



DUMISHA HAKI NA UONGOZI MWEMA KENYA

A STATUS HUMAN RIGHTS REPORT AND MANIFESTO

July 2017

A Report by the Kenya Human
Rights Commission



“DUMISHA HAKI NA UONGOZI MWEMA KENYA”

**A Status Brief and Peoples Manifesto for Political
and Policy Engagements**

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A. INTRODUCTION

The Kenya Human Rights Commission (KHRC) is a premier Non-Governmental Organization which was established in 1992 with a mandate of *enhancing human rights-centred governance at all levels*. The KHRC *envisions human rights states and societies*, which in practical terms, aligns very well with the Republic envisaged in Article 5 of our Constitution, i.e., “...a *multi-party democratic state founded in the national values and principles of governance referred to in Article 10*”.

It is on that basis that we espouse a very holistic concept of human rights that straddles *civil and political rights* (as fundamental to political democracy); *economic and social rights* (as critical building blocks for social democracy); and *equality and non-discrimination* (both as integrated and specific interventions in programming). To this effect, we remain committed in deepening our political and policy leadership on the key human rights and governance issues in the country.

Most of these are the public matters the KHRC and partners have been working on through research, monitoring and documentation, policy and legal interventions. The Constitution of Kenya (2010) and other national, regional and international policy instruments remain our main governance and accountability frameworks around those issues for they espouse very detailed and progressive guidelines on the management of the same.

Such include: Electoral Governance; Corruption-Theft and Waste of Public Resources; Civic Space and Protection of Civil Liberties; Security Governance; Ethnic Exclusion; Devolved Governance; Labour Rights and Industrial Democracy; Women’s Inclusion in Governance; Citizenship, Statelessness and Universal Registration of Births; Violence and Discrimination on Grounds of Sexual Orientation and Gender Identity and Expression; Historical Injustices and Gross Human Rights Violations; Land Rights and Injustices; Business and Human Rights-Corporate Accountability in Investments; Resource Rights and Other Key Governance Issues².

¹ “Haki” and “Uongozi Mwema” are Kiswahili words that literally mean “Human Rights” and “Good Governance” respectively. Meaningfully, “The Haki na Uongozi Mwema Kenya” Status Brief and Peoples Manifesto is a framework for enhancing human rights-centred governance in Kenyas with the political actors among others, towards August 8, 2017 General Elections and Beyond. This resonates well with the KHRC’s mandate and essence of the Constitution of Kenya, 2010.

² Mainly: *Enhancing Accountability in Mega Infrastructural Projects; Respecting the independence of State Commissions and Independent Offices; Pursuing a people and human rights centred foreign policy, and Protecting and Supporting other Disadvantaged Groups.*

Finally, the envisaged August 8, 2017 General Elections and the ensuing campaigns and debates provide more opportunities for political and policy conversations around the aforementioned issues. It is on that basis that the KHRC is presenting the **“Dumisha Haki na Uongozi Mwema Kenya”: A Status Brief and Peoples Manifesto for Political and Policy Engagements.**

The brief and manifesto is inspired by our related work between October 2002 and March 2003 where we developed, publicized and pursued an agenda for Kenya which shaped the policies of the incoming and later the ruling, National Alliance Rainbow Coalition (NARC)³. Moreover, the KHRC initiated the “Peoples Manifesto and Score Card Initiative” that saw massive engagements with the political class with the key issues during and after the 2007 General Elections⁴. It is also informed by the periodical reports, political and policy actions by the Commission around the issues at hand.

Thus, this is just but a summary of our documentation and engagements with the issues. Details can be found in the institutional and sectoral reports and statements, all available in our website and resource centre. The document provides a status update of the issues, the key political questions and policy gaps for actions by the actors and finally, recommendations to inform the conversations around the issues. *Specifically, it aims to achieve the following objectives:*

First, is enhancing conversations with and securing commitments from the political main actors and presidential candidates in the midst of their campaigns and manifestos ahead of the August 8, 2017 General Elections. To this end, we will have consultative meetings with the secretariats and presidential aspirants of the main political parties and coalitions.

The first consultations took place during the Public Benefits Organizations summit that was co-hosted by the KHRC, the Civil Society Reference Group and The International Center for Not-for-Profit Law (ICNL) to mark the 27th *Saba Saba Day* at the All African Conference of Churches in Nairobi, on July 7, 2017. Here, the 6 presidential aspirants either in attendance or represented⁵ signed a pledge committing to support the operational and sectoral issues related to the PBOs in Kenya. This manifesto and brief its draft form was the source of information on the sectoral issues canvassed.

³ This was finally published and disseminated as a report entitled: *Eyes on the Prize*, KHRC, Nairobi, 2003.

⁴ “In 2007, KHRC’s Peoples’ Manifesto and Scorecard Initiative was premised on the fact that political party manifestos and the development performance promises they contain did not mean much to the electorate besides being colours that distinguished one group of voters from another and more from an ethnic perspective rather than ideology”. See: <https://www.google.co.ug/search?tbm=bks&chl=en&q=KHRC%27s+peoples+manifesto+and+score+cards>.

⁵ Presidential candidates: Dr. Ekuru Aukot (Third Alliance); Prof Michael Wainaina (An Independent) and Peter Solomon Gichira (An independent who is yet to be cleared). Representatives included: Raphael Tuju- for Uhuru Kenyatta, Jubilee Party; Dr. David Ndii, for Raila Odinga, National Alliance Super Alliance and Peter Odeng (for Joe Nyagah, Independent). Those absent include Cyrus Jirongo (United Democratic Party-UDM) and Abduba Dida (The Alliance for Real Change-ARC)

We liaised with the Presidential Debates Limited, the median consortium organizing the public discussions with the eight presidential candidates and their deputies. KHRC and four other civil society organizations are in consultations with the consortium to explore the best ways of informing contents for the same.

Moreover, it serves as the baseline for monitoring progress and deepening accountability over the human rights and governance issues from the time the new President and political system are voted in August 2017. To this extent, we shall remain in a better position to inform the periodical and annual reports by the President⁶, the Chief Justice⁷ and the Governors⁸/ Council of Governors⁹ to the country as provided in the Constitutions and other laws.

Finally, and related to this, it acts as critical starting and reference point for advancing human rights and governance programming ; harmonized documentation and progressive reporting under our international obligations within the United Nations and African Union¹⁰. **To this effect, we shall also consider publishing and disseminating this brief and manifesto as a status report for Kenya too.** *Below find the key human rights and governance issues, questions and recommendations.*

B. KEY HUMAN RIGHTS AND GOVERNANCE AGENDAS AND QUESTIONS

1. Electoral Governance

Free, fair, accountable and credible electoral governance systems, processes and outcomes are critical in the management and stabilization of state affairs. It is on that basis that the Kenyan state has after experiencing the perilous aftermath of the 2007/2008 post-election violence strived to put in place various legal and operational reforms, including replacing Commissioners to the electoral management body twice in the face of eroded public confidence.

⁶ Article 131(1) (c) of the Constitution provides that once every year— report, in an address to the nation, on all the measures taken and the progress achieved in the realization of the national values, referred to in Article 10; publish in the *Gazette* the details of the measures and progress under sub-paragraph (i); and submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.

⁷ The State of Judiciary Report is prepared in fulfillment of Section 5 (2) (b) of the Judicial Service Act.

⁸ The Council of Governors' (COG) Statutory Annual Report is developed in compliance with the requirements of the Intergovernmental Relations Act, which establishes the COG.

⁹ The Annual State of County Report is prepared and delivered pursuant to Section 30(2)(j) and (k) of the County Government Act. .

¹⁰ Especially, the periodical reporting sessions within the African Commission on Human Peoples Rights; African Peer Review Mechanisms; Human Rights Council(especially within the Universal Periodic Review) among others.

However, multiple phases of the current electoral process, including legal reform, voter registration, party primaries, procurement of technology, and security deployment have already been marred by errors, irregularities and a striking lack of transparency. The Independent Electoral and Boundaries Commission (IEBC) has admitted that it cannot fully expunge deceased persons from the voters' register.

The printing of ballot papers has descended into a time-consuming judicial dispute with the IEBC purporting to commence the printing exercise despite several aspersions cast against the company contracted to print the ballot papers and several court petitions arising from party primaries that could affect nominees cleared to participate in the elections.

A High Court decision directing the IEBC to reissue the tender for the printing of the Presidential ballot papers and subject it to public participation has attracted hostile political rhetoric directed at the Judiciary which has been branded as assisting the opposition to derail the elections scheduled for August 8, 2017. The IEBC has further indicated that it will appeal this decision which puts the required arrangements in under a month at great peril.

There is no clarity on the back-up mechanisms to address potential problems with the identification of voters and the electronic results transmission on Election Day. The deployment of security personnel has also emerged as a source of apprehension and raises fear in the event of crowd control issue and there have been no assurances that security forces will not use undue force to quell public protests.

