



## AFTER THE NARC PROMISE: DID KENYANS GET TO ENCASH THEIR CHEQUE?



*The fight against corruption was one of the fundamental promises made by President Kibaki when he took power in 2002. Five years later, Kenyans go to the polls and not surprisingly, the issue of the anti-corruption is once again at the centre of the campaigns. The big question is, did kenyan's get to encash their cheque?*

By Maurice O Makoloo

### ECHOES FROM THE PAST

After several years of trying, Kenyans eventually succeeded in removing Moi and his KANU regime from power. The KANU regime was extensively described, and correctly so, as corrupt, undemocratic and dictatorial. It is no wonder that the then, new government came in on a promise of a crackdown on corruption. The first signs after the inauguration of President Kibaki suggested that there was bound to be a change. The zeal with which the public went about arresting and reporting

bribe-taking traffic police officers was evidence of a quest for a fresh start. They were inspired by the words of the President, both during his swearing-in ceremony and in his subsequent addresses. In short, the fight against corruption was one of the fundamental promises made by President Kibaki. Five years later, Kenyans heading to the polls once again not surprisingly, the issue of the anti-corruption war is once again at the centre of the campaigns.

Kenya is now by any measure, a more democratic country than it was under the KANU regime. Nonetheless, the high expectations that accompanied

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## ...Did Kenyans Get To Encash Their Cheque?

President Kibaki's victory seem to have been tempered by a more measured recognition of the complexities and constraints regarding democratization in the Kenyan context. Most people equated the change of political leadership, especially at the top, with the taking of the road to good governance.

However, it has become apparent that neither the fundamental nature of Kenyan politics nor the institutional bottlenecks to transition have changed. Numerous aspects of the post-2002 constitutional, legal, and political context remained incongruent with human rights objectives and have to date lack transparency, equity, access and a voice for the "civic commons". Significantly, continuity with the ethnic centered, and corruption ridden patron-client based political system have threatened to undermine the consolidation of democratic governance in Kenya.

Corruption mis-allocates scarce economic resources and, undermines the very institutions we rely on to develop our nation. It distorts the values that are essential to maintaining a peaceful and orderly society. Corruption is thus an antithesis of good governance. The fight against corruption is, a prerequisite to development. In this issue I seek to ask whether Kenyans will get to encash their cheque: the promised war on graft.

### CONSTITUTIONAL DEBACLE

It is universally recognized that a constitution is the supreme law of any country. Constitutional provisions *inter alia* underline national priorities and hence determine the direction and nature of future legislative policies and executive actions. One of the key campaign pillars for the NARC team was the enactment of a new constitution within 100 days of the formation of the new government. This never came to pass- not within the promised time frame anyway, though later on efforts at the same, came to nought.

The constitutional review process commenced in earnest in the sunset years of the Moi regime. The Kenya Constitution of Kenya Review Act had created the Constitution of Kenya Review Com-

mission. This Commission had prior to the inauguration of the Kibaki government come up with a draft Constitution of Kenya. In its campaigns, NARC declared that it was satisfied with this draft and that it would push for its enactment as soon as it came to power. In other words, the new government's work was merely to bring to a conclusion a process that was already in motion.

The new constitutional dispensation was expected to boost the war on corruption. The draft contained provisions whose enforcement would greatly improve good governance which in turn would have direct implications on corruption. The quest for a new constitution was to later turn into a political contest between the new regime in power and those opposed to it. In the end result, the proposed Constitution was defeated at a referendum on the 21<sup>st</sup> November 2005. In re-

spect, it emerged that the referendum was more on the performance of President Kibaki and his government than on the merits and demerits of the draft Constitution.

In the aftermath of the referendum, the President took two actions that have relevance to the fight on graft. First, he dissolved his cabinet. Secondly, he appointed a Committee of Eminent

Persons whose task was to seek views from the public on how to move the constitutional process forward. This was really not a correct diagnosis of the problem. Little wonder then that after the Committee submitted its report to the President, nothing major materialized. On the contrary, the matter degenerated from a question of the enactment of a new constitution to a debate about minimum reforms ostensibly because there was realization that a full constitutional overhaul and implementation would not be possible before the next General Elections.

