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Money and politics in Tanzania: An Evaluation of the Election Expenses Act in the 2010 general elections

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ABSTRACT

The problem of mobilisation and spending of money during elections is critical to Africa and Tanzania in particular. Most sources of money are not known and corruption has therefore remained a central feature of Tanzania's elections. Realizing this problem, the government has for many years instituted various mechanisms to address this vice. In some cases such mechanisms have been regarded as promoting corruption than preventing it as was the case with the "Takrima" Law which was declared unconstitutional by the High Court in 2006. To fill this legal vacuum, the government enacted the Election Expenses Act in 2010 with the aim of managing money in politics. The law was used during the 2010 general elections. I argue that this law is ineffective in several aspects to manage money in politics. As such the 2010 elections were marred with more corruption incidences and election malpractices.

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Introduction

The funding of elections in both the advanced and new democracies today is a critical issue especially on how resources are mobilized and spent. Nonetheless, funding elections in Africa is more problematic because of the low level of economic development. Yet, ruling parties enjoy relatively some advantages in terms of resource mobilization. Subscribing to this view, Wallerstein (1966:206) posits that "in many African states the theory of the precedence of the party over the state has become official doctrine". Related to this, Biezen and Kopecky (2007:251) contend that the access to state resources by political parties in Africa tends to be the exclusive rights of those parties that win elections. For one thing, with state power, these parties have state-command over resources with which they can sustain and expand their political organisations. Indeed, they have hyper-incumbency advantages and therefore enjoy huge material resources at the expense of the opposition parties. Greene (2007:39) concisely submits that resource endowments deeply affect political parties and their ability to compete. Resource-rich parties attract better candidates, have ability to campaign widely, and they are able to buy large amounts of air time in the mass media. It is universally argued that money is recognised to shape the contours of electoral competition and democratic representation. As such, most campaigns do not revolve around policy commitments; instead, campaigns remain as contests in which candidates spend time, energy, and money to win (Samuels 2001:569; Meirowitz 2008:681). It should be emphasized that in new African democracies, the funding structure of parties is definitely biased in favour of the incumbent parties either because of the regulations inherent in public funding of political parties and elections or because of the absence of separation between the state and the party in power (Fambom 2003). In this context, the way parties finance their activities has come under increasing scrutiny. The last decade

was marked by a wave of corruption scandals affecting more ruling political parties and their leaders.

In Tanzania, the problem of mobilising and spending money in elections was not so critical during the single party era (1965-1990). Even corruption scandals were minimal. This was due to the Tanzania's socialist ideology which emphasized on egalitarian principles that stressed human equality and welfarism. Two key documents, that is, the Arusha Declaration in 1967, and subsequently the Leadership Code as defined in the Party Guidelines of 1971 (*Mwongozo wa Chama wa 1971*) public leadership was viewed as an opportunity to serve the people and not as a means for personal enrichment. As such during the one party regime, all electoral processes were under the strict supervision of the party itself. Moreover, candidates did not have to bother looking for funds to finance their campaigns. The party funded the entire electoral processes. Indeed, "election regulations did not allow individual candidates to mobilize and use resources available to them for the purpose of bettering their chances of getting elected" (Kiondo 1994:67).

Following the adoption of economic liberalization measures from the mid 1980s and subsequently the re-introduction of multiparty competitive politics from 1992, electoral corruption has become more conspicuous to the extent of threatening the integrity and legitimacy of the electoral processes and political institutions including political parties and the government itself. There is ample evidence to support this observation. The 1995 Kigoma by-election is the case in point. In this incident, the ruling party Chama Cha Mapinduzi (CCM) used corruption to solicit votes.

This is well illustrated in the Court of Appeal of Tanzania's decision in Attorney General and two others v. Aman Walid Kabourou 1995¹.

¹Court of Appeal Tanzania, Civil Appeals no.32 and 42 of 1994, TLR 1996.

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In this case, the court ruled that the maintenance work of the Kigoma-Ujiji road during the election campaign constituted non-compliance with the prohibition against electoral bribery, and was executed with the corrupt motive of influencing voters to vote for the CCM candidate and accordingly affected the results of the election. Other successful grounds in that case were several election offences and illegal practices committed by very senior members of the government including the president.² Consequently the ruling party candidate lost the parliamentary seat.

Corruption was further enhanced in election when the National Assembly amended the National Elections Act,³ to allow the use of gift in election process, that is, from nomination to campaign. These amendments are commonly known as "Takrima" provisions. Section 98(2) of the amended National Elections Act, provided that "anything done in good faith as an act of normal or traditional hospitality shall be deemed not to be treating." Section 98(3) provided that "normal or ordinary expenses spent in good faith in the election campaign or in the ordinary cause of election process shall be deemed not to be treating, bribery, or illegal practice."⁴ Political parties and candidates used these provisions to offer to voters free drinks, food, clothes, construction materials, hard cash, and social services in schools or hospitals during campaigns with the purpose of inducing voters. The result is that people fell in to corruption trap by electing corrupt and irresponsible leaders at the expense of the poor. The impact of these practices creates unequal field of play of election where by only the haves who are able to provide such gift could be elected. This is inconsistent with the Constitution of the United Republic of Tanzania which requires all men to be treated equally.⁵ In line with this view, the High Court of Tanzania held in *Legal and Human Rights Centre (LHRC), Lawyers' Environmental Action Team (LEAT) and National Organization for Legal Assistance (NOLA) v. The Attorney General*,⁶ that, "takrima" provisions are violative of Articles 13(1), 13(2), 21(1) and 21(2) of the **Constitution. The court reasoned as follows:-**

The "takrima" provisions are discriminatory. They seek to legalize an action in relation to one group of the society which would be illegal if done by another group of the same society. African hospitality has been known for ages. It does not need codification. It is priceless, humble and timeless. It does not resurface with the advent of elections. If this happens, it ceases being African hospitality. It becomes business. In pure African

hospitality, it is the host who entertains mostly relatives and friends, not the guest.⁷