These security concerns are further exacerbated by the reality of fractious and highly contested politics at the county level and the traditional drivers of conflict which include youth unemployment and a significant economic downturn as witnessed in the high prices and scarcity of critical consumer goods such as maize flour.

There is need to overcome some of these challenges as a matter of urgency if the country is to secure a credible election; one that a broad section of the public views as legitimate and reflects the highest levels of integrity within every phase of the electoral cycle.

For more details about the challenges, see a pre-election statement issued by the KHRC ahead of the August 8, 2017 General Elections on August 4, 2017¹¹.

The foregoing raises the following questions:

- *Will you support a call for the IEBC to enhance transparency and communication to the public regarding the remainder of the electoral process? What should the IEBC do to improve in this regard?*
- *Will you support the release of the report by KPMG firm on the audit of the voter register as well as the voter register before and after the audit recommendations were effected?*

¹¹ <http://www.khrc.or.ke/images/docs/KYSYPreelectionStatement2017.pdf>.

- *Will you respect the courts as the final arbiter of electoral disputes and interpretation of the law?*
- *What security strategy do you endorse for the electoral period and how will you ensure that the peoples' fundamental rights and freedoms are not undermined during this period?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *The IEBC must establish a communication strategy that enhances transparency with the public on the progress made with regard to these issues as well as makes publicly available critical information such as the voters' register and the KPMG audit report without further delay.*
- *There must be deference to the judicial process in determining the ballot printing dispute and all other subsequent electoral disputes. No stakeholder should take a unilateral stance outside court decisions.*
- *The IEBC must clearly outline what complementary mechanisms will be utilized as a back-up to electoral technology, the instances in which they will come into play, and how these alternatives will be accountable.*
- *Security operations must be undertaken in line with rights-based policing which is grounded on public participation and respect for fundamental rights and freedoms.*

2. Grand Corruption - Theft and Waste of Public Resources

Despite the many legal and institutional frameworks initiated against corruption, massive theft, plunder and waste of public resources (both financial and land based resources) continue unabated within the three arms of and levels of government. The Auditor-General in his annual audit reports has exposed an environment of unprecedented permissiveness for corruption at both the national and county levels. He indicated in his 2013/2014 report, that only 1.2% of the government expenditure could be properly accounted for¹². *The Annual Corruption Perceptions Index (CPI)* published by Transparency International in 2016 ranked Kenya at position 145 out of 178 countries in the world¹³.

Other reports such as Global Economic Crime Survey (Pricewaterhouse Coopers, 2014) and the Kenya Youth Survey Report (The East African Institute of the Aga Khan University, 2016) reveal persistent impunity in the management of public resources, including in the last concluded political party primaries and the on-going campaigns. Perhaps it is on that basis that anti-corruption pundits have described Kenya as the most rapacious state that has created an atmosphere in which civil servants, politicians and businessmen engage in corruption on a grand destructive scale¹⁴.

¹² Auditor General Report 2013/2014

¹³ Transparency International; (2016) Corruption Perceptions Index (CPI)

¹⁴ <http://bit.ly/2INUM9D> . Daily Nation newspaper; John Githogo interview; corruption in Kenya worse than ever

This problem is perpetrated by state capture¹⁵ and the lack of political will to intervene appropriately. Despite the rise in cases of public theft, there is little or no consequences for perpetrators, many of whom have been heavily mentioned in a series of scandals. Moreover, there are inadequate mechanisms to determine the integrity threshold. The current system that utilizes criminal standards to determine integrity thresholds have failed. Further, the thresholds are too low that perpetrators have found a way to easily get away with anti-corruption crimes and attempts to bar them from holding public offices¹⁶.

The foregoing raises the following questions:

- *What political actions will you initiate to communicate a very strong statement and commitment that you won't tolerate any plunder of public resources?*
- *What policy actions will you effect to support accountability for culprits, recover the stolen resources and deepen integrity in the management of public affairs?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Showing a genuine will and interest in battling public theft and waste. The accused must not just be prosecuted but also be sacked and barred from state appointments.*
- *Undertaking wealth declaration for public officials before they assume offices. Such made be lead by the Presidency and all documents made public.*
- *Complimenting this with public lifestyle audits and assets recovery mechanisms so as to deal with any illegally and irregularly acquired wealth.*
- *Creating a conducive environment for anti-corruption agencies to establish policy frameworks and ethical standards in line with the Chapter 6 on the Constitution on Leadership and Integrity.*
- *Disrupting the deeply entrenched culture of looting the public and private coffers by introducing ethics and good governance studies in schools.*

3. Protection of Civic Space and Civil Liberties¹⁷

The expansion and protection of civic space and liberties in Kenya has come a long way, right from the struggles for independence and reforms, to the adoption and implementation of the new Constitution and other legal frameworks. Moreover, in January 2013, the then president Mwai Kibaki assented into law the Public Benefits Organizations (PBO) Act of 2013, a new legal framework that is intended to ensure a more efficient, transparent and publicly accountable civil society sector with effective leadership.

¹⁵ The existence of cartels within the elite class with enormous influence to manipulate state policies and institutions, particularly anti-corruption agencies/institutions and policies.

¹⁶ While the Independent Elections and Boundaries Commission (IEBC) got a list of 106 suspects from the Ethics and Anti-Corruption Commission (EACC) for consideration during the clearing of candidates, it was impossible for the elections body to lustrate them. See "IEBC in dilemma over clearance of aspirants with integrity issues" Read more at: <https://www.standardmedia.co.ke/article/2001241901/iebc-in-dilemma-over-clearance-of-aspirants-with-integrity-issues>

¹⁷ See full document with detailed recommendations by ICNL, KHRC & CSRG titled "Civil Society Agenda for the State and Political Leadership in the Context of the 2017 General Elections and Beyond".

However, between 2013 and 2015, there were no less than 5 attempts by Parliament to amend this fairly progressive law in what was a seemingly serious and malicious intent to cripple the Civil Society Organisations (CSO) sector. In 2016, major strides were made with the Cabinet Secretary for Devolution and Planning, Hon. Mwangi Kiunjuri on September 9th announcing the commencement of the PBO Act, without any changes on it. On October 31st 2016, the High Court also gave a ruling compelling the Government to gazette the Commencement by 11th November 2016.

Despite this directive and legal order, the Act is yet to be operationalized. CSOs resorted to going back to court, and on 23rd May 2017, the high court found the Cabinet Secretary (CS) in charge of the Ministry of Interior and National coordination in contempt of court for failing to heed to the 1st judgment of October 2016, ordering again commencement within 30 days thereof. The 30 days have since elapsed, and the Act is yet to be commenced. The government remains in contempt of court.

During this period, CSOs have also been faced with threats and intimidation from the state, through attempted mass deregistration exercises by the NGO coordination board on grounds of alleged noncompliance with the law, embezzlement of and diversion of donor funds, money laundering and financing of terrorist activities, among other allegations.

In December 2014 and December 2015, a total of 540 NGOs and 959 NGOs respectively were targeted for deregistration by the NGO Coordination Board, an attempted exercise that failed to demonstrate substantive grounds for cause. A final blow to the sector was dealt in October 2016, when the sector was moved from the Ministry of Devolution and Planning to the Ministry of Interior and Coordination of National Government in October 2016, without any due consultation with the CSO sector.

Moreover, there have been many attempts to frustrate the operations of other independent actors, voices and institutions in Kenya, (including the media, bloggers, faith based organizations, trade unions, courts, state commissions and independent offices) through retrogressive legal and administrative frameworks.

With regards to media freedom, although Kenya's 2010 constitution sought to ensure that the country's media and its information, communications, and technology sectors develop and thrive, a report by the Committee to Protect journalists¹⁸ shows that there are worrying signs that old efforts to control the media are undermining this freedom through the passage of poorly drafted and restrictive legislation, commercial pressures, and threats and attacks on individual journalists and bloggers.

¹⁸ Report by Committee to protect journalists, "Broken promises How Kenya is failing to uphold its commitment to a free press" A special report by the Committee to Protect Journalists

According to the report, there were an estimated 19 cases of threats or attacks against the press between January and May 2015, almost one each week, and all but three involved police or other state officials, including members of county assemblies. A 2013 survey by the Kenya Media Programme polled 282 journalists across the country and found that the media is regularly induced to self-censor on crucial issues such as politics, corruption, and land. More threats against the press are made over the phone than by any other means, according to the survey.¹⁹

The foregoing raises the following question:

What political and policy mechanisms will you put in place to create a conducive and enabling environment for civil society and other independent voices and institutions in Kenya?

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Immediately gazetting and operationalizing the PBO Act 2013 and refraining from efforts to restrictively amend the PBO Act and other laws.*
- *Improving and facilitating the operational infrastructure, without constraints and hindrances to legitimate actions by civic actors, other non-state actors and independent state institutions.*
- *Creating a consultative, partnership and other support programmes for developing CSO capacity and effectiveness.*
- *Continuing to make the case for civil society to flourish everywhere and to defend it wherever and whenever it is under attack.*

4. Security Governance

The security and safety of all Kenyan citizens is a an obligation that is solely vested in National Security Organs like the Kenya Defence Forces, the National Intelligence Service and the National Police Service²⁰. Constitutionally these organs are mandated to discharge their obligations in compliance with the law, respect for the rule of law, democracy, human rights and fundamental freedoms²¹.

