

CENTRE FOR LAW AND RESEARCH INTERNATIONAL – CLARION

CONSOLIDATION OF DEMOCRACY PROJECT

PROGRESS REPORT

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TABLE OF CONTENTS

1.0 Introduction	1
2.0 Objectives 1	
3.0 Project activities	1
3.1 Research	1
3.2 Peer review	2
3.3 Contributing to the Legislative agenda	2
3.3.1 Critiquing of bills of Parliament	2
3.3.2 Dissemination Workshops	4
3.3.3 Brochures for Members of Parliament	4
3.4 Tracking Government Performance	4
3.4.1 Radio Programme	4
3.4.2 Darubini Newsletter	5
3.5 Activity Summary Table	6
Strategy 2	8
Strategy 3	8
5.1 Project Activities	8
5.2 Research	8
5.3 Sectoral Forums	9
6.1 Lessons	9
6.2 Constraints	10
6.3 Adjustments and Responses	10
6.3.1 Brochures	10
6.3.2 Caucusing with Members of Parliament	10
7.0 Conclusion	10

1.0 Introduction

In the past six months, the Centre for Law and Research International (CLARION) has been implementing the Consolidation of Democracy Project (CDP). The CDP project is part of CLARION's programme titled *Enhancing and Consolidating the Gains of Democratisation in Kenya*, which is premised on the recognition that there are opportunities for greater democratisation in the country that must not be squandered. The programme recognises that the gains so far made can be reversed in the absence of continued work towards consolidation.

2.0 Objectives

The objective of CDP is to support continuing consolidation of democracy in Kenya through:

1. Contributing to the country's legislative agenda;
2. Contributing to efforts aimed at ensuring the successful completion of the constitutional review process and the implementation of the new constitution;
3. Tracking government performance in various areas; and
4. Contributing to the country's war against corruption through research.

CDP's objectives are in line with CLARION's mission, which is to enhance constitutionalism through systematic generation of knowledge, advocacy and public education.

3.0 Project activities

CLARION used the following strategies and activities to realise the objectives of CDP in the past six months.

3.1 Research

Clarion engaged three researchers to explore important dimensions of Kenya's war on corruption. The researchers were able to submit their first drafts within the agreed timelines. The commissioned papers covered the following areas:

- (i) The Evolution of Kenya's Anti-Corruption Strategy: Developments since 2001.

The researcher's terms of reference included studying and analysing government Anti-corruption strategy/strategies since 2001. In 2001, CLARION undertook a study that looked at initiatives put in place in the public and private arenas to combat corruption. This study resulted in the publication: *Initiatives against Corruption in Kenya: Legal and Policy Interventions 1995-2001*. This current study is therefore an effort to further a critical documentation of the on-going initiatives.

The researcher was further required to situate the current government initiatives within such identified strategy or strategies, to identify strengths and weaknesses in the strategy or strategies and recommend new strategies or improvements on the current strategies.

(ii) **The New Legal and Policy Framework in Kenya's War against Corruption.**

The researcher was required to study and analyse the current anti-corruption legal framework, to identify gaps and strengths of the framework, to address enforcement issues and to recommend actions by parliament and other relevant actors that would help strengthen the framework.

(iii) **Fighting Corruption: The Politics in a Post-KANU Kenya.**

The researcher was required to study and analyse the politics that have attended Kenya's anti-corruption initiatives since January 2002, to identify key interests in Kenya's war against corruption and analyse government response to those interests, and finally to recommend responses that would be effective in the current political environment.¹

3.2 Peer review

A Peer Review meeting held on the 15th of April 2004 brought together a team of academicians and practitioners who have demonstrated keen interest in the area of corruption together with the researchers. Useful comments were made in respect of each paper. These inputs will substantially enrich the papers.

3.3 Contributing to the Legislative agenda

3.3.1 Critiquing of bills of Parliament

Under this strategy, CLARION undertook to contribute towards the government's legislative agenda by critiquing bills tabled before parliament and sharing such critiques with members of parliament as well as other interested sectors. The aim of this strategy is to ensure that laws passed by the 9th parliament are faithful to the principles that underlie an open society. Through this strategy, CLARION also approximates a participatory approach to legislation by engaging different sectors to discuss potential laws that will affect them once legislated.

