



Two Steps Forward One Step Backwards

The Status Of Human Rights In Kenya

Main Report

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LIST OF ABBREVIATIONS / ACRONYMS

AChHPR	-	African Charter on Human and People's Rights	KEWOPA	-	Kenya Women Parliamentarians
ACHPR	-	African Commission on Human and People's Rights	KFS	-	Kenya Forestry Service
AU	-	African Union	KHRC	-	Kenya Human Rights Commission
BVR	-	Biometric Voter Registration	KLA	-	Kenya Land Alliance
CDF	-	Constituencies' Development Fund	KLRC	-	Kenya Law Reform Commission
CEDAW	-	Convention on Elimination of all forms of Discrimination Against	KNDR	-	Kenya National Dialogue and Reconciliation
Women			LGBTI	-	Lesbian, Gay, Transgender and Intersex (Persons)
CEMIRIDE	-	Centre for Minority Rights Development	LRTU	-	Land Reforms Transformation Unit
CESCR	-	Covenant on Economic and Socio-Cultural Rights	MDGs	-	Millennium Development Goals
CIC	-	Commission for the Implementation of the Constitution	MRC	-	Mombasa Republican Council
COTU	-	Central Organizations of Trade Unions	MSIRP	-	Ministry of State for Immigration and Registration of Persons
CSOs	-	Civil Society Organizations	MWVA	-	Mau Mau War Veterans Association
DFID	-	Department for International Development	NCCC	-	National Consultative Coordination Committee
DPP	-	Director of Public Prosecutions	NCIC	-	National Cohesion and Integration Commission
EAC	-	East African Community	NHC	-	National Housing Corporation
EACC	-	Ethics and Anti-Corruption Commission	NHIF	-	National Hospital Insurance Fund
EPMC	-	Electoral Processes Monitoring Centre	NIS	-	National Intelligence Service
ERT	-	Equal Rights Trust	NLC	-	National Land Commission
EVID	-	Electronic Voter Identification	NPS	-	National Police Service
FAO	-	Food Agricultural Organization	NPSC	-	National Police Service Commission
FBOs	-	Faith based Organizations	NSSF	-	National Social Security Fund
FPE	-	Free Primary Education	PBOs	-	Public Benefits Organizations
GALCK	-	Gay and Lesbian Coalition of Kenya	PEV	-	Post-Election Violence
GER	-	Gross Enrolment Rate	PSC	-	Public Service Commission
GVRC	-	Gender Violence Recovery Centre	PWDs	-	Persons with Disabilities
ICC	-	International Criminal Court	RBA	-	Retirement Benefit Authority
ICCPR	-	International Covenant on Civil and Political Rights	SGBV	-	Sexual and Gender-based Violence
IDAHO	-	International Day against Homophobia and Transphobia	SRC	-	Salaries and Remuneration Commission
IDPs	-	Internally Displaced Persons	SSR	-	Security Sector Reforms
IEA	-	Institute for Economic Affairs	STIs	-	Sexually Transmitted Infections
IEBC	-	Independent Electoral and Boundaries Commission	TI	-	Transparency International – Kenya
IG	-	Inspector General of Police	TJRC	-	Truth Justice and Reconciliation Commission
IPOA	-	Independent Policing Oversight Authority	UDHR	-	Universal Declaration on Human Rights
JSC	-	Judicial Service Commission	UN	-	United Nations
KDF	-	Kenya Defense Forces	UNCAT	-	United Nations Convention against Torture
			UNESCO	-	United Nations Economic Socio-Cultural Organization
			UNICEF	-	United Nations Children's Fund

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EXECUTIVE SUMMARY

Background

The Kenya Human Rights Commission (KHRC) is a national non-governmental organization, established over two decades ago to work towards the protection, promotion and realization of human rights in Kenya and beyond. Broadly, KHRC's work revolves around four thematic areas namely: Civil and Political Rights, Economic and Social Rights, Equality and Non-discrimination, and Institutional Development and Sustainability. The first three themes are covered in this report under Chapters two, three, and four respectively. . The KHRC has for over twenty years, monitored and reported on Kenya's international human rights obligations, at national, regional, and global levels. This report, which is an audit of the status of human rights in Kenya for the period August 2010 to March 2014, is therefore not the first, but one in a series of many published since 1992.

The Constitution of Kenya provides that all international laws, treaties, and conventions, among other instruments, which Kenya has ratified, form part of Kenya's laws. Kenya has thus emerged from what has popularly been called a 'domestication regime', to adopt an 'incorporationist regime', where all international obligations are binding. Generally, international obligations are grouped into three: obligation to respect, obligation to protect, and obligation to fulfill. These obligations are particularly meant for states and by extension other actors; in case of breach of respect of people's rights, they should step in to protect such people.

This report is descriptive and exploratory, and relies largely on secondary sources of data including government reports, treaty bodies' concluding observations, media reports, and past KHRC reports authored in the last three years, that monitored various aspects under the three obligations. Data was collected, collated, and analyzed in a candid and objective manner, resulting in this report.

Findings on Civil and Political Rights

Civil and political rights generally restrict government powers with respect to actions affecting individuals' liberty or autonomy. While these rights encompass a wider range of issues under the obligation to respect, this report focuses only on six sub-themes. These are: Electoral Governance, Security Sector Reforms, Judicial Reforms, Land Reforms, Transitional

Justice, and Constitutionalism, as a broad-based encompassing concept. Although there are gains that have been achieved under all these themes, there are still gaps that remain to be addressed.

Since the Constitution was promulgated, institutional formation has generally happened, laws have been passed, and some level of independence has been achieved. Under electoral governance, the existence of the electoral body does not necessarily mean that the 2013 General Elections were free and fair. The KHRC noted with concern the failure of registration processes, voter identification, and a most cowardly judiciary when it came to ruling on the presidential poll. Nonetheless there are gains that have been recorded in terms of speedier handling of petitions. Judicial reforms have also been appreciated, especially the decentralizing of courts which has enhanced access to justice. There is still need however to pass requisite laws to assist in obtaining legal aid for indigent people.

Security sector reforms have been undertaken in terms of creating new institutions. However, funding these institutions has proven difficult. The police reforms process also seems to have stalled; police vetting outcomes have been wanting, and have received little or no public support. The insecurity facing the country not to mention ill-treatment of the Kenyan Somali Community in the name of counter-terrorism measures leave a lot to be desired.

Land reforms have recorded some gains through creation of a national body to deal with this. Unfortunately, infighting between this body and the Ministry of Lands has been rather troublesome resulting in failure of the reform agenda moving forward. Further, transitional justice has been a far cry from reality since after conclusion of a protected truth commission, implementation of the report has been stalled.

Findings on Socio-Economic Rights

The Committee on Economic, Social, and Cultural Rights, in its 21st session held in November 2008, observed key areas of concern in realization of these rights in Kenya. These included: general high poverty levels, water and sanitation, healthcare, and malnutrition. Housing is a matter of serious economic concern. With respect to this, Kenya has in place an informal settlement upgrading and prevention policy. Among other things, this policy sets the blue print for tackling some key socio-economic problems faced

by informal settlement dwellers including poor sanitation, poor quality of houses, extortion by landlords, and lack of access to credit.

Despite some of the gains made, there are gaps in this area of socio-economic rights that are begging to be addressed. For example, the Government has taken modicum steps towards resettling IDPs. There has also been a rise in illegal and inhumane evictions which in many cases have been handled by government agencies. New health facilities are also constructed haphazardly without clearly defined policies to govern their establishment and subsequent management. The poor quality of education in Kenya has also been noted e.g. children in higher classes are unable to read stories for lower levels of classes, not to mention the deplorable teacher, student ratio that has come about as a result of Free Primary Education (FPE).

On the social security front, a number of Government programs aimed at social protection for the vulnerable exist. For example, in 2014, President Uhuru Kenyatta officially re-launched the social security program which had been expanded to include: 164,000 persons above 65 years of age living in extreme poverty, 27,200 persons with severe disabilities, and 253,000 orphans and vulnerable children. In the same year, the National Assembly passed the new National Social Security Fund (NSSF) Act. Effective May 2014, this Act seeks to restructure the fund into a pension fund as opposed to a provident fund.

A review of labour reveals that despite the reported increase in the number of jobs created through public and private sector initiatives, unemployment is still on the rise. Even the Government admits this. Further, poor working conditions are prevalent for flower farm workers, domestic workers, commercial sex workers, among others.

Finally, stakeholders in the socio-economic sector state that there is very limited government funding for programs aimed at promoting the enjoyment of socio-economic rights. A look at reports and budgetary allocations by the government affirms the gap between funding needs and actual allocations to the sector.

Findings on Equality and Non-Discrimination

In Kenya, entitlement to equal treatment and freedom from discrimination is premised on the Constitution. Like the aforesaid international law instruments, the Constitution of Kenya proscribes discrimination based on

sex, gender, ethnicity, among other things. It has been argued by scholars that inclusion of additional grounds in the discrimination list is unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, as is in the Constitution of Kenya.

While 'sex' can include sexual orientation, homosexuality in Kenya is a criminal offence. This results in widespread suffering of LGBTI persons in the hands of law enforcement officers. Indeed, LGBTI persons are routinely harassed by the police, held in remand houses beyond the constitutionally legal period without charges being brought against them, and presented in court on trumped-up charges (commonly, possession of narcotic drugs, drunk and disorderly behavior, and prostitution). The society on the other hand stigmatizes and discriminates against these people.

Gender-related gains include the directive for free maternity care for all women giving birth in public hospitals. In terms of the electoral process, the past was rife with violence, forcing women to stay away from the polls. Under the new regime however, it is an offence to use force or violence during the election period to compel or prevent a person from voting. In a bid to eliminate coercion based on gender bias, the law also criminalizes canvassing or interfering with any voter's free will on the basis of inter alia gender. .

The advisory opinion held by the Supreme Court in October 2012 unfortunately resulted in a claw-back of women's gains. It was held that the two-thirds principle in the Constitution had 'not been transformed into a full right ... capable of direct enforcement'. This was criticized by women's rights crusaders for being retrogressive. Regardless of this opinion, women's participation as candidates in the 2013 General Elections was disappointingly low.

Finally, the Constitution acknowledges ethnicity as a matter of pride and identity of Kenyans. It also prohibits discrimination on the basis of ethnicity, and in various provisions encourages ethnic diversity in government appointments. In an audit of ethnic diversity in the Civil Service reported in 2011, a government agency revealed some startling statistics on the direct connection between the serving president's ethnicity, and the dominance of his ethnic community in public service. The situation has not changed under the current government, fortifying the conviction by many ethnic groups in Kenya that it is 'their time to eat' whenever they capture the

presidency. At the receiving end of this ethnic-based distribution chain are persons living with disabilities, numerically disadvantaged ethnic groups or communities, not to mention other groups previously marginalized by law or practice.

Final Verdict

From the foregoing, this report offers sector-specific recommendations on how to uphold the international obligations; to respect, protect, and fulfill human rights and fundamental freedoms. It is evident that for every two steps recorded over the years, especially after promulgation of the Constitution, there is one step back. Particular reference is made to the record of the Jubilee Government, which is only one year old!



I have walked that long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb. I have taken a moment here to rest, to steal a view of the glorious vista that surrounds me, to look back on the distance I have come. But I can only rest for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not ended".¹

-Nelson Mandela (1995)

1.1 Background: About KHRC

The Kenya Human Rights Commission (KHRC) is a national non-governmental organization established over two decades ago to work towards the protection, promotion and realization of human rights in Kenya and beyond. In the current Strategic Plan (2014-2018), the KHRC envisions the creation of human rights states at national, regional and global levels. Its mission is to foster human rights, democratic values, human dignity, and social justice.

Broadly, KHRC's work revolves around four thematic areas namely: Civil and Political Rights, Economic and Social Rights, Equality and Non-discrimination, and Institutional Development and Sustainability. The first three themes are covered in this report under Chapters Two, Three and Four respectively. The fourth theme is an inward looking one that seeks to continuously build and enhance the KHRC as an organization. As reiterated at the World Conference on Human Rights in 1993, all human rights are indivisible, independent, and inalienable. It is within these three frameworks, that the human rights discussed in this report are analyzed.

¹ Nelson Mandela Long Walk to Freedom, (Back Bay, 1995)

1.2 Monitoring and Reporting on Human Rights

KHRC has for over twenty years, monitored and reported on Kenya's international human rights obligations, at national, regional, and global levels. This report, which is an audit of the status of human rights in Kenya for the period August 2010 to March 2014, is therefore not the first, but one in a series of many published since 1992.

The audit has been made possible through collection, collation, and analysis of all human rights and democratic freedoms in relation to many events in the country's history. These include: electoral processes, international reporting obligations, political and socio-economic developments, conduct of trade, commerce or business, and most importantly, the transition of Kenya from a laidback constitutional dispensation to a more progressive one.

The promulgation of the Constitution of Kenya in 2010 was a historic moment. It marked the beginning of a new level of analysis for the KHRC, as Chapter Four on the Bill of Rights, is one of the most progressive the world over. In September 2010, the KHRC developed and launched a monitoring report, christened "The Baseline of Human Rights in Kenya, from 2005 to 2010"; the first, following enactment of the Constitution.

1.3 International Human Rights Obligations

The Constitution of Kenya provides that all international laws, treaties and conventions, among other instruments which Kenya has ratified, form part of Kenya's laws². Kenya has thus emerged from what has popularly been called a 'domestication regime', to adopt an 'incorporationist regime' where all international obligations are binding.

In the same breadth, Kenya, through the National Assembly, has enacted the Treaty Making and Ratification Act (No. 45 of 2012).³ This legislation is meant to give effect to the provisions of Article 2(6) of the Constitution, and to lay out the procedure for the making and ratification of treaties.

Generally, international obligations are grouped into three: obligation to respect, obligation to protect, and obligation to fulfill.

a) Obligation to Respect: the State or its agencies violate rights through action or inaction, such as when security agencies commit extra-judicial executions, or when they deprive liberty through illegal incarceration of persons.

²Article 2(6)

³Visit, kenyalaw.org/kl/.../Acts/TreatyMakingandRatificationNo45of2012.doc

b) Obligation to Protect: the State and its agencies should take all necessary steps to prevent other actors, State or non-State from violating individual or group rights. For example attack of one ethnic group by another, or failure of companies to pay descent wages to their workers.

c) Obligation to Fulfill: given that the State is signatory to the relevant international treaties, it should take necessary measures to ensure that all people have access to healthcare, food, and education.

In summary, these obligations are particularly meant for states and by extension other actors; in case of breach of respect of people's rights, they should step in to protect such people.

1.4 Legal Background and Framework

The promulgation of the Constitution of Kenya on August 27th, 2010 was summarized as the "birth of the second republic."⁴ It is still arguable to date however, as to whether the Constitution has offered renewed hope for better governance, and protection of human rights and fundamental freedoms for all persons. The Constitution laid the ground for progressive norms intended to institutionalize reforms and create reliable procedures for the respect, protection and fulfillment of human rights. Indeed, the President has a constitutional mandate to report to the National Assembly annually, on the status of human rights obligations, and the extent to which Kenya is respecting the same.⁵

Pursuant to the requirements of the Constitution and timelines set out in the Fifth Schedule, a wide range of legislations have since been passed, both by the Tenth and Eleventh National Assemblies. Further, policies have been developed which in various ways, aim to give effect to the constitutional provisions and principles.

Over time, Kenya has also ratified various regional and international human rights instruments. It is party to six of the seven core United Nations (UN) Human Rights Treaties; it has also adopted many of the conventions established by the African Union (AU), and the East African Community (EAC).⁶ Therefore in terms of obligations, Kenya has ratified several of the international agreements, treaties, conventions, declarations, and such

⁴ Greste. P (2010), *Kenya's New Constitution Sparks Hopes of Rebirth*. BBC East Africa correspondent. Available at <http://www.bbc.co.uk/news/world-africa-11103008>

⁵Article 132(1)(c)iii, provides that the President shall table in the National Assembly, "on the progress made in fulfilling the international obligations of the Republic", which definitely incorporates human rights obligations.

other instruments.⁷

1.5 Methodology towards this Report

This report is descriptive and exploratory, and relies largely on secondary sources of data including government reports, treaty bodies' concluding observations, media reports, and past KHRC reports authored in the last three years, that monitored various aspects under the three obligations.

From the foregoing, the context of the reports by media especially on human rights abuses, treaty bodies' reports, and other reports by various human rights groups, led to the qualitative and quantitative data shown in this report. In order to augment the methodology utilized to develop this report, reference was also made to judicial precedence (case law) emerging from various jurisdictions.

The data collected was collated and analyzed in a candid and objective manner resulting in this report. The use of various sources of secondary data enabled triangulation of data with clear benchmarks so as to remove bias and avoid prejudice.