Despite an abundance of resources being invested in security sector reforms, human rights violations at the hands of security agencies persist alongside low levels of accountability for culpable security officers. The persistent trends of violations include undue force in the policing of public protests, human rights abuses arising from counter-terrorism measures²² and most worryingly the escalation and normalization of extra-judicial killings and executions.

¹⁹ Ibid

²⁰ Article 239 (2) of the Constitution of Kenya 2010.

²¹ Article 238 (b) of the Constitution of Kenya 2010.

²² <http://www.khrc.or.ke/mobile-publications/civil-political-rights/24-insult-to-injury/file.html>

Statistics indicate that 141 persons were killed by the police in 2015 while 204 were killed in 2016 and 80 persons as at June 28, 2017. The demographic of these killings is often youthful persons from low income areas.²³ The increased cases of extrajudicial killings and summary executions have even drawn the attention of the African Commission on Human and Peoples' Rights (ACHPR) who have issued a letter of appeal to the Kenyan government decrying the widespread patterns of these killings, the culpability of the police and the lack of investigations and prosecutions on the same.²⁴

The findings in the reports by state agencies on the IEBC protests²⁵ and the Langata School playground protests²⁶ remain unaddressed. Some findings include: Death and serious injury, abuse of firearms, a worrying assumption that protesters would be violent, poor communication, coordination, control and command, contravention of the rights of arrested persons, displays of partisanship in policing decisions such as whether or not to ban political demonstrations or rallies, the absence of medical aid as part of public order management and the failure to interdict officers deemed culpable of rights violation or improper conduct.

The security sector also remains an area of scrutiny with regard to corruption. The Auditor General's report of 2014/15 deemed KES 4,617,843,750 expenditure by the State Department of Interior to have been wasted while in that of Defence, KES 1,102,678,054 was deemed as wasted.²⁷ These illustrations call to question the impact of police vetting, the extent of political support for comprehensive security sector reforms and the utilization of resources on these reforms.

Moreover, there are numerous incidents of insecurity in many parts of the Country. Violent extremism and terrorism by the Al-Shabaab militia and extremists has increased in some parts of Kenya over the past years with many citizen's being victims of multiple terror attacks. In this year alone, three police officers were killed when their vehicle hit an improvised explosive device at the border town of Liboi²⁸ near the country's eastern border with Somalia. On the 31st of May 2017, 4 policemen and a civilian were killed after an Al Shabaab militant attack in Kiunga, Lamu.²⁹

²³ <http://www.nation.co.ke/newsplex/deadly-force-database/2718262-3402136-ms1o0nz/index.html>

²⁴ <http://www.achpr.org/news/2017/06/d290>

²⁵ <http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf>

²⁶ <http://www.ombudsman.go.ke/wp-content/uploads/2016/04/Investigation-Report-on-use-of-excessive-force-by-police-officers-and-improper-conduct-by-other-public-officers-during-the-Langata-Road-Primary-School-Demonstration.pdf>

²⁷ <http://www.nation.co.ke/news/Auditor-General-questions-Sh3-8bn-expenses-at-Interior-ministry/1056-2942920-bgi5bu/index.html>

²⁸ <http://bit.ly/2th1rBp>

²⁹ <http://bit.ly/2sVOycS>

The proliferation of illegal firearms and sporadic cattle raids by armed bandits in the North Rift has contributed to instability and insecurity in that region. The latest report on the Annual State of National Security submitted to parliament disclosed that over 600,000 illegal fire arms were in circulation within Kenya³⁰. These arms are especially found amongst the pastoralist communities in North Rift, North Eastern and Upper Eastern. Recent incidents of inter-clan clashes between the Pokot and Turgen communities have led to deaths³¹ and massive displacements of over 4,000 people.

The foregoing raises the following questions:

- *Will you acknowledge extrajudicial killings and executions as a systemic issue in the security sector and how do you intend to hold culpable officers to account?*
- *How do you intend to address the wastage and corruption within the security sector given its opaque procurement procedures?*
- *How do you purpose to address the security challenges posed by the terrorists, militias, bandits and other organized groups and gangs?*
- *How do you intend to resuscitate security sector reforms in line with the vision of Agenda 4 and the Constitution?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Commissioning an audit on the state of security sector reforms with a pledge of political support to prioritize and fast-track the pending security sector reforms. In particular, the vetting process of the police must be reopened to the public and include human rights abuses as a factor for consideration.*
- *Enhancing accountability for the security agents involved in violation of human rights and failing to respect the rule of law. This should include both criminal and civil liability at the individual and command responsibility levels.*
- *Immediately constituting a judicial commission of inquiry on extrajudicial killings and executions in Kenya as a pathway to accountability in this critical area.*
- *Addressing the key drivers of insecurity in Kenya that include youth unemployment, poor working conditions and terms of service for the police officers which incentivizes corruption.*
- *Creating an explicit and unequivocal repudiation of shoot-to-kill orders and undue use of force in policing of protests with a guarantee of prosecuting officers found culpable.*

³⁰ <http://bit.ly/2tQAilQ>

³¹ <http://bit.ly/2sVFVyR>, <http://bit.ly/2tdWNDr>

5. Ethnic Exclusion

Ethnicity has been used as a basis of inclusion and exclusion in all governance and development processes in Kenya. Kenya can proudly celebrate over 50 years of being a state but the same cannot be said of Kenya as nation. It is on that basis that the Constitution seeks to introduce inclusiveness in all spheres of life - political, social and economic. However, disparities and exclusion are still glaring in the country; despite the constitution having provided mechanisms to stop the domination of majority ethnic communities³² over the minority or even the mobilization of citizens along ethnic lines.

Whereas it addresses various forms of discrimination, ethnic discrimination currently manifested in the so called “tyranny of numbers” is barely understood and seldom discussed with the weight that it deserves. Resultantly, Kenya still lacks a sense of a national identity with which all ethnic groups identify with. Kenyan citizens identify more with their ethnic groups than Kenya as a nation. A look at the country in terms of infrastructure and national appointments and employment in the civil service shows marginalization taking a regional shape with an ethnic face.

These has resulted in the marginalization of most of the ethnic communities that are low in population. The 2013-2017 cabinet is the least balanced since independence. The Kikuyu and the Kalenjin, which are the president and deputy president’s ethnic groups, are disproportionately over-represented comprising 50% with each having 25% share of the executive appointments and the Somali coming in third at 15 %, The other communities are therefore left to share the 35%³³.

The Jubilee government however must be lauded for significantly empowering minority communities through cabinet appointments, both in terms of numbers and the weight of their cabinet portfolios. The problem is manifested in parastatal appointments. The Kikuyu have the largest share of parastatal Chief Executive Officers (CEOs) (22.2%), followed by Kalenjin and Luo’s at 16.2%³⁴.

In other words, nearly 40% of all parastatal CEOs are from the president and deputy president’s ethnic groups. The problem is further exacerbated by the fact that the ethnic group of each parastatal CEO tends to have more employees in that parastatal than the other ethnic groups. In constitutional commissions, the largest representation in the employment of Commissions is made up of the Kikuyu at 22.2%. With the Kalenjin (12.8%), Kamba (11.3%), Luhya (11.1%)

³² The big 5 comprising of the Kikuyu ,Luhya , Kalenjin ,Luo and the Kamba who comprise 64%of the total population size

³³ See NCIC 2016 statistics

³⁴ <https://www.cohesion.or.ke/images/downloads/Ethnic%20and%20Diversity%20Audit%20of%20Parastatals%202016.pdf>NCIC 2016

and Luo (9.4%) coming in high proportions as well. There is an inclusion of ethnic minorities at 19.3 percent representing communities like the he Maasai, Njemps, Rendille, Orma and the Ogiek.

This background clearly shows that ethnic mobilization and balkanization is a strategy applied across to marshal political support to ascend into political office and is subsequently used in distribution of resources and key government appointments. The big ethnic tribes of Kikuyu, Kamba, Kalenjin, Luhya and the Luo, who constitute 64% of the total population, dominate the space and occasionally tag the Somali, Kisii and Meru but blatantly leave out the other communities.

This therefore informs the subsequent distribution of resources on ethno- regional basis in terms of employment, appointments and public funds thus leading to highly skewed development and a poor level of nationhood for most. This national problem is also replicated at county levels, where the “dominant” community ends up taking a bigger share of resources and opportunities at the expense the minorities³⁵.