On the other hand various studies have revealed corruptions in election processes. One of these studies has shown that political parties used corruption during civil election held in October 2009.⁸ This study which was conducted in Manyara, Arusha, Dar es Salaam, Morogoro, Dodoma, Kilimanjaro and Tanga, revealed the level of corruption by Chama cha Mapinduzi (CCM) was 49.5 percent, while that of Civic United (CUF), CHADEMA, NCCR, and TLP⁹ was 2.7, 7.0, 0.5, and 0.5 respectively. All these cases and findings sent an important message to government and the country as whole that politics is solely driven by money and the playing field is no longer leveled hence no free and fair elections. As Mnamdi rightly points out, "Money should not be persuasive; the best qualified candidate should win"¹⁰.

Requirements of equal ground and the problems associated with expenses incurred during electoral period have necessitated enactment of the Election Expenses Act.¹¹ The objective of this Act is to make provision for funding during nomination process, election campaigns and elections. The rationale for that is to control the use of funds and prohibited practices in elections. It also makes provisions for allocation, management and accountability of funds. Moreover, it provides for consequential and related matters. The purpose of this article is to examine the management of funding elections particularly by paying attention to the Election Expenses Act. No. 6 of 2010 (EEA).

Overview of the EEA

The EEA was enacted by parliament on February 2010 and assented by president in April 17, 2010. The EEA and its Regulations and order came in to force on 9th July 2010¹². It amended the Political Parties Act. The Act has eight parts. Part I covers preliminary provisions which provides for short title reflecting subject matter, time as to when the Act will take effect, purpose of the law and defining sections. Part II provides for administration of the Act.

Part III is entitled election expenses. This is the most prominent part as it regulates the election expenses from nomination to election.¹³ The law requires that a presidential candidate should submit forms of disclosure of funds to a

² Mwaikusa 1996: as quoted from Rachel R. Ellett, *Emerging Judicial Power in Transitional Democracies*, Malawi, Tanzania and Uganda 2008 p.387.

³ Act No 1 of 1985, amended by Electoral Laws (Miscellaneous Amendments) Act No. 4 of 2000 the law was meant to enhance the so called "African" traditional hospitality which consisting in offering food, drinks, money or clothes to fans during campaigns.

⁴ Electoral Laws (Miscellaneous Amendments) Act No. 4 of 2000.

⁵ See articles 13 (1) and 21(1) of the Constitution of the United republic of Tanzania 1977.

⁶ High Court of Tanzania, Miscellaneous Civil Cause No. 77 of 2005.

⁷ Judge Masati S A in *Legal and Human Rights Centre (LHRC), Lawyers' Environmental Action Team (LEAT) and National Organization for Legal Assistance (NOLA) v. The Attorney General*, High Court of Tanzania, Miscellaneous Civil Cause No. 77 of 2005.

⁸ Study done by Institute of Development Studies of university of Dar es salaam in collaboration with Prevention and Combating of Corruption Bureau, see also A.B. Makulilo and C. Raphael, *The October 2010 General Election*, Department of Political Science & Public Administration, University of Dar es Salaam p 5.

⁹ Ibid.

¹⁰ Mnamdi A, *Money in Politics: the Nigerian Experience*, available at dspace.unijos.edu.ng as assessed on. 20/6/2012 This means that, voters should be induced by political parties manifesto and not money.

¹¹ Act No. 6 of 2010.

¹² See government Notice no. 246 for Election Expenses Act, 2010 and Elections Expenses Regulations 2010, and Government Notice No. 247 for Order under the EEA, 2010.

¹³ Section 7 to 14 of the EEA, 2010.

secretary general of political party within seven days before the nomination day. In case of a parliamentary candidate, similar forms have to be submitted to a district party secretary¹⁴. Some of the information to be provided in the disclosure form includes amount of money, other type of funds which can be cashed or converted in to money value or money worth; source of money or other type of funds; and any other thing intended to be used during election campaigns.¹⁵ Section 8 (2)¹⁶ allows candidate to use his own funds during election as may be necessary or required for the purpose of election campaigns. The EEA clearly requires the candidate and political parties to make disclosure of funds before election campaigns.¹⁷ The returns of election expenses of gift, loan, advance deposit and donation treated as confidential.¹⁸

Section 10 of the Act, empowers Minister responsible to prescribe the maximum amount of election expenses depending on the difference in the size of electoral constituency; categories of candidates; population of people; and communication infrastructure.¹⁹ The Minister may also vary the amount of election expenses to be used by political parties during the election campaigns.²⁰ Section 10 (2) provides that in exceptional circumstances, where a political party or candidates spends funds in excess in the prescribed amount, he/she will report to the registrar of political party. Such report has to contain reasons for the use of excess funds. Similarly, section 11 (1) requires that any donation received by a political party which intends to fund election must be disclosed to the registrar as well as board of trustee of the political party. However, such funds must exceed one million shillings. The EEA imposes restrictions on importation of foreign funds in Tanzania ninety days before general election and thirty days before by-election.²¹

Part IV provides for accountability of political parties on keeping records, disclosure and receipts of election expenses.²² Part V covers prohibited practices. Here the law prohibits every person who before or during the election campaigns period directly or indirectly gives any gift, loan or offer so as to induce people to procure the nomination of the giver.²³ In terms of section 21 (3), an act or transaction shall not be deemed to constitute prohibited practice if it is proved to have been designed to advance the interests of community fund raising, self-help, self-reliance or social welfare projects within the constituency and to have been done before the nomination process or election campaign. Section 28 (1)²⁴ provides presidential candidate the right to utilize government

broadcasting services and television during election campaigns in accordance with the National Elections Act.²⁵

