



THE NARC'S ANTI-CORRUPTION DRIVE IN KENYA

Somewhere over the rainbow?

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The departure of former president Daniel arap Moi from Kenya's political scene and the ascension to power of the National Rainbow Coalition (NARC) after the 2002 elections generated hope that a political system that had become almost synonymous with corruption would undergo fundamental redemption. While the early days of NARC rule seem to paint a picture of a government committed to combating corruption, most analysts continue to warn the Kenyan public and the international community not to slip into premature excitement. This article puts the early days of NARC's rule under scrutiny with a view to shedding light on the new government's commitment to eradicate the scourge of corruption.

Introduction

The 2002 elections in Kenya saw a resounding rejection of the Kenya African National Union (KANU) and Daniel arap Moi's legacy of endemic corruption and mismanagement. As the first electoral change of government in independent Kenya, it aroused hopes of the possibility of reform and renewal. Among President Kibaki's first acts was the creation of a new Ministry of Justice and Constitutional Affairs (MoJCA), mandated to coordinate the anti-corruption campaign and spearhead the enactment of laws to facilitate it. The appointment of Transparency International's (TI) John Githongo to the newly created position of Permanent Secretary (PS) in the Office of the President for Governance and Ethics was considered an indication of serious political will to combat the pervasive corruption which had

seen Kenya occupying an apparently permanent position near the bottom of TI's annual Corruption Perceptions Index.

By May 2003 two keystone pieces of legislation had been enacted: the Anti-Corruption and Economic Crimes Act (ACECA), which created the Kenya Anti-Corruption Commission (KACC) with responsibility to investigate corruption and economic crimes and conduct public education on corruption; and the Public Officer Ethics Act (POEA), which provides for codes of conduct for all public officers and compels all officers to declare their wealth, including that of their spouses and dependent children. With these two Acts, Kenya fulfilled long-awaited conditions for the improvement of relations with multilateral institutions after their suspension of cooperation with the Moi government. The International Monetary Fund (IMF) resumed

lending in November 2003. The new government argued that, rather than submitting to external demands, it was henceforth committing itself to its own conditionalities for the economic recovery of Kenya. However, the attitude of the 'international community' has constituted a large part, whether positively or negatively, of the NARC government's preoccupations.

Economic recovery through good governance

The overall policy direction of the NARC government is laid down in the Economic Recovery Strategy for Employment and Wealth Creation 2003 (ERS). In keeping with its election manifesto the new government's plans for recovery were firmly predicated on the need for governance reforms and the strengthening of governance institutions. The ERS promises the passage of key laws – in addition to the ACECA and POEA, a Public Procurement and Disposal of Public Assets, and a Financial Management and Accountability Bill were promised within the 2003/04 financial year. The government also undertook to bring individuals involved in corruption to court. The Attorney General and the Anti-Corruption Police Unit, precursor of the KACC, were to produce quarterly progress reports on investigating and prosecuting cases of corruption; the establishment of task forces to review various past misdeeds was also envisaged. The ERS promised the establishment of a commission to inquire into the Goldenberg Scandal (see below) so that proper prosecution and assets recovery could follow. Further measures, including the creation of an ombudsman, were contemplated.¹ Progress against corruption was to be achieved through a strategy whose pillars were leadership or political will; dealing with the abuses of the past (or 'transitional justice'); institutional reform and legal reforms; and coalition-building with non-state actors and the international community.

Political will is commonly viewed as essential to the success of any reform programme. The Kenyan anti-corruption programme was predicated on the personal commitment of

the president, who took every opportunity, in the first year, to reiterate his stance of a 'zero tolerance policy' towards corruption. Kenya, like many other countries embarking on legal reform, already had anti-corruption legislation in place; the key ACEC Act is the successor to the greatly under-enforced colonial Prevention of Corruption Act, 1956. However, it goes far beyond the latter in its definition of what constitutes a corrupt act and in creating a mechanism that enables the government to seize corruptly and criminally acquired assets.

