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Kenya's Fight against Corruption

An Uneven Path to Political Accountability

by John Githongo

Executive Summary

Democratic elections in Kenya in 2002 were supposed to have heralded a period of intense political and economic reform. At the start of its term in office, the government of Mwai Kibaki did undertake a number of important reforms, including the creation of a special unit tasked with overseeing the fight against corruption and fraud. Unfortunately, the reform process soon ran into trouble. The governing coalition disintegrated and factional strife reemerged—much of it along ethnic lines. The government's commitment to reduce the power of the presidency was soon abandoned. Moreover, grand-scale corruption accompanied the end of the reform process.

But there are hopeful signs in Kenya and other parts of Africa. The end of Daniel arap Moi's autocratic rule reinvigorated the democratic forces in the country. The young generation especially treats Kenya's politicians with growing skepticism, and civil society and the media are increasingly active in exposing corruption and misrule there. The process of public awakening is not particular to Kenya. Globalization and technological change are having noticeable empowering effects on African youth. With growing frequency, demands for accountability and a better government are being heard throughout the continent.

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The 1990s saw an unleashing of many freedoms, which changed the way in which Africans see themselves.

Introduction

In December 2002, the National Rainbow Coalition (NARC) came to power in Kenya as a result of democratic elections. That event ended 24 years of a stifling autocratic rule by Daniel arap Moi and his Kenya African National Union (KANU). Moi had ceded democratic space with reluctance and in bad faith. He had gone to every length to confuse; bribe; intimidate; and, at times, injure or eliminate the forces of change in the 1990s. One of the most important developments that came as a result of the peaceful transition at the end of 2002 was the entrenchment and further expansion of democratic space that had been fought for and won bitterly over the past few decades. Kenyans had not so much voted for this or that party. Rather, they voted for change. They voted for a change in the way they were governed and hoped for a more accountable and transparent government. They were tired of the old order and wanted something new, something better. They were also excited that, at the last minute, the opposition had finally united. That hunger for change was not a uniquely Kenyan phenomenon. Across the African continent similar expectations of change were coalescing and continue to do so.

The National Rainbow Coalition Undertakes Important Reforms

Within months of the election, the new administration had embarked on an ambitious program of reform that included, among other measures, the creation of a Ministry of Justice and Constitutional Affairs, my own appointment as the permanent secretary in charge of governance and ethics, and the appointment of a new director of public institutions, who was charged to create a special unit to address corruption, serious crime, fraud, and asset forfeiture. The Anti-Corruption and Economic Crimes Act of 2003 was signed into law by

Kenya's new president, Mwai Kibaki. The process of institutionalizing the resultant Kenyan anti-corruption commission as the premier anticorruption agency was completed at the end of 2004.

The government also established the Kenya National Commission on Human Rights, created a specialized cabinet committee on corruption, and institutionalized the declaration of assets and liabilities by public officials after passing the Public Officer Ethics Act in 2003. In addition, the Goldenberg Commission of Enquiry was established to get to the bottom of the Goldenberg scandal of the early 1990s, in which corrupt government officials hoodwinked the Kenyan taxpayer out of approximately US\$1 billion. The Commission on Illegal and Irregular Allocation of Public Land and the National Anti-Corruption Campaign were established, as was the Task Force on Truth, Justice, and Reconciliation, with the aim of ascertaining public opinion as to whether a truth commission should be set up. There was also a dramatic reform of the judiciary that saw 50 percent of the top judges removed from office.

The Coalition Begins to Unravel

It is important to note that all the reforms discussed above were initiated within the first nine months of the Kibaki administration. Unfortunately, disagreements over the constitutional review process, the powers of the presidency, and the inability to agree on the post of the prime minister splintered the NARC coalition. Virtually overnight, NARC became dysfunctional, with the Liberal Democratic Party (LDP) pitted against the National Alliance Party of Kenya (NAK). The constitutional reform process of 2003 culminated in the November 2005 referendum on the proposed constitution. The referendum became an arena in which the internal disagreements within the coalition were played out.