2.0 Introduction

Civil and Political Rights generally restrict government powers with respect to actions affecting individuals' liberty or autonomy.⁸ While these rights encompass a wider range of issues under the obligation to respect, this report focused only on six sub-themes. These are: Electoral Governance, Security Sector Reforms, Judicial Reforms, Land Reforms, Transitional Justice, and Constitutionalism, as a broad-based encompassing concept.

2.1 Electoral Governance

2.1.1 Gains in electoral governance in Kenya

2.1.1.1 Electoral Law Reforms

Several legislations regulating elections were enacted pursuant to the Constitution. These included the Elections Act No. 24 of 2011, the Independent Electoral and Boundaries Commission (IEBC) Act of 2011, and the Political Parties Act of 2011. Despite various laws that generally corrected a number of anomalies experienced in previous elections in Kenya, the players or actors in various electoral processes did not respect the rules as the KHRC summed it up in *The Democratic Paradox: a publication on the Kenya 2013 General Elections*.⁹ In summary, the KHRC averred:

⁶Law Society of Kenya 'Treaties and Agreements Repository- Kenya' <http://online.lsk.or.ke/treaty/> accessed 14th February 2014
⁷Visit, <http://kenyalaw.org/treaties/>, for details of each

⁸Lincoln University, *Civil and Political Rights*. Available at <http://www.lincoln.edu/criminaljustice/hr/Civilandpolitical.htm> (Accessed on February 11, 2014)
⁹<http://www.khrc.or.ke/cpublications>

“While we appreciate the great efforts taken by all the national, regional and international actors – State and non-State – to support the 2013 electoral process against many temporal and resource constraints, we wish to observe that the stakeholders and the Kenyan society in general may have, at the altar of peace and mostly owing to the experiences of the 2007/2008 PEV, sacrificed the democratic principles of credibility and accountability in the 2013 General Election.”¹⁰

2.1.1.2 Peace without Justice in 2013 Elections

Many people anticipated violence during the March 2013 General Elections following the violence that marred the one in 2007. Fortunately, the elections were by and large peaceful. Regardless, some of the salient issues which made Kenyans fight one another in 2007, still remained unaddressed. The absence of violence in 2013 does not mean therefore that justice was served. In essence, Kenyans sacrificed accountability at the altar of peace which can therefore be termed as negative peace.

2.1.1.3 Dispute Resolution: Supreme Court?

Electoral disputes arising from the 2013 General Elections as well as from party nominations in the run up to the elections were handled in a well-coordinated and timely manner by the lower echelons of the Judiciary. Through a Judiciary Working Committee, petitions arising from most elective posts were determined within prescribed timelines. The courts successfully concluded all petitions filed within statutory timelines¹¹ including senatorial¹² and gubernatorial petitions. However, some of these disputes un-procedurally, ended up in the Supreme Court, where the resolutions made were not fully appreciated both by the KHRC and the public at large. The Presidential Election dispute determined by the Supreme Court also left a lot to be desired.

2.1.2 Gaps in electoral governance

The KHRC set up an Electoral Processes Monitoring Centre (EPMC) in July 2012, through which fieldwork was carried out and documented over a six

¹⁰KHRC (2014), *The Democratic Paradox: A Report on Kenya's 2013 General Elections*, P xiii

¹¹The Judiciary Post-Election Report March - September, Available at 2013 http://kenyalaw.org/kl/fileadmin/Judiciary_Post-Election_Report_2013.pdf (Accessed on February 19, 2013)

¹²Musikari Nazi Kombo v Moses Masika Wetangula & 2 others [2013] eKLR Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others [2014]eKLR Available at <http://kenyalaw.org/caselaw/cases/view/93989/>

¹⁴See varying opinions in mainstream media, also visit AfriCoG Website http://africog.org/reports/AfriCOG-KPT1_%23Elections2013_Compndium.pdf accessed July 24, 2014

months period.¹⁵ The following key issues were observed during the March 2013 General Election period:

2.1.2.1 Voter intimidation

Although the Constitution guarantees the right to freely register as a voter, and to vote by secret ballot in an election,¹⁶ instances of voter intimidation were witnessed. For example, majority of workers in the Naivasha flower plantations were from the Luo, Kisii and Luhya communities. Incidents of systematic workplace frustrations aimed at constructively evicting these workers were reported.¹⁷ As such, a large number of them were unable to vote as they had already registered in Naivasha, but had to relocate before the General Elections took place. The IEBC did not respond in any way to these acts of intimidation, thus absconding from its responsibility of ensuring a fair electoral process. Similarly, massive voter intimidation was witnessed on social media platforms where ethnic-fueled hate speech was perpetrated.

2.1.2.2 Voter Bribery

Free and fair electoral processes devoid of corruption are enshrined in the Constitution, statutes,¹⁹ and regional and international treaties.²⁰ Unfortunately, the EPMC recorded numerous incidents of voter bribery mainly through cash handouts and other material enticements.²¹ These acts were an affront to the right to a free and fair election. In a display of ineptness, the IEBC did not take any form of disciplinary action against any of the culpable politicians.

2.1.2.3 Violence Against and Intimidation of Women Candidates and Voters

Apart from guaranteeing every citizen the political right to participate in electoral processes and to vote, the Constitution seeks to eliminate gender discrimination. It was noted that many women candidates fell victim to violence and intimidation during the electioneering period contrary to the spirit of the Constitution. Indeed, many of the cases of violence reported between July and December 2012, involved women candidates and women voters. The violence against women was meant to intimidate and thus dissuade them from vying for various elective seats.²²

¹⁵Kenya Human Rights Commission (2013), *Countdown to the March 2013 General Elections: Interim Elections Monitoring Report*

¹⁶Constitution of Kenya (2010), Article 38 (3)

¹⁷Kenya Human Rights Commission, *Countdown to the March 2013 General Elections: Interim Elections Monitoring Report* (KHRC, 2013) ¹⁸Article 28(2)

¹⁹See Section 64 of the Elections Act and Section 3 of the Elections Code of Conduct pursuant to Sections 56(6) and 110(1) of the Elections Act No 24 of 2011

²⁰U.N. Convention against Corruption, Art. 1819; UNHRC General Comment 25, para. 20; AU, ACHPR, Art. 17(1); Constitution of Kenya (2010), Article 38

²¹KHRC, above n22

2.1.2.4 Delayed issuance and collection of National Identity Cards

The low voter registration was to a large extent attributed to lack of identity cards. This was primarily amongst the youth, many of who were thus unable to exercise their democratic right to vote. According to a 2012 report by the KHRC's field monitors, eligible youth in the country were likely to miss out on voting as a result of delayed issuance of identity cards by the Ministry of State for Immigration and Registration of Persons (MSIRP). This problem was compounded by the low collection of already processed identity cards. Upon the KHRC's visits to various chiefs' camps, it became apparent that blame should also be apportioned to the card holders since MSIRP had already processed and disseminated numerous identity cards to the respective provincial and district administrative offices where they remained uncollected.²³

2.1.2.5 Voter Registration

Even though the IEBC largely met its obligation of building an accurate and comprehensive voter register ahead of the 2013 Elections, a number of concerns in the process stood out. A case in point was the tender and procurement of faulty Biometric Voter Registration (BVR) equipment. Though the faults of BVR and Electronic Voter Identification (EVID) kits were flagged early enough, IEBC did not address them. Failure to test these kits ahead of the elections e.g. during the simulation process, can only be termed as gross negligence on the part of IEBC, whose mandate it was to ensure efficiency of the electoral process.²⁴

In addition, the period for public verification of the voter register was reduced to two weeks only. This time was inadequate for citizens to confirm their registration. Similarly, other election actors had inadequate access to the voter register before the elections.²⁵ This was a direct violation of the constitutional right of access to information; citizens were denied the chance to adequate time to inspect voter registers and correct any erroneous information contained therein.²⁶

²²Kenya Human Rights Commission, *supra* note 26 ²³ Kenya Human Rights Commission, *supra* note 26

²⁴The African Commission On Human And People's Rights (ACHPR) April 4 To 14, 2013 Banjul, Gambia Briefing Paper On Kenya

²⁵Carter Center (2013), *Observing Kenya's March 2013 National Elections, Final Report*, Available at http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf (Accessed on February 11, 2014)

2.1.2.6 Insufficient Civic and Voter Education

By the end of 2012, an overwhelming number of Kenyans had not received sufficient civic or voter education on the choices, procedures, and mechanisms they would face in the 2013 General Elections. The KHRC²⁷ reported that most voters did not understand the basic units of representation, and the various elective positions they were going to vote for, or even the roles of the given elective positions.

The State and the IEBC failed in their responsibility to ensure that adequate civic and voter education was undertaken well ahead of the election date. Instead, the IEBC carried out a crash course initiative on civic and voter education three weeks to the General Election which proved insufficient.²⁸

2.1.2.7 Election Day Challenges

During the tallying process, the electronic vote transmission system broke down. On March 5th, 2013, IEBC finally admitted that the system had totally failed forcing them to resort to manual vote counting.²⁹ Further, various civil society organizations that had been accredited as election observers, noted the irregular alteration of results contained in Forms 34 and 36, as well as reported incidents of party agents being forced to sign these forms in their blank state. There was also heightened concern and suspicion when election agents were excluded from the National Tallying Centre.³⁰

This turn of events dealt a blow to the confidence placed in the IEBC by political parties and the public who raised concerns as to the credibility of the whole electoral process, and occasioned a number of legal suits in both the High Court and the Supreme Court of Kenya.³¹

2.1.3 Recommendations on Electoral Governance

- a) The Ministry of Interior and Coordination of National Government should expeditiously issue national identity cards to youth on attainment of the statutory legal age i.e. 18 years to enable them exercise their democratic rights;

²⁶Constitution of Kenya (2010) Article 35

²⁷ Kenya Human Rights Commission *supra* note 26

²⁸Carter Center (2013), *Observing Kenya's March 2013 National Elections Final Report* Available at http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf (Accessed on February 11, 2014) ²⁹It should be noted that a simulation process held barely three weeks to the elections had revealed that the electronic transmission of results was bound to fail owing to the poor standard of software and hardware that had been procured for the exercise

³⁰The African Commission On Human And People's Rights (ACHPR) April 4 To 14, 2013 Banjul, Gambia Briefing Paper On Kenya

³¹Africa Centre for Open Governance, (2013) *The Election Petition*, Available at <https://www.africog.org/category/election-petition> (Accessed February 13, 2014)

- b) The IEBC should launch civic and voter education programmes much earlier in the electoral cycle to enable informed citizen participation in elections;
- c) The IEBC should consolidate the existing Voter Register and all separate voter lists into one single register, and during election period, allow citizens adequate time to inspect the same;
- d) The IEBC should tackle voter intimidation by establishing a functional electronic voter system, which will allow for remote voting thus enabling a voter to cast his vote from any part of the country as opposed to only where one registered.;
- e) The IEBC should allow for continuous voter registration by maintaining a live voter register and release an official list of registered voters a few days to the General Election;
- f) The IEBC should have a transparent, and efficient procurement system to ensure electoral materials such as BVR kits are not defective, and also promote accountability to the public on their usage of public funds;
- g) The IEBC should have a transparent tallying process that is not only efficient and traceable, but also credible;³²
- h) Political parties should adequately plan for their nomination exercises through early planning and preparation, and conduct transparent and fair elections; and
- i) The Office of the Registrar of Political Parties should undertake disciplinary measures against errant politicians who disobey electoral rules.

2.2 Security Sector Reforms

2.2.1 Gains in Security Sector Reforms

2.2.1.1 Legislation with Institutionalization

To effect the constitutional provisions on Security Sector Reforms (SSR), with regard to the police, only three key laws were passed: The National Police Service (NPS) Act, which establishes the NPS under the command of the Inspector General of Police;³³ The National Police Service Commission (NPSC) Act, which establishes the human resources function such as recruitment, transfer, demotion, promotion and such functions;³⁴ and finally, the Independent Policing Oversight Authority (IPOA) Act, which establishes an oversight authority mandated to deal with complaints

³²Relief Web (2013) European Union Election Observation Mission to Kenya - General Elections 2013 Final Report <http://reliefweb.int/report/kenya/european-union-election-observation-mission-kenya-general-elections-2013-final-report>

³³National Police Service Act No. 11A of 2011 Available at http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalPoliceServiceAct_No_11Aof2011_.pdf (Accessed on February 21, 2014)

³⁴National Police Service Commission Act No. 30 of 2011 Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalPoliceServiceCommissionAc_No30of2011.pdf (Accessed on February 21, 2014)

against the police, whether by members of the Service or the public.³⁵

2.2.1.2 Vetting the Police

Commendably, the National Police Service Commission in a bid to inspire public confidence in the NPS began publicly vetting police officers on December 17th, 2013. This is an ongoing process, which is notably a key step in achieving SSR, as it not only promotes transparency, but also demands accountability from police officers. The process has nonetheless attracted negative comments about the manner, nature, and degree of vetting since some of the salient issues on human rights violations have been side-stepped.³⁶

2.2.1.3 State Response to Insecurity

Following reports of heightened insecurity throughout the country in 2013, the Government set in place a number of measures and operations albeit reactionary. Key among these was the launch of the Nyumba Kumi initiative (literally 'ten homes', but in essence means 'neighborhood watch'), in 2013. This was not accompanied with step-up of general security, and more so, effective counter-terrorism measures to deal with the *Al Shabaab* insurgency. Whereas some immigration officers found to be culpable of graft were sacked in 2013,³⁷ arrests and charging of more than 100 *Al Shabaab* suspects in Mombasa in February 2014 happened,³⁸ and suspected terrorists responsible for an attack at the Jomo Kenyatta International Airport on January 16th, 2014 were charged,³⁹ terrorism acts and insecurity as a whole continued to escalate.

2.2.1.4 Review & Accessibility of Police Standing Orders

The ongoing review of the NPS Standing Orders is a positive step towards achieving SSR. The objective of the review is to ensure that the Standing Orders are in conformity with the Constitution. Previously, the Standing Orders were not accessible to the general public but in keeping with the right of access to information, every citizen now has modicum access to this document. It is important to note however, that though the Standing Orders were to be ready by December 2013, as per the law, they are still in draft stage with the Office of the Inspector General.

³⁵Independent Policing Oversight Authority Act No. 35 of 2011 Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Independent_Policing_Oversight_Authority_Act_No_35_of_2011.pdf (Accessed on February 21, 2014)

³⁶See various statements by CSOs, especially the Independent Medico-Legal Unit (IMLU)

³⁷KHRC, (2013). Profiling insecurity in Kenya.

³⁸BBC, Kenya terror charges after police raid mosque. Available at <http://www.bbc.co.uk/news/world-africa-26013964> (Accessed February 13, 2014)

³⁹Daily Nation, Suspects in JKIA blast taken to court. Available at <http://mobile.nation.co.ke/news/JKIA-Explosion-Terrorism-Investigation/-/1950946/2170980/-/format/xhtml/-/xa7147z/-/index.html> (Accessed February 13, 2014)

2.2.2 Gaps in Security Sector Reforms in Kenya

2.1.2.8 Political Will

The Executive arm of Government failed to publish the National Police Service Act in time prior to the intervention of the IPOA in August 2012. The Executive is now proposing an array of retrogressive amendments to this Act as well as the National Police Service Commission Act. The National Police Service (Amendment) Bill 18 of 2013 and the National Police Service Commission (Amendment) Bill 17 of 2013, propose the following amendments:

- a) Key powers originally granted to the independent National Police Service Commission would either be transferred to the Inspector General of Police or would require consultation with the Inspector General and the Cabinet Secretary for Interior and Co-ordination of National Government. These powers which include recruitment, vetting, and discipline of police officers, would therefore be at greater risk of political interference;
- b) There were proposed amendments to Sixth Schedule on the use of firearms. Currently, the circumstances under which police are permitted to use firearms are limited to saving or protecting life, or in defense against an imminent threat to life or serious injury. New amendments would allow officers' use of the same, to protect property, to stop someone charged with a serious crime from escaping, or to stop someone who is helping them to escape;
- c) The Kenya Defense Force (KDF) would carry out duties hitherto reserved for the police exclusively. This includes fighting crime; specifically terrorism;
- d) The Inspector General (IG) should be appointed by the President and Parliament, without an open and competitive recruitment. The independence of the role of the IG would therefore be threatened.