The Public Officer Ethics Act crafts ethical standards for public officers and creates a legal framework for dealing with conflicts of interest. The occupation of public office in Africa has long been the shortest avenue to great wealth, and Kenya is no exception. Kenyan civil servants' consciousness of what constitutes a conflict of interest has become remarkably blunted over the years following the conclusions of the Ndegwa Commission, which in 1971 recommended that public officers be allowed to conduct private businesses.² However, a series of measures were also recommended that ostensibly aimed at mitigating the danger of conflicts of interest. They were largely ignored, while the permission to engage in business was enthusiastically embraced by the nascent African bureaucratic elite. A conflict of interest that particularly irks the Kenyan public today is the exploitation by senior public servants, in particular MPs, of their power to determine their wages and allowances, leading, in the absence of a national wage policy, to exorbitant pay scales and profligate expenditure.³ It should be noted that the wealth declarations submitted under the POEA are not amenable to easy scrutiny since, apart from being strictly confidential, they are available only in hard copy and an inadequate format for the provision of relevant and comprehensive information. Attempts led by Githongo to capture the declarations electronically and render them easier to monitor were unsuccessful.

While the NARC government's reform strategy is heavily biased towards a lengthy menu of legislative reform, Kenya's parliament, despite the generous salaries and allowances it has approved for itself, is notoriously

lethargic. For the larger part of 2003, MPs managed to pass only three laws.

Dealing with the past

Kenyans hoped to uncover, punish and, it is hoped, avert repetitions of the abuses of the past. The NARC government chose to investigate and ultimately redress these abuses through a series of specially established commissions of inquiry. The most prominent was the Commission of Inquiry into the Goldenberg Scandal, established to look into the infamous and complex scheme of swindles around non-existent exports of gold and diamonds from Kenya in the early 1990s, which ultimately cost the country an estimated US\$650 million.⁴ The commission did well to unearth in detail the methods used to defraud the country. However, after a massive investment of resources, questions whether the commission will adequately fulfil its terms of reference are justified. Kenyans demand that the senior figures involved be brought to book. They crowded to witness the proceedings of the commission, which were reported on fully in the electronic and print media. However, if the conduct of the inquiry is any indication, they may well be disappointed. The report of the commission is not expected until October, at which time Kenyans may well be too preoccupied with the planned constitutional referendum to pay attention to its conclusions. Already the government has distanced itself from its original commitment to recover assets.

The Commission of Inquiry into Irregular and Illegal Allocation of Public Lands, known as the Ndung'u Commission after its chairman, looked into the expropriation of public lands to the politically connected. The misappropriation of public land was increasingly adopted under Moi as a means of accessing resources and dispensing patronage as other avenues for corruption were increasingly closed down by advancing economic liberalisation. However, the government's delay in publishing the Ndung'u report, leading to public suspicion of manipulation of the committee's conclusions, overshadowed the commission's work. Not

for the last time, the NARC government displayed a talent for shooting itself in the foot. However, the report, with its list of beneficiaries of illicit land transactions, demonstrated clearly the web of complicity that implicates large sections of the Kenyan elite of whatever political colour in plundering the country's resources. According to the report, illegal forest excisions alone amounted to 299,077.5 hectares since independence. Development of a comprehensive land policy remains imperative.

The Task Force on Truth, Reconciliation and Justice was appointed in March 2003 to enquire into the possibilities of establishing a commission to deal with past human rights abuses, as other countries undergoing transition from authoritarianism to democracy have done. The task force consulted widely, travelling around the country, and recommended the establishment of a commission on the South African model to deal with abuses by the state and its agents. It recommended that the commission also consider economic crimes. The government has not established such a commission. It is doubtful whether it will, given that it eventually formed a government of 'national unity' that includes politicians from the previous administration, some of whom would have been the subject of inquiry by such a commission.

The Pending Bills Verification and Validation Committee sought to unravel valid from invalid claims on the government in the area of construction and recommended that hundreds of millions of shillings be repaid by construction companies, in some of which public officials had an interest, and that some companies be blacklisted. Pending bills are one of the many imaginative ways in which the exchequer is defrauded. Ministries fail to pay their bills and carry them forward into the following financial year(s). Apart from allowing them to fudge their expenditure positions, this is a gross violation of regulations that also represents expenditure incurred without parliamentary approval. Through this mechanism, government ultimately pays for non-performing contracts or fraudulent bills; for instance, of a batch of 31 companies whose pending bills for KSh9 billion were scrutinised, only

about Sh250 million – or 3 per cent of the total – were genuine claims, the committee found.⁵