Part VI deals with offences and penalties. It imposes a penalty of three million, for a political party, one million for a candidate and five million for an organization, or institution in case of violation of its provisions.²⁶ These penalties are for unspecified offences. If a political party fails to submit financial and audited reports within the set deadlines, it shall be disqualified to contest in any election. However, this penalty does not apply if a political party files such financial and audited reports to the satisfaction of the registrar before the next nomination day²⁷. Similarly, where a political party and candidate fail to disclose funds will be liable for disqualification in absence of reasonable explanations.²⁸ In terms of section 11(5) it is an offence for anyone who threatens in anyhow any person, his family or undertakings that donates or intends to donate any fund to a candidate, commits an offence. The penalty for such an offence is a fine not less than one million and not more than five million or imprisonment for six months but not more than two years or both.²⁹ Section 13(5) provides an offence for a non government and faith based organization where they spend more funds than what is prescribed by Minister. This is also the case when they fail to furnish expenses to the registrar³⁰. However, the penalty in this case is a fine of five million or more or imprisonment not exceeding three years or both. Part VII deals with general provisions and part VIII provides for consequential amendments which amends the Political Parties Act.

Critical Evaluation

The EEA was first applied in the 2010 general elections with the objective of curing financial related problems, in particular the excessive use of money in previous elections. It is unfortunate that this objective may have not fully been achieved. There are a number of reasons in holding this view. First and foremost, the application of EEA during the 2010 general elections was marked by apparent discrepancies between the law and practice. These discrepancies can be traced back from the Act's legislative process. The EEA bill was sent to the parliament under the certificate of urgency on 27February 2010³¹ and passed into law just in few days. As a result, there was no ample time for the legislators to debate the law thoroughly. Similarly, the EEA bill lacked adequate public consultation. These problems had adverse consequences in the implementation of the law.

¹⁴ Section 9(1) (a) and (b) of the EEA, 2010. See also regulation 7 of the Election Expenses Regulations, 2010.

¹⁵ Regulation 7 (2) of the Election Expenses Regulations, 2010.

¹⁶ The EEA, 2010.

¹⁷ Section 9 (1) , (2) , (3) ,(4) and section 18 of the Election Expenses Act, No 6 2010

¹⁸ Regulation 9(3) of the Election Expenses Regulations, 2010.

¹⁹ Section 10 (1)(a) (i-iv) of the Election Expenses Act, No6 2010

²⁰ Section 10 (b)

²¹ Section 12 (3) of the EEA, 2010.

²² Sections 15 to 20 of the EEA, 2010.

²³The EEA, 2010.

²⁴ Ibid.

²⁵ Section 53 (1) and (2) of the National Election Act, Cap 343 of 2010 R.E requires candidate for the office of the president and vice president of the United Republic and political parties participating in election shall have the right to use the state radio and television broad casting during the official period of campaign. This is subject to consultation between elections commission of the united Republic established by constitution with candidates, political parties concerned and officers responsible for the public media.

²⁶ Section 26 of the EEA, 2010.

²⁷ Ibid Section 18 (4).

²⁸ Section 20(1).

²⁹ Section 11(7) of the EEA, 2010.

³⁰ Section 13 (2) and (4) of the EEA, 2010.

³¹See parliament Hansards of 27/January /2010, after the Parliament leadership committee satisfied that there was a need for parliament to do all necessary steps in the same conference pursuant to Parliament standing Order 5.

Apart from the EEA's legislative process, both the Act and its Regulations come in to force on 9th July 2010,³² only three months before the 2010 general elections. The question is whether a period of three months was sufficient time for a stakeholder that is voters, political parties and candidates to understand well their obligations and liabilities. From a practical point of view, three months' period was not sufficient time. A survey conducted by Tanzania Election Monitoring Committee, (TEMCO) revealed that only 31% of stakeholders read the EEA before the 2010 general elections, 18.2% had never heard about the law and 39.5% heard about the law but had not read it.³³ Thus at least 57.7 % stakeholders had never read the EEA and its Regulations leave alone those who were not ready to participate in the survey. One of the reasons advanced by the survey findings was that the time between effective date and election date was too short to enable stakeholders to read the Act and understand it.³⁴ The other reason was that, the government and in particular the responsible ministry and National Electoral Commission of Tanzania, NEC did not publicize as much as possible the EEA, its regulations and Order so as to enable members of public to understand the law.³⁵

The level of preparedness by institutions of implementation is also important. One may ask, to what extent the implementation institutions such as the Prevention and Combating of Corruption Bureau (PCCB), registrar of political parties, National Electoral Commission of Tanzania (NEC), etc were prepared to implement the EEA? During the 2010 general elections it was revealed that in enforcing the law, the PCCB officers encountered many challenges. These included irregular transfer and demotion of some of its commanders in particular Kilimanjaro after arrest of Betty Machangu. The latter was accused of bribing members of her political party during nomination processes³⁶. Similarly, PCCB's credibility was put to question after being accused of bias by favoring the ruling party, CCM. Moreover it was accused of being working maliciously, unethically and impartially in executing its duties³⁷. It is interesting to find that PCCB was not well prepared to conduct

various awareness seminars timely³⁸. The desire of educating stake holders was also raised by members of Parliament³⁹.