Those disagreements could have been anticipated, since in the immediate after-

math of the single-party state in 1991, the oppositions splintered along ethnic lines. Individual parties drew support from particular areas dominated by specific ethnic groups that were mobilized along tribal lines by individual leaders on the basis of their past, present, and future promises of delivering more political patronage. It was such a splintering of the political elite—encouraged enthusiastically by the then-ruling party—that characterized politics between 1992 and 2002. The unification of the opposition behind Mwai Kibaki and under the NARC banner managed to push KANU out of power, but that unity was temporary.

As the disagreements within the coalition deepened, some members of the leadership wanted to preserve NARC as one political entity. They argued that since NARC had contested the election as a single party, it should remain together and be further strengthened. Others argued that the NARC coalition had come together to remove KANU from power. Now that KANU had been defeated, there was no need for NARC's unity to continue.

The first, "centralizing" group of leaders harked back to the era of the 1960s and 70s, when the Kenyan economy grew under the authoritarian rule of President Jomo Kenyatta. Their view was based on an implicit, and ultimately destructive, notion that Kenyatta's Kikuyu tribe and the associated communities possessed the capacity to get the economy moving again after a period of prolonged incompetence, looting, and resulting stagnation. That implicit organizing idea around which many members of the ruling elite coalesced manifested itself in a number of ways, including, for example, with regard to early appointments of senior public officials, including myself.

More destructively, it manifested itself in the arrogance of those who believed that the Kikuyu tribe would produce economic growth and be allowed some "excesses" in return. That was a model that was reasonably successful during the Cold War and had only started to falter in the mid 1980s, when the Moi regime consolidated. By 2004, it began

to look as though the state was dominated by "Cold Warriors" seeking to impose their 1970s political ideals on the new realities around them.

Young People Are Changing Africa

But the Cold War had ended. Young people—influenced by television, radio, the Internet, and mobile phones—who now make up a majority of the population, do not remember Jomo Kenyatta—except for what they read about him. In the cities, the young generation speaks its own language, "Sheng," which is a combination of English and Kiswahili. They are less deferential toward their leaders than their parents were. They are better educated and more exposed to the world than any preceding generation. There are both negative and positive aspects of those developments. These changes hold true—in varying degrees—for the whole of Africa.

Moreover, the relevance of Africa's former development partners and of foreign aid has declined since the end of the Cold War. That was in part the result of the West's disengagement from directly supporting the corrupt central government and its support for civil society in the 1980s and 1990s. Other factors leading to the decline of Western influence in Africa included reduction of the government's capacity to absorb aid, improved tax collection that decreased Africa's reliance on foreign aid, and the rise of political correctness that saw conditional lending as "imperialistic."

The 1990s saw an unleashing of many freedoms, which changed the way in which Africans see themselves. In particular, there emerged a more confident urban population, which, while acknowledging the shortcomings of life in Africa, also feels an affinity with urban young around the world. That is especially true with respect to access to information, for technological interconnectedness has heightened expectations among the young. Today, African governments have to be sensitive to those expectations or risk political

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crises. Consequently, foreign aid, although still important to those countries that receive budgetary support and infusions of emergency aid to mitigate natural disasters, might also be less relevant in the minds and hearts of an entire generation of young Africans whose outlook is more global. Throughout the 1980s and 90s, Africa was the world's least globalized continent. Moreover, the information age arrived when Africa's own institutions were at their weakest and the suppression of the intellectual class at its worst, in the 1980s. However, successful elections in a country like Kenya, in which the electorate clearly articulated its wishes, point to a strengthening of the democratic process.

Politics and Corruption

By the end of 2003, there was a perception that a small group of Kikuyu, the so-called "Mount Kenya mafia," dominated all key political decisions. At the same time, the idea of a monolithic single party (NARC) dominated by the Kikuyu came to be resisted by all of its larger constituent parties. By that time, the institutional instruments that could have been used to iron out some of the disagreements between NARC members had atrophied. There was a sense that the anti-corruption drive was being driven off-course by the power struggle within the coalition. From that moment on, two factions within NARC, the NAK and the LDP, became preoccupied with containing one another.