Constitutional reform

In keeping with NARC's promise to deliver a new constitution 'within a hundred days' of its inauguration, successful conclusion of the process of constitutional reform that had stalled under Moi is a major benchmark of NARC's performance. The process underlines the fluidity of the current political situation in Kenya. The provisions of the various drafts of the constitution in the unfolding, protracted and hotly contested process had been uncontroversial as concerns anti-corruption institutions in the narrow sense until the tabling of the new draft, by Attorney General Wako, which is destined for presentation to a national referendum in November 2005 for a straight 'Yes' or 'No' vote. In a surprising shift, the new draft has introduced changes to the hitherto uncontested anti-corruption architecture proposed previously. Most glaringly, it no longer contains an Anti-Corruption Commission. The Ethics and Integrity Commission, which had also been proposed in earlier drafts, is retained. However, the commission has now, in the opinion of constitutional law expert Wachira Maina, been reduced to a "toothless, merely clerical and archival constitutional busy-body: it will receive and store declarations of wealth, do some of the things now done by service commissions under the Public Officer Ethics Act and issue anti-corruption guidelines to public officers".⁶ Since the mandate of the Ethics and Integrity Commission is different from that of the KACC, which has investigative powers, this would mean that upon passage of the new constitution, the KACC would either have to wind up or risk facing challenges to its constitutionality. While it was clear that the anti-corruption and governance institutional framework would be subject to uncertainty under a new constitution, as institutions would have to be restructured and budgets reassigned or established, this new draft deals what would appear to be a mortal blow to NARC's anti-corruption

edifice. In the event of its passage, important investigations by the KACC would risk being terminated. Admittedly, doubts on the level of energy and commitment to these investigations are yet to be decisively negated. NARC's belated fulfilment of its promise of a new constitution threatens to ratchet up political and ethnic polarisation. Kenya's usually reticent and hands-off president has been much in public evidence, actively leading the campaign for a 'Yes' vote, a partisan move whose wisdom is open to question. He has, further, been reported as having made a concession on an aspect of the draft constitution after vocal representation by an affected constituency, an action that would appear to open the floodgates for applications by other aggrieved parties.⁷

Radical surgery: The first year under NARC

The first year of the NARC regime saw a measure of progress on various fronts. Diagnosing corruption in the judiciary as a major block to reform, the regime set about what it referred to as 'radical surgery' of the judiciary that was widely regarded as exceedingly corrupt and subservient to the executive under the Moi regime.⁸ Beginning with the suspension of Chief Justice Chunga, who then resigned, an Integrity and Anti-Corruption Commission of the Judiciary was constituted. It travelled around the country receiving memoranda and conducting public hearings. Out of 82 magistrates, 17 judges of the High Court and 6 judges of the Court of Appeal were implicated before the commission in allegations of corruption by the public. Eventually 76 magistrates were retired in the public interest, while 12 judges of the High Court and 4 judges of the Court of Appeal opted to retire.⁹ While agreeing with the assessment of the integrity of Kenya's judiciary, and noting the continued existence of judicial corruption as a serious impediment to the rule of law, the International Commission of Jurists criticised shortcomings in the exercise, which it viewed as prejudicial to the independence of the judiciary and to principles of due process and

security of tenure.¹⁰ Others went further. For them, NARC's strategy appeared limited to firing corrupt judges while leaving the real business of judicial reform untouched:

None of the important dimensions of judicial reform have [...] even made it to the discussion table. They include: 1) dealing with precedents tainted by corruption; 2) implementing the changes needed to ensure the institutional and decisional autonomy of judges; 3) implementing measures for ensuring judicial accountability; 4) settling the question of acting or contract judges; 5) addressing the role of judges in quasi judicial political bodies; and 6) refining the process of appointment, promotion and removal of judges and magistrates.¹¹

Opponents of the 'radical surgery' also cast aspersions of ethnic favouritism and patronage.

Kenya's mixed experience in dealing with endemic judicial corruption throws up lessons for transitional governments on the dilemmas attached to breaking away from a corrupt and unaccountable past. The reformers, often novices to government and in a minority, were faced with aggressive counter-reaction in an area essential to progress in the fight against corruption, with cases being repeatedly thrown out and constitutional challenges mounted. However, their attempt to dislodge elements of the old regime that were securely ensconced in bastions such as the judiciary raised questions that were to haunt the legitimacy of the reform effort. To their disadvantage also, the reformers failed to determinedly address corruption in another stronghold, the bureaucracy, an omission that contained the seeds of the defeat of the anti-corruption campaign.