The non-enactment of a new Constitution was bad enough from the perspective of the fight against corruption, what made the issue worse was that the government ceased to read from the same script for most of the time. The schisms that emerged in the government emboldened the perpetrators of corruption, who quickly regrouped and multiplied their cells. Similarly, the

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public faith in the new administration quickly ebbed. Soon, it was business as usual.

### RULE OF LAW

Constitutionalism recognizes the necessity for government but insists upon a limitation being placed upon its powers. This limitation is often achieved through the doctrines of the Rule of Law and Separation of Powers.

As such, institutions which promote and protect the rule of law ought to be strengthened. These institutions include those of vertical accountability such as anti-corruption bodies like the Kenya Anti-Corruption Commission (KACC), the Efficiency Monitoring Unit (EMU), the Auditor and Controller-General, and the various Parliamentary Committees just to mention a few. These work in tandem with institutions of horizontal accountability such as a free press, a vibrant civil society and a vigilant citizenry exercising its democratic right to choose new leaders.

It must be pointed out that respect for the rule of law is crucial in the fight against corruption. Those suspected of graft must retain their constitutional rights, chief of these include the presumption of innocence, the right to be tried within reasonable time by a lawful and impartial tribunal, right to representation and the right not to be discriminated against, among others. Kenya has faced a serious challenge on the question of presumption of innocence- not least because it is a fine line to tread.

Press reports on corrupt practices and their perpetrators have been taken in a number of quarters as evidence of such corruption. From the perspective of government and its anti-corruption brigade, this has been used to tell the public that the fight against corruption is on. On the other hand, the public has also been keen to see what the government does with people within its ranks that have been reportedly involved in corruption. Where such action has been absent, the public has taken that as a testimony to the

reluctance, by government, to fight graft or at least tolerate corruption. Similarly, it has not been uncommon for persons accused or suspected of graft going to seek judicial redress. Whereas, that on its own is a function of democracy and the rule of law, two points arise out of this process.

On the one hand, the government has accused such persons of hiding behind the law and frustrate its anti-corruption war. Such a position is of course most unfortunate for a government that appreciates the rule of law. On the other hand, such persons have also taken advantage of the legal process that allows for lengthy judicial proceedings and technical legal issues to thwart their facing corruption charges. The latter issue does also point out some of the weaknesses within our judicial system that need to be ironed out if the anti-graft war is to gather and maintain momentum.

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The rule of law also calls for equality before the law and equal subjection of people before the law. Where government selectively takes people to court on corruption charges, it opens itself up to criticism over cronyism and favouritism. It cannot be said that the government has ap-

proached the issue with clean and open hands. In this respect, it has frustrated its own efforts to fight corruption. This was particularly evident in the aftermath of the referendum and cobbling up of the new cabinet. Similarly, the government has been guilty of deliberately defying court orders directed at it broadly, or against its chief officers or ministers.

Although such decisions may not all necessarily relate directly to corruption cases, they have the effect of sending the wrong messages to the public and we dare say to the perpetrators of corruption. The clear message is that, if, you have enough state power or cohort with people who exercise enough of it, you have nothing to fear. The contrary must then be true, that if you have no such power, there is everything to fear. Such asymmetry has certainly worked against the government in its anti-corruption crusade.

## EXIT NARC, ENTER THE GOVERNMENT OF NATIONAL UNITY

Not so long after the inauguration of President Kibaki, the then ruling NARC coalition entered into a minefield of political problems. The reported betrayal of the Memorandum of Understanding that helped bring Kibaki to power grew to become an issue of betrayal of trust between the President and Kenyans. That saw, a rare historical phenomenon where the government broke ranks over the Constitution review process. When the draft Constitution was subjected to the referendum, it was roundly defeated. The President responded by dissolving his cabinet. In the new cabinet line up that he set up, he brought on board, persons from outside of the original coalition that brought him to power. This included people from KANU, the party that Kenyans had rejected in the elections not too far back. This delicate balancing act, dubbed the creation of the Government of National Unity (GNU), had profound implications for the fight against corruption. An alarmed public could only watch in profound surprise the return of the Moi brigade that had for so long held the country at ransom. To the public, the fight against corruption had been abandoned. In this respect, the line between this regime and the former one had been

blurred.