In the past six months we had the opportunity to contribute to the following bills:

- 1. The Suppression Bill**

¹ Summaries of the recommendations are attached as Annex 2

This bill was chosen purposefully for critique because its provisions threaten to claw back on many of the fundamental rights and freedoms that Kenyans are entitled under the constitution. The government could use these provisions to reverse the gains of democratisation and violate key political freedoms such as expression and assembly.

The critique on this bill have been shared with civil society partners through the Kenya Human Rights Network (KHURINET) and specifically the Network's Task Force on the Suppression of Terrorism bill. The KHURINET Task Force has strategic membership from the Kenya Law Reform Commission as well as the Kenya National Commission on Human Rights. A model Anti-Terrorism law generated by the task force has recently been circulated to stakeholders including the Minister for Justice and Constitutional affairs and the Attorney General. Even though the government has not moved to revise or republish the bill, intense lobbying by stakeholders is on course.

2. The Privatisation Bill

This bill was selected for critique because of the importance of making the privatisation process transparent. There have been complaints that the process has been fraught with underhand dealings in respect of government officials and those interested in buying a stake in the corporations being privatised.

Critically, an attempt made to provide for a transparent privatisation regime will also be an indicator of government's willingness to fight corruption. The law that the government uses to privatise will provide the first crucial step in ensuring that the process is insulated from corruption.

The Privatisation Bill as republished in March 2004 reflects some changes proposed by CLARION after undertaking research. Though the Privatisation Commission is the key organ, the bill seems to subordinate its work to that of the Steering Committees. In this regard, first the Steering Committees should be committees of the Commission and not statutory committees. If established by law these Steering Committees might become too powerful as to overshadow the Commission.

CLARION also recommended that the fate of state corporation employees be looked into before privatising the different corporations. This recommendation seems to have been taken into account and is reflected in the republished bill.

Finally, CLARION recommended that the size of the committees be reduced. However, this particular recommendation is not reflected in the republished bill, as the size of the committees remains large. CLARION will continue to share the recommendations on this particular bill as the legislation process continues. Another recommendation that seems to have been overlooked is that for a leaner Privatisation Commission not too heavy-laden with government bureaucrats.

3.3.2 Dissemination Workshops

CDP aimed at enhancing public participation in the legislative process through continuous review of Bills of Parliament. The critiques on bills were followed by dissemination through workshops involving stakeholders, legislators and the public in general. Through this process, CLARION was able to facilitate public participation and feedback from members of the public. As Kenya's prepare to usher in a new constitutional order, the key challenge is to ensure that laws enacted are supportive of and indeed mirror Kenya's reform agenda that must be actualised in the long term.

CLARION held dissemination workshop for the socialisation of the two bills. The dissemination for the Suppression of Terrorism bill took place on the 23rd of January while that for the Privatisation bill was done on the 29th of January 2004.

3.3.3 Brochures for Members of Parliament

Since Members of Parliament were a critical public as far as the results of the critiques on bills is concerned, efforts were made to have them participate in the dissemination workshops. However, it proved difficult to get them due to the National Constitutional Conference, which was going on at the time. To remedy this situation, CLARION published brochures on the privatisation and terrorism bills and shared these with all legislators.

3.4 Tracking Government Performance

Activities under this strategy were facilitation of a quarterly radio programme and the production of a quarterly newsletter to provide a platform for critical analysis of government's performance in critical areas such as constitutional review and the fight against corruption, among others.

3.4.1 Radio Programme

CLARION facilitated the first radio programme on the 22nd December 2003. The programme, which was aired by *Nation FM's* Midmorning programme, discussed the government's war on corruption. The second radio programme, which was aired on the 19th of April 2004, discussed government's performance in facilitating the completion of the constitutional review process.

Nation FM radio covers 7 of Kenya's 8 provinces leaving out North Eastern Province. This is considerable audience though it is regrettable that North Eastern is not covered. On both programmes, the host was able to involve listeners through a call-in facility.