The foregoing raises the following questions:

- *To what extent are you managing the deployment of ethnic mobilization in your campaign for 2017?*
- *Once elected how will you ensure that Kenyans of all ethnic communities feel a deep sense of belonging in your government?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Adopting a proportional representation system of elections for the presidency and gubernatorial positions so that political parties can grow in ideology and the executive positions of the presidency and governor can have a broader support and legitimacy base.*
- *Supporting devolution by fully devolving all the devolved functions with the requisite set of resources to the county governments since devolution offers a great mechanism for distribution of resources and power.*
- *Increasing quotas and other affirmative action measures for the employment and support of the ethnic minorities at the national and county levels.*
- *Operationalizing the equalization fund and clearly defining marginalized groups at national level and the county levels.*
- *Including all ethnic grouping the national census to allow for planning and future monitoring and involvement.*

³⁵ At the country levels, some of the majorities may be the minority groups at the national level.

6. Economic and Social Rights

Economic and Social Rights(ESR) are designed to ensure the protection of people as full persons, based on a perspective in which people can enjoy rights, freedoms and social justice simultaneously. These rights are fully recognized by the international, regional and national frameworks of governance. Nationally, ESR are enshrined in Article 43 and other sections of the Constitution of Kenya which provides for the right of every Kenyan to: the highest attainable standard of health; accessible and adequate housing and to reasonable standards of sanitation; be free from hunger and to have adequate food of acceptable quality; social security; education; and clean and safe water in adequate quantities. Evidently, Kenya is lagging behind in each of these areas. We focus on a few:

First, is the right to health. Despite significant gains in promoting awareness of health and wellness in Kenya, preventable diseases remain a serious issue. Malaria is one of the country's biggest problem, with 6.7 million new cases and 4,000 deaths each year, particularly among children under 5 years³⁶. Additionally, although the rate of HIV infection has slowed in recent years, millions of families are still impacted by AIDS. Poor sanitation in urban areas and a lack of affordable medications in rural communities further contribute to the spread of disease.

The delivery of healthcare by public healthcare facilities in Kenya has in the recent past been punctuated by incessant industrial action by practitioners. Kenya recently witnessed the longest strike by doctors (100 days) which was quickly followed by a strike by nurses which is still ongoing. Just like it has been with other strikes by public officers, the response by the government to the recent strikes by doctors and nurses was an immediate declaration that the strike was not legal followed a refusal to respond to the issues raised by the striking officers. This issue is discussed further in section 7 below.

Access to basic healthcare is still out of reach for the majority of Kenyans. Among the reasons for this state of affairs is the low doctor to patient ratio which stands at 1:17,000 in sharp contrast to the World Health Organization requirement of 1:1,000. This is despite the fact that Kenya produces 600 doctors a year, many of whom do not get employment.

Additionally, according to an official of the Kenya Medical Practitioners, Pharmacists and Dentists Union³⁷, Kenya loses an average of 25 doctors a year through brain drain. Further to this, doctors are poorly distributed throughout the country with a good number of them concentrated in cities leading to low quality of treatment in remote areas. Poor wages and ill-equipped facilities have also been major inhibitors to access to healthcare. All these, point out to poor governance of the healthcare system which formed part of the substantial issues underpinning the now ended doctors' strike.

³⁶ https://www.cdc.gov/malaria/malaria_worldwide/cdc_activities/kenya.html

³⁷ Kenya producing 600 doctors a year but counties not hiring – survey http://www.the-star.co.ke/news/2016/02/04/kenya-producing-600-doctors-a-year-but-counties-not-hiring-survey_c1289115

Second is the right to education. While the Free Primary Education (FPE) program has increased access to primary education especially among poorer households, ancillary costs of primary education such as school uniform, school infrastructure development and refurbishments costs, among other expenses shouldered by parents and guardians, continue to hinder the educational attainment of many children. In addition, the provision of quality education remains a challenge. Several research reports by Uwezo Kenya have brought to the fore glaring inadequacies of the basic education system in Kenya and its inability to deliver quality education.

In its 6th annual assessment of basic literacy and numeracy skills, Uwezo found that children are still not learning as they should, a constant in all its earlier reports. In the report³⁸ published in 2016, it emerged that on average, only 30 out of 100 class 3 pupils could do Class 2 work, while 8 out of 100 pupils in class 8 could not. Other issues that emerged in this report were low teacher to classroom (stream) ratio (Mandera and Garissa recorded the lowest ratio), high teacher and student absenteeism, high numbers of untrained teachers in primary schools (only 40% are trained), admission off children at the wrong age among other issues. All these issues affect learning to a large extent and have greatly contributed to the low competence of students and impacted the employability of graduates of various secondary and tertiary institutions in Kenya.

Third is the right to environment. The right to a healthy environment is recognised in both international and regional conventions. Article 12 (2) (b) ICESCR requires states parties to improve ‘all aspects of environmental and industrial hygiene’. The Economic, Social and Cultural Rights(ESCR) Committee states in General Comment 14 that the right to a healthy environment includes, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; and the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. Furthermore, industrial hygiene refers to the minimization, as far as is reasonably practicable, of the causes of health hazards inherent in the working environment.

More over climate change is perhaps the most considerable environment challenge of our time and one that has impeded the right to a healthy environment. Changing precipitation patterns, arising from climate change, such as drought and shorter but more intense rainfall, have been increasingly common in Kenya in recent years and have had negative direct and indirect impacts on health, food insecurity, migration and increased conflict.

A key feature of this has been desertification and flooding. The latter was clearly witnessed during short rains in May this year in places like Mombasa, a situation that highly restricted movement and resulted to a number of casualties. The most impacted have been indigenous

³⁸ Uwezo Kenya, (2016), **Are our Children Learning?**, Uwezo Kenya 6th Learning Assessment Report

populations, poor and socially marginalized individuals, women and people with disabilities. Further, the damaging effects of environmental pollution on human beings and their quality of life have increased dramatically.

Finally, is access to water and food of adequate quality. While we have developed many laws and policies in respect to these, we are still facing practical challenges as demonstrated by the acute deficiencies and the poor supplies of these resources owing to natural and human factors. The current and unprecedented shortage of food stuffs such as maize flour (popularly known as “unga” in Kiswahili) and scarcity of water in many urban and semi-arid areas in the country is a case in point.

The ICESCR requires States “to take steps” to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. This notwithstanding, states MUST take immediate action, irrespective of the resources they have, in five areas: elimination of discrimination; economic, social and cultural rights not subject to progressive realization; obligation to “take steps”; non-retrogressive measures; and minimum core obligations.

The foregoing raises the following questions:

- *What plan do you have for the realization of economic and social rights, and the emerging issues impeding these rights discussed above?*
- *What do you intend to do to foster equity of access and good governance at county and national levels for the realisation of these rights?*

We seek a political commitment to Kenyans towards the following:

Recommendations

- *Taking immediate policy and administrative measures to addresses the 5 ECOSOC rights. That also entails adopting the rights based approaches to social and economic development.*
- *Putting in place measures to curb corruption through which colossal amounts of funds that would otherwise be used for the attainment of economic and social rights, are lost.*
- *Providing the necessary resources and policies to County Governments that are largely responsible for the delivery of basic services.*
- *Curbing poverty and inflation levels-the hindrances that make it problematic for the poor and other disadvantaged groups and persons to access and enjoy those rights and services.*
- *Ratifying The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Such would clarify our obligations and accountability on those rights.*

7. Labour Rights and Industrial Democracy

Article 41 of the Constitution of Kenya provides for the right of every worker to form or join a union of their choice. Further, Kenya has ratified ILO Convention 98 on the 'Right to Organise and Collective Bargaining' and has, by dint of Article 2 (6), domesticated the Convention. The right to organize is a fundamental right upon which most of the other labour rights are premised.

However, a vast majority of workers especially those in precarious work³⁹ and in the informal sector do not enjoy this right as they remain largely unrepresented. Kenya has the highest informal sector employment at 77.9% ahead of Rwanda (73.4%), Tanzania (8.5%) and Uganda (59.2%). In Egypt, Liberia, Madagascar, Mauritius and South Africa, the sector offers jobs to 51.2, 49.5, 51.8, 9.3 and 17.8 per cent of workers, respectively⁴⁰.

Situations are not any better for the unionized workers because of the lack of goodwill by the employers (both state and non-state), government and courts to enforce the Collective Bargaining Agreements (CBA) and apply Alternative Dispute Resolution (ADR) mechanisms effectively. These lead to endless strikes and other industrial actions that if unresolved on time, affect the provisions of services. This is mainly attributable to an exploitative political system and an economic model that prioritises capital at the expense of labour.

Kenya adopted the capitalist mode of production after the colonial era and has sustained this mode of operation since. In 1966 for instance, a number of trade union representatives were arrested and detained without trial. History has repeated itself several times with the arrest of 42 teachers and union officials in 2009 over participation in demonstrations and most recently in February 2017, the arrest of 7 officials from the Kenya Medical Practitioners Pharmacists and Dentists Union (KMPDU) for refusal to call off a strike. The raging strike by the doctors spanning over 100 days and the current strikes by the nurses and the lectures point to a lack of interest by the government to restore the much-needed harmony in the affected sectors.