More implementation problems were marked by incidents of conflicting powers of institutions. For example, NEC and the registrar of political parties had conflict in implementing their mandates. This happened when the registrar allowed political parties and candidate to campaign beyond 6.00 in the evening contrary to the law.⁴⁰ Soon after the announcement of this direction, the NEC chairman announced a conflicting announcement that campaigns must be conducted from 8 P.M to 6 P.M in the evening and not beyond such time as the registrar of political parties had directed.⁴¹ In another incident, the registrar of political parties extended ten days as for aspiring candidates for parliamentary and councillorship to submit their duly completed election expenses declaration forms to the office of registrar.⁴² This happened when CHADEMA and NCCR Mageuzi appealed to the registrar that they did not receive disclosure forms on time⁴³. In extending time, the registrar said he was satisfied himself with the seriousness of the concerns and reservations raised hence the decision to extend the earlier deadline. Legally speaking, the registrar acted ultra vires as the EEA and its Regulations are silent on what should be done in extension of time in relation to disclosure forms.⁴⁴ If one further looks in to section 10 of the EEA where the Minister is empowered to make regulations for the purpose of implementing section 9, the issue of extension of time is not revealed. From legal point of view one can find that the implementing institutions were not well prepared as there was overlapping of powers and in some areas the registrar exercised powers which were not conferred upon him or did not know the limits of his powers.

The clarity of any law is necessary for its implementation. However, the experience from the 2010 general elections shows that the provisions of the EEA and its regulations are to some extent problematic to itself and it leaves much to be desired. The EEA was enacted with the view of limiting excess use of funds in elections among other things. For that reason, the law clearly provides that excess use of money is an offence.⁴⁵ If one

³² Government notice No. 246 and 247.

³³ TEMCO report, "How the Election Expenses Act wa Received by Stakeholders" 2011 p. 53.

³⁴ Interview with registered voters at Manzese ward, Kinondoni municipal, Dar es salaam.

³⁵ Interview with academic staff and students of The Open University of Tanzania Ilala Regional Centre. The interviewers were on opinion that, that is why every Act provides for preliminary provisions which provides for the short title which reflects subject matter, time as to when the Act will take effect, purpose of the law and defining sections. Rationale behind preliminary provisions is to enable the public or the one who will be affected by the particular Act to understand what the Act is all about. This will help public to have enough time to read and understand well their obligations, duties and rights. They will also be able to understand consequences for failure to obey the law.

³⁶ See The daily News of 27 July 2010; Makulilo AB and Raphael C, The October 2010 General Elections in Tanzania, p 6.

³⁷ Frank Kimboy, "PCCB Filed 10 Cases" The *Citizen*, 10th November 2010. See also TEMCO Newsletter, Enforcement of the Election Expenses Act, Issue 1, 1 September 2010 p.16.

³⁸ Hosea, E.G, Government position on Fight against corruption, GBS Annual Review 2010 available on www.tzdp.org.tz as accessed on 24July 2012. In this seminar the following were trained; - 131 police officers from mainland and Zanzibar, 133 District Executive Directors and 33 managing editors from electronic and media houses.

³⁹ See parliament Hansard of 14th conference 4th meeting of 11 February 2010.

⁴⁰ It should be noted that the function of lying time table for elections is vested in under Election Ethics Committee comprising NEC commissioners and political parties' representatives.

⁴¹ The citizen, September 22, 2010. See also TEMCO Newsletter, The Enforcement of the Expense Act, Issue No.2 October 2010 p. 4

⁴² Ibid

⁴³ TEMCO Newsletter, the Enforcement of the Expenses Act, Issue No.2 October 2010, p 6

⁴⁴ See section 9 of EEA, 2010 and Regulation 9 of the Election Expenses regulations 2010.

⁴⁵ Section 10 (3) of the EEA, 2010.

looks in the interpretation sections⁴⁶ one will find that the offence of excess use of funds is not defined. However, the practice has shown that, the excessive use of money has been linked with corruption for two reasons; first, the law empowers the Attorney General to institute criminal proceedings to a person who commits prohibited practices whether won or lost election be proceeded according to prevention and combating of corruption Act.⁴⁷ In the 2010 various cases of corruption were reported throughout the country. This included the CCM nominations where many aspirants were arrested bribing party members in various places. For example, 17 suspects were arrested by the PCCB in Kilimanjaro; among them was a CCM aspirant for a special seat in Kilimanjaro, Kilimanjaro Regional CCM Women Organization (UWT) Secretary, and Kasulu District Commissioner.⁴⁸ They were bribing party members by cash between Tanzanian shillings 50,000 and 100,000, pairs of “*khanga*” and “*vitenge*”.⁴⁹ It was further reported that other prominent CCM aspirants who were taken to court included Mr Joseph Mungai and Fred Mwakalebela in Iringa Region.⁵⁰ Mungai, the former minister and two others charged with 15 counts contrary to section 15 (1) (b) of PCCB Act No.11 of 2007 and Election Expenses Act.⁵¹ Similarly Mwakalebela was charged with giving bribe contrary to section 15 (1) (b) of PCCB Act, 2007 and section 21(1) (a) of the Election Expenses Act, 2010.

Other reports from Tanga revealed that the anti-corruption agency has similarly taken to court four outgoing CCM councillors who were aspiring for election through special seats for allegedly giving bribes to voters during the preferential polls. The councillors include Fatuma Athman Fundi, Maweni Ward UWT chairperson Hafsa Abubakhar Othman, who aspired to contest for the Chumbageni ward councillorship, Kurwa Akida Maziwa and Saida Yahya Swaleh alias ‘Ghadafi’. The report revealed further that all four accused violated provisions in the PCCB and the law on election expenses⁵² further more it was also reported that the former Minister for Community Development and Children Honourable Margaret Sitta was

arrested with PCCB for bribing party members with cash and mobile phones.⁵³

It is important to note that, although various corruption cases were reported, some of them ended up at PCCB before taken to the court of law, for reason that there was no sufficient evidence. This is the case, for example, of Dr. Beth Machangu who was cleared by PCCB letter with reference number PCCB/KIL/ENQ/08/2011⁵⁴. On the other hand, courts’ judgments based on the EEA and its Regulations have confirmed use of corruption in the 2010 general elections. In the recent decision at Mbeya, the High Court nullified the election results of the CCM Member of Parliament Khalifan Aesh Hilaly on the ground of corruption. The CCM candidate was found guilty of bribing six delegates at a closed meeting that was convened by party leaders at Kantalamba Mazoezi Primary School. Each of the delegates received Sh15, 000/=.⁵⁵

Secondly, the linkage between corruption and excess use of fund is that, aspiring candidate may use money to bend rules of elections by bribing voters. Oftentimes, elections are costly engagement which an ordinary Tanzanian cannot manage on his or her own. As a result, borrowing money or getting sponsorship from the rich ones is a dominant practice. While this money is used to support election campaigns, etc, it is at the same time used to bribe voters in order to influence favourable results.