The summary suspension in May 2003 by the Minister of Finance of all senior procurement officers was a further example of the use of personnel purging, ostensibly to break up a "mafia-like procurement cartel through which [the officers] were effectively controlling the entire public procurement system".¹² Around the world, public procurement is a lucrative source of illicit enrichment. A study by the Centre for Governance and Development

analysed the reports of the Controller and Auditor General and found that the Kenyan government may have lost more than KSh475 billion (US\$6.4 billion) between 1991 and 1997 through corruption and bureaucratic laxity.¹³

It is clear that the most pervasive and costly cases of corruption in Kenya involve serious bureaucratic lapses. But again this action appeared to be ad hoc and unrelated to any consistent and comprehensive effort. Despite this purge, procurement, particularly in the area of security, was to present an ever-greater credibility problem for the NARC government's claims of a clean-up effort. In contrast to the ERS promise to reform procurement regulations in the 2003/04 financial year, this process took until mid-2005, when parliament finally passed a new law under massive donor pressure. Its results will remain to be seen, but there is cause for concern in the continued excessive space granted to executive discretion.

A particularly dramatic action was the razing of structures that had been illegally erected on public land, particularly road reserves, which saw even luxury mansions being torn down in the full glare of media publicity. This was done to prepare for the construction and extension of roads and bypasses and create the preconditions for economic recovery by repairing Kenya's inadequate and damaged infrastructure, itself a result of massive corruption over the decades. However, after a vigorous start, the campaign petered out inconclusively, partly owing to the political unpopularity of evicting poor communities without providing alternative shelter.

At regional and national levels, Kenya signed the African Union Convention on Combating Corruption and Related Offences after the AU summit in Maputo. On 9 December 2003, Kenya became the first country in the world to sign and ratify the United Nations Convention Against Corruption (UNCAC). In contrast to its haste to ratify the UNCAC, and the pledges made by the president at the Maputo AU summit in July 2003, Kenya has yet to ratify the AU Convention, despite repeated assurances to the contrary. Kenya also undertook to be one of the frontline states in implementing the African Peer Review Mechanism under NEPAD. However, implementation has been slow and dogged with political wrangling. In addition, Kenya is a

signatory of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) memorandum of understanding, established to combat a scourge of “strategic importance to organised crime generally, and to corruption in particular”.¹⁴ Despite this, the country has still not adopted a law to combat money laundering.

An examination of the first NARC year as reported in the local press exposes a multitude of revelations by NARC public officials of wrongdoings of the past regime and activities aimed at reversing them.¹⁵ Public opinion supported this drive; an opinion poll conducted by TI-Kenya in September 2002 showed that 59 per cent of the respondents considered corruption the number one national issue. Although 80 per cent of Kenyans at that time believed that the government was committed to fighting corruption, 35 per cent thought that corruption was a problem in this government. In contrast to government reluctance to act on corruption within its ranks, 66 per cent of Kenyans thought corrupt ministers should be sacked. This is a stark reminder of the political capital which was wasted by government procrastination on its declared goals.

Coalition building

Reform-minded ministers within NARC adopted a policy of collaboration with the civil society from which some of them had come. Similar to civil society in post-apartheid South Africa, which found itself depleted of leading cadres and disoriented in its strategy toward a reform-willing government, Kenyan civil society organisations (CSOs) went through a period of reorientation.¹⁶ From a positive stance at the outset, many CSOs found themselves adopting an increasingly adversarial position towards government as movement on central reform platforms slowed down. What had gone wrong? Experience in other Third World countries attempting a transition from an unaccountable and corrupt past has shown that, for a short period, extensive public support and confidence can facilitate the rapid implementation of a range of far-reaching measures. Conversely, failure to act decisively can result in the growth

of public disaffection and the eventual recapture of the centres of power by well-resourced and organised corrupt elements, and the closure of this ‘window of opportunity’.¹⁷

While Kenya saw a series of dramatic moves in the first year of the new regime, there was little follow-through and a stop-start approach appeared to give corrupt elements room to regroup and to recruit enthusiastic new adherents from among the ranks of the new government. All policy change creates winners and losers. Anti-corruption reform is no different. Therefore it is not surprising that potential and actual losers quickly unite forces to frustrate it. Government disunity did not help. The strife found its origins in the dissatisfaction of a coalition partner over an unfulfilled agreement on power-sharing concluded before the 2002 elections between the constituent wings of the ruling coalition, NARC. Unfortunately, what began as a promising experiment in governance in the African context increasingly presented itself as an unwieldy and unruly collection of warring factions with power reputedly concentrated in a kitchen cabinet composed of Kibaki’s allies from the so-called Mount Kenya Mafia, so named because of the geographical origins of the ethnic groups involved, which is in itself reportedly disunited.