3.4.2 *Darubini* Newsletter

The strategy has allowed CLARION to produce the first issue of the *Darubini*² newsletter. 1000 copies of the newsletter were printed and disseminated to CLARION's partners through different networks, members and libraries, among other important channels. CLARION's network is estimated at 300 mostly CBOs that have been involved in one or the other aspect of CLARION's work, some of whom are corporate members of CLARION. Work on the second issue of the newsletter, for the quarter ending April 2004, is at an advanced stage and will soon be published and disseminated.

² Translated literally, *Darubini* means "the microscope", and reflects CLARION's aim of tracking the government's performance on various issues by scrutinising its actions

3.5 Activity Summary Table

The Activity Summary Table below details the activities that CLARION undertook during this reporting period.

Activity Summary Table

Specific Activity/Project	Target amount	1 st half Achieved this period	Intended beneficiaries	Participants in workshops and other forums			Comments/Impact
				T/L	M	F	
Critique Bills	4	2	Legislators and others interested groups				<ol style="list-style-type: none"> 1. Some CLARION's recommendations on the Privatisation Bill 2003 were reflected in the changes made to the republished Privatisation Bill 2004 now before Parliament; 2. The recommendations on the Privatisation Bill 2003 have spurred other interest groups to take up lobbying activities. Thus follow up public forums have been organised by groups such as Institute of Economic Affairs and Centre for Governance and Development; and 3. CLARION's work on the Suppression of Terrorism bill has also informed discussions around the bill by various interested groups such as the KHURINET, which has formed a Task Force on the SOT. One key aim of the Task Force is to produce a model SOT bill to be presented to the relevant ministry. CLARION is part of this process.
Dissemination workshop Privatisation Bill	4	2		47	7	40	It proved difficult for CLARION to mobilise Members of Parliament to take part in the forums. This was caused by the National Constitutional Conference, which was going on at the time. This anomaly was ameliorated by using brochures, which were disseminated to MPs.

Dissemination workshop Suppression of Terrorism Bill				39	11	28	It proved difficult for CLARION to mobilise Members of Parliament to take part in the forums. This was caused by the National Constitutional Conference, which was going on at the time. This anomaly was ameliorated by using brochures, which were disseminated to MPs.
Commissioned researchers	3	3	3				CLARION was able to attract from its pool of research associates very able researchers who have demonstrated great interest in governance issues and specifically the areas of anti-corruption. Because of the fluid nature of this important governance issue, it remains a potential area for academic research that should continuously guide public discourse and official action.
Peer review meeting	1	1	1				The peer review meeting was a meeting of leading academicians who have an interest in the issue of corruption. It was productive and will greatly enrich the research papers.
Radio programmes	4	1	1				The Mid-Morning programme by <i>Nation FM Radio</i> , attracts audiences from about 7 provinces in Kenya. It combines entertainment and serious discussions on topical issues.
<i>Darubini</i> newsletter	4	1	1				The newsletter addressed the anxiety that gripped the nation in the process of constitutional reform, the fight against corruption, dynamics within civil society and other issues of concern to Kenyans. It was received well and demands for copies of the issue are still being received long after we disseminated it. The next issue of the newsletter will come out in the first week of May.

4.0 Work plan for the next six months

Strategy 1	Activities	Means of Verification	Impact Indicators
Contributing to Legislative and Policy Agenda	<ul style="list-style-type: none"> - Critiquing two bills of parliament in May and July. - Dissemination Workshops for the two bills held in June and August - Brochures for Members of Parliament produced and disseminated in July and August. 	<ul style="list-style-type: none"> - Critique Papers - Workshop report and attendance lists - Brochures 	<ul style="list-style-type: none"> - Recommended changes reflected in revised bills or enacted laws.
Strategy 2			
Tracking Government Performance	<ul style="list-style-type: none"> - Production of Issue 3 of <i>Darabuni</i> Newsletter in August - Air radio Programme in August 	<ul style="list-style-type: none"> - Newsletter - Audio Cassette recording of radio Programme 	<ul style="list-style-type: none"> - Enlightened discussions on democratisation issues
Strategy 3			
Book on Corruption	<ul style="list-style-type: none"> - Publish book in May - Hold dissemination workshop in June - Disseminate book from June 	<ul style="list-style-type: none"> - Anti-Corruption book - Workshop Report and attendance list 	<ul style="list-style-type: none"> - Government Efforts to improve their anti-corruption strategy - Use of book by policy makers.