From the foregoing it is difficult to link excess use of money with corruption. Because one can use prescribed amount to bribe but not necessarily use excess money. The fact is that when one looks at all the charges and decision of cases above, there is no any case which shows the element of excess use of fund during elections. They have been referring to contravene both Prevention and Combating of Corruption Act or other sections of the EEA, but not section 10 of the EEA, which prohibits the excessive use of funds. In addition, the amount which is referred in various cases ranges from two thousand to two hundred thousand shillings which cannot amount to excess amount of funds. Moreover, it is not easy to establish when a candidate or political party used excess funds until when returns are made. This brings difficulty in establishing elements which clearly link the offence of excessive use of money in elections and corruptions. I argue that, corruption and excess use of money in election are two different offences and that two offences should be only linked when money spent for corruption exceeded the prescribed limit of candidate or political party as the case may be.

The EEA requires candidate to disclose fund in a manner provided in regulation 7(2) by filling form EE1.⁵⁶ Information to be contained in form EE1 includes amount of money, other type of funds which can be cashed or converted in to money value or money worth; source of money or other type of funds; and any other thing intended to be used during election campaigns.⁵⁷ There are three problems here; first, neither the law nor the

⁴⁶ Section 3 of the EEA 2010. It should be noted that, an interpretation provision gives definitions to words or expression or limits or extends meaning of a word or expression. In terms of Interpretations Act, Section 4 Cap 343 Revised Edition 2010, definition means interpretation given by any written law to a word or expression. The rationale behind defining word or expression is to provide certainty to its meaning, or to limit its ordinary meaning or to extend its ordinary meaning, and in some cases merely to avoid repetitions.

⁴⁷ Section 24 (7) and (8) of the EEA 2010.

⁴⁸ See the daily News of 27 July 2010; Makulilo AB and Raphael C, The October 2010 General Elections in Tanzania, p 6. See also, Babeiya E., Electoral Corruption and the politics of election financing in Tanzania, Journal of Politics and law, Vol4, No2; September 2011,p.97.

⁴⁹ Makulilo AB and Raphael C, The October 2010 General Elections in Tanzania, p 6.

⁵⁰ Ibid,

⁵¹ Criminal case No. 5 of 2010. See also www.pccb.go.tz/...142-ex-minister-jj-mungai-in-court-over-corruption accessed on 26/12/2011.

⁵² Ibid, see also Gurdian Team, Ex Minister J J Mungai over corruption, The Gurdian, IPP media 21 August 2010.

⁵³ TEMCO News Letter, The Enforcement of the Election Expenses Act, EEA Series Issue no1, September 2010 p.12, Despite these allegations, the CCM NEC proceeded to nominate Dr. Machangu and Hon Sitta.

⁵⁴ See Mwananchi Sunday Nov.6 2011 and Nipashe of 6th November 6, 2011. Mrs Magreth Sitta also was cleared of his allegations.

⁵⁵ The Citizen, 30 April 2012.

⁵⁶ Regulation 7 of The Election Expenses Regulations 2010.

⁵⁷ Regulation 7 (2) of the Election Expenses Regulations, 2010.

regulations state clearly what other types of funds and any other thing means.⁵⁸ Secondly the word 'other type of funds' is used in two places in the same regulations, sub regulation 3 (b)⁵⁹ and sub regulation 3 (c)⁶⁰. If plainly construed one finds that these words mean different things when they are applied under regulation 7(2) (b) and when they are used under regulation 7(2) (c).⁶¹ If these words meant two different things, then the law should clearly define these terms in interpretation provisions. If they just meant same things in both circumstances explained above, then there was no need of repetition. Third, during the 2010 general elections it was observed that political parties and candidate's contribution and expenditure were transferred electronically by using mobile phones such as M- PESA, by Sending SMS or by mobile banking to mention a few examples. The problem is that both the Election Expenses Act and Regulations do not provide for provisions to regulate electronic contributions and expenditure. The law is also silent on effective tracking and procedure of disclosing money obtained through electronic means.⁶² Similarly, the law allows candidate to use his own funds during election as may be necessary or required for the purpose of election campaigns.⁶³ However, it does not specify the circumstances which can be considered as necessary or required by the campaign.

Election is a public affair. Therefore it should be a transparent exercise. Perhaps because of this, the EEA clearly requires the candidate and political parties to make disclosure of funds before election campaigns.⁶⁴ Surprisingly, section 9(5)⁶⁵ of the same law requires funds made pursuant to the provisions of the EEA to be confidential and only be divulged when such information is the subject of a complaint or a complaint lodged by the Registrar, investigation initiated by the Registrar or if it is the subject of proceedings in the court of law. Similarly, regulation 9(3)⁶⁶ requires the disclosure in respect of returns of election expenses of gift, loan, advance deposit and donation to be confidential. I argue that, these requirements do not increase transparency in whole process of managing funds in elections.⁶⁷ The reason for this is that, first; if means of obtaining funds is clearly stated in the EEA and its regulations there is no need for disclosure be confidential. Secondly, the transparency is required by all stake holders and in particular voters who are affected by the acts of their leaders whom they put in power. Moreover, the confidentiality in disclosing funds may create loopholes for political parties and candidates to engage massive

use of funds hence lack of control and tracking of excess use of funds in elections.

