



Slaying the Monster: How to Win the War on Corruption in Kenya

By Willy Mutunga



The social cost of corruption in this country is incalculable. It has emptied our ethical contents, hemorrhaged our economy, corroded and destabilized our politics. It must be confronted directly and boldly, employing the full panoply of instruments of public education, sanction and restitution. Both administrative and legal measures must be summoned in this fight.

One significant but often ignored truth is that fighting corruption is primarily a political project. The political will leading that fight will only succeed if it is credible. Vehemence, however boisterous and loud; righteous but false indignation, however shrill, are all “a tale told by an idiot full of sound and fury signifying nothing.”

We must ponder. Why did wananchi undertake citizens’ arrest of corrupt officers when NARC (National Rainbow Coalition) came to power? Why did harambees, land allocations and the attendant corruption around public land die during the Kibaki years? If the link between harambees and corruption had long been established (see several Transparency International reports on this subject), why did we resurrect them in 2013, sometimes in total disregard of the law that prohibits public servants from conducting them?

The big question we pose, is do the political elite now leading the fight against corruption have the

moral standing sufficient to win public credibility? If they do not then how can they win? My view is the lifestyle audit from the top that was promised a year ago would have come close to conferring that credibility. And that credibility will be long in coming until we clear the dark clouds surrounding issues like [Eurobond](#), the [Afya House Scandal](#), [Laptop and Medical equipment leasing](#) to name but a few and make public the sovereign debt for debate.

So, which arm of state is the most corrupt?

This is a false question that is at the core of the blame games being played over the “War on Corruption.”

Over two years ago when I still worked in the Judiciary, Hon Duale, the majority leader in the National Assembly and I, had an interesting spat on Twitter. He had posted a tweet decrying corruption in the Judiciary. I retorted that there was corruption in the Judiciary but not the magnitude found in Parliament. I believe very few people would doubt the enormity of corruption in the Executive and Legislative arms. One only needs to read the Auditor-General reports since independence to confirm this.

Historically, whereas the Judiciary has faced its own independent corruption challenges, part of this problem has been driven by the fact that the Judiciary has been an appendage of the colonial and postcolonial Executive. What is not common knowledge is that until 2010, the Judiciary was closely weaved into the structure and organization of government, listed as a Department of the Attorney General’s Office.

Staff were under the public service and the Judiciary was the place where ‘problematic’ civil servants were banished as punishment.

District Treasuries held Judiciary accounts (some are still in their control even though we began the delinking process). Ironically, since the Judiciary never dared stand up to the Executive, it did the latter’s bidding, but also created spaces for it to shake down litigants, the Judiciary well protected by the Executive in this form of corruption.

The state has always known who the corrupt judicial officers and staff are. The incorruptible ones have had to struggle against the pressure of the Executive and other forces to save their integrity. I believe that is the challenge the Judiciary faces in its quest for integrity and independence. Therefore, the issue is not which of the arms (of government) is more corrupt but rather how the arms and their organs reflect the integrity and independence decreed by the Constitution.

“War on Corruption” is a National Project

For the “War on Corruption” to be operationally successful, it has to be a national project where the entire justice chain must work in coordination and in concert. This requires that investigation (police), prosecution (Director of Public Prosecution), and the adjudication (Judiciary) should be seamless, effective, incorruptible, and focus on the national interest.

The National Council for the Administration of Justice (NCAJ), which the Honourable Chief Justice chairs, brings together representatives of the Executive (Attorney-General, DPP, Prisons, Inspector-General of Police) and representatives from civil society and the private sector. This provides the institutional framework for the attainment and monitoring of this objective.

It is the arena where approaches to the fight against corruption should be discussed and any outstanding issues resolved. If NCAJ worked properly, the public altercation that we have seen in this fight would not occur. It is the peer review chamber in the administration of justice where each

of the agencies can be held to account.

There has been a consistent policy of blame games by the members of this chain for the administration of justice, that does not serve national interest. The investigations are supposed to be as thorough as the prosecution with the Judiciary promising no delays or compromises in its administration of justice. I believe it was also once suggested that the Inspector-General of Police, through the Director of Criminal Investigations, could utilize the services of the lawyers upfront to make sure that all the relevant and admissible evidence was collected. I believe it was also a practice that once the investigations were complete and the suspects given the chance to respond, the Office of the DPP would peruse the file to make sure the charges taken to court were in order and backed by evidence. Bail applications would be dealt with on this basis and there would be no applications for time to complete investigations, secure exhibits and so on. The [NYS criminal prosecution](#) (among others) clearly demonstrates the policies of the NCAJ, are not being adhered to.