Patronage politics

To understand the evolution of events from the end of 2003 it is necessary to step back and look at the nature of the regime that took over office after 2002 and some of the enduring features of Kenyan politics. Many Kenyan observers speak of an incomplete transition or even deny that there has been a transition at all. The government was, after all, not so new; many of the ministers in the NARC regime had been in government before, including President Kibaki himself as well as figures such as Minister for Education George Saitoti, who had been mentioned in connection with the Goldenberg Scandal.

Kenya is a multi-ethnic society. The instrumentalisation of politics along ethnic lines has led to a de-institutionalisation of political parties; rather than articulating and mobilising

around interests and policies they depend on ethnic mobilisation. Politicians have effectively utilised ethnicity to build political constituencies, including support bases to attack threats to their political and economic interests. In addition, politics in Kenya, as elsewhere in Africa, is dominated by the expectation and granting of patronage, which encompasses politicians and the electorate in a maze of mutual complicity. A study by TI-Kenya tracked expenditure of some MPs in the 2002 pre-election period and showed that MPs often spent more than they earned on various 'donations', raising the question of where they found the additional funds and what trade-offs were involved.¹⁸ Kenyan voters are accustomed to viewing elections as a time when they can 'eat' at the expense of politicians in return for their vote. In effect, rather than trusting to the uncertain future returns of development policies promoted by their representatives, voters prefer to receive tangible benefits directly and immediately. The politics of patronage drives the demand for ever more resources with which to conquer and maintain political power. Analysts trace a direct link between the advent of competitive multi-party politics in 1991 and the growth of mega-scams such as Goldenberg. Nor is the problem overcome. The felt need to amass wealth for electoral competition in 2007 may be a major factor behind the current re-emergence of looting. Breaking the nexus between politics and money is an intractable problem around the world. In Kenya, the 2004 version of the Political Parties Bill has been developed, including proposals on public funding of political parties to begin to address this problem. Once again the real challenge is one of enforcement, with all parties having great difficulty complying with their own constitutions, let alone the letter of existing laws.¹⁹

The rot sets in

It was in 2004 that the case that was to become synonymous with grand corruption in NARC, Anglo Leasing, or 'Anglo Fleecing', in popular parlance, surfaced. The affair involved at least two contracts with a shadowy company known as Anglo Leasing and Finance Ltd, one

for procurement of passport issuing equipment by the Department of Immigration (DOI), and one for a forensic laboratory for the Criminal Investigation Department (CID) under the Ministry of Internal Security, which together reportedly cost the government over KSh7 billion. Ironically, the projects began life under the previous regime. The immigration procurement, originally projected to cost about KSh622,039,944.65, lapsed, only to be resurrected and expanded under the NARC government. On 1 August 2003 Anglo Leasing and Finance Ltd submitted a purportedly unsolicited, but detailed, technical proposal for supply and installation of an Immigration Security and Document Control System (ISDCS).²⁰ A financial agreement suggesting a facility of KSh2.67 billion for the system repayable at 5 per cent was included. Although the proposal was apparently proffered without an official request, it seems to have conformed with an updated technical specification report, raising suspicions of collusion. Authority was sought for direct procurement, or single sourcing, which was granted by the Treasury. The Public Accounts Committee, questioning the use of single sourcing, labelled this a clear denial to government of the advantages of public bidding.²¹ After signature of an agreement between the government and Anglo Leasing on 4 December 2003, the sum of KSh91,678,169.25, or 3 per cent of the credit sum, was paid to the financing firm in February 2004. Preposterously, when questioned, the government disclaimed all knowledge of the identity of the principals or actual location of the company to which it had paid out such a sum of money.

While the Public Accounts Committee was investigating the DOI procurement exercise, another contract with Anglo Leasing emerged, in relation to a forensic laboratory project for the CID, for which a total of almost US\$5 million was paid for services that were never rendered. It was clear that a high-level conspiracy was at the root of this affair, and indeed the public had been told that investigations were under way to unravel the mystery, coordinated by John Githongo and involving the Kenya Anti-Corruption Commission. Mutual legal assistance had been obtained from both Britain

and Switzerland. The primary lead being followed was tracing the source of a refund to the Treasury of the US\$5 million already paid to Anglo Leasing, apparently in connection with the forensic laboratory project.²²