In related matters, the EEA requires only disclosure of any amount exceeding one million received by political party for the purpose of election.⁶⁸ This means that any amount less than one million is not necessary to be disclosed. The law is not clear as to what happens if one pays various installments which are less than one million at different times. Furthermore, section 11 (4)⁶⁹ allows political party to receive voluntary donations from any individual or organizations within and outside Tanzania. On other hand, regulation 10 requires disclosure of funds by donations voluntarily made to exclude resident Tanzanians.⁷⁰ Regulation 10 (2) (c) is of interest as it requires only disclosure of the voluntary donation from any person resident in Tanzania who is not a citizen of this country. The law contradicts itself by allowing political parties to receive donations from individual within and outside Tanzania but exclude disclosure of any amount obtained from Tanzanian residents. This loophole can be used by the political party or candidate to accumulate money which is not accounted for to political party or to the registrar of political party and therefore take advantage over the other party or candidate.

The EEA empowers minister responsible for political parties to set a maximum limit on election Expenditure⁷¹. The Minister may also vary the amount of election expenses to be used by political parties during the election campaigns⁷². The law does not state the circumstances which may trigger the minister's exercise of his powers to vary the amount of election expenses. This may create room for minister to abuse the given power to favour a political party or category of candidates. Similarly, section 10 (2) allows political party or candidates to expend funds in excess in exceptional circumstances and make a report to a registrar containing reasons for the use of excessive funds. In order to implement this requirement, the law allows excess use of fund not more than fifteen percent of the substantive maximum amount under special circumstances as provided under order 3.⁷³

There are two related problems here. One is that while the EEA provides for special circumstances, the Order provides for exceptional circumstances. Neither the Act nor the Order provides for the meaning of both terms. Ordinarily, special and exceptional circumstances mean different things. Exception means exemption, omission, immunity and exclusion while a special circumstance means particular, individual, extra ordinary⁷⁴. If one goes to the interpretation principle these two words are ambiguous as they are capable of providing two

⁵⁸ See interpretation provisions, section 3 and section 12(2) of the EEA, 2010 and Regulation 3.

⁵⁹ Regulation 7 of the Election Expenses Regulations 2010.

⁶⁰ Ibid.

⁶¹ Other type of fund under regulation 7(3) (b) means anything capable of being cashed or converted to money value or money worth, while 7 (3) means anything capable of being source of money.

⁶² The EEA, does not refer to the Electronic and Postal Communications Act, 2010.

⁶³ Section 8(2) EEA, 2010.

⁶⁴ Section 9 (1), (2) , (3) ,(4) and section 18 of the EEA, 2010.

⁶⁵ The EEA, 2010.

⁶⁶ The Election Expenses Regulations, 2010.

⁶⁷ See study done by TEMCO in finding whether the EEA will increase transparent whereby 72% said it will not increase transparency. TEMCO Report "How the Election Expenses Act was received by Stakeholders" 2011 p 52.

⁶⁸ Section 11 (1) of EEA, 2010.

⁶⁹ The EEA, 2010.

⁷⁰ Regulation 10 (2) provides that voluntary donations made to a political party shall be disclosed to the registrar showing donations from source outside united republic of Tanzania, whether obtained directly or through sources within Tanzania; from foreign organization stationed within the united Republic; or from any other person resident in the United Republic but not citizen of United Republic.

⁷¹ Sections 10 (1) (a) (i-iv) 2, 7, and 26 respectively of the EEA, 2010.

⁷² Section 10 (b).

⁷³ See order 3 of the Election Expenses (Maximum Amount of Funds) order, 2010.

⁷⁴ Encarta Dictionary.

different meaning hence the law lacks clarity. This indicates that the Minister responsible has acted *ultra vires* in providing orders which allows the use of excess funds in elections under special circumstances and not exceptional circumstances as required under section 10 (2) of EEA. Second, the law gives a leeway by allowing any excess use of money be justified by writing report. As Mvungi rightly pointed out that “the EEA is a failure because from the experience of 2010 general elections political parties and their candidates exceeded limits of expenses on their own will, and nothing has been done so far to take them accountable”.⁷⁵

Moreover, the EEA provides for restriction of money brought in the country ninety days before general election and thirty days before by-election⁷⁶. If this is plainly interpreted it clearly means that any fund received before that period has no any restriction regardless of whether the said money will be used for particular elections or not. In 2010 it was reported that the CCM party imported more than 200 vehicles in preparation for the 2010 general elections ninety days before election⁷⁷. This can create a loophole for a political party leave alone candidate who is not subject of this provision to accumulate money within this period as much as possible as they are not bound by the law.

At the same time, the EEA, prohibits every person who before or during the election campaigns period directly or indirectly give any gift, loan or offer so as to induce people to procure the nomination of the giver⁷⁸. Yet, it allows transactions which are designed to advance the interests of community fund raising, self-help, self-reliance or social welfare projects within the constituency be done before the nomination process or election campaign, and shall not constitute prohibited offence⁷⁹. Here the law is silent on which acts are actually self help, self reliance or social welfare practice. There is serious impact on the law to allow the said acts during nomination or campaign. Because any act done just before or during election campaigns are capable of influencing expected voters’ choices. This loophole may be used by political parties and their candidates to make loans and offers for the reason of advancing interest of the society. Hence the law is inconsistent and contradicts itself.