The integrity of the organs and institutions in the entire chain for the Administration of Justice is premised on the integrity and independence of such organs and institutions. So who protects their independence? It is the organs and institutions themselves, the citizens, and other arms of state, the corporate sector, civil society and international interests.

All these organs and institutions face pressure from different quarters anyway, including ethnic communities, families, friends and other insidious demands. Politicians and their masters, the cartels and foreign interests, do not support the independence and integrity of these institutions and they seek continuously and consistently to capture and enslave them. Rarely, do they talk about their corruption, and politics of division and inhumanity. Indeed, when politicians attack institutions that have integrity they invariably do great job in guarding the integrity and independence of these institutions. The attacks by politicians can be construed as the frustration and failure on their part in their quest to enslave these institutions.

The Constitutional Oath of Office

Officers in the three arms and all organs of the State swear to uphold the Constitution. Yet as soon as you are sworn in to serve, this duty seems to be constantly and summarily forgotten. Most politicians have not read the Constitution. If they did why would they argue publicly that one cannot be granted bail when charged with murder? Why would they be quiet about the right of appeal against decisions granting or denying bail? I am quite sure they could get basic constitutional education from the learned lawyers if they chose to be honest about the issue of bail. I have heard the two main 'hand-shakers' attack the Judiciary on issues of bail. How will they protect the integrity and independence of institutions if they constantly abuse and disrespect them? It seems using the Judiciary as a punching bag is not restricted to presidential petitions and their outcomes. The independence and integrity of institutions have to be nurtured by a culture of respect and dialogue.

The speeches of President Uhuru and the Right Honourable Raila Odinga in the recently concluded Multi-Sectoral National Anti-Corruption Conference profiled the Judiciary as the weakest link in the "War on Corruption." It is a clearly predictable critique because the investigatory and prosecution processes are in the departments controlled by the Executive. Indeed, for the entire chain in the War on Corruption to work seamlessly and effectively the Executive must respect their integrity and independence. The Inspector-General of Police and the Office of the DPP must resist compromising their integrity and independence as decreed by the Constitution. Every institution under the Constitution has delegated powers from the Kenyan people. Protecting the human rights of the Kenyan people in the processes of investigating corruption and prosecuting it are cardinal considerations to bear in mind. Investigations and prosecutions must never be selective or politically motivated.

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It pains me when I hear Right Honourable Raila Odinga subvert the Constitution by arguing that suspects of murder and corruption must prove their innocence. The Constitution provides otherwise. Indeed, he knows that the provisions on bail in part are historically explained by the trials and tribulations he and other patriots went through in the courts captured by the Jomo Kenyatta-Moi-KANU dictatorships. I was shocked by his proposal in the said conference that suspects must prove their innocence and the courts, notwithstanding the provisions of the Constitution, must deny such suspects bail. President Uhuru, himself a beneficiary of soft bail from an international court that enabled him to run and campaign for office, earlier criticized the courts for giving soft bail terms. We are told that the courts must decide based on the will of the Executive notwithstanding the provisions of the Constitution and the Oath of Office taken by all judicial officers to uphold the Constitution and protect it. I hope that both our leaders never rue the day they uttered these words in the future. An independent Judiciary is critical to all politicians, as is indeed, to all citizens.

What has always surprised me is how those who attack and refuse to nurture the integrity and independence of institutions forget that they need those institutions more than the ordinary citizens. If as a politician or a cartel you enslave an institution, what guarantees you that your enemies, once in the same privileged position as you, will not use the institution against you? In this regard, all politicians and other interest groups should not influence (in any way) the integrity and independence of the Judiciary. They will not have to yell from the rooftops that “money has been poured (sic) or we are being finished” when their turn comes to answer the crimes they have committed. Judiciaries are temples of justice where the oppressed, discriminated, bullied, tortured, and intimidated run to. You do not want to run there and find your worst enemy at the entrance of the temple of justice!