As this report was being wound up, the National Assembly was debating on these amendments which if passed into law will undermine the spirit of police reforms as envisaged by the Constitution.⁴⁰

2.1.2.9 Resource Gaps

A report by the Usalama Reforms Forum, released in 2012, reveals that Police in Kenya continue to operate with very limited resources.⁴¹ They are

⁴⁰Shoot-To-Kill Bill: MPS Should Guard The Constitution And Do No Harm https://www.standardmedia.co.ke/my/?articleID=2000104492&story_title=Shoot-to-kill-Bill-MPS-should-guard-the-Constitution-and-do-no-harm
⁴¹Usalama Reforms Forum, (2012) *Communities and their police stations. A study report of 21 police stations in Kenya, 2012.*

faced with weak operational preparedness, lack of equipment, logistical, as well as technical capacity. Police officers' low remuneration, poor working conditions, as well as low standards of living, compounds this problem further as they are often demoralized and lack incentive to carry out their duties.⁴²

2.1.2.10 Impunity by Security Agencies

Impunity for human rights violations committed by the police and other security agencies has been sustained in violation of the law. Very little has been done in terms of internal disciplinary measures or criminal prosecution of officers for human rights violations.⁴³ On the contrary, Kenya has seen many acts of cover up by the Executive and political manipulation in protection of perpetrators and police.⁴⁴ The following are illustrations of acts of police impunity during the period under review:

i) Failed Prosecution of Police

In August 2012, a multi-agency taskforce was constituted by the Director of Public Prosecution (DPP) to review cases from the Post-Election Violence (PEV) in 2007/2008. However, no prosecutions have been initiated with respect to any case, including those involving police, on account that the DPP's office was experiencing challenges obtaining evidence.⁴⁵

ii) Violence in the Tana

Violence in the Tana Delta which began in February 2012, and extended to January 2013 led to the death of over 200 people, displacement of 112,000 people,⁴⁶ and deployment of over 2,000 police officers to the area.⁴⁷ Residents in the Tana Delta however claimed that the police and security forces did not respond to the situation with the seriousness it deserved.⁴⁸ During one incident in December 2012, police are reported to have watched as ten suspected raiders were burned alive in Kipao Village.⁴⁹

⁴²Ibid

⁴³To date the police have not disclosed this information. Under the new legislation however (IPOA Act, Sections 30 and 38), this information will have to be made public. ⁴⁵Amnesty International (2013). *Police Reforms in Kenya: A Drop in the Ocean*. Available at https://www.amnesty.nl/sites/default/files/public/kenya_afr_32_001_2013.pdf (Accessed on February 12, 2014)

⁴⁶Kenya Red Cross, *Ten More Lives Lost in Tana Delta as fighting erupts again*, 10 January 2013, Available at <http://reliefweb.int/report/kenya/ten-more-lives-lost-tana-delta-fights-erupt-again> (Accessed on February 12, 2014)

⁴⁷The Standard, *The time bomb that was Baragoi massacre*, 31 December 2012, Available at http://www.standardmedia.co.ke/?articleID=2000073982&story_title=Kenya-The-time-bomb-that-was-Baragoi-massacre (Accessed on February 12, 2014)

⁴⁸Human Rights Watch, *Kenya: Investigate All Politicians in Tana River Violence*, 13 September 2012, Available at <http://www.hrw.org/news/2012/09/13/kenya-investigate-all-politicians-tana-riverviolence> (Accessed February 12, 2014).

⁴⁹71 The Daily Nation, *Massacre in Kipao Village took us by surprise, say leaders and police*, 23 December 2012, Available at <http://www.nation.co.ke/Counties/Massacre-took-us-by-surprise-leaders/-/1107872/1650834/-/15qfhpvz/-/index.html> (Accessed February 12, 2014). The Daily Nation, 25 August 2012, *Power struggles and conflict over use of land and fan Tana clashes*, Available at <http://www.nation.co.ke/News/Power-struggles-fan-Tana-Delta-clashes/-/1056/1487278/-/45is3qz/-/index.html> (Accessed February 12, 2014);

iii) Excessive Force

Despite the Court lifting a ban against the Mombasa Republican Council (MRC),⁵⁰ there appears to have been a concerted government crackdown on its leadership, with most of them facing various charges including, belonging to an illegal group, and incitement. On 15th October 2012, people were arrested during a raid on a home in Kwale, including the leader of MRC, Omar Mwamnuadzi.⁵¹ All those arrested were charged with various offences including, possession of firearms, incitement, witchcraft, and belonging to an illegal gang. These cases remain pending; some MRC members are out on bond while others remain in detention in Shimo la Tewa prison.

iv) Reprisal Attacks by KDF

On November 19th, 2012, the Kenyan military violently carried out an apparent reprisal attack in the northern town of Garissa where three soldiers had been shot dead. Witnesses told Human Rights Watch (HRW) that immediately after the three soldiers had been killed, the Kenyan army surrounded the town, preventing anyone from leaving or entering, and started attacking residents and traders. The witnesses said that the military shot at people, raped women, and assaulted anyone in sight.⁵²

v) Violence against the Somali Community

In November and December 2012, hundreds of ethnic Somali people were arbitrarily or discriminatorily detained, particularly in the Eastleigh area of Nairobi, following grenade or other bomb attacks by unknown suspects. Over the course of three days in December, up to 300 people are reported to have been arrested, including Somali refugees, asylum-seekers, as well as Kenyan Somalis.⁵³ Most were subsequently released without charge. Many of those detained alleged that security forces had ill-treated them during arrest or detention and had attempted or succeeded in extorting money from them. The wave of arrests and lack of charges gave rise to serious concerns that the response by the authorities was rooted in discrimination against people of Somali ethnicity.⁵⁴

⁵⁰BBC, *Mombasa secessionist group unbanned by Kenyan court*, 26 July 2012, Available at <http://www.bbc.co.uk/news/world-africa-18996621> (Accessed on February 12, 2014).

⁵¹The Standard, *Two killed, MRC leader arrested in dawn gunfight*, 15 October 2012, Available at <http://www.nation.co.ke/News/MRC-leader-arrested-following-gunfight/-/1056/1533332/-/6m87yz/-/index.html> (Accessed on February 12, 2014)

⁵²Human Rights Watch, *Kenya: End Security Reprisals in the North*, (2012) Available at <http://www.hrw.org/home> (Accessed on February 13, 2014)

⁵³BBC News, *Kenya Grenade Attack: Somalis attacked in Nairobi*, 19 November 2012 <http://www.bbc.co.uk/news/world-africa-20393013> (accessed 27 January 2013); Daily Nation, *Police nab 300 after Eastleigh blast*, 9 December 2012, <http://www.nation.co.ke/News/Police-nab-300-after-Eastleigh-blast/-/1056/1639752/-/5xka0n/-/index.html> (accessed 27 January 2013)

2.1.2.11 Sustained Cattle Theft Incidences

It should be noted with great concern that in 2013, the country witnessed an exceptional level of coordinated armed violence perpetrated by illegal, organized militia gangs. This was under the guise of cattle rustling in various parts of the country including Baringo, Kuria, Turkana, Isiolo, Baragoi, and even in places hitherto unknown for the same, such as Meru County. Security agencies' response to these incidents was invariably slow and belated leading to hundreds of deaths and casualties, displacements and loss of basic sources of livelihood. In addition, a worrying emerging trend was observed where members of the security agencies were also falling victim to such raids.⁵⁵

2.1.2.12 Terrorism and Counter-Terrorism

Kenya has witnessed numerous terror attacks since October 2011, after the KDF launched a military offensive against *Al Shabaab* militants. In 2011, a total of 17 people reportedly died due to alleged acts of terror. In 2012, a total of 104 deaths were recorded and in 2013, 88 deaths were reported, 67 of which were as a result of the September 21st 'Westgate Attack'.⁵⁶ Media reports indicate that *Al Shabaab* claimed responsibility for this attack; the State also attributed the same to *Al Shabaab*.⁵⁷

Following the 'Westgate Attack', the National Intelligence Service (NIS) and immigration officers were put to task. It was alleged that they had failed to detect the signs early enough, or had not considered the signs to be serious enough to warrant follow-up and early response. Other allegations were made against the police and border security agencies for a leakage in the porous border between Kenya and Somalia.⁵⁸

2.1.2.1 Torture and Ill-Treatment

Freedom from torture and cruel treatment are constitutionally guaranteed rights, without any limitations.⁵⁹ Nonetheless, the eradication of torture and ill treatment in Kenya is still hampered by lack of a comprehensive legal framework. There are a number of proposed laws, including the Prevention of Torture Bill 2011, which is yet to be enacted. If passed, it will strengthen the legislative application to the United Nations Convention against Torture (UNCAT).⁶⁰

⁵⁵Visit, www.khrc.or.ke, Press Releases

⁵⁷National Consortium for the Study and Responses to Terrorism, *Al-Shabaab attack on Westgate Mall in Kenya* Available at http://www.start.umd.edu/sites/default/files/publications/local_attachments/STARTBackgroundReport_alShabaabKenya_Sept2013.pdf (Accessed on February 19, 2013)

⁵⁸S. Derroso, 2013 *The Fight Against Al-Shabab* Available at <http://www.aljazeera.com/indepth/opinion/2013/10/fight-against-al-shabab-201310282112677589.html>

⁵⁹Constitution of Kenya (2010) Article 25

⁶⁰Convention against Torture, Available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (Accessed February 13, 2014)

Incidences of torture and ill-treatment by State officials, in particular by law enforcement agencies (as demonstrated above), continue to be reported. Reports include, houses being torched, acts of terror, rape, abductions, forceful evictions, domestic violence, among others.⁶¹ This is despite the existence of provisions against torture within the UNCAT framework, in the National Police Service Act.

2.1.2.14 Null Penal Legislation

There are instances where the police have charged persons engaging in lawful demonstrations, and invoked outdated penal provisions which are inconsistent with the Constitution. In February 2014 for instance, a group of activists participating in a lawful demonstration were arrested and charged with rioting after proclamation; a penal provision created in 1952 attracting a life imprisonment sentence.⁶² The said persons were released on a cash bail of Kshs. 200,000 each pending hearing.⁶³ The said law invoked by the police is unconstitutional as it is contrary to the spirit of Article 37 of the Constitution which accords citizens the right of assembly, demonstration, picketing, and presentation of petitions to public authorities.

2.2.3 Recommendations for Security Sector Reforms

- a) The IPOA should establish checks and balances to bring an end to impunity and human rights violations by police officers;
- b) The President should not assent to the National Police Service (Amendment) Bill 18 of 2013 and the National Police Service Commission (Amendment) Bill 17 of 2013 as these will greatly undermine SSR in Kenya;
- c) The Inspector General and National Police Service should direct that force be used only as a last resort when non-violent measures are ineffective, and in line with the Sixth Schedule of the NPS Act and international human rights law and standards;
- d) The Inspector General and National Police Service must restrict intentional lethal use of firearms. These should only be used in strictly unavoidable instances in order to protect human life, in line with the Sixth Schedule of the NPS Act and international human rights law and standards;
- e) The NPSC and IPOA should take disciplinary measures against

police officers who abuse codes of conduct or any other policing norm;

- f) The KDF should only be deployed to a policing role when absolutely necessary, for a limited and specified duration, under a clear command, and with respect for international human rights law. This is especially with regard to the use of force, and accountability for human rights violations;
- g) The State should implement financial reforms and provide realistic budgetary allocations for the National Police Service;
- h) The National Police Service and NPSC should address the plight of police officers by ensuring that they have adequate budgetary allocations to accord the officers a decent standard of living;
- i) CSOs should form a Public Interest Litigation Center to challenge unconstitutional directives whenever they arise. For example, during the General Election, the IG issued unconstitutional directives such as outlawing all demonstrations and petitions.
- j) The Kenya Law Reform Commission (KLRC) and other relevant actors should 'clean up' the penal code and other legislation to ensure that they are consistent with the Constitution.⁶⁴

2.3 Judicial Reforms

2.3.1 Gains in Judicial Reforms

2.3.1.1 Appointments of Senior Judicial Officers

The appointment of judicial officers (Chief Justice, Deputy Chief Justice, and Supreme Court Judges) was carried out through a public process which promoted public participation. This is a principle enshrined in the national values of the Constitution.⁶⁵ However, for the process to re-start and conclude as per the law, it took demonstrations and condemnation by civil society, and protests from one side of the Grand Coalition Government against the unilateral Presidential appointments that were contrary to the Constitution.

2.3.1.2 Vetting Judges and Magistrates

Similarly, in February 2012, The Judges and Magistrates Vetting Board began the process of publicly vetting judges and magistrates. Judicial

⁶¹Universal Periodic Review, Annual Progress Report September 2012- September 2013); An Assessment of Government's Performance In Implementation of UPR Recommendations

⁶² Penal Code, Section 83, (Chapter 63, Laws of Kenya).

⁶³Standard Digital News, 'State Of The Nation' Protestors Charged (February, 18 2014) https://www.standardmedia.co.ke/m/story.php?articleID=2000104931&story_title=State-of-the-Nation-protestors-charged

⁶⁴Section 7 of the Sixth Schedule

⁶⁵Constitution of Kenya (2010), Article 10 (2) (a)

officers' fitness to serve the Kenyan public was reviewed based on track record, integrity, and any complaints filed by the public. The vetting process is still ongoing for the magistrates. Some judicial officers have been declared unfit to serve while others have "passed" the vetting process and continue to dispense their duties.⁶⁶ The vetting process promotes the values espoused under Chapter 6 of the Constitution on Leadership and Integrity.

2.3.1.3 Judicial Transformative Framework

In 2012, the Judiciary embarked on a Judicial Transformative Framework which has established more courts including the number of mobile courts, and decreased the cost of accessing judicial services for public interest cases. Case backlog and digitization of case management have been progressively implemented by various judicial officers and office bearers.⁶⁷ In the same year, the judiciary embarked on setting up additional courthouses and decentralizing the High Court to other towns in a bid to ease the geographical distance in access to justice.⁶⁸ While the precedence of setting judgments were towards progressively interpreting it, some pronouncements equally left the judiciary being questioned, especially on election petitions.

2.3.2 Challenges facing Judicial Reforms

2.3.2.1 Dismissal of Deputy Chief Justice

In October 2012, Nancy Baraza, then Deputy Chief Justice, was dismissed from office on grounds of misconduct. Her dismissal attracted mixed reactions. Whereas some citizens felt that this was a positive move as it exalted the principle of accountability among senior State officers, some viewed it as a big blow to the momentum of judicial reforms. This is because the Supreme Court lacked full constitution up until May 2013, when Justice Kalpana Rawal replaced Baraza.

2.3.2.2 Chief Registrar and the Judicial Service Commission

In 2013, the public was treated to disgraceful infighting between the Chief Registrar of the High Court (Gladys Shollei), and the Judicial Service Commission (JSC). Gladys Shollei was eventually dismissed from office on October 18th, 2013, on grounds of financial impropriety, incompetence, and insubordination. Shollei has since been replaced by Ann Amadi, who took office in January 2014.

⁶⁶ICJ Kenya, *Vetting Substance Part 2*, Available at www.icj-kenya.org (Accessed on February 14, 2014)

⁶⁷*Ibid*

⁶⁸Universal Periodic Review, *Annual Progress Report September 2012- September 2013*; *An Assessment of Government's Performance In Implementation of UPR Recommendations*

This issue dealt a huge blow to the confidence the public had in the Judiciary as it displayed gross mismanagement of affairs, and exuded a lot of discord among officials. Besides, some legislators politicized the matter and used the Departmental Committee on Justice and Legal Affairs to summon the JSC, but to no avail.

2.3.2.3 Suspension of JSC members

Following the Shollei dismissal, the JSC came under public scrutiny for various allegations including: unlawful dismissal of the Chief Registrar, drawing of hefty allowances during their sittings, obstruction of investigations by the Banking Fraud Unit, among others. Politicization of the process saw a petition presented to the President on November 14th, 2013, disclosing grounds under Article 251(1) of the Constitution for removal of six members of the JSC from office. The President formed a tribunal to investigate the alleged conduct of the six members and determine whether indeed there were Constitutional grounds for their removal.

On November 29th, 2013, President Kenyatta announced the suspension of the six members (Ahmednasir Abdullahi, Dr. Samuel Kobia, Prof. Christine Mango, Justice Mohamed Warsame, Ms. Emily Ominde, and Ms. Florence Mwangangi) of the JSC who were to be investigated.

The suspension of the six commissioners left JSC only with five yet the law provides that the quorum of the JSC is six, resulting in crippling of its mandate.⁶⁹ On December 3rd, 2013, High Court Judge George Odunga, gave orders suspending the tribunal instituted by President Uhuru Kenyatta, pending hearing and determination of an application by the JSC challenging the said suspension.⁷⁰ The politicization of the process and illegal interference by the Executive on judicial functions raises serious concerns as to whether the doctrine of separation of powers is appreciated and upheld by all arms of government. Further, such interference threatens the constitutionally-guaranteed independence of the Judiciary.

2.3.2.4 Access to Courts

Lastly, measures to improve access to judicial remedies and address limited access to courts by individuals have not been implemented. The Legal Aid Bill, 2013, which seeks to give effect to Articles 48, 50 (2) (g) of the

⁶⁹Standard News, *Uhuru Suspends Six JSC Members*. Available at http://m.standardmedia.co.ke/story.php?articleID=2000099000&story_title=Uhuru+suspends+six+JSC+members

⁷⁰All Africa (2013) *Kenyan Court Reinstates Six Suspended JSC Members*. Available at <http://allafrica.com/stories/201312030802.html> (Accessed on February 14, 2013)

Constitution, to establish the National Legal Aid Service, to make provision for legal aid, and to provide for funding of legal aid and connected matters, is yet to be enacted by Parliament.⁷¹ The Equal Opportunity Bill, 2007, which seeks to promote equality and eliminate discriminative practices, as well as the Small Courts Claims Bill, 2007, tied to questions of reduced or no cost for accessing the courts, are also yet to be published and tabled before Parliament.⁷² Access to courts will improve if such bills are enacted and operationalized.