The foregoing raises the following questions:

- *What mechanisms do you intend to put in place to ensure that un-unionised workers, especially those in precarious employment, are not exposed to labour violations as a result of not organising? Further, how do you intend to ensure the voice of such workers is heard without occasioning victimisation (to the workers)?*
- *What interventions do you plan to put in place to ensure labour disputes are resolved amicably and sustainably without jeopardising access to fundamental human rights while at the same time safeguarding the right to organise and to collective bargaining?*

³⁹ Work that is easy to find and lose at the same time, especially in the agricultural sector, textile Export Processing Zones and domestic work where meagre pay impedes most workers from joining trade unions

⁴⁰ Business Daily, June 25, 2015

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Striking a balance between the interests of labour and those of capital. There should be a modality to 'disincentivise' corporates from blatant abuse of human rights. Some of the proposed disincentives include revocation of licences and work permits, and imposition of heavy penalties.*
- *Ensuring that the Ministry of the East African Community, Labour and Social Protection effectively engages in resolution of disputes without curtailing the right of workers.*
- *Ensuring that the Employment and Labour Relations Court plays a facilitative role and not a punitive role where strike actions are concerned.*
- *Establishing a department within the Ministry of Labour where all unrepresented workers submit occasional reports on status of their labour rights. This should be multi-stakeholder initiatives.*
- *Regulating, through the Registrar of Trade Unions, the amount of money paid by workers as union dues and cap it as a percentage of workers' net pay. The Registrar must also establish a participatory mechanism for accountability of trade union dues.*

8. Devolved Governance

The promulgation of the 2010 constitution ushered in a new era of devolved governance in Kenya⁴¹. Devolution is designed to bring government closer to the people and allow them to take charge of their development initiatives at their local levels. It also envisions timely and efficient delivery of public services, equitable distribution of public resources and seeks to eliminate political tensions normally witnessed at the national level.

Since its inception, devolution has recorded a number of successes: marginalized counties in the north got their first stretch of tarmac roads (Mandera and Wajir), better health facilities in counties like Garissa and is also responsible for the rapid development of most of the Kenyan rural economies, increased opportunities for private investments hence the rise in hospitality and real estate industries, increased employment opportunities and accessibility to public services. In addition, the expansion of political space coupled with attempts to engage local citizens in county governance has renewed a sense of self-determination among many Kenyans.

Despite the successes, devolution has had its fair share of setbacks, key among them corruption, poor and inadequate service delivery and ineffective public engagement in key decision making and implementation processes. Corruption remains the greatest threat to devolution. The annual Auditor General reports⁴² reveals massive wastage of public funds, misplaced priorities and poor administration of resources that continue unabated. County government officials, rather than prioritize development, have influenced the allocation of resources to projects that generate kickbacks and trips that generate hefty allowances.

⁴¹ Kenya has a two tier government that are distinctive and inter dependent

⁴² Article 229 (4) of the COK, mandates the Auditor General to audit and report accounts of the national and county governments within six months after the end of each financial year.

Inadequate capacity (technical & financial) has also undermined devolution. This has been exemplified by, a) inadequate legislative and oversight capacity of most Members of County Assemblies (MCAs), b) low capacity of counties to deliver quality services in an efficient and timely manner, c) inadequate capacity of the public to play their oversight role and hold duty bearers accountable and d) failure to implement key legal and constitutional requirements such as the one-third gender rule in county employment opportunities and 30% public procurement reservation scheme.

While the national government has argued that counties lack the capacity to absorb more than 15 per cent of the total national revenue collected⁴³, governors view this position as a strategy to frustrate the effectiveness of county governments. Indeed, the Council of Governors (COG) has made been accusing the national government of delaying the full devolution of functions and the disbursement of funds⁴⁴.

The foregoing raises the following questions:

What mechanisms will you put in place to protect, defend and effectively implement devolution?

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Resource the auditor general office and implement his annual reports' recommendations. In addition, conduct lifestyle audits for county officials, recover assets acquired through corrupt means and jail perpetrator. The EACC need to effectively enforce counties code of conduct.*
- *The national government needs to meaningfully engage the counties on the question regarding governors' quest to have more than 15 per cent of national revenue collected allocated to the counties. The increase should be premised on functions and seal loopholes for wastage so as to harvest maximally in service delivery.*
- *Counties through the COG and Counties Assemblies Forum (CAF) should engage relevant institutions through partnerships to undertake capacity building of the counties. Kenya has the requisite expertise both in and out of government to undertake this function. The national government must ensure that the necessary environment prevails for this function.*

9. Women's Inclusion in Governance

In the 2013 General Elections, less than 5% of women were elected across all political parties to the county assemblies and the national assembly. Moreover, no woman was elected as a senator, governor, president or even deputy president. In line with the affirmative action measures in the constitution, in terms of gender representation, women in the national assembly of

⁴³ Article 203 (2) of the COK; By law, counties are entitled to at least 15 per cent of the total National Revenue collected

⁴⁴ <https://www.standardmedia.co.ke/ktnnews/video/2000129175/-council-of-governors-blame-government-of-withholding-funds-cripling-devolution-prime-pt-3>;

Kenya constitute 19%⁴⁵ of the total number of legislators which is way below the set threshold. Subsequently, the national government has been found by the High Court not to have complied with the two-third gender rule in the current cabinet.

Additionally not a single appointment to state institutions complies with the said constitutional rule. An analysis by the National Gender and Equality Commission of key state corporations indicated that women form only 11.1% of the chairpersons with men taking the rest of the leadership⁴⁶. The current key political formations and parties have no women in key positions of power. Both the National Supper Alliance (NASA) and Jubilee party (the main political players) have their principals as men⁴⁷.

Moreover, all the eight presidential candidates are men. Just like in 2013 not a single political party can be said to have complied with the two-third gender rule in the list of candidates per county and nationwide. The enactment of a mechanism to ensure full implementation of the two-third gender has seen over 6 motions fail in Parliament over the last 3 years. No political leader on both sides of the divide has whipped adequate support for the adoption of the implementation mechanism.

The foregoing raises the following questions:

- *Why does the political class perennially fail to put in place a mechanism for equal representation and effective inclusion of women in decision making processes?*
- *What mechanisms will you put in place to ensure immediate enactment and implementation of a law and actions towards the realization of the Two-Thirds Gender principle?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Upholding and fully implementing the two third gender rule as provided for in articles 27(6) (8) and 81(b) to protect respect ,promote and fulfill women's rights in political and public life.*
- *Ensuring that the next national assembly enacts a legislative mechanism for implementation of the two-third gender rule within the first 6 months in office.*
- *Ensuring full implementation of the legal and constitutional provisions in both the appointive and elective positions.*

⁴⁵ <http://www.ngeckkenya.org/Downloads/Status%20of%20Equality%20and%20Inclusion%20in%20Kenya.pdf>

⁴⁶ <http://www.ngeckkenya.org/Downloads/Equality%20and%20inclusion%20in%20state%20corporations%20in%20Kenya.pdf>

⁴⁷ While NASA has five, Jubilee has two.

10. Youth Inclusion in Governance⁴⁸

Articles 55 of the Constitution recognizes the place of youth in decision making processes at all levels. The State is specifically mandated to take measures, including affirmative action programmes, to ensure that the youth access relevant education, training and employment and have opportunities to associate, be represented and participate in political, social, economic and other spheres of life.

Support for the youth seems to have been largely limited to the establishment of three mega youth development initiatives — the Uwezo Fund, the preference and reservation of 30 per cent of all public procurement for young people, and the revamped National Youth Service (NYS), all of which have missed the targeted results by far.

At least 78 percent of the Kenyan population is under 35 years old, meaning a massive youthful population remains largely marginalized and excluded from governance and development processes. Today, official statistics show that Kenya's unemployment rate stands at 40 per cent. Sadly, seven out of every 10 people who are jobless are youth, who also constitute 60 per cent of Kenya's population. This has exposed them to massive poverty and vulnerabilities that expose them to crime.

Over the years, politicians have used youth to ascend to power only to abandon them immediately after. Young people are treated as voting banks, people whose only value is their numbers. Youth are not accorded enough influential slots in party leadership commensurate to their numbers.

The foregoing raises the following question:

What are the plans for ensuring effective participation of the youth and resolution of their issues during and after the elections?

Recommendations

- *Creating a comprehensive plan for decent and well-paying jobs for the youth. This will entail remodeling education to provide skills required in the market - 21st century curriculum.*
- *Reviewing the National Youth Policy (2006) to align with the current laws and reality and formulate policies to make the youth fund and medical care more accessible. There is also a need to tackle corruption which takes away resources meant for youth development.*
- *Implementing Articles 55 and 100 of the constitution and ensuring that the youth are involved in decision making and appointed to public office.*

⁴⁸ For detail see: “**Kenya Youth Manifesto shows a new dawn**”. On April 14th, 2016, The Youth Congress, and Coalition of Youth Organizations launched Kenya Youth Manifesto at the Zetech University in Ruiru. The manifesto seeks to ensure that youth issues are well articulated, and placed at the top of the agenda in the run up to the elections. The youth manifesto initiative is expected to take its own life and help the young people to emerge as a serious political constituent. The Youth Congress is one of the KHRC's partner Human Rights Networks (HURINETs) based in Nairobi.