In the weeks that followed, government attempted, without success, to defuse the fallout from Anglo Leasing and its extensive media coverage. An announcement by the powerful Head of the Public Service and Secretary to the Cabinet, Francis Muthaura, on 22 June 2004 seemed to pre-empt the completion of investigations by summarily clearing all public officers, ministers included, from blame in the matter.²³ He also threatened civil servants who leaked government documents with punishment under the Official Secrets Act. In addition, it was seriously argued on various occasions that no harm had been done, since the money had been repaid. This line was repeated by the gauche Minister for Justice and Constitutional Affairs over half a year later when he, directly contradicting Githongo's assessment of Anglo Leasing as a 'test case' for NARC that hung around its neck like a 'millstone', referred to it as 'the scandal that never was'.²⁴ Public anger was high, with demands for the sackings of those politically responsible, particularly of the Minister for Finance, David Mwiraria, and the then Minister for National Security, Chris Murungaru, under whose watch there had been repeated reports of procurement irregularities. When permanent secretaries were later indeed prosecuted, purportedly in connection with the affair, no explanation or apology for misleading the public was forthcoming from Muthaura. Nor was public opinion placated, although the accused were senior officials. The impression dominated that the real 'big fish', those who were politically responsible and had the power to influence decisions, were being let off scot-free. To this day the government owes answers on many questions to Kenyans in connection with Anglo Leasing; the exact status of investigations by the KACC is unclear.

At the end of June 2004, in an attempt to quell perennial Cabinet wrangling and put to rest clamour for action on grand corruption, particularly Anglo Leasing, the

president resorted to a stratagem that he has since employed with increasing frequency, the reshuffle. Against promises to the electorate of a lean government, the reshuffle bloated the ranks of government to Moi-esque proportions. Elements of the former regime from opposition parties who were associated with the abuses of the past were invited into the Cabinet. Although the government tried to sell the reshuffle as a 'government of national unity', members were invited in with no consultation with their parties. While the government may have thereby swelled its parliamentary majority, it escalated the transaction costs of pushing its projects through parliament, since they henceforth had to be negotiated on an individual rather than a party basis.²⁵ Accusations of bribery within parliament abounded.²⁶ At the same time, and almost incidentally, the reshuffle moved PS Githongo away from the Office of the President to the MoJCA. Given the president's repeated pointing to Githongo's easy access to himself as proof of his commitment to the fight against corruption, the move was seen as a downgrading of the anti-corruption agenda. Energetic protests led by civil society and the donors ensued and within two days Githongo was back at State House. The ease with which the gains made under NARC could be reversed nevertheless was disconcerting and agitation for a fundamental uncovering of the Anglo Leasing Scandal continued.

In February 2005, in another reshuffle, in response to revelations of new scandals and unrelenting pressure that also divided the Cabinet, the controversial Murungaru, Minister for National Security, was moved to Transport, in an action that seemed to acknowledge that he was indeed problematic, but kept him in government. Rather than placate the public, this dithering reinforced the impression that there was no political will to resolutely address high-ranking graft.

Anglo Leasing brought the vexed issue of security procurement to the fore. Conducted in secrecy, often without competition, military procurement is internationally dogged by corruption, as the infamous South African arms scandal demonstrated. The Kenyan military is as implicated in the web of corruption that

entraps Kenya as any other institution. The extensive reshuffling of the military leadership by Kibaki in August 2005 has been connected to reports of massive corruption. However, in time-honoured fashion, Kenyan senior officials rarely retire or are fired; they simply shuffle on to another sinecure, such as chairmanship of those parastatals that have survived the sword of privatisation. Kenyans, and indeed anyone at all, may well be forgiven for questioning how a stint in the military qualifies one to lead organisations such as the Kenya Meat Commission, Kenya Ports Authority, Kenya Wine Agencies and Kenya Industrial Research Institute, which is where, it is reported, the retired military gentlemen were recycled. This apparent placation of soldiers with plum civilian jobs also causes concern about the separation between the civil and military realms.

The criminalisation of the state?

Corruption is a crime that is closely associated with other crimes. Officers of the Kenyan police force are often accused of active involvement in crime: immigration officials facilitate the commission of terrorist acts through acceptance of bribes,²⁷ and corrupt officials launder the proceeds of their crimes, all in a ‘tangled shrubbery of illicit activity’.²⁸ Kenya has been classified as a high risk for money laundering.²⁹ A Draft Proceeds of Crime and Money Laundering (Prevention) Bill 2004 still awaits approval, debate and enactment. At the 7th Eastern Africa Police Chiefs Cooperation Organisation conference this year, the Kenyan police commissioner spoke of the increase in trafficking in human beings, drugs, firearms and stolen motor vehicles. In December 2004 one of the largest cocaine seizures in Africa netted drugs weighing 1,141.5 kg, worth about KSh6.4 billion (US\$86.5 million) on the market.³⁰ Subsequently, there was controversy between the immediate former Director of Public Prosecutions, Philip Murgor, the Police Commissioner and the Ministry of Internal Security over the handling of the case and the drugs, leading to intense public speculation over purported official skulduggery.³¹ Furthermore, the DPP, after his sacking, was