2.3.3 Recommendations on Judicial Reforms

- a) The National Assembly should complete the law making process and President Uhuru should then assent to the Equal Opportunity Bill, the Legal Aid Bill, and the Small Claims Court Bill, pursuant to the enabling provisions of the Constitution of Kenya, in order to promote access to justice;
- b) The State should allocate sufficient funds to the Judiciary for effective implementation of the Judiciary Transformative Framework;
- c) The Judges and Magistrates Vetting Board should expedite the vetting of magistrates and subsequently release their reports, documenting facts and recommendations on the whole process to facilitate improvement of the Judiciary;
- d) In addition to curbing political interference in the Judiciary, it should be noted that the Judiciary should equally not interfere in political processes;
- e) 'Court Users Committees' should continue to be advanced in a bid to advance civic participation. This is because they openly and consultatively provide an avenue to address a broad range of administration of justice matters, both precautionary and responsive.

2.4 Land Reforms

2.4.1 Gains in Land Reforms

2.4.1.1 The Land Acts

A taskforce, established in July 2012, was charged with the duty of preparing regulations, rules, and guidelines to enable the effective operationalization of the Land Act and the Land Registration Act. It identified gaps, omissions, and inconsistencies in the new laws, to enable legislative amendments by the current Parliament. Another taskforce, established in September 2012,

⁷¹Commission for the Implementation of the Constitution, *Legal Aid Bill, 2013* Available at http://www.cickenya.org/index.php/legislation/item/342-legal-aid-bill-2013#.UwWCL_mSyAU (Accessed on February 14, 2013)

⁷²ICJ Kenyan Section, *Access to Justice, 2012* Available at <http://www.icj-kenya.org/index.php/icj-programmes/access-to-justice6> (Accessed on February 14, 2013)

was charged with the duty of formulating a Community Land Bill and an Evictions and Resettlement Bill (Republic of Kenya, September 2012).

2.4.1.2 The National Land Commission

To give effect to the provisions of the Constitution,⁷³ legislation to operationalize the National Land Commission (NLC) was enacted in April 2012. It is worth mentioning that the then Grand Coalition Government was sluggish in gazetting of the Commission, but stakeholders mounted spirited pressure which eventually saw the President gazette it on February 20th, 2013.⁷⁴

2.4.1.3 Environment and Land Courts

Following the enactment of the Environment and Land Court Act in 2011⁷⁵, the Judiciary moved expeditiously to conduct interviews and appoint some judges to the courts established under this law. These are superior courts established 'to hear and determine disputes relating to the environment, and the use and occupation of, and title to land. The courts have the same status as the High Court with the principle objective of just, expeditious, proportionate, and accessible resolution of disputes relating to environment and land.⁷⁶ This was a great gain for land reforms.

2.4.1.4 Land Use Policy

The Ministry of Lands has initiated processes for the development of a land use policy which is at an advanced stage. A concept paper has been prepared and a number of stakeholder forums held to review the draft policy. It is prudent that the Ministry allows the NLC to take the lead in development of this policy.⁷⁷

2.4.1.5 Public Awareness

The Ministry of Lands, under its Land Reforms Transformation Unit (LRTU), has been conducting civic education on land reforms around the country. The forums have been undertaken under the Public Education and Awareness Technical Working Group of LRTU. These efforts have been complemented by Civil Society Organizations (CSOs)⁷⁸ as this is a positive step in realizing the right of access to information under Article 35 of the Constitution.

⁷³Constitution of Kenya (2010) Article 67

⁷⁴Mwathane (2010) *Steps Towards Enhancing Land Tenure Rights : The Kenya Case – Gains And Challenges* ⁷⁵Constitution of Kenya (2010) Article 162 (2)

⁷⁶Mwathane (2010) *Steps Towards Enhancing Land Tenure Rights : The Kenya Case – Gains And Challenges*

⁷⁷Ibid

⁷⁸Ibid

2.4.2 Challenges facing Land Reforms

2.4.2.1 Forceful Evictions

Poor Kenyans continue to suffer perennial inhuman and un-procedural evictions. In January 2014, the Kenyan government sent Kenya Forest Service (KFS) guards, with police support, to Embobut Forest in the Cherangany Hills, to forcibly and illegally evict thousands of indigenous people (the Sengwer), from their ancestral land and burn their homes.⁷⁹ This was despite issuance of a court order forbidding the evictions. These evictions are not only a severe violation of the Constitution,⁸⁰ but also of international law on human rights, biodiversity conservation, and sustainable use of land and the environment.

2.4.2.2 Political Interference

In a special issue of the Kenya Gazette dated October 10th, 2013, Land, Housing and Urban Development Cabinet Secretary, Charity Ngilu, appointed Peter Kangethe Kahuho as the acting Director General of Lands. This position was not contemplated by statute; she did this without consulting the Public Service Commission (PSC) and the NLC. The Cabinet Secretary further granted Kahuho the authority to sign titles, also through a gazette notice, thus taking away the duty from the Lands Commissioner, Zablon Mabea.⁸¹

The Cabinet Secretary is now facing possible removal from office, after the National Assembly adopted the report of a joint committee of lands and delegated legislation with an amendment compelling Ngilu to take responsibility for what the MPs have termed as unlawful actions.⁸²

Similarly, in August 2013, President Uhuru and the Deputy President issued 60,000 title deeds for selected schemes. It was an extremely rushed operation as the title deeds were prepared within one month by the Ministry of Lands, Housing and Urban Development.⁸³ Despite assurances by the NLC chairman that the commission was part of the process, some local leaders claim that NLC was left out of the picture.

The above exercise was viewed as a political move to woo the people of the former Coast province. This is because the land issue was perceived to have been one of the contributing factors to the unpopularity of the Jubilee

⁷⁹Forest Peoples (2014) Kenya defies its own courts: torching homes and forcefully evicting the Sengwer from their ancestral lands, threatening their cultural survival Available at <http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi> (Accessed on February 14, 2014)

⁸⁰Kenya Constitution (2010), Article 63 (d)

⁸¹Standard News (2013). Joint committee probing Cabinet Secretary Charity Ngilu over illegal appointments expected to table report Available at: <http://www.standardmedia.co.ke/?articleID=2000096314> (Accessed on February 14, 2014)

⁸²Citizen News (2013) Parliament Adopts A Report Implicating Ngilu. Available at <http://www.citizennews.co.ke/news/2012/local/item/14899-parliament-adopts-a-report-implicating-ngilu> (Accessed on February 14, 2014)

⁸³Standard Media (2013) Uhuru issues titles as Jubilee bets on land to woo Coast. Available at http://www.standardmedia.co.ke/?articleID=2000092360&story_title=uhuru-issues-titles-as-jubilee-bets-on-land-to-woo-coast&pageNo=2 (Accessed on February 14, 2014)

Coalition during the 2013 General Elections. The Kenya Land Alliance (KLA) warned that the titles being issued could attract a court battle against the NLC in the event that cases of discrimination in the same were reported. The KLA has decried the failure to involve the NLC in the scrutiny of the titles, to ensure that they are not just political documents.⁸⁴

2.4.2.3 Limited budgetary allocation to the National Land Commission

According to a report by Hakijamii and the International Budget Partnership (IBP), the much-awaited land reforms through the NLC would remain a mirage because of budgetary constraints.⁸⁵

2.4.2.4 Policy Implementation

The implementation of Kenya's land policy has been rather ad hoc, guided by internal plans prepared by the Lands Ministry in accordance with the routine Medium Term Plans around which funds are released. No proactive efforts have been made after the approval of the Land policy and the Constitution, to bring stakeholders together to develop clear implementation strategies and plans, and supporting budgets.

This therefore makes it difficult for stakeholders and the public to understand, monitor, review, or audit the progress of implementation. It also makes it difficult for stakeholders to identify their roles in the implementation process. The absence of such a comprehensive plan also makes it difficult to determine and source for budgetary support.⁸⁶

2.4.3 Recommendations on Land Reforms

- a) The Government should provide realistic budgetary allocations for the NLC to enable it dispense its constitutional mandate;
- b) The Jubilee Government should desist from politicizing land issues which constitute the core mandate of the independent and constitutionally established NLC;
- c) The Government should halt illegal forceful evictions of the Sengwer community from the Embobut forest and allow for amicable settlement of the matter;
- d) The Ministry of Lands should put in place monitoring and evaluation mechanisms to oversee implementation of land reforms;⁸⁷
- e) The NLC should set the minimum and maximum acreages as

⁸⁴Ibid.

⁸⁵Standard News (2014) Land Reforms Under Threat as NLC Denied Cash Available at https://www.standardmedia.co.ke/mobile/?articleID=2000103509&story_title=land-reforms-under-threat-as-nlc-denied-cash&pageNo=4 (Accessed on February 14, 2014)

⁸⁶Ibid

⁸⁷Mwathane (2010) Steps Towards Enhancing Land Tenure Rights : The Kenya Case – Gains And Challenges

required by the Constitution, and equally set the provisions on leasing land to non-citizens.

2.5 Constitutionalism

2.5.1 Gains in Constitutional reforms

In 2010, the Commission for the Implementation of the Constitution (CIC) was established in order to monitor, facilitate, coordinate, and oversee the implementation of the Constitution. After the Constitution was promulgated in 2010, the CIC in accordance with its mandate oversaw the establishment of new state institutions.⁸⁸

In line with the above, came positive institutional reforms in the security sector, the Judiciary, the electoral system, and the land sector as already discussed in preceding sections of this report. Similarly, in 2013, President Kenyatta nominated and appointed cabinet secretaries as prescribed by the Constitution. The recruitment of Principal Secretaries was through a somewhat competitive and open process.

2.5.2 Setbacks threatening Constitutional reforms

As already set out above, various challenges have been witnessed in the electoral, judiciary, security, and land sectors, which have the potential to greatly undermine constitutional reforms. In addition, in 2013, MPs fought to increase their salaries and disband the Salaries and Remunerations Commission (SRC) as they pushed to withdraw themselves as state officers contrary to the Constitution. This subject is analyzed in detail in Chapter three, in relation to Economic and Social Rights.

Kenya has recently marked a retrogressive step in realization of the fundamental freedom of expression, including that of the media, as guaranteed in the Constitution.⁸⁹ This occurred when President Uhuru Kenyatta assented into law the contentious Kenya Information and Communications (Amendment) Bill passed by MPs on December 4th, 2013. The net effect of the amendment was to create a government-dominated tribunal with power to punish journalists and media houses for their reporting, by imposing hefty fines for both.

Interestingly, the House also passed a law which establishes a self-regulatory mechanism for the media but placed it under the oversight of a government-dominated tribunal. With a provision of KSh20 Million fine

⁸⁸TISA, Available at <http://www.tisa.or.ke/reforms-update/constitution-implementation-scorecard/cic/> (Accessed on February 11, 2014)

⁸⁹Constitution of Kenya (2010) Article 33 -34

⁹⁰Daily Nation News (2013) *Controversial Media Bill signed into Law* Available at <http://mobile.nation.co.ke/news/Media-Bill-Uhuru-Kenyatta-Justin-Muturi/-/1950946/2114230/-/format/xhtml/-/enasn7/-/index.html> (Accessed on February 14, 2014)

against media houses and an expansion of offences for which media houses can be punished by a government-dominated tribunal, constitutional protections guaranteed to journalists have been breached; these provisions severely restrict press freedom.⁹⁰

2.6 Transitional Justice

2.6.1 Gains in Transitional Justice in Kenya

2.6.1.1 Landmark Ruling on Indigenous Land Rights

In 2003, Centre for Minority Rights Development (CEMIRIDE) in Kenya and the Minority Rights Group International instituted a suit at the African Commission on Human and People's Rights (ACHPR) on behalf of the Endorois (a traditional pastoralist community). The Endorois had been evicted from their homes at Lake Bogoria in the 1970s, to make way for a national reserve and tourist facilities.⁹¹

In a landmark ruling determining who indigenous people in Africa are, and what their rights to land are, the ACHPR found that this eviction, with minimal compensation, violated the Endorois' rights to property, health, culture, religion, and natural resources.⁹² The Kenyan Government was therefore ordered to restore the Endorois to their historic land and to compensate them. This ruling is a major victory for indigenous people across Africa.

The Endorois people are however yet to get justice. Currently, the KHRC and other human rights actors are pushing the Government to implement the said ruling and return the Endorois land, compensate them for the loss and damage they suffered, and involve them in planning and development projects in the area. In November 2013, the African Commission on Human and Peoples' Rights passed a resolution urging the Republic of Kenya to honour its obligations under the African Charter and implement 'Endorois decision'.⁹³

2.6.1.2 Recognition of liberation movements pre and post-independence

A 2012 case filed by the Mau Mau veterans against the British Government⁹⁴ ended successfully on June 6th, 2013, when the British Government

⁹¹276/ 2003

⁹²African Commission on Human and Peoples' Rights 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya Available at <http://www.achpr.org/communications/decision/276.03/> (Accessed on February 15, 2014)

⁹³African Commission on Human and Peoples' Rights(2013) 257: Resolution Calling on the Republic of Kenya to Implement the Endorois Decision Available at <http://www.achpr.org/sessions/54th/resolutions/257/> (Accessed on February 15, 2014)

announced that it had reached an out-of-court settlement with Leigh Day and Co. Advocates, the Mau Mau War Veterans Association (MWVA), and the KHRC. The settlement of the claim in torture and abuse by the British Colonial Government consists of an apology, compensation for damages, and construction of a monument to immortalize Mau Mau war veterans.

2.6.2 Gaps in Transitional Justice

2.6.2.1 The TJRC

The TJRC conducted its work and delivered a voluminous report amidst several concerns as to the creditability of its proceedings and outcomes. As it carried out its proceedings, questions arose as to the integrity of the Commission's Chairperson, Bethuel Kiplagat. As a result, the TJRC suffered financial and other resource constraints, as well as public apathy.

Furthermore, doubt has been cast on the credibility of the report, as it was alleged that there had been interference by the current Executive. This was in relation to the content of Volume IIB of the report whose Chapter on Land and Conflict had been edited without the collective consensus of all commissioners. Indeed three commissioners authored a dissenting report on this section. In contravention to the TJRC standing orders, the dissenting report was not included in the final volumes handed over to the President.⁹⁵

2.6.2.2 No Justice after Post-Election Violence

i) *The International Criminal Court (ICC) Trials*

The high political profile of the trial of the President and the Deputy President at International Criminal Court (ICC) has overshadowed the exigencies of finding justice for the PEV victims. The Government of Kenya has consistently stated that it is committed to cooperating with the proceedings. However, the ICC Chief Prosecutor has on several occasions complained of the lack of cooperation from the Jubilee Government and even alleged witness intimidation. This has led to several witnesses recanting their evidence or stepping down from the cases.

Further, contrary to its statement of cooperation, the Government has in the past made several unsuccessful attempts to scatter the

proceedings through the AU and the UN Security Council, among other avenues.⁹⁶

ii) *National complementary activities*

In May 2012, a Judicial Service Commission committee was set up with the mandate to look into modalities of establishing an international crimes division in the High Court, to hear and determine pending post-election violence cases, and deal with other international and transnational crimes.⁹⁷

However, the Judiciary and the Director of Public Prosecutions (DPP) have differed over whether Kenya should set up a court to try international and organized transnational crimes. The DPP holds that investigations and prosecutions under the Constitution of Kenya do not and cannot lie with or under the High Court, as the principle of separation of powers must be respected.⁹⁸

Another big blow was dealt to the PEV victims when in 2013 the DPP stated that there was insufficient evidence to prosecute 5,000 pending cases. The victims had hoped that middle and lower level perpetrators of PEV would be brought to account.

iii) *IDP Resettlement*

A report from a Government Taskforce on Resettlement of IDPs and Forest Evictees shows that as at September 2013, a total of 6,546 households had been resettled or were in the process of being resettled on a parcel of land purchased by the Government measuring 19,168 acres.⁹⁹ However, there remain a significant number of IDPs who are not captured in Government data, hence still not contemplated in resettlement and assistance programs. It has been noted that some IDP's from the former Western and Nyanza provinces have been left out of the compensation scheme and been accorded little recognition in comparison to their counterparts

⁹⁶Universal Periodic Review, Annual Progress Report September 2012- September 2013); An Assessment of Government's Performance In Implementation of UPR Recommendations

⁹⁷S. Kobia, 2014, The International Crimes Division of the High Court of Kenya Stakeholders' Workshop <http://www.judiciary.go.ke/portal/untitled-resource12.html>

⁹⁸Daily Nation, 2014 JSC, Tobiko in row over special court by Macharia Mwangi Available at <http://mobile.nation.co.ke/news/JSC-Tobiko-in-row-over-special-court/-/1950946/2196020/-/format/xhtml/-/kk3oddz/-/index.html> (Accessed on February 20, 2014)

Daily Nation, 2014 JSC, Tobiko in row over special court by Macharia Mwangi Available at <http://mobile.nation.co.ke/news/JSC-Tobiko-in-row-over-special-court/-/1950946/2196020/-/format/xhtml/-/kk3oddz/-/index.html> (Accessed on February 20, 2014)

⁹⁹Universal Periodic Review, Annual Progress Report September 2012- September 2013); An Assessment of Government's Performance In Implementation of UPR Recommendations

⁹⁴Ndiku Mutua and Others v. The Foreign and Commonwealth Office Case No: HQ09X026666 of 2012
⁹⁵[CTJ (2013) "ICTJ Welcomes Kenya's TJRC Report" Available at <http://ictj.org/news/ictj-welcomes-kenyas-tjrc-report> (Accessed on February 15, 2014)

from the former Central province. This is an issue that should be addressed.