Penalties are punishment imposed to an offender with the purpose of rehabilitation, retribution, incapacitations and deterring an offender from committing offence. The penalty inflicted therefore must be proportional to the legal wrong committed, or to the moral blameworthiness so as to deter the offender and other members of the society from committing further offences. If penalties are lenient to an offender, then the law will not be serving its purpose. Under EEA, the excess use of funds; failure to comply with requirement of restriction of foreign funding by candidate, political party and organizations;⁸⁰

and failure to disclose gift, loan or advance are offences⁸¹. Persons convicted of these offences are liable for three million Tanzanian shillings in case of a political party, one million for candidate and five millions for an organization, corporation or institution⁸². The law also imposes serious penalty to anyone who threatens a person who intends to donate funds of a fine not less than one million and not more than five million or to imprisonment for six months but not more than two years or both.⁸³

Penalty for excess use of fund in election is of particular interest. The penalty imposed to excess use of fund is less serious than penalty for one who threatens to harm any person who contributes or intends to contribute donations. Three million penalty imposed is not proportional to the offence of excess use of fund if compared with the prescribed amount for each category of candidate. The regulations set the amount of funds to be used by office of the president is five billion, office of the member of the parliament ranging from thirty to eighty million, member of parliament special seat ten millions, office of the councilor seven to five million, and office of the councilor special seat two million five hundred thousand to three million five hundred thousand. For nomination process presidential candidate is two billion, for members of the parliament two point five billion and special seat is seven hundred million, councilors one point five billion and special seat three hundred million. For political parties’ campaigns the amount is fifteen billion⁸⁴. Yet, the law allows the excessive use of fund by fifteen percent of substantive amount prescribed to be expended⁸⁵. Now if one compares the amount of penalty imposed to respective parties and amount of money spent, it is at advantage of the offenders which cannot deter offenders from committing such offence in future elections.

The law also imposes penalty of three millions if political party fails to submit financial and audited report within required time. Where a political party is to submit the report at any later time and failed to do so, shall be disqualified to contest in any election including the next general election, unless political party files such financial and audited report to the satisfaction of the registrar before the next nomination day.⁸⁶ If plainly construed, the provision actually sets no time for a political party to file the said reports. The law allows political party to file their reports any time before next nomination day. Taking into account the election system of Tanzania, general elections are normally done after every five years. This means that a political party may file its report even after five years as nomination day for general election happens once after five years⁸⁷. Where a

⁷⁵ Frank Kimboy, “Election Expenses Act in Spotlight after Igunga” *The citizen* 11 October 2011.

⁷⁶ Section 12 (1) (2) and (3) of the EEA 2010.

⁷⁷ Tundu A. M Lisu, *Electoral Reform or Assault in Democracy?* Position paper prepared in response to the publication of the bills for the Electoral Laws (Miscellaneous Amendments) Act, 2009 and the Election Expenses Act, 2009, January 2010 p.11.

⁷⁸ Section 21 (1) (c) of EEA, 2010.

⁷⁹ Section 21 (3) EEA, 2010.

⁸⁰ Section 10(3); 12 (1) and (4); 15 (2) respectively of the EEA, 2010.

⁸¹ Part 5 sections 21 to 23 and 25 respectively of the EEA, 2010.

⁸² Section 26 EEA, 2010. The law clearly states that where the penalty is not specifically mentioned, they will be penalized under section 26.

⁸³ Section 11(7) of the Election expenses Act.

⁸⁴ Election Expenses (Maximum Amount of Funds) Order, 2010, Part one A, B, C, D and E; see also part two and three schedules of the Election Expenses (Maximum Amount of Funds) Order, 2010.

⁸⁵ Order 3 of the Election Expenses (Maximum Amount of Funds) Order, 2010.

⁸⁶ *Ibid* Section 18 (4).

⁸⁷ Nomination day means a day appointed for the nomination of candidates in a contested election for the Office of the President,

political party and candidate fail to disclose funds, they are liable for disqualification in absence of reasonable explanations.⁸⁸ The penalty given is proportional to the offence committed. However, the penalty is subjective as it works only in absence of reasonable explanation.⁸⁹ The word reasonable is vague and does not create certainty in law.

Likewise, the EEA provides for protection from liability of officers or employees of the registrar office or (NEC) or any government official in the cause of performing functions under EEA, if that act is done in good faith⁹⁰. The EEA does not define what good faith is and it leaves much to be desired.

Besides having problematic provisions, the EEA has some provisions well formulated. However, its implementation has been difficult. Section 21 (c) in particular is of an interest. This provision prohibits every person who gives gift, loan or offer before or during election campaigns. In the 2010 general elections it was established that some aspirants to political positions distributed gifts a day before nomination processes. This was evidenced by petition filled by CHADEMA against President Jakaya Kikwete alleging that he was making promises aimed at procuring votes by declaring salary increment for civil servants and promised to buy a new ship for Kagera region during election campaigns contrary to section 21(1) (c)⁹¹. In ruling to the petition, the registrar said that the president was fulfilling CCM manifesto of 2010⁹².

The other example is of Dr. Juma Ngasongwa⁹³ who admitted to have distributed corrugated iron sheets and cement bags to a number of party offices in Manda chini, Lugala and Madubila for the reason that he was fulfilling promises he made earlier⁹⁴. The same was reported in Bagamoyo where by one contestant from CCM, distributed jerseys and sports equipments to a football club within the constituency a day before the aspirant picked up intra-party nomination forms.⁹⁵ The reason advanced by the Registrar on fulfilling manifesto of a political party and reasons by Dr. Ngasongwa of fulfilling promises made while he was a member of parliament are not stated in the Election Expense Act. Moreover, the Act is silent as to when is to be the deadline for incumbent members of the parliament, president and councilors should end fulfilling their previous promise or political party manifesto. Any promises fulfilled during or before campaigns have serious impact in determining the results of nomination and elections.

The right to the candidate for the office of the president in election to utilize the government broadcasting services and television during election campaigns is clearly enshrined in the

the Vice-President, a Member of Parliament or a Councilor; see section 3.

⁸⁸ Section 20(1).

⁸⁹ What is reasonable to one is not necessarily be reasonable to the other.