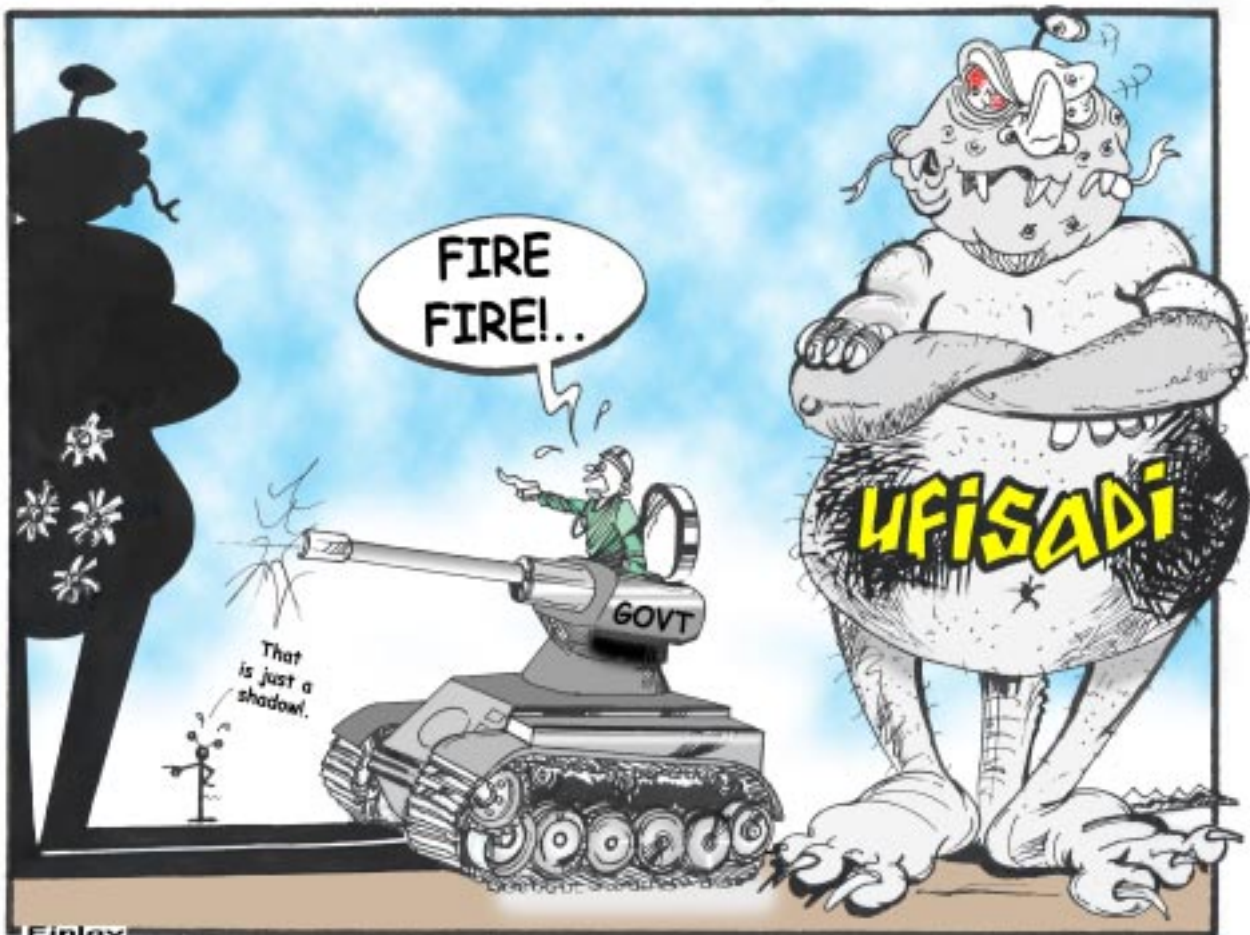
For the new government, the formation of the GNU meant practically that it could not move against some of the known or suspected perpetrators of corruption, having brought them to its own fold. Any attempts to speak about corruption was variously derided as empty rhetoric. Indeed, the government could not escape the criticisms that when it moved against anybody on cases of corruption it was a mere political war camouflaged as a legal process.