5.0 Audit of the New Constitution Project [ANCP]

The Audit of the New Constitution Project is the CIDA supported component of the CDP. The project aims at identifying gaps and discrepancies between the new constitution and the provisions of statutes that require further legislation. The project provides information relevant for constitution making and related legislation in relevant areas.

5.1 Project Activities

CLARION has used two strategies, namely research and sectoral forums to achieve the objectives of this project.

5.2 Research

CLARION contracted eight researchers to conduct studies and write papers in eight different fields considered important for the consolidation of democracy and that deserve greater attention when legislating to implement the new constitution. Dealing with specific provisions in the Draft

Constitution, each paper aimed to describe and analyse the provision as contained in the DC, explain the implications of the provision for the country and the given area of inquiry, propose and describe an enabling legislation and generate a model law. Four of the papers are now complete.

5.3 Sectoral Forums

The sectoral forums aimed to disseminate the research findings to relevant sectors and communities of interest. So far, CLARION has held three forums on political parties, electoral system and public finance. The beneficiaries of these forums are those who work in these sectors as well as academicians and policy makers. In addition, other members of the public and persons who have shown consistent interest in Kenya's democratisation process were also invited [see Annex 3]. For example, most NGOs in the Human Rights and governance sector sent representatives and made useful contributions in these forums.

The first sectoral forum, which discussed the regulation of political parties in a democratic Kenya, was held on the 20th of January 2004. The second forum on the proposed electoral system and its implications in Kenya was held on the 23rd of January. The third forum on Public Finance was held on the 29th of January.

The other strategy under this project is the dissemination of the revised subject papers to relevant sectors and government institutions. This strategy will be implemented in the next half [six months].

6.0 Lessons, constraints, adjustments and responses

CLARION has learnt key lessons in the course of implementing the CDP. We also faced constraints that we are able to surmount through certain adjustments in project implementation.

6.1 Lessons

CLARION learnt the following two key lessons in the implementation of the project activities:

- That Members of Parliament still view legislation as their exclusive domain and are reluctant to partner with others in an arrangement that makes other stakeholders meaningfully participate in the legislative process. From CLARION's observation, it will take a lot of persuasion for MPs to embrace the spirit of participation; and
- Ethnicity and ethnic considerations often cloud debate on very important national issues. The discussions over radio on corruption and the completion of the constitutional reform process made this very clear. One would have hoped that a dissipation of the euphoria that greeted NARC ascendancy to power would be replaced by objective analysis of the events of the times but sadly, euphoria is being replaced by a more dangerous kind of bias – ethnicity – that makes citizens see discussions through ethnic lenses.

6.2 Constraints

A major constraint was the difficulty in getting a sizeable number of members of parliament to attend CLARION's forums. Most MPs were busy at the Bomas Conference and attending all the other caucuses that accompanied that process. CLARION will make efforts to ensure that more MPs attend lobbying meetings that are currently being organised.

6.3 Adjustments and Responses

6.3.1 Brochures

As noted earlier, CLARION was unable to get MPs to attend the dissemination workshops because of the significant events going on then. In addition to distributing the papers that critiqued the bills, we came up with brochures that summarised the critiques highlighted CLARION's areas of concern as well as the recommendations.

6.3.2 Caucusing with Members of Parliament

CLARION has began laying ground for possible caucusing with Members of Parliament in small groups of MPs that will, it is hoped, make it easier to work with them.

7.0 Conclusion

As witnessed in the last couple of months, navigating a coalition government for a young democracy such as Kenya can be a very tricky affair. Specifically, the Narc coalition has been in conflict since President Kibaki formed government in early 2003. Since then, continued quarrels and public demonstration of might by the different factions has left many wondering about the viability of a coalition arrangement given Kenya's political history and realities. This is even more so given the slate of reforms that the people expect from the current regime.