⁹⁰ Section 30 of the EEA, 2010.

⁹¹ The petition was filled by CHADEMA on 30th August 2010 to the registrar of political parties. See also TEMCO Report on Enforcement of the Election Expenses Act, Issue No. 2, 1-14th October 2010 p1.

⁹² *Ibid*, p 2.

⁹³ He was contesting for a parliamentary seat in Luangwa west constituency.

⁹⁴ TEMCO News letter, The Enforcement of Election Expenses Act, Series no 1 September 2010 p.8.

⁹⁵ *Ibid*.

law⁹⁶. Although the law provides for that right, it has been established that, the distribution of coverage in public media for political parties was not even or equal. Research done on September 2010 revealed that, on television broadcasting political parties received the following seconds CCM 150,700; CHADEMA 109,300; CUF 5,955; NCCR 29,720; UDP 12,400; TLP 5,085; NRA 5,841; JAHAZI 6,488; DP 1,560; APPT 2,760; UPDP 1,230; NLD 780; TADEA 4,701.⁹⁷ On public radio stations, the findings also shown that the most covered party during the month of September was CHADEMA due to the higher number of seconds that it received. CHADEMA had 58,177; followed by CCM which had 50,855 seconds; and CUF had 39,853 seconds. DP 9,180; UPDP 8,040; NCCR 3,760; TLP 5,580; NRA 4,320; UDP 4,260; DEMOKRASIA MAKINI 4,020; SAU 3,900; APPT 1,320; JAHAZI 1,140; while TADEA, NLD, UMD, CCJ and UPDP received below 1,000 seconds each⁹⁸

The EEA further requires that the Government media should include in their publications information related to the electoral process without bias and such publication should not tamper with information or discriminate against any candidate⁹⁹. Similarly, section 53 (3) of the Elections Act¹⁰⁰ requires every print media owned by the government publishing any information relating to electoral process to be guided by the principle of total impartiality. It also requires them to refrain from discriminating in relation to any candidate journalistically and in the amount of space dedicated. To the contrary this principle was not followed as CCM received space more than other political parties. The study done by Synovate shows that CCM had 52,743; followed by CUF 24,364; CHADEMA 17,882; NCCR 4,860; TLP 4,219; APPT 2,257; SAU 872; TADEA 635; JAHAZI ASILIA 613; NLD 522; NRA 480; UMD 415; UPDP 723; and UDP 543. Other political parties such as DP, DEMOKRASIA MAKINI and AFP received below 100 centimeters.¹⁰¹

The EEA further requires a candidate to submit forms of disclosure of funds within seven days before the nomination date¹⁰² by filling form EE1¹⁰³. In the 2010 general elections most of the parliamentary candidates were not able to submit their forms within seven days as required by the law. For example, the

⁹⁶ Section 28 (1) of Election Expenses Act, and section 53 (1) and (2) of the National Election Act, 2010. This is subject to consultation between elections commission of the united Republic established by constitution with candidates, political parties concerned and officers responsible for the public media.

⁹⁷ This covered public own televisions namely, TBC, Mlimani TV, and TVZ as extracted from Synovete, Tanzania Media Election coverage 2010 Monthly Monitoring Report #5 (October).

⁹⁸ This covered Tanzania Broadcasting Cooperation TBC and Sauti ya Tanzania Zanzibar STZ radios as extracted from Synovete, Tanzania Media Election coverage 2010 Monthly Monitoring Report 5 (October)

⁹⁹ Section 28 (2) of the EEA, 2010.

¹⁰⁰ Cap 343 of 2010 R.E

¹⁰¹ This covered Daily News, Habari Leo and Zanzibar Leo as extracted from Synovete, Tanzania Media Election coverage 2010 Monthly Monitoring Report #5 (October).

¹⁰² Section 9(1) (a) and (b) of the Election Expenses Act, Act no. 6 of 2010.

¹⁰³ Regulation 7 the Election Expenses Regulations, 2010.

deadline for nomination of candidate was 19 August 2010 this means submission of the forms was on 27 August. A day before the deadline for submission of the forms 26 August 2010, CHADEMA and NCCR Mageuzi cried foul of what is called serious problem with issuance of the forms EE 1 by some returning officers.¹⁰⁴ They claimed to receive forms late on 18 August 2010 contrary to EEA¹⁰⁵.

Conclusion

The evaluation of the EEA on the eve of the 2010 general elections has revealed that, it did not meet its objectives as expected. This is because it was rushed and stakeholders did not have enough time to discuss and familiarize with it. The Act broadly is not defining key terms. It contains repetitions and inconsistencies in some areas and leaves much to be desired. Moreover, some of penalties provided are not serious enough to deter the offenders not to commit or repeat the same prohibited conducts. Similarly, the EEA's implementation has not been adhered to. Thus, as it now stands, EEA failed to manage finance and corruptions in the 2010 general elections.

It is therefore recommended that, stakeholders and implementing institutions should take necessary steps to make sure that the EEA is well understood by majority parties for the forth coming elections. Also the law should be amended to provide clear definitions and clarifications of all words which are ambiguous, including excessive use of funds and how it is related to corruptions. The disclosure for elections funds should be made public and be done from all sources including Tanzanians so as to enhance transparency in election processes. Clear demarcation should be set to end implementation of political parties' manifestos. Serious penalties should be imposed in offences of excessive use of money and in lack of impartiality to public media. In doing so money will not be used as a sole determinant factor in elections and therefore whoever qualifies will be elected, hence level playing field will be provided to all.

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¹⁰⁴ TEMCO Newsletter, The Enforcement of the Expenses Act, Issue No.2 October 2010, p 6, see also, the Guardian and Mwananchi of 25th August 2010.

¹⁰⁵ Section 9(1) of Election Expenses Act, 2010.