11. Citizenship, Statelessness and Universal Registration of Births

Kenya is home to over 20,000 stateless persons according to the UNHCR statistics. In 2016, the Makonde community were recognized and granted citizenship as scores of individual stateless persons have also been granted the same. However, communities like the Pemba, people who migrated from Burundi and Rwanda, the Galjeel and the Shona communities remains undocumented persons and unplanned for by the government. Kenya still has over 30% of its population as not having been registered and over 10% as undocumented. Acquisition of identity cards in Kenya is reported to be one of the areas that records the highest levels of corruption.

In addition, there exists varying requirements and processes for Kenyans across the country particularly for the Somali and other border communities. The processes are so protracted as the acquisition of an identity card takes between 6 months to over 5 years. In recent times, opposition strongholds seem to have faced differential standards and varying timelines in the acquisition of national identity cards. Since time immemorial, there is no document that acts as conclusive proof of nationality for Kenyans by birth, they are thus put through winding processes of vetting that are very uncertain and subjective⁴⁹.

The foregoing raises the following questions:

- *What will your government do to ensure 100% universal registration of births, eradication of statelessness and equal access to identity and registration documents for Kenyans regardless of ethnic community or political affiliation?*
- *What will your government propose to be a conclusive proof of Kenyan Nationality?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Ensuring that at least 95% of the population is registered at birth and nationality is determined and declared by the state within 3 years of age*
- *Recognizing and granting citizenship to all stateless persons in the next 2 years*
- *Conducting biometric registration of Kenyans for the national identity card between the ages of 13-16 years*
- *Operationalizing and putting in place measures for data protection of the Integrated Population Registration System (IPRS) which will capture and synchronize all data with respect to an applicant from birth to death hence enhancing efficiency and minimizing possibilities of fraud, irregular or multiple issuances of vital documents.*

⁴⁹ <http://www.ombudsman.go.ke/wp-content/uploads/2016/04/Investigation-report-on-the-crisis-of-acquiring-identification-documents-in-Kenya.pdf>

12. Violence and Discrimination on Grounds of Sexual Orientation and Gender Identity and Expression

Almost seven years since the passing of the new Constitution, members of the lesbian, gay, bisexual, transgender, and intersex community (LGBTI) continue to suffer from abuse on grounds of their sexual orientation, gender identity and expression. Statistics by the KHRC and other organizations have documented abuses and violations including police harassment, murder, physical assault, blackmail, kidnappings, and sexual harassment, as well as discrimination at work, at school, and at home.⁵⁰

KHRC and other LGBTI rights organizations blame Kenya's colonial era laws for a substantial part of the violence and the discrimination members of the LGBTI community experience in the country. Although activists have over the past few years challenged anti-LGBTI discrimination in court, sometimes culminating in significant victories⁵¹, the executive branch of government has failed to implement these decisions and in some cases fervently pursued their appeals.

Institutionally, the views of key political figures regarding homosexuality, including by Deputy President William Ruto⁵² and former Prime Minister Raila Odinga⁵³, contribute to the generally held view that violence and discrimination is legitimate in Kenyan society. In 2015, President Uhuru Kenyatta was quoted in the international press stating that his administration would not tolerate violence against members of the LGBTI community.⁵⁴ However, without legal reform to repeal outdated and abusive laws and the passing of laws that outlaw discrimination on

⁵⁰ See, “**The Outlawed Amongst Us: A Study on the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya**”, Kenya Human Rights Commission, 2011 <http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> (accessed July 6, 2017) Also see “**National Gay and Lesbian Human Rights Commission Legal Aid Report: 2016**”, National Gay and Lesbian Human Rights Commission, 2017, <https://static1.squarespace.com/static/581a19852994ca08211fa-ca4/t/58c802d3f5e231994084e9b0/1489502932154/LegalAidReport2016.docx.pdf> (accessed July 6, 2017)

⁵¹ See, for instance, **Republic v Cabinet Secretary Ministry of Health & 2 others Ex-Parte Transgender Education and Advocacy (Suing Through Its Officials) Audrey Mbugua Ithibu (Chairperson) & 2 others [2015] eKLR**. See also, **Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR**. See also, **Richard Muasya v the Hon. Attorney General [2010]**, Petition 705 of 2007. See also, **Eric Gitari v NGO Board & 4 Others [2015]**, Petition 440 of 2013.

⁵² See **Kenya will not allow homosexuality, says DP Ruto**, Standard Digital, May 3, 2015, <http://www.standardmedia.co.ke/article/2000160893/kenya-will-not-allow-homosexuality-says-dp-ruto> (Accessed on July 6, 2017) See also, **DP William Ruto: Homosexuals have no place in Kenya**, Standard Digital, July 5, 2015 <https://www.standardmedia.co.ke/article/2000168074/dp-william-ruto-homosexuals-have-no-place-in-kenya> (Accessed on July 6, 2017)

⁵³ **Odinga Remarks Spark Persecution Fears for Kenya’s Gay Community**, Voice of America, November 29, 2010, <https://www.voanews.com/a/odinga-remarks-spark-persecution-fears-for-kenyas-gay-community-111057574/156941.html> (Accessed July, 6, 2017)

⁵⁴ See **President Kenyatta on gay rights**, CNN Press Room, October 15, 2015, <http://cnnpressroom.blogs.cnn.com/2015/10/18/president-kenyatta-on-gay-rights-in-kenya/> (Accessed July 6, 2017)

grounds of sexual orientation and gender identity, abuses against LGBTI persons will continue. Article 27 (1) of the Constitution states that “*every person is equal before the law and has the right to equal benefit and equal protection to the law.*”

This raises the following question:

What will your administration do to combat violence and discrimination against LGBTI persons?

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Repealing with immediate effect Section 162 (a) and (c) and Section 165 of the Penal Code and withdrawing all appeals to cases in which the High Court ruled in favour of LGBTI rights.*
- *Ensuring the enactment and implementation of a legislation enforcing Article 27 (4) of the Constitution, with provisions outlawing discrimination on grounds of sexual orientation, gender identity, and expression.*
- *Fostering an adoption and enforcement of a law affirming the rights of transgender and intersex persons, especially on the right to have one’s gender marker changed in all government-issued documentation.*
- *Introducing a legislation to criminalise hate speech and incitement to violence on grounds of sexual orientation and gender identity, and expression.*
- *Implementing the commitment of the Kenyan government to introduce an Anti-Discrimination Act addressing discrimination on grounds of sexual orientation and gender identity or expression.*

13. Historical Injustices and Gross Human Rights Violations

Since the Report of the Truth Justice and Reconciliation Commission (TJRC) was handed to the President in May 2013 and tabled in the National Assembly on 2013, The National Assembly is yet to debate and establish an implementation mechanism for the recommendations of the TJRC especially as they relate to reparations for victims.

The President in his 2015 State of the Nation Address committed to offer restorative justice for victims of historical injustices including the 2007 post-election violence through a fund of Ksh.10 billion after conceding that prosecutions for the post-election violence had not taken place. The utilization of these funds has been hampered by the lack of operational guidelines or framework. The government through the Office of the Attorney General eventually committed to developing regulations to govern the operations of the fund and as of July 2017 the process remains ongoing.

In the face of all these developments, numerous victims have not received reparations and remain unrecognized by the State. As a result, there are currently 3 constitutional petitions

before the High Court filed by victims of sexual and gender-based violence⁵⁵, forced migration⁵⁶ and police shootings⁵⁷ all seeking recognition and reparations. This means that the rhetoric on the campaign trail has seen some political actors call for the implementation of the TJRC report while others are re-litigating the causes of the 2007 Post-Election Violence and those responsible. Two of the leading political coalitions have made direct references to the issue of historical injustices in their recently released manifestos.

