

“RE-OPENING AND CONSOLIDATING DEMOCRATIC SPACE IN KENYA”: CONTEXTUAL, CONCEPTUAL AND POLITICAL PERSPECTIVES¹

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The phenomena of rogue governments (mainly the executive wings) working tirelessly towards limiting the rights and spaces of citizens and key actors or players critical in the governance of public affairs (mainly outside the realm of the State, popularly known as Non-State actors) is as old as the society itself. While the insidious intentions and manifestations of such regimes have remained constant (to cause fear and curtail public accountability), the framing of the same has remained quite dynamic and convoluted over time and space. For the description of the problem and prescription of solutions have ranged from ‘confronting and ending political autocracy, repression, fascism and capture’ to ‘fighting impunity, consolidating civic space, re-opening democracy’, among others.

There is a clear contextual and conceptual correlation between the state of democracy and the nature of rights and spaces to be accorded or denied and vice versa. In most cases, it is the most repressive or authoritarian regimes which are prevalent to the limitation of civil rights and civic spaces³. And, then, the increasingly popular terminology of “civic space (whether shrinking/ constraining or be protected/ expanded) is quite problematic in that it narrows down the discourse and actors to the citizens and its organizations (civil society). Also it doesn’t capture the rights and political perspectives, critical in underscoring the depth of governance questions and actions required.

Simply put, this is a question of bad governance that undermines democracy and the rights and values that comes with it. “Civic space” by large is a conservative narration of the requisite civil liberties and political rights that are freely enjoyed within a democratic state⁴. It is on this basis that the notion of “re-opening democratic space” is gaining more traction among the progressive human rights scholars and activists. This novel framing was adopted during a very robust online conversation among the INCLO’s Focal Points responsible for civic space in November 2018⁵. Members espoused it on the basis that it “probably captures the broader agenda for countries that are currently ‘closed’ and those that are ‘open’ but under threat”. However, the “re-opening” must be safeguarded with “consolidation.”

This is so apt in Kenya given that for the last 100 years, we have been operating within a very fluid and adverse contexts. Such ranges from the despotic colonial and post-independence regimes that have entrenched impunity and seen massive resistance⁶ by the citizens and civil society organizations⁷. This state of affairs is well captured in the report of the Truth, Justice and Reconciliation Commission (TJRC) in Kenya. In its *primary findings*, the TJRC noted that between 1895 and 1963, the British Colonial administration in Kenya was responsible for unspeakable and horrific gross violations of human rights;

¹ A paradigmatic shift from the increasingly obscure, blurred and escapist notions of ‘Safeguarding’, ‘Shrinking’, ‘Civic Space’.

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³ There is also an emerging trend of populist regimes (whether democratic or autocratic) who seem to be gaining pleasure in undermining rights and democracy in the name of the so called “public interests”.

⁴ Moreover, the agitation for the enshrinement, expansion and protection of those rights is also key in securing and sustaining a democratic state. Its also key in supporting actions that lead to equitable and unconditional realization of social and economic rights and development. Thus again explaining the reasons as to why governments remain comfortable with repression and inimical to human rights.

⁵ INCLO stands for the International Network for Civil Liberties Organizations. The author represents KHRC in the Civic Space Working Group of the Network.

⁶ Whose framing has ranged from the struggle for independence (between 1920 to 1963) to the fight for reforms (legal, administrative and constitutional between 1963 to 2010) and constitutionalism (especially after the promulgation of the new constitution in 2010).

⁷ From the radical political associations, churches, civic movements, Non-governmental organizations, trade unions, media, youth and women groups among others.

that between 1963 and 1978, President Jomo Kenyatta presided over a government that was responsible for numerous gross violations of human rights; and that between 2002 and 2008, President Mwai Kibaki presided over a government that was responsible for numerous gross violations of human rights⁸.

Fast forward and enter the Jubilee regime in April 2013. Owing to the legitimacy crisis occasioned by the failure of the new government to secure majority votes in the March 2013, coupled with the fact that its leaders were facing charges before the International Criminal Court⁹ and that the same were also part of KANU regime up to 2002, the UhuruRuto regime has continuously hatched and enforced punitive and prohibitive policies targeting almost every independent institution and voice, both within and outside the government. Such include the civil society organizations (also called the Public Benefits Organizations (PBOs), Faith Based Organizations (FBOs), media organizations, trade unions, political parties, the judiciary, Parliament¹⁰, Constitutional Commissions among other actors.

Some of repressive tactics being applied by the Government against these actors include:

- Burdensome registration requirements and threats of deregistration.
- Actual deregistration of civil society organizations and shut down of some media platforms.¹¹
- Broad discretion to seize assets on suspicion of terrorism financing without any due diligence.
- Disproportionate penalties for non-compliance with regulatory laws/ severe reporting requirements
- Difficulty in getting approvals from governments especially for governance programmes as compared to humanitarian programmes.
- Limited government consultation with respect to policy development and governance processes.
- Undue surveillance by security forces/ restrictions on online access and spaces.
- Punitive court decisions against HRDs including exorbitant bails and costs for suits.
- Restrictions to financing from foreign sources/ threatening donors not to fund certain institutions.
- Harassment, arrests, intimidation, targeting, clampdowns and vilification of actors/ activists.
- Banning, criminalization and violent disruption of protests and other forms of picketing.
- Limitations in obtaining work permits and visas and in country registration of international agencies.
- Introduction of draconian and non-constitutional laws in a hurried and undemocratic manner that restrict freedom of association, assembly and expression¹².
- Delays in the commencement and implementation of the PBO Act enacted in January 2013.
- Negative profiling of the different state and non-state institutions:-for instance, the civil society as the “evil society” and the Supreme Court Judges as “Wakora.”¹³
- Cuts on the finances of the key government institutions, for instance, the judiciary, commissions and independent offices, county governments.
- Executive efforts to exert unconstitutional controls over Parliament, Judiciary, Council of Governors, National Police Service among other critical state institutions.
- Creation of divisions within the trade unions or a times a refusal to collect and remit remittances from members who are public officers thus curtailing their operations.
- Initiate divisions within; or cooption of other political parties, thus weakening the opposition.