Two fundamental choices faced the Kibaki administration when it was confronted with disagreements within the NARC coalition. First, the administration could have aggressively continued down the path of reform. Unfortunately, those who controlled the levers of power were unable or unwilling to conceive of a more diffused power structure and watering down of presidential powers. Second, the administration could have reverted to a monolithic party structure and tried to consolidate power in the hands of a smaller clique of people, who would hold onto their power

using a mixture of some real reforms, public relations, and dubiously financed political patronage. The second option turned out to be more familiar and, perhaps, easier. I believe that the setbacks in the fight against corruption in Kenya during the Kibaki administration resulted from opting for that second choice. What the reformers wanted was to implement bureaucratic and institutional reforms that were necessary for Kenya to move forward. Unfortunately, a far more conservative instinct had kicked in at the same time. The fight against corruption came to a halt.

At the heart of grand corruption in Kenya is a series of financial arrangements that together make up a system of security-related procurement, procurement of commercial debt, and financing of the political system. For example, at the beginning of 2004, the government had granted a contract worth about \$41 million to an entity that did not exist. The Kenyan anticorruption authority proceeded to investigate the case. Suddenly, about \$1.3 million that had been paid out as a "commitment fee" by the Kenyan government, was returned. We proceeded to discover that there were several other such entities. When we started to enquire about them, more refunds started to pour in. By August 2004, about \$12 million had been returned to the Kenyan government. It became obvious that some of those transactions were conducted by members of the administration to raise money for political financing.

It turned out that our enquiries were not only about investigation of particular crimes, followed by arrests and court proceedings; they shook the entire political system. Of course, one result of those enquiries was that I had to leave Nairobi and my government position for exile in Great Britain. Some of my colleagues have justified their corrupt practices by claiming that they needed money to pay for political campaigns. I am amused that in Great Britain there is much controversy over relatively small amounts of money—a few million pounds. That is nothing compared to the amount of resources mobilized for politics in Kenya.

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Vote Buying in Kenya

The good news is that vote buying no longer seems to work. If it did, in 2002 the ruling KANU party candidate, who had more money, would have won. Similarly, in the 2005 referendum on the Kenyan Constitution, the ruling elite lost despite having, by its own admission, enough resources to win. I have personally witnessed offerings of cash, T-shirts, and food in exchange for votes. But Kenyan democracy has reached a new level. If you are a politician in Kenya today, people will line up and take your money, your T-shirts, and your food, but they will vote their consciences. These days, the worst effects of dubiously acquired resources on the political process are felt when the money is disbursed within small groups of decision-makers, such as, for example, members of Parliament. A million dollars here and there can change individual decisions, but \$100 million can no longer buy an election in Kenya.

Bearing that positive development in mind, it is unfortunate that the reform process did not continue. When it comes to derailing the Kenyan anti-corruption drive, the cabinet reshuffle in June 2004 proved pivotal, as it saw inclusion in the cabinet of opposition legislators, marginalization of the LDP faction, and the subsequent slowing down of the reform process. The administration also attempted to consolidate its position via the constitutional referendum of 2005. In fact, the referendum turned out to be less about the proposed constitutional changes and more about a power struggle between two groups in the cabinet.

One group supported the new constitution and was assigned the banana symbol by the electoral commission of Kenya. The opponents were assigned the orange symbol. The oranges promptly formed a movement that traversed the country, campaigning against the new constitution mainly on the grounds of excessive powers of the presidency that had been left intact in the new draft. As the banana and orange campaigns progressed, they deteriorated into crude ethnic mobilizations. The fear of domination by the largest ethnic

group, the Kikuyu, turned out to be the most important tool of political mobilization available to unethical Kenyan politicians. It no doubt contributed to the outcome of the referendum—a resounding loss for the banana camp at the hands of the oranges.

That a sitting government could lose a referendum despite its access to resources was not entirely surprising. What was surprising was the unwillingness of the banana leaders to draw lessons from their defeat. The president used the defeat in the referendum to sack the entire cabinet and replace it with the same old faces minus, of course, the rebellious ministers, who had supported the orange camp. The process of making the cabinet appointments was fraught with unprecedented difficulties, with several ministers initially refusing to take their positions and negotiating with a politically weakened executive for a bigger slice of the cake along ethnic lines.

At the end of the day, the referendum became a vote of confidence in the elite and the administration. It was more about corruption than the constitution; more about the concerns regarding ethnic domination than new citizenship; more about jobs not created than undeniable economic achievements; and, ultimately, it was about the perceived failure to deliver in good faith a more equitable constitution itself.