Paying Lip Service to Corruption

Let us not pay lip service to War on Corruption. Let us not be selective in the prosecutions. Let us be consistent in our narratives in support of the War. What became of lifestyle audits that would start from the very top of our political leadership? Why, in the observation of the constitutional values of integrity, transparency, and accountability should we not make accessible all management and loan agreements, and details of our sovereign debt? Why do citizens have to go to court under Article 35 (freedom of information) of the Constitution to get these agreements and details? What is being hidden from the Kenyan public? It is on the basis of this disclosure that we can have a national dialogue on what these debts are, and who will ultimately pay for them.

I believe some are not even legally recoverable.

Under the 2010 Constitution, the State cannot live to its historical reputation of “Siri Kali/Vicious Secret” on matters of finance, security, investments, and the use of people’s resources. Kenyans must still demand the implementation of the Constitution in its entirety in their quest to change our unacceptable and unsustainable status quo.

The War on Corruption in Kenya is also an intra-elite struggle about looting, succession, corruption, and how fruits of corruption are shared. The War is also about struggles between national cartels and foreign interests. Like any other war it is an industry where profits are found in buying elections, oiling the machinery of state violence, and investing the ill-gotten gains internally and externally. The corrupt have no loyalty to any country or relationship. The elite hate the people they

rule. How does one view all these merchants of death in any other way? The so-called illicit economy (money laundering, piracy, terrorism, human trafficking, trafficking in human body parts, counterfeit, corruption, wildlife crimes) co-exists with legitimate ones – there is no distinction. Legal corruption (such as exploitation) is a twin of illegal corruption reflected in the illicit economy. Ultimately, a system that puts profits before people controls and owns both legal and illegal corruption.

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The War on Corruption must extend to foreign interests and forces (economic, social, military, financial, communications and surveillance, the entire system of imperialism of the West and East) if the War is to be won.

What can we do in the short-term?

Political leaderships the world over and the interests they serve (economic, social, military, financial) are the root cause of corruption. The joint control of resources by leaders and their interests mean that only by bringing, by all means possible, leaderships that are alternative to the current ones can we hope to end corruption, or at least start mitigating it.

In the case of Kenya, we are yet to even occupy the vacuum that exists for authentic opposition. Such opposition is the beginning of this struggle. We have many uncoordinated social movements that need to come together in a national convention against corruption and their delegates elect interim leaders to start the People’s War on Corruption.

This will be a national convention by delegates of all social movements and non-baronial parties and their affiliates. I believe there has been enough discussion on the critiques and consequences of corruption on our development. The national convention should collate and coordinate solutions and actions to achieve them. We have various precedents of national conventions. We had one in Limuru in April 1997. There have been other formats like the one adopted by the [Kenya Tuitakayo Initiative](#).

Public intellectuals will definitely play an important role.

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The convention will also draw a four-year program of activities by social movements and parties and the holding of a yearly national convention. It will have sub-committees to deal with specific issues. I believe all these initiatives can be funded by Kenyans. The convention will determine a funding strategy. And there are many more issues to come out of the convention such as its manifesto, ideology, politics, and membership. It is not rocket science.

The time to end the baronial politics narratives that only the rich who can rule this country is now. The time to reject baronial promises on fighting corruption is now.

We need to protect and secure our national resources. Out of these movements, and political parties that are not captured by baronial elites, a national progressive party can be formed to contest political power over the next ten years. The window of opportunity is now. The time for the politics of issues is now. The opportunity for implementing the Constitution, particularly its fundamental pillars are now. The time to end the baronial politics narratives that only the rich who can rule this country is now. The time to reject baronial promises on fighting corruption is now. This can only be done by political formations that will contest political power and wrestle it away from the barons.

Kenya gained its nominal independence because of the Mau Mau War of Independence and the collapse of the British Empire. There followed the second liberation that resurrected multipartyism. There was the third liberation brought about by the promulgation and implementation of the 2010 Constitution. Together with citizens of the world, we must bring about a humane, peaceful, non-violent and non-militaristic planet that is ecologically safe, equitable, The fourth liberation is about consolidating the gains of all these liberations, rescuing their fundamental weaknesses, and bringing the end of baronial rule in Kenya. just and prosperous.

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We in Kenya must start our effort for an alternative world. Let us think freedom and emancipation of our country, our continent, and our planet. To do so we must imagine the defeat of the imperialism of West and East. Such a world cannot exist under these current corrupt systems. Our Constitution's vision is socially democratic and its implementation will put us into the trajectory of the fourth liberation forming the basis of the fifth liberation to come.

The views expressed are personal to the author and do not in any way reflect those the Office of the Former Chief Justice

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