The National Consultative Coordination Committee (NCCC) on Internally Displaced Persons is yet to be established. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 (or simply the IDPs Act) creates the NCCC, which is meant to provide a wholesome approach to dealing with matters of internal displacement. The NCCC is meant to include representation by IDPs and non-state actors working on matters of displacement. Despite the IDPs Act coming into force on January 4th, 2013, the Government is yet to constitute the NCCC.¹⁰⁰

2.6.3 Recommendations on Transitional Justice

- a) The Government should expeditiously implement the Endorois' decision by the ACHPR;
- b) The Government should implement the TJRC report by instituting investigations, prosecutions, and other measures aimed at bringing to account those adversely mentioned in the report;
- c) The Government should commit to publish the dissenting report with respect to the Chapter on Land and Conflict in Volume IIB as part of the TJRC final report, and in addition take disciplinary measures against persons who allegedly tampered with the report;
- d) The Judiciary and the Office of the DPP should exercise expedience in establishing the proposed international crimes division of the High Court of Kenya aimed at trying middle and lower level perpetrators of 2007 /2008 PEV.¹⁰¹



In a real sense, all life is interrelated. The agony of the poor impoverishes the rich; the betterment of the poor enriches the rich. We are inevitably our brother's keepers because we are our brother's brother. Whatever affects one directly affects all indirectly."

- Martin Luther King Junior Jr (1967).¹⁰²

3.1 Introduction

The Committee on Economic Social and Cultural Rights, in its 21st Session held in November 2008, observed that that the key areas of concern in realization of these rights in Kenya include general high poverty levels, water and sanitation, health care and malnutrition.¹⁰³ The Constitution has progressive provisions regarding these concerns; at Article 43 which is dedicated to Economic and Social Rights mostly derived from the Covenant on Economic and Socio-Cultural Rights (CESCR).

This Chapter of the Report will assess the gains made and the apparent gaps in addressing some of the Committee's concerns as well as other emerging issues such as housing, labour rights, education and social protection. Generally, the normative content relating to this rights include four key issues: adequacy; access; affordability; and, availability. These are the factors informing the analyses below.

¹⁰⁰Universal Periodic Review, Annual Progress Report September 2012- September 2013); An Assessment of Government's Performance In Implementation of UPR Recommendations

¹⁰¹Universal Periodic Review, Annual Progress Report September 2012- September 2013); An Assessment of Government's Performance In Implementation of UPR Recommendations

¹⁰²Martin Luther King, 'The World House' in *Where Do We Go From Here: Chaos or Community?* (1967), <<http://www.thinkoutword.org/wp-content/uploads/world-house-MLK.pdf>> Accessed 19th February 2014

¹⁰³UN, 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Kenya' (19th November 2008) http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.KEN.CO.1_EN.pdf

3.2 Right to Housing

The Constitution provides that every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.¹⁰⁴ In Article 11 of the CESC, the right to housing is also listed among the body of rights that State parties should recognize in line with everyone's right to an adequate standard of living. Concerns relating to these rights over the period under review revolve around unlawful and inhumane evictions, slum insurgence, poor sanitation, and general access to the right to housing.

3.2.1 Gains in Securing Housing Rights

Kenya has in place an informal settlement upgrading and prevention policy (May 2013)¹⁰⁵ which sets the blue print for tackling some key housing problems faced by informal settlement dwellers including: poor sanitation and poor quality of houses, lack of access to credit, and extortion by landlords. A national Task Force on Evictions and Settlement is also currently working on an Eviction and Resettlement Procedure Bill which aims to stipulate procedures that will ensure protection, prevention, and redress against forced evictions.

There have also been a number of progressive pronouncements by courts on the right to housing. Key among these is the case of Susan Waithera and others Vs. The Town Clerk, Nairobi City Council and two others [2011] eKLR, where the court declared that evictions must uphold the dignity of the evictees, and that Government has an obligation to provide alternative housing during evictions. In another case of Satrose Ayuma and Others v AG [2013] eKLR, the Court upheld the need to balance the right to housing with protection of property rights.

The Government has also taken modicum steps towards resettling IDPs. The President, in the State of the Nation Address to the National Assembly on March 27th, 2014, stated that the Government began the implementation of a cash payment programme for all pending cases of Internally Displaced Persons (IDPs); about 8,298 households which had not been resettled. As at March 2014, a total of 777 households had received cash payments of Kshs 400,000 each, totaling Kshs 3.3 Billion. The exercise was ongoing at

the time of writing this report. The KHRC has an upcoming report which appreciates the milestones, but indicates that more needs to be done to achieve sustainable solutions for internal displacement. Resettlement has been dogged by corruption, favoritism, discrimination, and a host of human rights violations faced by IDPs.¹⁰⁶

3.2.2 Gaps in Realizing the Right to Housing

According to 2011 Government statistics, the need for new urban housing stands at 150,000 units annually, and only 20 percent to 33percent of this demand is being met by the Government and the private sector.¹⁰⁷ Besides, even though the Government reports an increase in housing construction, 80 percent of the new housing supply only meets the needs of the middle-to high income part of the population, yet the greatest demand is among the lower-middle and low-income population.

According to the 2013 Slum Upgrading and Prevention Policy, at least 60 percent of urban residents live in informal settlements where housing conditions are dire. Most informal settlement houses are one room shacks built with very poor materials, thus exposing the residents to health hazards. The houses lack basic services such as water and sanitation, and fire and safety protection, and the rental cost is usually not commensurate with the house conditions. This is largely attributable to the fact that most informal settlement dwellers and landlords have no access to affordable credit to improve their structures. Additionally, they suffer a variety of illegal levies imposed by organized cartels that normally collude with the Local Administration.

Another negative phenomenon in Kenya's housing landscape is the rise in illegal and inhumane evictions, in many cases done by Government agencies. Examples of recent evictions include the Embobut Forest and Cherangany Hills evictions, which saw security agencies torch houses as part of the forceful evictions. Not only do the evictions infringe on the rights of indigenous people, but also leave thousands homeless, with the Government not offering any adequate alternative accommodation. The failure to do so greatly infringes on the peoples' right to housing.

¹⁰⁴Article 43(1)(b)

¹⁰⁵GoK, *Slum upgrading and prevention Policy (May 2013)* http://healthycities.berkeley.edu/uploads/1/2/6/1/12619988/kenya_slum_upgradeprevent_policy_may_2013.pdf

¹⁰⁶KHRC, (2014), *Displaced: Not Yet Settled*, www.khrc.or.ke/publications

¹⁰⁷See *Simplified Version of Existing Housing Sector Incentives*, Ministry of Housing, (May 2011) <http://www.housing.go.ke/wp-content/uploads/2012/06/Housing-Incentives-Revised-in-May-2011.pdf>

3.3 Right to Healthcare

Article 43 guarantees every person the right to the highest attainable standards of health. This accentuates the right as guaranteed by Article 12(1) of the CESC and Article 16 of the African Charter on Human and Peoples' Rights (AChHPR).

3.3.1 Gains in Access to Healthcare

On June 1st, 2013, the Jubilee Government declared the implementation of free maternal healthcare. This was pursuant to its campaign manifesto that promised to focus on primary healthcare for all Kenyans, starting with women, and particularly, expectant and breastfeeding mothers. The State of the Nation Address in March 2014, reported that the introduction of free maternal healthcare had contributed to the rise of hospital delivery from 44 percent in March 2013, to 66 percent as at March 2014.

3.3.2 Gaps in Realizing the Right to Health

The shortage of labour is one of the most outstanding problems in the health sector in Kenya. Notably, Kenya falls far below the minimum threshold as set by the World Health Organization (WHO), of 23 doctors, nurses, and midwives per population of 10,000 for the delivery of essential child and maternal health services.¹⁰⁸ This shortage is markedly worse in the rural areas where, as noted in a study by Transparency International – Kenya (TI), there are under-staffing levels of between 50 percent and 80 percent at the then provincial and rural health facilities.¹⁰⁹

In particular, the problems in the sector acutely affect maternal health. Kenya's maternal mortality rate is estimated at 488 deaths per 100,000 live births, well above the Millennium Development Goals (MDGs) target of 147 per 100,000 by 2015.¹¹⁰ Further, it is estimated that for every woman who dies in childbirth in Kenya, another 20 to 30 women suffer serious injury or disability due to complications arising during pregnancy or delivery.¹¹¹

According to a TI Survey,¹¹² Kenya has good healthcare policies but glaring implementation gaps. This survey reports that new health facilities are

¹⁰⁸WHO, *Global Atlas of the Health Workforce*, World Health Organization, Geneva, 2013 <www.who.int/globalatlas/autologin/hrh_login.asp> Accessed 12th February 2014

¹⁰⁹Transparency International – Kenya *The Kenya Health Sector Integrity Study Report (2011)* <<http://www.tikenya.org/index.php/integrity-studies?download=152:the-kenya-health-sector-integrity-study-report>> Accessed 13th February 2014

¹¹⁰Kenya's Other Great Catastrophe: Women and Infants Dying in Childbirth, *The Guardian*, September 28, 2013, <http://www.theguardian.com/commentisfree/2013/sep/28/kenya-westgate-maternal-infant-mortality>

¹¹¹Realising Sexual and Reproductive Health Rights in Kenya: A Myth or Reality? (Kenya National Commission on Human Rights, 2012)

¹¹²[file:///C:/Users/Ataka/Downloads/ti%20health%20report%20\(1\).pdf](file:///C:/Users/Ataka/Downloads/ti%20health%20report%20(1).pdf)

constructed in a very haphazard manner, without clearly defined policies to govern their establishment and subsequent management.

Indeed, in a number of the geographical locations covered by the TI Survey, there were many health facilities that had been constructed from the Constituencies' Development Fund (CDF). These facilities however did not have sufficient staff, drugs, and medical supplies. Their construction was more as a result of influence by politicians who held the misconceived notion that access to health facilities automatically translates to good health for the community, without necessary consideration of any substantial health indicators.

Most recently, it is becoming apparent that the planned decentralization of health services to the county level as required by the Fourth Schedule to the Constitution has stalled.

3.4 The Right to Education

Education is guaranteed in the Constitution, including the right to free and compulsory basic education for every child.¹¹³ The Constitution also guarantees the youth right of access to relevant education and training.¹¹⁴ The right to education is also founded on Article 13 of CESC and Article 17 of the AChPHR.

3.4.1 Gains made in realization of Right to Education

One of the legacies of former President Mwai Kibaki is the Government's introduction of the Free Primary Education (FPE) program in 2003, and subsequently in 2008, Free Day Secondary Education (FDSE). The introduction of free education and particularly FPE has seen a steady increase in school enrolment over the years. According to a 2013 Report by KIPPRA,¹¹⁵ between 2010 and 2012, the Gross Enrolment Rate (GER) in primary schools rose from 60.9 percent to 66.3 percent. The GER in Secondary Schools improved from 47.8 percent in 2010 to 49.3 percent in 2012.

3.4.2 Gaps in Realization of the Right to Education

An October 2012 report by United Nations Economic Socio-Cultural

¹¹³Article 43(1) (f) and Article 53(1) (b)

¹¹⁴Article 55(a)

¹¹⁵KIPPRA, 'Kenya Economic Report, 2013' <http://www.kippra.org/downloads/Kenya%20Economic%20Report%202013.pdf>

¹¹⁶UNESCO 'Education for All Global Monitoring Report' http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/EDUCATION_IN_KENYA_A_FACT_SHEET.pdf

Organization (UNESCO)¹¹⁶ on Kenya paints a picture of failure despite legislative and policy measures such as FPE and FDSE. According to the report, approximately one million children are still out of school in Kenya despite FPE and attempts at FDSE. While this is almost half the number reported in 1999, it is still the ninth highest of any country in the world. The survey also raised concerns about the inaccessibility of free education and resulting benefits to poor and marginalized groups. It reports that 55 percent of poor girls and 43 percent of poor boys living in the North-Eastern regions have never been to school.

Education in Kenya has also been noted to be of poor quality in that it does not ensure that all children learn the basics. According to a 2011 report by Uwezo Kenya,¹¹⁷ 'only three out of 10 children in Class Three can read a Class Two story [in English], while slightly more than half of them can read a paragraph. Four out of 100 children in Class Eight cannot read a Class Two story'. Further, Uwezo reported that 30 percent of Class Three children are unable to complete Class Two division, and 10 percent of Class Eight children cannot do Class Two division. The 2012 survey by UNESCO also revealed that among young men aged 15-29 years who had left school after six years of schooling, 6 percent were illiterate and 26 percent were semi-literate. The figures are worse for girls, with 9 percent illiterate and 30 percent semi-literate after being in school for six years.

The Jubilee party through its campaign manifesto acknowledged the inequalities and poor standards of education in Kenya. It therefore pledged that the Government would increase the number of schools in disadvantaged areas, and restrict class sizes to a maximum of 40. It would further improve the student-teacher ratio to 1 teacher for every 40 students. The Government is yet to disclose any programs it has formulated to honour these pledges.

3.5 Social Security

Social Security is a right provided for in the Constitution,¹¹⁸ and Article 9 of the CESC. In Kenya, social security, social assistance, and health insurance converge to form the bigger sphere of social protection measures which are calculated to:-

¹¹⁷Uwezo, Kenya 'Are Our Children Learning? Annual Learning Assessment Report, 2011' <http://www.pokot.org/wp-content/uploads/2012/05/Uwezo-20111.pdf>
¹¹⁸Article 43(1)

- Enhance the capacity of and opportunities for the poor and vulnerable to improve and sustain their lives, livelihoods, and welfare;
- Enable income-earners and their dependents to maintain a reasonable level of income through decent work;
- Ensure access to affordable health care, social security, and social assistance.

Social protection recognizes the poverty gaps in society.

3.5.1 Gains in Social Security

There are various programs in Kenya aimed at social protection for the vulnerable. These include the United Nations Children's Fund (UNICEF), the World Bank, and the United Kingdom's Department for International Development (DFID) supported Cash Transfer for Orphans and Vulnerable Children (CT-OVC) programme. According to the Food Agricultural Organization (FAO), by December 2012, the Government had succeeded in providing regular bi-monthly cash transfers of Kshs 4,000 to over 150,000 households nationwide, across the 47 counties¹¹⁹ covered by the program.

In February 2014, President Uhuru Kenyatta officially re-launched the program which was expanded to include 164,000 persons above 65 years of age who are living in extreme poverty, 27,200 persons with severe disabilities, and 253,000 orphans and vulnerable children. The Government is working towards raising the number of beneficiaries of the monthly government stipend of Kshs 2,000 by 92 percent; from 236,839 households in December 2012, to 454,200 households by end of June 2014.¹²⁰

In December 2014, the National Assembly passed the new National Social Security Fund (NSSF) Act which with effect from May 2014, seeks to restructure the Fund into a pension fund; it has previously operated as a provident fund. The contributions to the fund and the size of benefits from the same will also rise, as individuals will now contribute 6 percent of their salaries as will their employers.

3.5.2 Gaps in Social Protection

The 2012 Sector Review while reporting general success of social assistance programs noted that social protection payments in Kenya have tended to

¹¹⁹FAO, *The economic impacts of CT-OVC Programme in Kenya* (2013)

¹²⁰Business Daily 'Kenya Strengthens Welfare State with Stipend for the Poor' (4th February 2014)

be erratic. As a result, recipients' ability to use the transfer as collateral has been undermined, the risk of defaulting on loans has increased, as has the likelihood of recipients having to spend all their resources on short-term consumption.

The key problem in social protection lies in the implementation of the twin social security and insurance schemes, the NSSF, and the National Hospital Insurance Fund (NHIF). As noted in the 2012 Sector Review, the NSSF has over the years had low rates of coverage and contributions. This, coupled with poor investment returns, has resulted in low benefit levels for members.