⁸ *Report of the Truth, Justice and Reconciliation Commission, Vol.1*, TJRC Kenya, 2011, p. vii.

⁹ President Uhuru Kenyatta and his deputy William Ruto(both commonly referred to as UhuRuto) were being charged for Crimes Against Humanity allegedly committed during the 2007/ 2008 post-election violence. They were accusing some sections of the civil society, media and government of being responsible for the intervention of the ICC in the Kenyan situation.

¹⁰ From the National Assembly to Senate and County Assemblies.

¹¹ Both mainstream and social media (bloggers, twitter and face book accounts among others).

¹²For instance, harmful amendments within the Security Amendment Bill of December 2014; media laws; Public Benefits Organizations Act (PBO Act) etc. There is a Bill before the National Assembly proposing amendments to the Public Order Act to the effect that the organizer of public actions will be responsible for any damages or violence that emerge from such.

¹³ This is Swahili for “thugs” or “criminals”. It was adversely coined by President Uhuru Kenyatta in October 2018 after the Supreme Court reversed the outcome of August president elections in which he had been declared the winner.

- Of course there have been cases of self-censorship by the different organizations for fear of political reprisals, which make create challenges organizing and resisting all these tactics.

Generally, the institutions used by the presidency to execute the said tactics remain as follows: Ministry of Interior and the Coordination of National Government, Ministry of Foreign Affairs, ICT Ministry; Immigration Department, the National NGOs Board, National Police Service, Communications Authority of Kenya, National Assembly, Kenya Revenue Authority and in some cases the courts, Immigration Department, Central Bank of Kenya and commercial banks (both public and public). This trend worsened during and after the 2017 General elections. Perhaps the incumbent wanted to create a situation where the deep state was fully in control of the entire electoral and other governance processes and outcomes. The period between August 2017 and March 2018 saw the worst repressive tendencies against the civil society, opposition and media.

The KHRC a result of its progressive leadership and position on governance issues remained the MOST TARGET actor, a record four times! First in October 2015 and then in January, August and October 2017, with the last 2 episodes coinciding with the General Elections and the repeat presidential elections, respectively. The ‘political accusations’ have remained the same, from government’s vague claims on non-payment of taxes, running irregular bank accounts, illegal hiring of migrants. The first instance entailed allegations of funding terrorism.

The period in between and after the repeat presidential elections (which was boycotted by the opposition in October 2017) and the ‘informal swearing in’ of Raila Odinga(the leader of the Opposition under the National Supper Alliance-NASA) as the “Peoples President” in January 31, 2018 saw unprecedented onslaughts on the members and leaders of the opposition. This led to wanton violence, injuries, deaths, political divisions and balkanization in the country. The media was equally targeted and persecuted for live reporting of Raila Odinga’s swearing in.¹⁴ It is this polarizing and captured space that occasioned the political détente(popularly known as the “handshake”) between President Uhuru Kenya and Raila Odinga under the banner of the so called the “Building Bridges Initiative(BBI) in March 2018. While the “Handshake” has to some extent reduced political tensions and nuanced executive fears, it has in big and disastrous magnitudes emboldened his control of the state and reduced the forces of the oppositions (which used to be a combination of the politicians, activists and media).

We are now in a state of a benevolent and populist dictatorship which uses more of carrot, cooption, infiltration, blackmail, divide and rule as tools of executive imperialism. Abuse of state resources, corporate capture and disregard to citizenry rights and interests have increased. Suppression remains high for those who threaten the interests of the deep state and its wicked beneficiaries¹⁵. **Kenyans have mainly survived this interminable impunity thanks to our very progressive constitution, fairly independent judiciary, positive media support and remarkable solidarity within the civil society.** Since the civil society is called to safeguard public interests by standing in between the state and market, it high time it remains more vigilant and organized in creating the requisite societal equilibrium. **For Kenya, it a call to politically organize the masses and work with likeminded actors to entrench the constitutional democracy envisaged in Article 4(2) of the constitution of Kenya. Thus the notion of RE-OPENING AND CONSOLIDATING OF DEMOCRATIC SPACE.**

¹⁴ There was for instance the shut down for close to two weeks the NTV, Citizen TV and KTN, the three mainstream TV stations

¹⁵For instance, an incident on January 31, 2019 where KHRC staff together with members of the Solai community in Nakuru were violated disrupted by police for organizing a public forum to discuss possible actions following government’s failure to compensate the families who lost their loved ones and properties after the collapse of a private dam in May 2018. In the process, 8 members and a local member of the Assembly were arrested and detained for close to one week., owing to adversarial bail terms. Also the April 20, 2019 situation when activists in Nairobi were tear gassed and one of them arrest for organizing a public demonstration against the increasing incidents of corruption in the country.