The Kenyan public has to hold firm the reform agenda because a slackening on the citizens' part might give the government an opportunity to abandon or gloss over important reforms and instead concentrate on political survival. This is not to say the government is not committed to such reform but to emphasise the role that citizens have to play on the path of consolidation of the gains of democratisation. Citizens need to hold all political parties, including those in the opposition, accountable on the reform agenda.

The reform agenda continues to face many threats. The wrangles in the ruling coalition over the pre-election agreements expressed through Memoranda of Understanding [MOU] have presented a good

opportunity for retrogressive forces in Kenyan politics to reposition, sabotage and stall the reform agenda – especially the fight against corruption.

Specifically, the fight against corruption has been highly politicised and ethnicised mainly by those who have been involved in economic crimes. Individuals are now taking advantage of the upheavals in the political front to externalise their individual sins of commission and omission. This calls for Kenyans to be extremely vigilant to protect the little gains made on the path to democratisation.

Annex 1: Financial Report

Budget Item	Total Budget	Projected Expenditure Six Months	Actual Expenditure This Period	Cummulative Expenditure By Line Item
	Kshs	Kshs	Kshs	Kshs
Legislative Policy Agenda	691,500	256,500	208,121	208,121
Track GOK Performance *see note	2,218,000	1,269,000	428,064	428,064
Audit of discrepancy with present law	-	-	-	-
Project Evaluation/Audit	700,000	-	-	-
Project Officer	1,296,017	499,440	499,440	499,440
Personnel	1,260,516	1,260,516	1,260,516	1,260,516
Overhead Costs	1,033,967	1,009,967	854,240	854,240
	7,200,000	4,295,423	3,250,381	3,250,381

Note:

The discrepancy arises due to on-going work on the research and publication of the "Book on Corruption and the Transition". CLARION expects that this work will be completed in the next one month.

Annex 2

A SUMMARY OF KEY OBSERVATIONS AND RECOMMENDATIONS OF THE ANTI-CORRUPTION STUDY

This annex carries summaries of the key observations and recommendations of the research papers in their draft form.¹

PAPER ONE

The Evolution of the Kenya Government's Anti-Corruption Strategy: Developments since 2001 by Dr. Ludeki Chweya

1. The government having come to power on a pledge of Zero tolerance to corruption has put in place a number of initiatives as starting points in its war against corruption. However, these initiatives though demonstrating greater political will to fight corruption perpetrated over the years by successive KANU regimes, are not indicative of a coordinated anti-government strategy;
2. The Anti-Corruption initiatives such as the Judicial Inquiry into the Goldenberg Affair are imperilled by the fact that key persons who have been reportedly named and in all probabilities were involved in official corruption are still in government some as cabinet ministers and in the top echelons of the civil service. This state of affairs exposes these initiatives and efforts at fighting corruption to sabotage and resistance from within;
3. The success of these initiatives will depend very much on certain historical imperatives and therefore future initiatives should be crafted with the history of the country in mind;
4. The legitimacy of these initiatives is being undermined by a growing perception that it is selective justice targeted at the officials of the former KANU regime and there isn't as much fervour in fighting current and especially corruption within government;
5. The two very important pieces of legislation on fighting corruption, the Anti-Corruption and Economic Crimes Act as well as the Public Officer Ethics Act are a good step forward but still trapped within the limitations that made KACA under KANU and other efforts after it fail. The Kenyan Anti-Corruption Commission [KACC] is still not entrenched in the constitution and is therefore as vulnerable to an assault through the judiciary as happened to KACA under KANU. Under the Public Officer Ethics Act public servants declare wealth but the wealth declarations are not accessible to the public.

¹ The researchers are yet to incorporate the changes suggested during the Peer Review meeting that took place at CLARION on the 15 of April 2004

6. The initiatives are also prone to political patronage. The history of the country is such that the current ruling elites and the former ruling elite are at times the same thing and therefore a lot of the corruption business was transacted with the involvement or complicity of most of them. Old boys networks could still work to frustrate the anti-corruption drive; and
7. It is therefore important to emphasise the role of greater democratisation in the war against corruption if the government is not to relapse into old ways or protect friends. This will clearly put the anti-corruption initiative firmly in the hands of citizens who will make it very expensive for politicians to cut deals with corrupt elites.