The Critical Role of Civil Society and Free Media

One of the most important developments that resulted from the peaceful transition at the end of 2002 was the entrenchment and further expansion of the democratic space that had been fought for and won over the previous decade in particular. Indeed, the already sophisticated media and civil society sectors in Kenya became bolder than ever. That was in part because those who were now in government were former members of the opposition, which meant that the press had unprecedented access to the higher echelons of government. We were all old friends, previ-

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ously united against KANU. Ministers and civil servants were regularly seen giving interviews on television and heard on radio talk shows. Similarly, civil servants—who were previously afraid to speak out about maladministration, perceived abuses, and corruption—now complained, often in writing, to their ministers, to civil society, and sometimes even to the media. Indeed despite all the difficulties, the most impressive achievement of the NARC administration was the freeing up of the democratic space that allowed the media to speak so forcefully about corruption and other ills.

Unfortunately, the government has been struggling to keep up with changes in Kenyan society, as well as with the high expectations of an increasingly informed and confident electorate. The police raid on *The Standard* newspaper in March 2006, for example, inflicted heavy damage on the government's much-prized reputation for openness. Balaclava-clad police burst into the premises of a major newspaper group, harassing and intimidating journalists, disabling equipment, and generally causing a scene in a manner that seemed more for show than for effect. Indeed, the only effect of the raid thus far has been to embolden the media and cause a further loss of confidence in the administration's democratic credentials both locally and internationally—despite the fact that Kenya is being led by a president whose reputation for political tolerance compared to his predecessors remains unchallenged.

The raid amounts to the most significant challenge to press freedom in Kenya in a long time. That is critical because well institutionalized, sophisticated, commercially independent, and assured of its own importance as a keeper of Kenya's democracy, the media is crucial to the way that the democratic system works. After all, until recently the media was the main vehicle for the political accountability of the government officials.

Although the attack provoked widespread and understandable outrage, both locally and internationally, and even led to demonstrations in the streets of Nairobi, it has not caused a fundamental loss of faith on the

part of Kenyans in Kenya. Such setbacks, bizarre and outrageous as they are, seem thus far to be well absorbed by an increasingly mature and sophisticated body politic, whose unspoken response is “see you at the next elections.” Indeed, people realize that there is an extent to which this developing trend of intolerant behavior on the part of the administration is merely symptomatic of the internal disagreements in what used to be called a coalition government and is now called a government of national unity.

Despite the above setbacks, two important achievements have been made. First, Kenyans are learning that public service means service to the nation and not personal gain. The public no longer accepts the weary excuse of “receiving orders from above” that led to breaking of the law and the abuse of public trust in the past. So, a culture of political accountability is beginning to take root. That will lead to increasing calls for greater presidential accountability in Kenya in particular. Such development might signal positive changes across the continent, where presidential accountability is still in its infancy. Second, the setbacks on the democratic front are not causing a generalized feeling of decline, despondency, and failure. Kenyans seem to pity the government as much as they are outraged by it. The government's failures cause them to laugh as much as they provoke the public's anger. Even the government's threats have not been able to inculcate fear, in part because the government does not seem to have the competence to carry them out even if it wanted to.

Ultimately, the fight against corruption will be defined by political developments. Since so much of the political class is tarred by corruption, it may be necessary for a new political alternative to emerge in Kenya. Even so, the kind of corruption that we have seen in Kenya in the past is unlikely to repeat itself in the future.

Conclusion

In conclusion, there are three problems that must be resolved with regard to the future

of the fight against corruption in Kenya. First, national security and government procurement have become the last refuge of the corrupt. Second, Africans have to decide who should pay for democracy in Africa. We need to learn how to win elections without stealing money or getting resources from special interest groups. Third, we need to learn how to make the fight against corruption more effec-

tive. It seems that restitution is more important than prosecution in the fight against corruption. Corrupt people want to go to court. They can keep fighting the legal battles for a decade and their lawyers tend to be better paid than government lawyers. It is far more effective to demand restitution, which takes money away from the corrupt, freezes their assets, and locks their accounts.

A culture of political accountability is beginning to take root.

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