Up until the restructuring that took place as a result of the new NSSF Act, the fund was structured as a provident fund. This meant that benefits were only payable once (in lump sum) upon retirement. Overhead costs of the fund have also been high. This has led to plummeting levels of confidence in the Fund's ability to deliver its mandate, hence low uptake of membership. According to a 2011/2012 survey by the Retirement Benefits Authority (RBA),¹²¹ the number of Kenyans participating in any retirement benefits arrangements falls short of 2 Million out of the 10 Million Kenyans recorded as employed; only 15.9 percent of the workforce is covered in formal retirement savings. The survey further revealed that workers preferred their occupational pension schemes to the compulsory NSSF scheme.

The structure and scope of the NHIF runs counter to the essence of social protection, as it is generally inaccessible to the poor and low income earners. Its coverage is limited to inpatient care; outpatient and preventive services are currently excluded, even though the NHIF Act confers the fund with the mandate to cover inpatient and outpatient care. Coverage extension to non-hospital health benefits has also not yet been implemented. Further, the scheme carries with it a prohibitive penalty (five times the defaulter's contribution) for default.

The above issues have resulted in reluctance of low income earners e.g. informal sector workers to enroll. They feel that inpatient cover alone might

not be sufficient for their healthcare needs, and the penalty is exceedingly disproportionate.¹²² Indeed a 2011 survey by Deloitte reports that informal sector workers who constitute up to 78.8 percent of Kenya's workforce account for only 19 percent of the total membership of the Fund.¹²³ Although membership is generally increasing, the survey revealed that the NHIF faces variations in the level of activity among members with dropouts being experienced. Inactivity (when contributions are paid inconsistently by members in a particular period) rates are higher among the informal sector members who make voluntary contributions.

Overall, the NHIF estimates that 30 percent of all members are inactive, with significantly higher levels of inactivity among informal sector members. This problem is compounded by the fact that informal sector members consume 33 percent of the benefits paid out yet they contribute a paltry 5 percent to the fund.

3.6 Protection of Labour Rights

Labour rights include the right to work, fair labour practices, and reasonable conditions of work,¹²⁴ similar to Article 15 of the AChHPR. The right to work is founded in Article 6 of CESC, and can also be inferred from Article 28 which affirms every person's inherent dignity, and the right to have that dignity respected and protected.

3.6.1 Gains in protection of Labour Rights

In a self-assessment report to the treaty body on ESCR,¹²⁵ the Government reckons that in the 2009/2010 financial year, 502,900 jobs were created. The number went up further to 503,500 in the 2010/2011 financial year. The formal sector is said to have generated 62,600 new jobs in 2010, compared to 56,300 jobs in 2009. This made up 12.4 percent of the total jobs generated. The informal sector, which represented 80.6 percent of total employment, generated an additional 440,900 jobs.

The increase in generation of jobs has been attributed to improved economic performance, coupled with increased access to cheaper credit from banks, from the Women Enterprise Fund, and from the Youth Development Fund. Since coming into power the Jubilee Government has also institutionalized

¹²¹RBA, *Policy Briefs, 2011/2012*, file:///C:/Users/Ataka/Downloads/rba_policy_brief_2011_2012.pdf

¹²²Bernard Muniya, 'Universal health care in Kenya: Opportunities and challenges for the informal sector workers' *International Journal of Education and Research* Vol. 1 No.11 November 2013

¹²³Deloitte Consulting, 'Strategic Review of the National Hospital Insurance Fund - Kenya' (2011) <https://www.wbginvestmentclimate.org/advisory-services/health/upload/Strategic-review-of-the-NHIF-final.pdf>

¹²⁴Article 41

¹²⁵Above n21

¹²⁶Government Printer, *Public Procurement and Disposal (Amendment) Bill, 2013* < [http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2013/ThePublicProcurementandDisposal\(Amendment\)Bill2013.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2013/ThePublicProcurementandDisposal(Amendment)Bill2013.pdf)>

potential employment generating initiatives; among them, the Uwezo Fund launched on September 8th, 2013, and the Public Procurement and Disposal (Amendment) Bill¹²⁶ intended to ensure that the youth get at least 30 percent of total annual procurements by public entities.

3.6.2 Gaps in realizing labour rights

Despite the reported increase in the number of jobs created through public and private sector initiatives, the Government admits to rising unemployment. The UN Committee on ESCR for instance revealed that Kenya's unemployment rate in 2011 was 40 percent, up from 12.7 percent in 2006. Further, the Government conceded that the right to work remains extremely tenuous for certain sections of society. For instance, despite the affirmative action provisions in the Constitution, and the Persons with Disabilities (PWDs) Act No. 12 of 2003, employment opportunities for PWDs remain extremely limited.

Poor working conditions are prevalent for flower farm workers, domestic workers, commercial sex workers, among others. A survey carried out by Oxfam in August 2013, in Mukuru, an informal settlement in Nairobi¹²⁷discloses that women domestic workers face serious livelihood challenges. These include low and delayed pay, poor working conditions, sexual exploitation, as well as physical and psychological abuse. The survey further revealed that to a great extent, economic obstacles stood in the way of these workers dealing with the problems they face at work, and the Government had also failed to intervene. It is reported that 40.52 percent of women in Mukuru faced the risk of losing their jobs and income if they reported their employers and therefore preferred to suffer in silence. Additionally, 36.49 percent were not aware of any place where they could report or lodge their complaints. Lack of confidence in the outcomes of any interventions, or lack of money and other resources to pursue their complaints, were each mentioned by 10.81 percent of women as deterrents to their quest for justice.

In 2012, the KHRC conducted a survey on the working conditions of women in 15 flower farms in Naivasha, Thika, and Athi River.¹²⁸ One of the key findings of the study was that on average, women in the farms work longer

¹²⁷Oxfam, *Report of a Baseline Survey of Women Domestic Workers in Mukuru Informal Settlement - Nairobi Kenya*, (Oxfam, August 2013)

¹²⁸KHRC, *Wilting in Bloom: The Irony of Women Labour Rights in the Cut-flower Sector in Kenya*, (KHRC, 2012)

hours (12.9 hours per day) compared to their male counterparts (8.2 hours per day). Worse still, the women earn less because the additional hours they work are not remunerated. All in all, the hours of work in the cut-flower sector are way above the national average, with work-days amounting to as high as 16 hours, especially during peak seasons.

Commercial sex workers (CSWs) on the other hand continue to suffer similar if not worse conditions of work. Their situation remains the same as it was at independence and now under the Jubilee administration. The current Government has retained systems and laws (Sections 153 and 154 of the Penal Code, Cap 63) that criminalize commercial sex work. CSWs are therefore subjected to unsafe and oppressive conditions. In the absence of any legal framework in defense of CSWs, they are exposed to harm, exploitation, and physical abuse, just as much as they are exposed to brutality in the hands of law enforcement agencies, especially askaris (security agents) in urban and town centers.¹²⁹

3.7 Challenges in Fulfilling Socio-Economic Rights

3.7.1 Financing Gaps

Stakeholders in the socio-economic sector state that there is very limited funding by the government for programs aimed at promoting the enjoyment of socio-economic rights. A look at reports and budgetary allocations by the Government affirms this. For instance, Hakijamii states that there is a huge gap between funding needs and actual allocations for the housing sector in the current 2013/2014 financial year. The housing development and human settlements program's requirement was Kshs 6.73 Billion,¹³⁰ yet it was allocated Kshs 5.94 Billion, about 12 percent less of what is required.

In the medium term, the program requires Kshs 23.32 Billion. However, the proposed allocation as per the 2013/2014 program-based budget estimates is about Kshs 15.98 Billion. This represents an under-funding of Kshs 7.34 Billion. As regards health, the budgetary allocation in 2013/2014 was Kshs 34.7 Billion compared to Kshs 55.1 Billion in the previous financial year.¹³¹ Although this reduction is attributed to the envisaged decentralization of healthcare services to the counties, the Institute for Economic Affairs (IEA) notes that there is no capacity at county level to absorb the ostensibly transferred finances, nor are there any measures to build the same.

¹²⁹It should be recalled that Article 6 of ICESCR places on the state an obligation to take steps to safeguard the right to work which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept

¹³⁰Hakijamii. 'Report on Housing Sector Financing in Kenya' <http://www.hakijamii.com/publications/budgethousingbooklet.pdf>

¹³¹IEA, 'Budget 2013/14: The Onset of the Devolved Government and the Hurdles Ahead' (July 2013) file:///C:/Users/Ataka/Downloads/Budget-Guide-2013-Very-Final%20(2).pdf

3.7.2 Governance

Kenya has some well-intended policies and measures for the realization of socio-economic rights on paper. The enjoyment of these rights is however often curtailed by weak institutional structures and in some cases, inadequate or retrogressive legal frameworks. For instance, access to mortgages has largely remained a reserve of the middle and upper class. This can be attributed to the inability of the National Housing Corporation (NHC) to formulate and operate a credit scheme for low income earners. Indeed, the Jubilee Government has not made good its promise to put in place measures to address the housing problem in Kenya; a promise made in its campaign manifesto. This includes the promise to waive and graduate stamp duty for first time home owners, formulation of 5 year housing plans by the County Governments, informal settlement upgrading, micro-finance credit for new home constructions, and lowering of mortgage rates.

Access to healthcare has probably suffered the most in terms of poor governance structures further compounded by the envisaged devolution under the Constitution. Health workers in Kenya are opposed to devolution of healthcare; this culminated in an eleven days' strike in December 2013, which paralyzed health services throughout the country and resulted in death of patients. Whilst the strike was called off, there was no tangible resolution reached between the Government and the health workers' union. It ended up in a blame game with both parties saying that the other should be answerable for the deaths. There is no guarantee that the problem will not recur.

Recent media reports also indicate that due to the move to decentralize healthcare services to the counties, a significant number of doctors have resigned from public service.¹³² The impasse is largely due to failure by the Transitional Authority to adequately consult the health workers, and to carry out a comprehensive human resource and assets audit, before gazetting the transfer of healthcare services as required by the Transition to Devolved Governments Act.

The NHIF and the NSSF schemes are equally strapped in poor governance. Prior to the amendment of the Act in 2013, the NSSF functioned as a provident fund (one pay off at retirement) rather than a pension scheme. This led to failure of the fund to serve as a poverty safety net; it essentially

encouraged dissipation of benefits. It is hoped that the new Act which has transformed the fund into a pension scheme and is improving the contribution portfolio will make the fund more beneficial to retirees. Nonetheless, a number of structural gaps exist.

The new Act re-establishes a statutory fund with no clarity as to whether it is to take the form of a trust or a body corporate, and the reference to "pension" schemes rather than "retirement benefit" schemes limits the opt-out option to pension schemes. The NSSF Board of Trustees is set up as a body corporate thereby causing confusion and ambiguity as to whether the fund is established as a statutory fund or as a trust.

Furthermore, the NSSF Board comprising two principal secretaries, seven cabinet secretaries, and a managing trustee appointed by the board, will largely be dominated by the Government.

Article 31 of the Constitution guarantees natural and juristic persons the right to privacy, including the right not to have their person, home or property searched, or information relating to their family or private affairs unnecessarily required or revealed. Notwithstanding, the Bill makes occupiers of premises liable to inspection and any employer, servants and agents of such occupier, and any employee, shall be required to furnish a Compliance Officer all information and documents as will be deemed necessary for inspection.

On the other hand, the NHIF structures are shrouded in opacity. Under the Act, the fund is answerable to the Government and not its members. Public disclosure of operational and financial information is limited in that information is disseminated through Government channels e.g. Parliament and not directly to contributors. An independent mechanism for contributors to address any grievances has also not been set up, nor is it envisaged in the NHIF Act. Moreover, the Act does not stipulate the skills that are necessary for the members of its managing board to possess. This leaves the board at the risk of being deficient in certain skills specifically health insurance skills.

Poor governance and a dilapidated inspectorate system are also partly to

¹³²The Standard 'Crisis Looms as 200 Doctors Resign' (19th March 2014)

blame for the deplorable conditions of work in flower farms, homes (i.e. domestic work), among others as previously discussed. The government affirms this in its 5th report to the committee on ESCR.

In 2012, the KHRC conducted research on the working conditions of women in flower farms.¹³³ The study found that the Ministry of Labour was severely under-staffed; with only 84 labour officers countrywide responsible for the enforcement of labour rights such as those of flower farm workers. This staffing constituted only 42 percent of the needed number of staff for the Ministry to operate efficiently. The Ministry was equally under-resourced with a 40 percent budgetary deficit, making it difficult to undertake activities such as labour inspections and enforcement of labour rights.

3.7.3 Corruption and Wastage

There are programs and projects that have been initiated in the past to address some of the above-mentioned socio-economic issues. However, such programs and projects have been entangled in corruption and wanton wastage of allocated funds. For instance, in 2010, a scandal leading to the loss of Kshs 103 Million of FPE money through fictitious workshops attended by ghost participants was unearthed. This led to the suspension of the then Minister for Education, Prof. Sam Ongeru. In 2011, the then Deputy Prime Minister, Uhuru Kenyatta who was also responsible for the finance docket, revealed in Parliament that Kshs 4.2 Billion had been lost under FPE. This led to several international grant-makers withholding or threatening to withhold funding.

In recent matters (2013), the intended supply of computers to primary schools by the Jubilee Government hit a snag following revelation of wanton corruption in the supplier tendering process.

The health sector is not an exception. It is rife with corrupt cartels involving malpractices such as fraudulent procurement of drugs and medical supplies. Suppliers offer bribes to procuring entities in order to be awarded contracts unfairly. This leads to overpricing, and procurement and distribution of sub-standard goods and supplies. In 2012, the healthcare sector also witnessed grand corruption; a Kshs 4.2 Billion scandal involving irregular payments to ghost clinics, and un-procedural selection of clinics to provide

health services to civil servants.

Worse still, the outright theft of drugs and medical supplies by public officials responsible for their custody and administration also leads to shortage of the same. Consequently, citizens are unable to access healthcare services. Healthcare workers have also been accused of absenteeism and conflict of interest while attending to their private or personal matters. This inevitably leads to lack of access to quality healthcare services by patients as and when they need them.

Decentralization of revenue to support the fulfillment of socio-economic rights such as healthcare, housing, and basic education, is also threatened by the reported wastage and misappropriation of funds both by the county and national governments. A 2014 report by the Controller of budget revealed that county governments spent Kshs 13.33 Billion from July 2013 to September 2013. These expenditures were classified into four categories: personnel emoluments; operations and maintenance; development; and servicing of debts and pending bills.

Of the total spending, 55 percent went towards personal emoluments, 38 percent for operations and maintenance, and only 7 percent towards development programmes. There was nothing allocated to servicing of debts and bills. The Auditor General while speaking to the media in March 2004 revealed that up to Kshs 500 Billion had been lost or was unaccounted for by the National Government between the FY 2011/2012 and 2012/2013. The amount is close to half of the revenue projections by the Government in the current financial year (2013/2014).

3.8 Recommendation on Fulfilling Socio-Economic Rights

3.8.1 On Housing

- a) Treasury and Parliament are urged to increase budgetary allocations for housing to reflect the empirically proven housing demand;
- b) The Jubilee Government in line with its campaign manifesto should provide home-starting incentives such as waiver and graduation on interest on mortgages;

¹³³Oxfam, *Report of a Baseline Survey of Women Domestic Workers in Mukuru Informal Settlement - Nairobi Kenya*, (Oxfam, August 2013)

¹³⁴KHRC, *Wilting in Bloom: The Irony of Women Labour Rights in the Cut-flower Sector in Kenya*, (KHRC, 2012)

3.8.2 On Education

- c) The Government needs to inform its financial investment on education with the urgency and primacy of needs that it deserves. For instance, it is better to reinvest the funds intended for laptop purchase into construction of schools in marginalized areas, and employment of more teachers so as to improve the teacher to student ratio to 1:40;
- d) Graft in the education sector should not be tolerated. Decisive action should be taken against culpable government officials, not just transferring them as was recently done following the laptop procurement graft allegations;

3.8.3 On Healthcare

- e) The Government must endeavour to resolve the outstanding investigation of graft in the health sector including the NHIF/Clinic scandal and ensure that the culprits are charged and punished;
- f) The Government must go beyond the presidential decree on free maternal healthcare and provide substantive legislative, policy, and institutional implementation structures;

3.8.4 On Social Security

- g) The Government needs to engage with stakeholders including Kenya Private Sector Alliance (KEPSA) who have raised concerns about the viability of the new NSSF structures. Future amendments should be undertaken after adequate consultations;
- h) The NHIF Act should be reviewed to promote more accountability by the fund to its members and ensure there is promotion of skills' competencies at the board;
- i) Further, access to the NHIF should be made friendlier to low income earners by eliminating exorbitantly punitive penalties for default;

3.8.5 On Labour

- j) The planned laying off of civil servants is inimical to the right to work and indeed the Jubilee Government's own campaign manifesto of creating more jobs. The Executive should shelve the idea and instead, the SRC should undertake further harmonization of salaries to help reduce the Government's wage bill;
- k) The Ministry of Labour should undertake an urgent audit of the numbers and conditions of workers in flower farms, domestic workers

and commercial sex workers in order to facilitate Government plans for strategic interventions;

- l) Parliament is urged to decriminalize commercial sex work by repealing Sections 152, 153, 154 and 155 of the Penal Code, Cap 63 Laws of Kenya and instead put in place regulatory measures.