PAPER TWO

Fighting Corruption: The Politics in a Post KANU Kenya – by Kichamu Akivaga

1. The wrangles within the ruling coalition NARC threaten to undermine or even torpedo the anti-corruption project altogether if efforts are not made to heal the divisions within;
2. The above wrangling decisively weakens the government and makes it vulnerable. This might mean the government having to choose between fighting corruption and survival in which case it may be forced to cut deals with persons who otherwise should have been made to account for their corrupt past;
3. A resurgence of ethnicised politics as understood to be behind the wrangling at the National Constitutional Conference at Bomas threaten the fight against corruption. The cries of persecution by tribes if their “sons” and “daughters” fall victims of the war against corruption are expected to increase with the attendant impunity if this ethnicisation of politics is not managed properly; and
4. There is need to bolster anti-corruption legislation with public education campaigns that make the Kenyan people truly own the anti-corruption project.

PAPER THREE

The New Legal and Policy Framework in Kenya's War against Corruption – by John Kithome Tuta

1. There should be proper co-ordination of anti-corruption strategies, plans and policies to avoid unnecessary contradictions, inconsistencies or duplication of roles and unnecessary costs over attempts to ‘re-invent the wheel’. At least there should be one person or institution that should co-

ordinate all anti-corruption initiatives in Government. The Ministry of Justice and Constitutional Affairs, the Department of Governance and Ethics, Kenya Anti-Corruption Commission and the Efficiency Monitoring Unit (EMU) should harmonise and streamline their policies, activities and operations;

2. The Public Officers Ethics Act (POEA) should be amended to allow access of wealth declaration forms by the media and members of the public. KACC should be empowered to be the repository of all wealth declarations for purposes of determining whether a public officer has unexplained wealth or not;
3. The government should expedite the passing of an Access to Information Law that will nurture a culture of glasnost (openness);
4. The Anti-Corruption and Economic Crimes Act (ACECA) should be amended to provide for the publication of an annual List of Shame, by the Attorney General, of all people convicted of corruption and economic crime, in the course of the year. The publication should be done in the Kenya Gazette as well as the major local dailies. Government bodies should be barred from employing or in anyway contracting with such convicts or their agents;
5. Besides shaming, convicts of corruption and economic crime should be ostracized from certain places or benefits enjoyed by law-abiding people. For example in the United States of America, a new law passed on 12th January, 2004 imposes sanctions and travel embargo against corrupt persons, their families and business partners from all over the world;
6. In line with Commonwealth Parliamentary practice, the watchdog Committees, especially PAC, should be headed by the Leader of Official Opposition in the National Assembly;
7. The government should move with speed to enact The Public Procurement and Disposal Bill, 2004 to address the problem of irregularities in public procurement and disposal of public assets. Thereafter, the government should move with speed to set up the institutional framework for implementing the statute;
8. There is need for a reward system for information that is given to anti-corruption agencies and helps in fighting corruption. People ought to see the benefit of giving useful information for fighting corruption;
9. There is need for the creation of an Ombudsman, preferably attached to KACC. The Public Complaints Unit (PCU) housed under the Department of Governance and Ethics should be converted into an office of the Ombudsman and transferred to KACC. This would make KACC a one-stop-shop for addressing matters touching on corruption, economic crime, bad governance and any form of maladministration;

- 10. KACC should be vested with prosecutorial powers donated by the Constitution, so that all anti-corruption efforts can be planned, executed, well-focused and co-ordinated, without undue dependence on other bodies;**
- 11. For better implementation of the Anti-Corruption and Economic Crimes Act, and to ensure that KACC plays its anti-corruption role effectively as envisaged by the Act, the government should initiate amendments to the Act or make Regulations (under Section 68 thereof) or introduce a new legislation to govern the modern aspects of fighting corruption in the resplendent scale of South Africa, as exemplified by their Prevention of Organised Crime Act (No.121 of 1998); Prevention of Organised Crime Regulations – Proceeds of Crime Regulations 1997, the International Co-operation in Criminal Matters Act (No. 75 of 1996) and the Regulations under the International Co-operation in Criminal Matters, 1996; and**
- 12. KACC needs to be entrenched in the constitution to protect it from a possible judicial assault like happened to KACA.**