reported as warning, “Watch out for businessmen in government who are exploiting the criminal justice system to extort money”.³² The truth is difficult to determine but, if justified, such allegations raise the spectre of the criminalisation of the anti-corruption agenda by murky special interests. In a speech made in Germany after his resignation, John Githongo refer to “red embedded corruption networks that bring together politicians, businessmen-brokers, bureaucrats and security officials [and] can thrive in the shadows as cohesive, albeit amorphous, entities reshaping the economic destiny of African nations, as a result of the size and scale of their illicit transactions; transactions that can entrap entire sections of the political elite”.³³ Anti-corruption reforms threaten to shut down this lucrative underground economy. Not surprisingly, the operatives of this underworld fight back, and they have the resources to do so. In extreme cases, such as in Italy, reformers are murdered. In others, resources are mobilised to fund opponents and compromise supporters. In Kenya, the corrupt seem to have fought back and captured central areas of the state. Reformers ignore these realities at their peril.

The role of the international community

From the days of the Moi regime, donors have been among the driving forces behind Kenya’s anti-corruption actions. As NARC retreated from its pledges, the donors played a greater role in keeping the issue on the agenda. Particularly prominent in this regard have been the US and Britain. British High Commissioner Edward Clay in particular attracted the wrath of NARC’s ministers with his forthright public statements on the issue. In a sensational move, Britain also revoked Minister Christopher Murungaru’s British visa because of his ‘character, conduct and associations’.³⁴ NARC reacted in a characteristically shambolic manner, first distancing itself from the fate of its minister in parliament, then appearing to disown its own parliamentary statement and accusing the British government of committing an ‘unfriendly act’, only to again apparently abandon the minister to

his own fate. The minister has since embarked on a suit against the British government that will allegedly cost him about KSh7 million (US\$95,000).³⁵ Public reaction sways between condemnation of British 'colonialism' and studiously disinterested calls for exposure of the specific reasons behind Britain's decision that cannot conceal a certain *Schadenfreude* at the controversial minister's fate. Others have suffered a similar destiny; last year, Nicholas Biwott, formerly Moi's right-hand man, with whom the Kibaki regime has recently appeared to have a rapprochement, was barred from entering the US, on suspicion of corruption. In a tightly stage-managed consultative group meeting, the government met with donors in April 2005. Presenting an elaborate report on its anti-corruption activities largely aimed at countering the combative diplomat Clay's public claims on corruption cases, the government labelled 2005, after over two full years of NARC incumbency, 'the year of action' on corruption. A hastily cobbled together anti-corruption action plan was presented. The plan was largely a warmed-up serving of already intended additional legislation and unrealistic promises about projects such as the moribund national anti-corruption campaign.³⁶

NARC fights back

If 2004 saw the NARC government on the defensive, reeling under serial revelations of corruption within its own ranks, 2005 was to be the year when a progressively more belligerent and unrepentant regime went on the offensive. In this, the government's confidence was buoyed by signs of a significant economic recovery and the resultant feeling that it could thumb its nose at the donors, who seemed increasingly irresolute and disunited in their response to official corruption.³⁷ However, 2005 was also the year in which the falsity of NARC claims to a genuine anti-corruption commitment was exposed by the sensational resignation in February from abroad of the so-called anti-corruption 'Czar' and symbol of NARC and Kibaki's political will, Permanent

Secretary for Governance and Ethics John Githongo.

Recently the Githongo affair received an interesting twist when the former PS reacted to a call from the reformist Minister for Planning for clarification of the reasons behind his resignation by issuing a statement to the media declaring his readiness to give a full account of the information in his possession to any competent authority. It remains to be seen what NARC – or rather the 'kitchen cabinet', busy with forcing along the contentious constitutional referendum process, and unlikely to welcome distractions, particularly those that threaten to credibly expose wrongdoing within its ranks – will make of his challenge. By the time of going to print, there has been no official reaction.