From the viewpoint of absolute truth, what we feel and experience in our ordinary daily life is all delusion. Of all the various delusions, the sense of discrimination between oneself and others is the worst form, as it creates nothing but unpleasant.”

- Dalai Lama¹³⁴

4.1 Introduction

Entitlement to equal treatment and freedom from discrimination in Kenya is premised on Article 27 of the Constitution, Article 1 of the Universal Declaration on Human Rights (UDHR), Article 26 of International Covenant on Civil and Political Rights (ICCPR), and Article 3 of the AChHPR among other international law instruments to which Kenya is party. The Constitution and the aforesaid international law instruments proscribe discrimination on the basis of sex, gender, or ethnicity. These three grounds of discrimination are the key areas of reporting under this chapter. The chapter however also briefly assesses progress made towards achieving equality for and non-discrimination of PWDs and other marginalized groups, before laying down the challenges encountered.

¹³⁴Quoted in Mathew E. Bunson, *Wisdom Teachings of the Dalai Lama*, (Plume November 1, 1997)

4.2 Sexual Orientation

Article 27(1) (4) of the Constitution of Kenya lists ‘sex’ as one of the grounds upon which one should not be discriminated. The inclusion of ‘sex’ in this list as was noted in the Australian case of *Toonen v. Australia*¹³⁵ can be interpreted to mean that one should not be discriminated upon on the grounds of sexual orientation. Similarly, at the European Court of Justice which offers persuasive jurisprudence to Kenyan courts, in *P. v. S. and Cornwall County Council*,¹³⁶ it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of sex.

Further, it has also been argued by scholars that inclusion of additional grounds in the discrimination list is unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive.¹³⁷ It follows therefore based on this reasoning that the inclusion of ‘sexual orientation’ in the ‘discrimination list’ is not needed in order for one to uphold the right not to be discriminated upon on the basis of being Lesbian, Gay, Transgender and Intersex (LGBTI). This view was demonstrated by the African Commission on Human and Peoples Rights in Zimbabwe NGO Human Rights Forum v. Zimbabwe.

4.2.1 Gains in eliminating discrimination based on sexual orientation

4.2.1.1 LGBTI case law

A couple of recent cases brought into focus and affirmed some fundamental rights of LGBTI persons and sexuality in Kenya. The first was *R.M vs. AG & Others*, Petition No 705 of 2007 wherein an intersex petitioner successfully petitioned the High Court and got declaratory orders that she had been subjected to intrusive body search by prison officials. In this case, the Court for the first time in Kenya defined what it is to be ‘intersex’. In another unreported case of *Alexander Ngungu Nthungi* (an Intersex) the High Court (Lady Justice Mumbi Ngugi) declared that officers at the Thika Police Station violated Nthungi’s rights and dignity by strip-searching to ascertain sexuality. Damages amounting to Kshs 200,000 compensation were awarded.

¹³⁶Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

¹³⁷Case C-13/94, [1996] IRLR 347 <<http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20P%20v%20S.pdf>>

¹³⁸ICJ Briefing Paper, May 2010. *International Human Rights Law and the Criminalization Of Same-Sex Sexual Conduct*. <http://icj.wpunet.edu/wordpress/wp-content/uploads/2012/06/International-human-rights-law-and-the-criminalization-of-same-sex-sexual-conduct-analysis-brief-2010.pdf> Accessed 16th February 2014

4.2.1.2 Growth of the LGBTI Movement in Kenya

The first signs of an organized LGBTI movement in Kenya appeared in 1997 with the forming of Ishtar MSM¹³⁸. Since then, Kenya has seen increased emergence and registration of movements advocating for gay rights; for instance the Gay and Lesbian Coalition of Kenya (GALCK) which is an umbrella organization of LGBTI organizations in Kenya. Over the years, especially during the second tenure of President Kibaki, LGBTI persons through these organizations have been passively allowed by authorities to come together in groups to advance the protection and realization of their rights.

There is also growing openness in events and functions related to, organized by, and/or attended by LGBTI rights groups. For instance in 2010, KHRC in collaboration with GALCK organized Kenya's first public celebration of the International Day against Homophobia and Transphobia (IDAHO) to wade off stigma and victimization of LGBTI persons.

Noteworthy too are the recent announcements ('coming out') by LGBTI persons of their sexual orientation. One of the most prominent announcements was by David Kuria, an openly gay politician who in the run up to the 2013 General Elections declared that he would vie for the Senate Seat of Kiambu County.¹³⁹ There was also a well-publicized announcement by a renowned author (Binyavanga Wainaina) that he is gay. The resulting publicity and openness about LGBTI persons and issues helps to create opportunity for public discourse and awareness on LGBTI rights.

4.2.2 Gaps in Realizing Equality for LGBTI persons

4.2.2.1 Criminalization of Homosexuality

The Penal Code of Kenya criminalizes homosexuality and categorizes it as 'carnal knowledge against the order of nature'.¹⁴⁰ This law and its provisions on homosexuality have transcended all four presidential regimes in Kenya since independence. Despite continued lobbying and international calls, the sections have neither been amended nor appealed. Criminalization of homosexuality by Kenyan law is at variance with development in other

jurisdictions. For example in South Africa, in the National Coalition for Gay and Lesbian Equality Case,¹⁴¹ the Constitutional Court found that statutory provisions and common law offences prohibiting sodomy were incompatible with the provisions of the country's Constitution (Sections 8 and 9 on equality and non-discrimination) which are similar to Article 27 of the Kenyan Constitution.

In India, the Delhi High Court in Naz Foundation v Government of NCT of Delhi- Delhi High Court No. 7455/2011 found that provisions within the Indian Penal Code that criminalized the so called 'unnatural offences' were incompatible with among others, the Indian Constitution's provision on equality and nondiscrimination (Articles 14 and 15 respectively). Similarly, the High Court of Fiji in a 2005 case of McCoskar v The State [2005] FJHC 500 found sodomy laws to be unconstitutional, on the grounds that criminal law should not be used to discriminate against private same-sex acts.

4.2.2.2 Harassment by State agencies

Flowing from the criminalization of homosexuality in Kenya, LGBTI persons suffer widespread violence and harassment in the hands of law enforcement officers. For instance in an apparent pursuance of Section 163 of the penal Code, on 12th February 2010, the Police in Mombasa arrested 5 men on reports that they were planning a gay wedding.¹⁴² The police subsequently released the men without charging them due to lack of evidence.

A 2011 study by the KHRC¹⁴³ also revealed that LGBTI persons are routinely harassed by the police, held in remand houses beyond the constitutional period under Article 49(1)(f) without charges being preferred against them, and presented in court on trumped-up charges (commonly possession of narcotic drugs, drunk and disorderly behaviour, and prostitution). Closely related to this, is a cartel of corrupt police officials who routinely extort and blackmail LGBTI persons with the threat of arrest and imprisonment if they do not give bribes.

LGBTI sex workers, mostly Men having Sex with Men (MSM) reported being asked for bribes and sexual favours by male police officers in exchange for their freedom and security. Those who failed to give bribes or sexual

¹³⁹KHRC, *The Outlawed Amongst Us: A Study Of The LGBTI Community's Search For Equality And Non-Discrimination In Kenya*, (KHRC, 2011)

¹⁴⁰Reuters, 'Kenya Political Campaign Puts Gay Taboo in Spotlight' (22nd November 2012)<http://www.reuters.com/article/2012/11/22/us-kenya-elections-gay-idUSBRE8AL0K920121122> Accessed 14th February 2014

¹⁴¹Sections 162 to 165

¹⁴²South African Constitutional Court 1999 (1) SA 6

¹⁴³BBC, 'Kenya's Gay Wedding Suspects Freed' <<http://news.bbc.co.uk/2/hi/africa/8520906.stm>> accessed 14th February 2014

¹⁴⁴KHRC, *The Outlawed Amongst Us: A Study Of The Lgbti Community's Search For Equality And Non-Discrimination In Kenya*, (KHRC, 2011)

favours were charged with trumped up charges and in some cases raped by the same officers. A number of respondents reported to have been arrested by police officers on night patrol only for them to be raped in dark street alleys, and then released without being charged. Attempts to report such incidents to the police were futile due to the reluctance of the police to investigate and prosecute their own.

4.2.2.3 Discrimination and Stigmatization by Society

According to the KHRC 2010 study, societal discrimination and stigma is often as a result of failure to appreciate human diversity in sexual orientation and gender identity. In a broader frame, it is also as a result of the failure by the Government through social reform initiatives, to facilitate the much needed sensitization on LGBTI issues and rights. LGBTI issues are generally treated as a taboo topic and the plight and predicaments of LGBTI persons remain shrouded in superstition; often met with irrational and repulsive contempt.

In the KHRC survey, 89 percent of respondents who had disclosed their sexual identity to their families reported being disowned by their family members. Some of them were forced to attend counseling sessions as they were perceived to be suffering from a psychological crisis. More than 300 respondents in the KHRC survey stated that they feel most unwanted and threatened by religious groups. The survey further revealed extensive discrimination and prejudice suffered by LGBTI persons at the workplace. Respondents at the working level reported to have been discharged from duty when their sexual orientation/gender identity was discovered. Others reported to have suffered discriminate refusal of promotion, hostile working environment, ridicule, and humiliation at the workplace.

Discrimination and alienation of LGBTI persons also extends to public institutions such as schools. LGBTI persons who are secondary school students or college students are reportedly punished, suspended, or expelled from school on grounds of actual or suspected sexual orientation or gender identity. Twenty three percent of respondents reported to have suffered one or more of these consequences. Seventy five percent of the respondents who confirmed having been disciplined for alleged same sex sexual conduct or tendencies in schools were expelled. In universities and colleges, victims reported social exclusion, stigmatization, sometimes bullying, and dismissal by private Christian colleges. Some private

universities also refused to allot course work to students who undertook their internships in organizations sympathetic to LGBTI issues.

The problem is also prevalent in other social amenities such as hospitals. LGBTI Kenyans, accessing treatment for Sexually Transmitted Infections (STIs), counseling and testing for HIV, and transgender and intersex persons seeking general care, are often afraid of responding honestly to medical interviews. This is because honesty could lead to rebuke, arrest or both. Doctors often violate the privacy of LGBTI patients by exposing them to other staff or police, preaching to redeem them, or altogether denying them medical care. Most LGBTI persons are more concerned about exposure of their sexual identity and behaviour, as well as how healthcare staff might react if informed of the same. They are thus less concerned about getting medical treatment which means that they will only seek medical attention when their health condition has significantly deteriorated, and when it is often too late.

Respondents also stated that same sex sexual behavior is rarely discussed among healthcare service providers, or between providers and patients. This is despite the fact that providers come across male patients with anal sores or ulcers in the throat, suggestive of male-to-male sex. In Nyeri, some of the respondents reported that they were often embarrassed when they had to explain to doctors or medical staff how they got such sores. This exhibited the lack of informed discussion among medical practitioners on the medical needs of LGBTI persons and in particular of MSMs. Twenty three percent of the respondents who were working reported not being free to nominate their partners of choice as next of kin, or not being able to include them in the medical insurance policies provided for them and their dependents by their employers. Further, these respondents reported their difficulty in finding medical insurance providers trained to meet their specific sexual health needs.

4.2.2.4 Exposure to Violence

The most reported forms of violence include, but are not limited to: physical violence or threats to violence (which include harassment, riots, beatings, lynching and mob justice); hateful printed publications (text messages, posters, books, printed and online publications); and hate speech. Physical violence perpetrated by the public was reported in the former provinces of Coast, Nyanza, Eastern, and Nairobi. Reports of physical violence mostly

came from Nairobi where LGBTI persons reported to have suffered violence when their orientation was discovered especially in night clubs, in the streets, and neighborhoods.

There were reports of gang rapes in Nairobi by organized gangs perceived to be Mungiki, and others who specifically targeted gay men and raped them to 'punish them for their errant ways.' In three out of the eight regions of Kenya, there were consistent reports by lesbians that they were subjected to verbal sexual abuse with threats of rape to 'straighten them'.

Unfortunately, these heinous acts continue unabated due to the reluctance of State officials and agencies to indiscriminately apply and enforce the existing laws to protect and safeguard the rights of LGBTI persons. Such reluctance is further exacerbated by the lack of express and comprehensive laws that prohibit all forms of discrimination against all persons.

4.2.2.5 Refusal of Recognition by Courts

Courts in Kenya have demonstrated inertia in recognizing the existence of an LGBTI class of people. This was apparent in the case of R.M vs. AG & Others; Petition No. 705 of 2007 discussed above, where the court in an apparent recourse to 'African-ness' refused to recognize that the petitioner represented a class of people describable as intersexual.

A reading of Article 159 of the Constitution, 2010, indicates that an objective interpretation and a constitutionally minded court would find no difficulty in finding a meritorious case for recognizing LGBTI persons as a class of people who need the protection of the law. The Article enjoins courts to exercise judicial authority guided by the principle that justice ought to be done to all irrespective of status.

4.2.3 Recommendations on sexual Orientation

- a) Kenya has the opportunity to draw lessons and utilize best practices from other countries e.g. Fiji and India which have decriminalized homosexuality, and taken a liberal interpretation of the list of grounds of discrimination, and considered the list open-ended. The African Commission on Human and Peoples Rights, interpreted 'sex' as a basis for discrimination to include 'sexual orientation.'

- b) The National Assembly should decriminalize homosexuality by repealing Sections 162, 163 and 165 of the Penal Code Cap 63 Laws of Kenya;
- c) The Judiciary is urged to take a more proactive and progressive approach in interpretation of Article 27 and other international instruments, with regard to equality and non-discrimination on grounds of limitation. The idea is to encompass discrimination on the basis of sexual orientation the same way it has been done in other common law jurisdictions;
- d) The National Police Service should undertake urgent proactive reform measures and create special facilities (desks and dedicated toll free-lines) to attend to and respond to LGBTI related complaints. Additionally, as a matter of urgency, train Police officers in handling LGBTI persons and cases;
- e) The Registrar of Societies should honour the right to freedom of association as enshrined in Article 36 of the Constitution, and remove bottlenecks in recognition, registration, and permitting of events of LGBTI persons;
- f) The Civil Society and Faith Based Organizations (FBOs) should undertake extensive sensitization campaigns and awareness creation on LGBTI identities so as to mitigate and eliminate social stigma and discriminatory practices.

4.3 Gender

The gender equality agenda is grounded in the Constitution of Kenya, 2010, and in the provisions and principles of several international law instruments to which Kenya is party. In particular, Article 27 of the Constitution and the provisions of the ICCPR, Convention of Elimination of All Discrimination Against Women (CEDAW), as well as the ACPHR and its Maputo Protocol, all form a solid basis for defending equality of all people irrespective of their gender.

4.3.1 Gains in Gender Equality

4.3.1.1 Electoral Law reform

In the run up to the General Elections in March 2013, the National Assembly passed the Elections Act, 2011, which was intended to correct some prejudices faced by women in the past in exercising their right to vote.

For instance, section 56 of the Act proscribes having in one's possession a voter's card which is not their own without the owner's consent. This was seen as a solution to previous problems of spouses and relatives withholding women's voter's cards and denying them the opportunity to vote.

In response to past situations in which violence forced women to stay away from the polls, Section 65 of the Act made it an offence to use force or violence during the election period to compel or prevent a person from voting. In a bid to eliminate coercion based on gender bias, Section 67 criminalizes canvassing or interference with any voter's free will on the basis of inter alia gender. Most importantly, the Act makes comprehensive provisions for proportional representation through the use of mixed-member party lists pursuant to the Constitution pattern to ensure gender balance and equity.¹⁴⁴

4.3.1.2 Access to Maternal Healthcare

In fulfilling the right to healthcare for women under Article 43 of the Constitution, on June 1st, 2013, President Uhuru Kenyatta gave directive for free maternity services in all public facilities.¹⁴⁵ Health facilities were reported to have immediately begun feeling the effect of this directive. On the day the directive was made, Pumwani Maternity Hospital was reported to have delivered 100 unprecedented births.¹⁴⁶

By July 2013, the Director of Public Health and Sanitation estimated a 10 percent increase in deliveries across the country, with increases of 50 percent in certain counties. Kenyatta National Hospital (KNH) reported that within a month, the number of pregnant women seeking maternal care had increased by 100 percent.

4.3.2 Gaps in Gender Equality

4.3.2.1 Supreme Court on the two-thirds Gender Rule

The October 2012 advisory opinion of the Supreme Court of Kenya held that the two-thirds principle, in Article 81 of the Constitution, had 'not been transformed into a full right ... capable of direct enforcement'. This has been criticized by women's rights crusaders for being retrogressive. It has been

described as 'the most momentous setback recorded in the implementation of the Constitution and efforts to increase women's representation'.¹⁴⁷ It was also viewed as an excuse to avoid a constitutional crisis; removing pressure from political parties to search and nominate female candidates.