In addition, it brought to the fore, once again, the long running ethnicisation of the anti-corruption war.

### Freedom of Expression

Good governance, an essential component of any thriving democratic state is premised on a system of openness, trust and accountability of the government. This can only be achieved if the public is involved in the process of governance. If the general public knows

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# Exit Narc , Enters The Government of National Unity

the functions, policies and decisions made by government they can question the government on the basis of the information obtained and most importantly the reasons for the governments actions.

Access to information makes the Government more sensitive and responsive to the needs and demands of the ordinary people. This in turn increases public participation, because it is a tool which the public can use to regularly engage with government officials and parliamentary representatives. Freedom of information entails the right of citizens of a country to access official information held or in the custody of their government. It invokes an obligation on the government to facilitate easy access to information under its docket and quite significantly publish important information proactively to the general public regularly. In the circumstances, it would be a tool for monitoring and exposing corruption.

Access to information is often facilitated through a vibrant and free press. Whereas the reportage of corruption cases and the press generally has been free, there have been reported instances of intolerance and outright attacks on the media. The invasion of the Standard Media Group by state-sponsored operatives, and that of the Nation Media Group by the First Lady, stand out as cases of blatant interference with and intimidation of the media. The Kenya Broadcasting Corporation (KBC), a public media outlet, has been effectively turned into a mouthpiece for the government of the day. This development is a radical shift from the then position soon after the new government came into office. This change can be safely attributed to a deliberate decision by the government to have total control of KBC as a way of having control over its media content.

The latest developments in this regard relate to the legislative proposals made by the Kibaki government. In contrast to such legislative proposals as the Freedom of Information Bill that would have had the effect of opening up access to information and boosting the war on corruption, the government pushed hard to have laws enacted that would have had profound negative impacts on the operations of the media in Kenya. These included the recently enacted Media Act and other proposed legislations such as the Information, Communication and Technology (ICT) Bill that was later

withdrawn due to pressure from concerned stakeholders.

The determination in government to push through the Media Act was remarkable. To his credit, the President returned the initial Bill to Parliament to remove sections from it that would have muzzled the press. The signing into law of the Witness Protection Act was another positive development in the war against graft. It needs no gainsaying that corruption thrives because its perpetrators are so powerful that those who expose them also expose themselves to danger. It was therefore imperative that such a law be enacted.

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This is not necessarily to say that this was what had been ailing the fight against corruption in this country. Even without such a law, there are sufficient legal provisions in the various statute laws that would have facilitated the fight against corruption. The issue has never really been one of absence or inadequacy of laws. Rather it has always been a question of mastering sufficient political will to enforce the laws.

In this respect, it is noteworthy that the Witness Protection Act, 2006 still remains largely un-enforced. Similarly, political will associated with witness protection would have seen the government help those who blew the whistle on the Goldenberg scandal and subsequent ones. As it is they have been largely neglected and left to fade away, fend for themselves or die ignominious deaths. Such developments do not instill any confidence in the general public that they should be partners in the war against corruption. In addition, these developments open wide one of the misconceptions of the government on this issue of corruption. From very early on, the government wrongly prescribed a slew of legislation for the fight against corruption. Thus, a number of laws have been enacted. These include the Public Officer Ethics Act, the Anti-Corruption and Economic Crimes Act, the Government Financial Management Act and the Public Procurement and Disposal Act. These are undoubtedly good arsenal in the fight against graft- but their enforcement is even of greater value than their mere existence.