The Jubilee Coalition has among its achievements touted that it has “closed a painful chapter in our (read Kenya) history” through the President’s apology to the country for historical injustices and the resettlement of Internally Displaced Persons”. NASA which ranks second in the latest opinion polls has made significant pledges to address historical injustices under its pillar of reconstructing nationhood. NASA among other things commits to establish a National Heroes Trust, immediately pay compensation awards made by courts to victims of injustices by the State and establish the Office of Victims of Extra Judicial Killing, Torture, Renditions and Enforced Disappearances.⁵⁸

The foregoing raises the following questions:

- *Will you commit to prioritizing adoption of the TJRC report and establishing an implementation framework for the same?*
- *What is the status of the KES 10 Billion Fund and what measures will be put in place to identify beneficiaries and their holistic needs?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Ensuring that the incoming National Assembly adopts the TJRC report and an implementation framework without further delay.*
- *Ensuring that the next government institutes clear policy and regulations to guide the KES 10 Billion fund as the inception of a reparations fund that will be refinanced in accordance with the victims’ needs.*
- *Creating a comprehensive and transparent process for identification and profiling of victims for future reparation programmes and an audit of the IDP resettlement programme thus far must be undertaken.*

⁵⁵ Nairobi High Court Constitutional Petition No. 122 of 2013

⁵⁶ Constitutional Petition No. 273 of 2011

⁵⁷ **Fact Sheet: Police Shootings in Kenya**, Open Society Justice Initiative accessed at <https://www.opensocietyfoundations.org/fact-sheets/fact-sheet-police-shootings-kenya>

⁵⁸ NASA Manifesto at p.7

14. Land Rights and Injustices

The TJRC in its findings held that the failure of colonial and post-independent governments to address landlessness has caused individuals and communities to turn to violence. In its recommendations, the TJRC called on the National Land Commission (NLC) investigate illegal or irregular acquisition of land and facilitate reparation for affected communities. This recommendation is also in line with the NLC's constitutional mandate to investigate historical land injustices and recommend appropriate redress.

The NLC sought to enact a law on historical injustices but faced inordinate delays until 2016. After a stalled attempt by a taskforce to enact the legislation, the NLC Act was amended via the Land Laws (Amendments) Bill to introduce an amended Section 15 to stipulate provisions on investigating and redressing historical land injustices. The provisions however remain insufficient in terms of elaborating procedures on submission of claims, conditions under which a reparative measure can be undertaken, financing for implementation and the appeals mechanism for decisions. The NLC has proposed regulations to bridge these gaps.

The consequences of failing to address historical land injustices has manifested itself in the contestation witnessed in the renewal of leases and embedded in the conflicts witnessed in Laikipia County and its environs. The Ministry of Lands constituted a taskforce to investigate the renewal of land leases and its work is ongoing. The Jubilee administration has during its term engaged in a policy of issuing individual title deeds around the country but the emergent response has been that this approach has grossly mischaracterized and failed to address the issue of historical land injustices comprehensively.

The question of historical land injustices also continues to be the subject of regional litigation. The African Court of Human and Peoples' Rights (AfCHPR) on May 26, 2017 issued a decision in, *Application 006/2012: African Commission on Human and Peoples' Rights (for the Ogiek) v Republic of Kenya*.⁵⁹ The decision affirmed the land and cultural rights of the Ogiek, and instructed both parties to make specific submissions on reparations after 90 days from the date of the decision upon which the Court will make further orders on reparations. This is the second decision of this kind after the 2010 decision by the African Commission on Human and Peoples' Rights in *Communication 276/2003: Centre For Minority Rights Development (CEMIRIDE) And Minority Rights Group International (MRG) On Behalf Of the Endorois Welfare Council V. Kenya*.⁶⁰

⁵⁹ Available here: <http://en.african-court.org/index.php/56-pending-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>

⁶⁰ http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf

The foregoing raises the following questions:

- *Will you acknowledge that Kenya has yet to confront the true extent of historical land injustices?*
- *How will you prioritize the investigation and resolution of land historical injustices?*
- *How will you rationalize land use and protect community land rights?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Creating an institutional framework that clearly describes the investigation process and the issuance of remedies which include land redistribution, restitution, and/or compensation. This framework must allow for the involvement of local mechanisms in the decision making processes in a manner that embraces the model of free, prior and informed consent.*
- *Fostering an articulation of procedures for submitting claims on historical land injustices and that these procedures prioritize ease of access for claimants.*
- *Providing for the establishment of a clearly defined fund to cater for the outlined redress options as well as how that fund will be managed and resourced.*
- *Operationalizing the implementation of the Community Land Act without further delay.*

15. Business and Human Rights-Corporate Accountability in Investments

For a long time, the terms business and human rights hardly formed part the same sentence. This is because human rights were the business of the state whereas companies were all about generating profit. A major shift has since taken place with the advent of frameworks on business and human rights, among them, the United Nations Guiding Principles on Business and Human Rights (UNGPs). This framework recognizes that companies too (whether public or private, big or small) have human rights obligations. According to the UNGPs companies have an obligation to respect human rights, that means, they should abstain from infringing human rights in the course of their operations.

Further to this, on 26 June 2014, the Human Rights Council adopted a resolution calling for the establishment of an Intergovernmental Working Group (IGWG) to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. A lot of progress has been made with regard to developing a binding treaty on business and human rights.

While Kenya has fully embraced the UNGPs and is in the process of developing a National Action Plan on Business and Human Rights which will in effect contextualize and operationalise the UNGPs, businesses continue to be grossly unaccountable for their conduct thereby causing far reaching human rights abuses. Corporate activities are closely connected to the most basic human rights, namely the rights to work, to adequate standard of living, health and access to a clean environment, among others. Since human dignity is the foundation upon which these and other human rights are based, then it is not too farfetched to invoke the concept of human dignity as the ultimate rationale for the enforcement of human rights responsibilities of companies at the international level.

A key issue of accountability on the part of businesses is tax avoidance⁶¹ especially through transfer pricing and shifting profits to offshore tax havens. Further, Kenya has been identified as one of the countries losing billions of shillings in illicit financial flows. A report by the United Nations Economic Commission for Africa (UNECA) covering 2002 to 2011 showed that the country lost over KSh. 2 trillion of national revenue through illicit financial flows during the period under review⁶². The report corroborates an earlier study by the Danish government that found Kenya's tax loss from trade misinvoicing by multinational corporations and other parties could be as high as 8.3 per cent of Government revenue, hampering economic growth and resulting in billions in lost tax revenue⁶³.

Other issues of accountability include failure by companies to comprehensively disclose the revenue they generate; their disregard of their environmental impacts, some of which are irreversible; and their impact on the resource rights of communities, whose details are captured in the section below.

The foregoing raises the following questions:

- *What do you propose to do to balance between the ever increasing competing development needs and the enjoyment of rights on the one hand and the desire to encourage investments on the other hand?*
- *What measures do you intend to put in place to curb illicit financial flows through mediums such as tax havens, secrecy jurisdictions, disguised corporations, anonymous trust accounts, fake foundations, trade mispricing, and money laundering techniques, all of which deny Kenya much needed resources to provide essential services and undertake infrastructural development?*

Recommendations:

We seek a political commitment to Kenyans towards the following:

- *Strengthening the key institutions such as the EACC, the Office of the Director of Prosecutions, the Department of Criminal Investigations and the judiciary to investigate, prosecute and recover assets acquired through illicit financial flows.*
- *Developing a multi-institutional/ multi-agency approach in combating and preventing illicit financial flows.*
- *Closely collaborating with destination countries of illicit finances from Kenya to enhance the recovery of the stolen funds.*
- *Supporting the Department of Justice and partners to conclude the formulation, adoption and implementation of the National Action Plan/ Policy on Business and Human Rights.*

⁶¹ A business practice of exploiting loopholes in tax legislation in a tax jurisdiction to reduce their tax liability

⁶² UNECA (2011) **Track It! Stop It! Get It! Report of the High Level Panel on Illicit Financial Flows**

⁶³ <https://www.standardmedia.co.ke/business/article/2000179109/kenya-among-african-countries-losing-billions-in-illicit-cash-flows>

16. Resource Rights

While mining in Kenya is not a new phenomenon, the focus on the mining industry as an important contributor to Kenya's economy is a more recent development. Until recently the extractive industry contributed only approximately 1% to Kenya's GDP, and less than 3% to total export revenues⁶⁴. While mining operations have been conducted since the 1930s, albeit on a relatively small scale, prior to the 2012 discovery of oil in Turkana County, the extractive sector was not seen as important to Kenya's development. Currently, the sector faces the following challenges:

- Lack of adequate protection of groups at risk in the mining sector e.g. women, youth and persons with disabilities most of whom are artisanal miners. These groups work in very difficult conditions and are grossly exploited by middlemen since they occupy the lowest point of the value chain.
- Lack of adequate community participation – While this is a constitutional right, in practice, communities living around mining areas have been denied access to critical documents and information that would inform and enhance their participation in the governance of mineral resources for example, various contractual documents between mining companies and the government, land leases etc. This denial has been on the basis of the right to privacy by private actors. Similarly, consultations between key actors (the government, the community and the mining companies) has been very limited.
- Lack of a clear benefit sharing formula arising from mining activities and adequate compensation for displaced persons. This has been a major cause of conflict in places like Kitui and Taita Taveta.
- Transparency around social investment programmes has also been also a source of discord between communities and mining companies.
- Policy incoherence owing to the fact that there are divergent laws and institutions (including ministries) governing minerals, oils, gas, energy and other natural/land based resources, both at the national and county levels.

The foregoing raises the following question:

How do we transform and optimize natural resources in a way that enhances access to rights and benefit sharing by communities and other actors?