The NARC anti-corruption campaign has ground to a halt. This was recently explicitly admitted by Justice Minister Murungi, who attempted to retract this statement after a public outcry. While there initially seemed to be some genuine political will, the campaign appears to have lost ground to the dictates of political survival of the central faction around the president and the reassertion of the influence of corrupt cartels. Although the KAAC follows up on some cases, there is no record of successful prosecutions of prominent officials. Quite clearly, the NARC government has other worries on its mind. Prospects are that the closer elections come, the less priority the fight against corruption will enjoy. All indications are that the next elections will begin with the referendum slated for November 2005. The current situation remains in flux with events rapidly succeeding each other and the outcome uncertain. It remains to civil society to keep the issue on the agenda and continue to articulate the public desire for 'a new Kenya'.

Notes

- 1 Economic Recovery Strategy for Wealth and Employment Creation, GoK, 2003, <www.statehousekenya.go.ke>.
- 2 Cf eg *Sunday Standard*, Ministers conspire to dodge

- land tax, 16 January 2005, in which the Finance Minister gave the Minister for Cooperatives a land tax waiver of at least R60,000 on the latter's acquisition of a private farm. Both professed to see no harm in the action.
- 3 Cf H Mule, T C I Ryan and D Ndi, *Public sector wage policy study*, Ministry of Finance, Nairobi, 2004.
 - 4 Government of Kenya, Gazette Notice No 1238, 24 February 2003.
 - 5 *Daily Nation*, 9 September 2003.
 - 6 W Maina, *Daily Nation*, 29 August 2005, p 5.
 - 7 *Daily Nation*, 30 August 2005.
 - 8 Cf The Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, 2002, who were 'shocked and dismayed' by allegations of bribery of judges.
 - 9 Status Report on the Anti-Corruption Agenda of the Government of Kenya, Kenya Anti-Corruption Commission, unpublished mimeo presented to CG meeting, April 2005.
 - 10 Report of the fact-finding mission to Kenya by the ICJ, 2005, <www.icj-kenya.org>.
 - 11 Wachira Maina, *The NARC government's performance in the fight against corruption*, December 2004, <www.tikenya.org>.
 - 12 *Kenya State of Corruption Report*, Issue No 9, Centre for Law and Research International (Clarion), 2003.
 - 13 *A survey of seven years of waste*, CGD Policy Brief, February 2001, Centre for Governance and Development, Nairobi, 2001.
 - 14 C Goredema, Money laundering in East and Southern Africa: An overview of the threat, ISS Occasional Paper 69, April 2003, p 1.
 - 15 Cf Clarion, op cit, p 40 ff.
 - 16 Cf D Okello (ed), *Civil society in the Third Republic*, The National Council of NGOs, 2004.
 - 17 Cf M Mati, 'Same forest: New trees', *Clarion Newsletter*, August 2004.
 - 18 *Paying the public Or caring for constituents?*, TI-Kenya, 2003, <www.tikenya.org>.
 - 19 Cf Centre for Governance and Democracy, *Policy Brief*, Political parties to be funded by state, Issue 01/03, March 2005.
 - 20 Ibid, p 8.
 - 21 Ibid, p 9.
 - 22 Cf Mati, op cit.
 - 23 *The East African Standard*, 22 June 2004.
 - 24 *The East African Standard*, 12 January 2005.
 - 25 Maina, 2005.
 - 26 Cf Raila Odinga's claims on bribery in parliament over constitutional reform, *The East African Standard*, 29 August 2005.
 - 27 Cf TI Kenya, *The Kenya Bribery Index*, 2004, p 10, which lists the Immigration Department as the institution with the greatest likelihood of encountering bribery, at 89.6 per cent of encounters. The Kenya Police have topped every edition of the Kenya Bribery Index from its inception as the Kenya Urban Bribery Index in 2001.
 - 28 J-F Bayart, S Ellis and B Hibou, *The criminalization of the state in Africa*, James Currey, Oxford, 1999.
 - 29 Goredema, op cit, p 14.
 - 30 *Daily Nation*, 26 August 2005.
 - 31 Cf *Daily Nation*, 17 August 2005.
 - 32 M Ngugi, Philip Murgor sacking: The inside story, *The Lawyer*, Nairobi, June 2005, p 11.
 - 33 *The East African Standard*, Githongo speaks, 15 April 2005.
 - 34 *Daily Nation*, 28 July 2005.
 - 35 *Daily Nation*, 17 August 2005.
 - 36 The National Anti-Corruption Campaign steering committee suffered a series of resignations including its director, from late 2004.
 - 37 The possibility of increasing trading ties with a partner not given to lectures on good governance must have been a positive side effect of a recent successful state visit to China. Cf *Sunday Nation*, 21 August 2005, p 9. NARC's claims to economic growth are being overshadowed by the negative assessments in the UN Human Development Report 2005.