The failure to enact the Freedom of Information Bill despite consistent appeals and the Presidents own stated commitment to do so, speaks volumes about the governments commitment to the anti-graft campaign.

## INTER-CONSTITUTIONAL CONTESTS

Under the Kenyan Constitution, the Attorney-General is in charge of all prosecution in this country. For practical reasons some prosecutorial powers have been delegated to a number of institutions and persons to exercise. Nonetheless the office of the AG has traditionally been key to the fight against corruption. Since the new government came to power, three new institutions joined the AG in this crusade. These were the Ministry of Justice and Constitutional Affairs, the Kenya Anti-Corruption Commission (KACC) and the Kenya National Commission on Human Rights (KNCHR). Whereas this should have heralded a new level of fighting the anti-corruption war, a situation emerged of turf wars and inter-institutional contests.

### The Attorney-General vs KACC

Whereas the office of the AG is created by the

Constitution of Kenya, the KACC was created by the Anti-Corruption and Economic Crimes Act. It was intended to be a strong, independent and professional body whose mandate, generally, was to combat and prevent corruption. One of the ways it has sought to fighting corruption is through investigating and recommending prosecution of those found to be culpable in its eyes. Under its parent statute, however, KACC does not have powers of its own mount to prosecutions against subjects that it has investigated.

It is expected and required to submit the report of its investigations to the AG for prosecution. Perhaps due to the constitutional provisions or generally due to other reasons, the AG does not seem to consider its role as merely to draw charges out of these reports and ran to court. Rather, it deems that part of his duty to satisfy

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## Election Corner

### *Irregularities on Polling Day*

- Closing polling stations before the expiry for 12 hours of voting

- Poor supervision on polling station leading to irregularities in voting

- Literate voters voting as illiterate

- Voting booths placed so as to expose the voters when they are marking the ballot papers.

- Ballot box being placed at a hidden place out of the view of the public. It should be in the centre of the polling room.

- Collusion of officials to allow irregularities

- Refusal to allow agents and election observes to closely observe the voting process.

- Issuing more than one ballot paper for each election (Presidential Parliamentary or Local authority to a registered voter.

- Voter voting more than once.

- Campaigning within the polling station and 400 metres a around it

- Bribery of voters or presiding officers

- Anyone voting using another person name

- Intimidating of voters with the polling area

- Transportation of voters by candidates or their agents

- Refusing eligible and qualified voters to vote

- Introduction of fake election materials to the polling station

- Creating a violent environment around a polling station

- Not allowing candidates and their agents to place their seals on the packet for their election material at the close of voting

- Unnecessarily high number of government officials and vehicles at or near polling stations

- Uniformed security personnel on the polling station

## Inter-constitutional Contests

himself that the reports present credible evidence to support a prosecution. This has been a great source of institutional contests leading to KACC demanding for prosecutorial powers. Legally speaking, this raises serious questions about whether an investigator can also be a prosecutor. Be that as it may, this contest between these two offices has not worked to further the anti-graft agenda.

### KACC vs KNCHR and Ministry of Justice and Constitutional Affairs (MOJCA) vs KNCHR

Another level of contest has been witnessed between the Kenya Anti-Corruption Commission and the Kenya National Commission on Human Rights. The latter is equally a creature of the Kibaki administration. Its statutory mandate is to further the protection and promotion of human rights in Kenya. Its vision is to establish in Kenya, a strong vibrant human rights culture, founded on equity and social justice for all. In the exercise of its mandate, the KNCHR has been known and renowned for making strong public statements against perpetuated violations of human rights particularly those related to corruption and misuse of public resources by government officers.

***The latter was particularly irked by the statements and reports by the Human Rights body linking top government officials in misusing state resources in the referendum campaigns. To its credit, the KNCHR has remained steadfast against these criticisms.***

This strong stance has not been received well in all quarters. In 2006, the KACC sought to investigate the KNCHR on allegations relating to transactions relating to purchase of motor vehicles for its use and some issue relating to the relocation of the chairperson of the KNCHR from abroad to take up his position as such here in Kenya. In its contests with the KNCHR, KACC was supported by the Ministry of Justice and Constitutional Affairs.