Recommendations

We seek a political commitment to Kenyans towards the following:

- *Accelerating the development of the Kenya Mining Vision in line with the Africa Mining Vision and create a supporting legal and regulatory framework in order to enhance transparency, equity and optimal exploitation of mineral resources for sustainable growth, human rights protection and socio-economic development.*

⁶⁴ U.K. Department for International Development, **Kenya Extractives Programme (K-EXPRO) Business Case and Summary, (2015)**, p.9. Available at: <https://devtracker.dfid.gov.uk/projects/GB-1-204339/documents>.

- *Harmonizing or synchronizing laws and policies governing all land based resources, including minerals, oils and gas, energy.*

17. Judicial and Legislative Reforms

We have witnessed many reforms under the Judicial Transformation programme that was initiated by Dr. Willy Mutunga and sustained by Justice David Maraga⁶⁵ from 2011 to date. Such has seen the realization of such results⁶⁶ as: new courts operationalized, court stations increased, case back log reduced, mobile courts increased, judicial officers increased, National Council on the Administration of Justice operationalized, a more humane, open and an independent judiciary realized-with courts making very progressive decisions around the issues documented here⁶⁷.

Moreover, we seen the enactment and amendment of many laws and policies by Parliament in resolution of the above and other issues affecting the public. Such entails the National Policy and Action Plan on Human Rights, Legal Aid Act, Freedom of Information Act, Land Laws among others.

However, these have seen the following the challenges:

- The political class mainly the executive and legislative arms of the national and county governments failing to comply with court orders;
- National and county legislatures formulating unconstitutional and draconian policies and acting as rubber stamps to the executive.
- Continued attacks by the political class targeted at the judiciary, a times threatening to cut its budgets as a results of it independence in decision making.
- Accusations of corruption among the Members of Parliament and judicial officers.
- The poor remains unable to access justice and remedies owing to economic hardships and ineffective justice systems (both formal and traditional).

The foregoing raises the following question:

- *What are your plans towards enhancing and respecting the independence of the judiciary and the legislature?*
- *What is your commitment towards ensuring compliance with court decisions, provisions of the constitution and access of justice of all, more so the poor and marginalized?*

⁶⁵ Dr Mutunga was the Chief Justice from June 2011 to June 2016. Justice Maraga took over from him in September 2016

⁶⁶ For details See: “Judiciary Transformation Score Card-2011 to 2016”.

⁶⁷ For instance: Between 2011 to 2016; the Supreme Court, Employment and Labour Relations and the Land and Environment Courts were set up; High Courts stations increased from 14 to 34, case back logs reduced from 1 million to 426,508; mobile courts increased from 19 to 53; judges and Kadhis increased from 24 to 104 and 15 to 56 respectively.

Recommendations

We seek a political commitment to Kenyans towards the following:

- Upholding the independence of the judiciary and the legislature under the doctrine of separation of powers;
- Providing the necessary political and administrative support to the judiciary for it to execute its mandate effectively.
- Complying with court orders and the provisions of the constitution in policy making processes.
- Auditing and repealing the laws and policies that may be unconstitutional.
- Enacting of the relevant regulations and the operationalization of the Legal Aid Board.

18. Other Key Governance Issues

Enhancing Accountability in Mega Infrastructural Projects.

We take note of the several development initiatives that have been initiated by the Government. “Key among these includes the LAPPSET⁶⁸. Project, the Standard Gauge Railway and the improved road infrastructure that has opened up many parts of the country including marginalized areas like Marsabit County”.⁶⁹ These are also critical in realizing/enabling rights that we care about (right to movement, development etc).

However, we are concerned that most of the mega-corruption scandals in Kenya have occurred in these large scale development projects and have therefore been a conduit through which the country has suffered immense financial losses. Further, we are alarmed by the lack of proper engagement with communities in the life cycle of these projects kind of projects

Moreover, others have largely impacted the environment. The Standard Gauge Railway (SGR) has for instance been faulted on account of destroying the ecology of the Nairobi National Park through which it passes. So far, the Nairobi National Park has lost 100 acres to the project, a matter that many environmental experts have raised concerns about. Similarly, the LAPPSET project has raised many concerns relating to the destruction of the ecosystem.

In conclusion and as noted by the KNCHR, there is a need to ensure effective public participation that guarantees free prior consent⁷⁰ and continuous accountability before the commencement and during execution.

⁶⁸ **Lamu Port and Lamu-Southern Sudan-Ethiopia Transport Corridor** project aka the Lamu corridor is a transport and infrastructure project in Kenya that, when complete, will be the country's second transport corridor.

⁶⁹ See “The State of Human Rights and Freedoms in the Republic of Kenya: Statement by the Kenya National Commission on Human Rights” Nairobi, Tuesday, 14th March 2017

⁷⁰ The aim of **Free Prior Informed consent** (FPIC), is to establish bottom up participation and consultation of people in the beginning of a development project. The concept was initiated in the context of undertaking investments on ancestral land or using resources within the Indigenous Population's territory. www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.

Respecting the independence of State Commissions and Independent Offices. These specialized and oversight state institutions are established pursuant to Chapter 15 of the Constitution and the enabling legislation. Article 249(1) of the Constitution provides that the objects of the commissions and the independent offices are to— protect the sovereignty of the people; secure the observance by all State organs of democratic values and principles; and promote constitutionalism⁷¹.

They are critical in ensuring effective response and remedies to virtually all the governance issues discussed in this brief. Given the challenges they have been exposed to, the executive and legislature should provide the requisite political, moral and financial supports for effective and independent execution of their mandates and provision of services.

Pursuing a people and human rights centred foreign policy: For the last 10 years, the Kenyan State has expanded its leadership within the region and its engagement with the international state and non-state actors. However, there seems to be a move towards a fairly parochial foreign policy and relations that does not seem to fully advance the rights of its citizens and the interests of the country at large.

We have for instance witnessed incidents where Kenyans in diaspora have faced flagrant violations especially those in the South Sudan, Middle East, among other regions without any supports from the government. The unfair and unlawful detention of Kenyans –the so called “The South Sudan 4” is a case in point⁷². Moreover and as indicated above elsewhere, engagements with transnationals and other business enterprises (including state corporations) seems to be driven by economic models that are inimical to public interests.

Thus the extent to which the political system will remain protective of its citizens residing abroad and report on the fulfillment of its international obligations pursuant to Article 131 of the Constitution is critical. Kenya must therefore adopt a progressive foreign policy that’s anchored in values of global good governance, social justice, international justice, and support for democratic values. There is also a need to engage in international business partnerships that are based on the corporate accountability values enshrined in the UN Guiding Principles on Business and Human Rights.

⁷¹ Article 249(2) further provides that the commissions and the holders of independent offices—(a) are subject only to this Constitution and the law; and (b) are independent and not subject to direction or control by any person or authority.

⁷² These citizens continue to be held in South Sudanese prisons without trial or access to justice. Monday 29th April 2017 marked **TWO YEARS** since Kenyan citizens Anthony Keya, Boniface Muriuki, Ravi Ghaghda and Anthony Mwadime were arbitrarily arrested, illegally detained, unfairly tried and wrongfully sentenced in Juba on accusations of complicity in defrauding the office of President Salva Kiir. The four Kenyans were sentenced to 72 years in prison and while the South Sudan Court of Appeal has ordered a retrial for them, they continue to languish in Juba Central Prison with little access to their families, medical attention or legal aid which impedes their access to justice. Despite numerous appeals to the Kenyan government to intervene on behalf of the four, their fate remains uncertain unless the Kenyan government demands justice for the four.

Protecting and Supporting other Disadvantaged Groups: We take note of the policies and programmes put in place to protect and support other disadvantaged groups in the society: older members of the society, children, and persons with disability. For they continue to enjoy such social and financial benefits as the Older Persons Cash Transfer, the Cash Transfer for Orphans and Vulnerable Children and Cash Transfer and the Persons with Severe Disability Cash Transfer.

We demand for a commitment to make funds more accountable and accessible to the genuinely deserving beneficiaries. There is also a need to formulate laws and policies for enabling both the persons with disabilities and the older persons to effectively participate in the affairs of the society as envisaged in 54 and 57 of the Constitution, respectively. Moreover, there is a need for Kenya to ratify The Optional Protocol to the Convention on the Rights of Persons with Disabilities. Finally, all these groups should be enabled to live in dignity and respect and be free from abuse; and to receive reasonable care.

IN CONCLUSION

Our **“Dumisha Haki na Uongozi Mwema Kenya”: A Status Brief and Peoples Manifesto for Political and Policy Engagements** calls upon our leaders and other duty bearers to politically commit to manage public affairs in line with the spirit and letter of the Constitution of Kenya, especially Article 10, which provides for the values and principles of governance and Article 19(1) which provides that: “The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies”. Finally, the National Policy and Action Plan on Human adopted in 2016 provides a complimentary framework for further entrenchment of human rights principles in the governance.



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