Bill approved by the National Assembly provides for the referral of amnesty recommendations to the Attorney General.

7.1. This provision is offensive to the doctrine of separation of powers as upheld by the *Constitution of Kenya*, 1963.

7.1.1. The Attorney General has no constitutional or statutory authority to decide on questions of amnesty. He may not issue amnesty, manage any amnesty process or act in terms of amnesty recommendations.

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[3] Kenya signed the Rome Statute on 11 August 1999, and ratified on 15 March 2005, becoming the 98th State Party.

7.1.2. Only those authorised by law to issue amnesty or to act in furtherance of amnesty recommendations may do so. No such law is in existence in Kenya.

7.1.3. Where the Attorney General purports to act in pursuance of an amnesty recommendation he does so without any legal authority.

7.2. Since the Attorney General is required to act in compliance with his duties as prescribed by law his discretion may not be interfered with. The discretion of the Attorney General must be exercised in terms of the law and a prosecution policy authorised by law.[4]

7.3. A decision not to prosecute may not stand or be recognised as an amnesty. A decision not to prosecute may be changed at any time.[5]

7.4. An amnesty also involves the extinguishing of convictions and/ or the release of convicted persons. It hardly needs to be stated that an Attorney General has no authority to overturn convictions which is exclusively within the powers of the courts.

8. Since the Attorney General is not authorised to act in terms of amnesty recommendations, section 38A is substantially invalid and unconstitutional and falls to be struck down by the courts.

<u>Victims are largely excluded</u>

9. The original version of the Bill essentially excluded victims from the amnesty process. The new s 34(4)(a) attempts to cure this defect with the insertion of a provision that requires the Commission to "consider any reasonable objection" from a victim before making a recommendation of amnesty.

10. The problem with this amendment is that it only requires the Commission to make an attempt to solicit the views of a victim towards the end of the amnesty process. In reality the legislative scheme permits the Commission to delay involving victims in the amnesty process, (unless a specific hearing is held), until a decision in principle has been made to recommend amnesty. Only at this point is the Commission required to secure and consider the views of victims before it makes its final decision.

11. The framers of the amendments chose not to amend the actual process leading to an amnesty recommendation. Section 36 which set out the process for the actual consideration and recommendation of amnesty remains largely unaltered.

11.1. Section 36(4) authorises the Commission to recommend amnesty (on the basis of the amnesty application alone) and inform the applicant accordingly, if it is satisfied that there is no need for a hearing or investigation. Section 36 makes no provision or requirement for the representations of victims to be made or heard.

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[4] The law speaks only of a referral of a recommendation to the Attorney General it does not speak of his power or authority to act in terms of such recommendation.

11.2. In terms of s 36(9) all documentation and evidence pertaining to an amnesty application are kept confidential until a hearing actually commences or when the Commission decides to release such information. It is entirely possible that victims and their representatives will be kept in the dark until a hearing commences in terms of s 36(5).[6] This will place victims at a significant disadvantage.

11.3. Section 36(9) implies that where there is an investigation but no hearing, it is entirely possible that the documentation and evidence pertaining to an amnesty application will not be released at all. Victims will accordingly not be able to make any meaningful representations.

12. It is fair to say that the law marginalizes victims from the amnesty consideration procedures. It appears that victims only get to play a meaningful role if a specific hearing is held, or once a decision in principle has already been taken to recommend amnesty. If the latter, it is then up to the victim to try and persuade the Commission not to pursue with such a decision. This is a heavy onus for victims to carry. The effective exclusion of victims from making meaningful input into the amnesty process implicates several of their fundamental rights and freedoms as enshrined in Chapter V of the Constitution of Kenya, 1963.

13. The design of the amnesty procedures violates the right of victims to equal protection before the law as protected in section 70(a) of the Constitution. It also violates the rights of victims to freedom of expression as enshrined in article 79 of the Constitution by denying victims, interested members of the public and the media the freedom to receive pertinent information in relation to amnesty applications until late in the process.

Reparations and Rehabilitation

14. Section 41 of the Bill remains unaltered in the version approved by Parliament. It requires each victim to apply for reparations within 2 years. Victims who don't are barred from receiving reparations regardless of how harsh their suffering. This requirement will hit the most marginalised in Kenyan society. These include the illiterate, the impoverished and those in isolated rural locations, particularly women and children. Such shortcomings potentially violate several provisions of the Bill of Rights.

Implementation of the Commission's report

15. In terms of section 47(2)(g) the Commission may recommend the "mechanism and framework" for the implementation of its recommendations. Section 48 requires the Government to establish whatever body has been recommended by the Commission in terms of s 47(2)(g) "to monitor the implementation of the recommendations *and to facilitate their implementation*".

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[6] Section 25 which deals with hearings is silent on what information must be disclosed to victims. However s 25(5)(ii) stipulates that "procedures dealing with victims" must be "fair". Fairness demands disclosure to the victims of all relevant information and evidence pertaining to an amnesty application. However, given that victims are not included in the amnesty procedure it may be possible to raise the argument that the amnesty procedures are procedures dealing with offenders; and as such they are not "procedures dealing with victims".

16. These sections are manifestly unconstitutional.

    16.1. Section 48 as read with section 47(2)(g) is unconstitutional as it requires the government to establish whatever body is recommended by the Commission, regardless of the views of government and regardless of the feasibility of such a body.

    16.2. Section 48 is also unconstitutional insofar as it purports to empower the s47(2)(g) body (or implementation committee) to implement or facilitate the implementation of the Commission's recommendations.

    16.3. Such requirements are offensive to the separation and allocation of executive powers as established by the Constitution. Section 48 is not saved by article 23 of the Constitution since Parliament is required to apply its mind and specifically identify a person or authority when conferring executive power, which it cannot do in this instance.

17. Section 49(2) which stipulates that "*all recommendations shall be implemented*" is manifestly inconsistent with the separation and allocation of executive powers by the Constitution. It amounts to an unconstitutional interference with the discretion of government to devise and implement policy.