The latter was particularly irked by the statements and reports by the Human Rights body linking top government officials in misusing state resources in the referendum campaigns. To its credit, the KNCHR has remained steadfast against these criticisms. Indeed, it was the KACC which emerged in the eyes of the public to be a tool in the hands of some hidden forces resisting transparency and accountability. The erosion of confidence in the KACC has been a general loss for the country and the government in the fight against corruption.

Overall, these inter-institutional contestation have

slowed down the fight on graft. However hand, they also shine light on some of the administrative areas in which institutional re-engineering might be necessary.

### BEYOND LAW, CRIME AND PUNISHMENT

Laws are necessary for defining actions that are legally and morally reprehensible. Such actions are thus classified as crimes for which punishments are prescribed.

However, the greatest arsenal in the fight against corruption is the citizenry. A vigilant and public spirited citizenry acts as a watchdog in the fight against corruption. Scenes and reports of citizen arrests in the early part of the Kibaki administration and the chill it sent down the backs of perpetrators of corruption is testimony to this fact. In short, an anti-corruption war cannot really be won without the support of the people. However, the government needs to court and build that support. These two need to go hand-in-hand. Enlisting the support of the public, an uninformed, public is like depending on an inspired fool. The inspiration alone is not adequate.

Which is why the government deserves commendation for the various efforts at educating the public on anti-corruption measures. These have been initiated through various institutions like: the Kenya Anti-Corruption Commission as part of its statutory mandate and the National Anti-Corruption Campaign Steering Committee. The country has also seen the formation and launch of District Anti-Corruption Civilian Oversight Committees.

While these efforts have been commendable, their efficacy was diminished because the public long removed their eyes from the ball- having determined that there was little good will on the part of the government to fight corruption.

It follows therefore that we must go back to the roots: get the public to understand that corruption not only impacts upon the country as a whole but also on the individual citizen. In other words make the people appreciate why they must fight corruption. But above all, as a government, demonstrate commitment to fight graft and set the standard that is lead by example.



## Some Indicators for Assessing the Effectiveness of Criminal and Civil Laws

- Does the criminal law provide for the following six basic offences
  - bribery of public servants (including Judges, Members of the Legislature and Ministers)?
  - Soliciting or the accepting of gifts by public servants?
  - Abuse of a public position for personal advantage?
  - Possession by a public servant of unexplained wealth (or living beyond ones official salary)?
  - Secret commission made to or by an employee or agents (covering private sector corruption)?
  - Bribes and gifts to voters?
  
- Does the criminal law adequately cover the worst types of corruption and provide a deterrent to would-be corrupt officials? If not, in what way is it failing (distinguishing failing in actual laws as opposed to failings in the institutions responsible for their enforcement)?
  
- Are existing laws adequate to move against the illicit acquired property of corrupt officials?
  
- Are the criminal laws being applied fairly, or selectively?
  
- Does the general public see all person as being equal under the criminal law? Or, are some categories of officials seen as being exempt?
  
- Are some matters that are presently being dealt with as criminal matters, that could be dealt with more effectively with the imposition of an administration penalty?
  
- Is the law on corrupt payment clearly understood? Is it adequate? Is it enforced? If not, why not?
  
- Are the remedies available to private citizens and the corporate sector adequate when it comes to coping with the consequences of corruption?
  
- Are claims by family members being used as shields to protect illicitly-acquired wealth from legitimate claims by the state?

### Up coming Events

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| <p><b>Event:</b> 2007 Global Corruption Report<br/> <b>Date:</b> December 6th<br/> <b>Venue:</b> Ritz Carlton Hotel, Berlin Potsdamer Platz 3, Berlin<br/> <b>Organizers:</b> TI-S,</p> | <p><b>Event:</b> International Anti-Corruption Day<br/> <b>Date:</b> December 9th<br/> <b>Organizers:</b> United Nation</p> |
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