¹⁴⁸

4.3.2.2 Dismal performance by women candidates

Despite the quota system and constitutional principles for affirmative action, women's participation as candidates in the 2013 General Elections was disappointingly low ¹⁴⁹. Out of 237 candidates for 47 governor positions, only 7 candidates were women (3 percent). Out of 244 candidates for 47 elected senate positions, only 19 candidates were women (8 percent). Out of the 9,603 candidates for county assembly, 697 candidates were women representing 7 percent.

Consequently, no women were elected as senators or governors. Only 16 women were elected to the National Assembly, 5.5 percent of the total number of members. For 1,450 ward representative positions, only 88 (6 percent) of the elected candidates were women. According to the EU Observation Group, this dismal performance is mainly attributable to an incomplete legal framework, imperfect candidate nomination processes, as well as distortion of information during campaigns on reservation of seats for women.

4.3.2.3 Repressive and Discriminative laws

Due to cultural and religious prejudices, members of the society often treat known (or suspected) LGBTI persons with contempt. This sometimes manifests in violent attacks triggered as a result of lack of respect for individual's rights. This can be illustrated by the contemptuous and largely derogatory remarks and responses by the public to disclosures of sexual identities of LGBTI persons.

Kenya has also retained a number of laws that have in the past been criticized by the UN Committee on the Elimination of Discrimination against Women¹⁵⁰ as being retrogressive and supportive of gender stereotypes. Such laws were also highlighted in a survey by the Equal Rights Trust (ERT) in Partnership with the KHRC in 2012.¹⁵¹ Some of the laws which are in breach of Article 2(f) and Article 16(1) (h) of the Convention on Elimination

¹⁴⁵However see FIDA, 'Key Gains & Challenges: A Gender Audit of Kenya's 2013 Election Process' (FIDA, 2013) where it is argued that the legislature only took a minimalistic approach by incorporating only the bare minimum constitutional requirements
¹⁴⁶State House Kenya, 'President Uhuru Kenyatta's Speech During Madaraka Day celebrations, June 1, 2013' (Scribd, 1st June 2013), <<http://www.scribd.com/StateHouseKenya>>
¹⁴⁷KNCHR, Above n

¹⁴⁸Ibid
¹⁴⁹EU, General Elections 2013: Final Report, (European Union Election Observation Mission to Kenya, 2013)<http://www.eods.eu/library/FR%20KENYA%2029.05.2013_en.pdf> accessed 13th February 2014
¹⁵⁰EU Electoral observation Mission (EU EOM)

of all forms of Discrimination against Women (CEDAW) include:

- i) Sections 32 and 33 of the Act which expressly exclude all agricultural land; cattle and crops in areas designated by ministerial notice from legislated inheritance, and instead place their succession under the pur-view of customary law;
- ii) The reaffirming and exemption of Kadhis' Courts by the Constitution, 2010, whereby Kadhis Courts and application of Islamic Laws has had discriminatory effect on Muslim women;¹⁵²
- iii) Pensions Act, the Widows and Children's Pensions Act and the Widows and Orphans' Pensions Act, all provide that a widow can only receive her deceased husband's pension if she does not remarry or cohabit with another man;¹⁵³
- iv) Section 45 of the Income Tax Act, Cap 470 Laws of Kenya provides that the income of a married woman residing with her husband will be treated as the income of the husband for tax purposes, unless the woman chooses to file a separate return;
- v) The Matrimonial Property Act of 2013 upholds the common law position requiring parties to a divorce or separation, to demonstrate actual economic contribution in the property to be divided.¹⁵⁴

4.3.2.4 Sexual and Gender Based Violence

According to the latest (2012) statistics by the Gender Violence Recovery Centre (GVRC) there is an alarming rise in gender-based and sexual violence cases in Kenya.¹⁵⁵GVRC reports that from 2009/10 to 2011/12, these cases rose from 2,487 to 2,954. It should be noted that this is only a fraction of the actual cases, since most women do not report rape and domestic violence incidents for fear of being stigmatized..

Part of the problem is also attributed to Section 38 of the Sexual Offences Act, which instills fear in rape victims by sanctioning false reports and prescribing criminal penalty. Note also that the figures above do not include statistics of marital rape which is inexplicably condoned by the Sexual Offences Act, 2006.

In the ERT and KHRC survey above, 74.5 percent of women interviewed

¹⁵¹Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination of Women: Kenya, CEDAW/C/KEN/CO/7, 2011, Para 17*

¹⁵²Equal Rights Trust & KHRC, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya. (ERT Country Report Series: 1London, February 2012)*

¹⁵³ERT above n

¹⁵⁴Pensions Act 2009 (revised), section 19(1)(c)(i); Widows' and Children's Pensions Act 1977, section 8(1)(b); Widows' and Orphans' Pensions Act section 20(1)

¹⁵⁵See Court of Appeal Kenya decision in *Echaria vs. Echaria, Civil Appeal No 75 of 2001*

reported having been victims of gender-based domestic violence or intimate partner violence. Further, the Government's report in 2010 to the Committee on the Elimination of Discrimination against Women, cited research showing that at least 47 percent of women who have ever been married have reported some form of domestic violence against them, including physical violence, rape, and strangling.¹⁵⁶

4.3.3 Recommendations on Gender Equality

- a) The National Assembly should urgently pass the Marriage Bill (2012) and the Protection against Domestic Violence Bill (2012), as well as implement the Matrimonial Property Act;
- b) The Civil Society should note that the Supreme Court advisory judgment on the two thirds rule only extends to elective positions in national elections; there is need therefore for continued vigilance in monitoring compliance with the rule in appointive and county positions;
- c) The Election Act 2011, must be amended to extend party list mix requirements beyond the constitutional minimums;
- d) CSOs should undertake civic education to counter the patriarchal rhetoric that women aspirants have only the special woman representative seat reserved for them;
- e) The National Assembly should amend the division of property provisions in the Matrimonial Property Act passed in November 2013, so as to allow 50-50 sharing of property and/or expressly provide for non-economic contribution of women to wealth creation;
- f) The National Assembly should pass legislation to implement and regulate the presidential directive on free maternity and also provide for progressive extension of the directive to cover the entire maternal healthcare spectrum;
- g) There is need for the Government to urgently implement the TJRC report especially for cases touching on Sexual and Gender Based Violence (SGBV);
- h) There is need to create a taskforce to oversee, review, and make recommendations on the implementation of the Sexual Offences Act;
- i) Kenya Women Parliamentarians (KEWOPA) should be given more funds to advance their development agendas.

¹⁵⁶GVRC, *2011-2012 Annual Report (GVRC, 2012)*

¹⁵⁷Committee on the Elimination of Discrimination against Women, *Seventh Periodic Report of State Parties: Kenya, UN Doc. CEDAW/C/KEN/7, 2010, Para 250*

4.4 Ethnicity

Ethnicity can be a problem as much as it can also be a rewarding challenge.¹⁵⁷ The Constitution of Kenya, 2010, in recognition of this duality acknowledges ethnicity as a matter of pride and identity of Kenyans.¹⁵⁸ It also prohibits discrimination on the basis of ethnicity under Article 27(4), and in various provisions encourages ethnic diversity in Government appointments.¹⁵⁹

4.4.1 Gains in Ethnic Diversity

4.4.1.1 Transitional Justice Initiatives Post-2007 PEV

Two of the key Agenda 4 institutions – the National Cohesion and Integration Commission (NCIC), and the TJRC, established in the wake of the 2007/08 PEV made commendable strides towards tackling negative ethnicity. Despite many operational challenges the NCIC led by Mzalendo Kibunja during 2010 and 2011, conducted various national integration programs and conducted ethnic diversity audits in Government appointments.¹⁶⁰ However, nothing much has changed after those reports, as the recommendations were not implemented.

In 2013, the TJRC which has now concluded its work, made several findings and recommendations touching on the role of land justice in ethnic tensions, the abuse of ethnic allegiance for political gain, among others. The TJRC report is yet to be implemented.

4.4.1.2 Relatively peaceful 2013 Elections

In the run up to the General Elections in March 2013, there were widespread fears that there would be ethnic violence. Indeed there were reports that communities were re-arming¹⁶¹. However this was not to be and the elections were conducted with relative calm. Even though the results were disputed, there was no recurrence of inter-ethnic violence as was witnessed in 2007/2008.

4.4.2 Gaps in Achieving Ethnic Equality

4.4.2.1 Tribal Political Alignments

Since 1992, political contests in Kenya have been more or less ethnic based. Conflicts which in reality involve ethnic interests have been warped by political elites; summed up as advocacy for interests of culturally distinct peoples or clans in heterogeneous societies, who are locked in rivalries

about access to power. Often, those concerned have strongholds in certain relevant counties as where they tend to follow the ethno-nationalism strategy.

The above paints a perfect backdrop for the political alignment that occurred during the 2013 General Elections; the Kalenjin Community (led by William Ruto) entered into an alliance (Jubilee Coalition) with the Kikuyu (led by Uhuru Kenyatta) to compete against the alliance of the Luo (led by Raila Odinga), the Kamba (led by Kalonzo Musyoka) and the Luhya (led by Moses Wetangula). Unless stopped, this pattern and trend will be an insurmountable obstacle in achievement of national cohesion and ethnic co-existence.

4.4.2.2 Government Appointments devoid of Diversity

In an audit of ethnic diversity in the Civil Service reported in 2011,¹⁶² the NCIC revealed some startling statistics that showed a direct connection between the ethnicity of the serving president and the dominance of his ethnic community in public service. The report showed that the Kikuyu and Kalenjin communities dominate the civil service; between them controlling up to 40 percent of all jobs. As stated above, the recommendations by the NCIC to correct the situation have never been implemented.

Besides overlooking the Kibunja recommendations, the Jubilee Government continues to perform poorly in attaining ethnic diversity in Government appointments. According to a media survey in January 2014, 57.5 percent of senior Government appointments made by the Jubilee Government since its formation, have been taken up by persons from the President's and the Deputy President's ethnic regions.¹⁶³ The composition of the Cabinet is evidence enough.

4.4.2.3 Ethnicity versus IDP resettlement

The National Policy Conference on IDP's Resettlement and Peace Building in Kenya held in Nairobi in September 2011, revealed deep rooted ethnic animosity between various ethnic groups. This had caused a stalemate in the resettlement of IDPs. Besides the logistical and administrative problems, it emerged that the Government's resettlement efforts were being seen as partisan and selective along ethnic and party lines, hence unwelcome.

¹⁵⁸Felicia Yieke, 'Ethnicity and Development in Kenya: Lessons from the 2007 General Elections' Kenya Studies Review Volume 3 Number 3 December 2011

¹⁵⁹Paragraph 3 of Preamble

¹⁶⁰See Articles 92(3), 130(2), 232(1)(i), 241(4) 246(4) and 250(4)

¹⁶¹National Cohesion and Integration Commission, Annual Report, 2009-2010

¹⁶²KHRC, *Recurrent Ethnic Violence and Claims of Communities Arming Ahead of the 2012 General Elections* (KHRC, 2011)
¹⁶³NCIC, 'Ethnic Diversity and Audit of the Civil Service' (2011) <<http://www.cohesion.or.ke/~cohesion/images/downloads/ethnic%20diversity%20of%20the%20civil%20service.pdf>> Accessed 13th February 2014

This was blamed for further fostering animosity between tribes, with the host communities unwilling to welcome back their erstwhile neighbours, or accept IDPs to be resettled in their “ancestral lands”.¹⁶⁴

4.4.3 Recommendations on Ethnicity

- a) The Jubilee Government and the PSC should urgently implement the recommendations in the 2011 NCIC audit on ethnic diversity in public service, and the TJRC recommendations on ethnic harmonization;
- b) Parliament is urged to undertake radical reform to reduce presidential powers so as to make it less alluring for tribal affiliation, and to eliminate the ‘winner take all’ election outcome model currently in place;
- c) The Government must urgently reconstitute the NCIC to enable it to complete ethnic integration programs;
- d) The Government, through the Special Programs department, should draw up a resettlement and compensation program that guarantees ethnic equity in compensation and resettlement of IDPs;
- e) The Judiciary to follow through with the intended creation of a division of the High Court to deal with International Crimes and take up compensation claims arising from victims of 2007/2008 PEV.

4.5 Persons with Disabilities

Persons with disabilities have for a long time been left out of developmental matters. As such, they feel subjugated. The purview of the Convention on the Rights of PWDs (and the Optional Protocol) is to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments, which in interaction with various barriers may hinder the persons’ full and effective participation in society on an equal basis with others.

4.5.1 Gains in Attained by Persons with Disabilities

- i) The incorporation of elective affirmative action seats has seen the

inclusion of PWDs in governance and developmental activities.

- ii) The creation of the National Council for PWDs is a great development in the fight for the rights of PWDs; it is a bold step.

4.5.2 Gaps in realizing the rights of Persons with Disabilities

- i) Most places, for instance public service vehicles, buildings, and other social amenities, are still inaccessible to PWDs.

4.5.3 Recommendations to realize the rights of Persons with Disabilities

- a) Governments, at national and county levels, should always develop sustainable policies that allow inclusiveness of PWDs for sustainable development;
- b) PWDs should broaden their horizons and cooperate amongst themselves in development, as the reluctance to do so will result in them being labeled “disadvantaged”, and feeling sidelined from the rest of the society;
- c) The Jubilee Government should properly identify categories of disabilities, and attend to them in line with this so as to effectively address their issues;
- d) There is need for the society to accept PWDs as part of them. This will help reduce the stigma that they face.
- e) There is need for enlightenment and provision of education to people who have PWDs in their homes, on how to take good care of them. In most families, PWDs are often locked away. Attitudes of family members, caregivers, and members of the community, contribute a lot to the marginalization of PWDs.
- f) Governments at national and county levels should ensure equal opportunities in the society for PWDs.
- g) Policies should be created to see to it that buildings, public service vehicles, and other social amenities accommodate PWDs.

4.6 Marginalized Communities

Minority communities (numerically inferior), and marginalized groups, (either by law or practice) have been given special recognition in the Constitution. The rights of minorities and marginalized groups are

¹⁶⁴The Standard (18th January 2014) ‘Uhuru Kenyatta, William Ruto Strongholds Hog Half of Public Jobs’. See also Daily Nation 25-2-2014 p. 10, Sunday Nation 23-2-2014 and Standard 18-1-2014

¹⁶⁵Friedrich Ebert Stiftung (FES), ‘Report of Proceedings at the National Policy Conference on IDP’s Resettlement and Peace Building in Kenya: State & Non State Interventions’ (FES, September 2011) <<http://www.fes-kenya.org/media/publications/National%20Policy%20Conference%20on%20IDPs%20Prsquoos.pdf>> accessed 12th February 2014

entrenched in Article 56 of the Constitution, 2010. It urges the Government to put in place affirmative action programmes designed to ensure that minority and marginalized communities are:-

- included in matters of governance and developmental spheres of their lives;
- are accorded special opportunities in educational and economic fields; and
- are provided with special opportunities for access to employment.

There are also other regional frameworks and international instruments on the rights of marginalized communities for instance, those enshrined in AChHPR.

4.6.1 Gaps in realizing the rights of marginalized communities

- i) Although the Constitution of Kenya contains a provision for ethnic minorities and marginalized groups, there is still exposure of vulnerability experienced by this category of people in Kenya. This means that although policy recognition of minorities is an important gain, legislative and administrative implementation remains a headache.
- ii) Marginalized groups and numerically inferior communities have for a long period of time been sidelined in development activities.
- iii) The minority communities such as the Sengwer and the Ogiek who live in the forests, have time and again experienced evictions carried out by the Government.

4.6.2 Recommendation to realize the rights of marginalized communities

- a) The Government should undertake comprehensive civic education to benefit all communities, civil servants, and especially the police, who are bound by the Constitution to address the needs of vulnerable and marginalized groups;
- b) The Jubilee Government should see to it that decentralization of power and development of projects are done in proper consultation with marginalized groups so that they do not feel excluded. This can be done through formulation of a national strategy to include marginalized groups at all levels of governance;
- c) The Government should create adequate capacity to enforce judicial

decisions of international treaties and instruments, as well as those of regional human rights treaty bodies;

- d) The Jubilee Government should give priority to full implementation of the Endorois decision by the African Commission;
- e) The Government should develop clear policies for engaging with the recommendations of the UN mechanisms, including the Universal Periodic Review process, and recommendations of special mechanisms.



5.1 Introduction

The 2007/2008 PEV exposed deep-seated weaknesses in Kenya's political systems and institutions. Kofi Annan led the process towards cessation of violence, which led to the development of the Kenya National Dialogue and Reconciliation (KNDR) mediation agreement. This was a four-point agenda adopted by politicians, charting the path towards normalcy. The KNDR addressed the need for constitutional, legal, and institutional reforms, among other needs. Against this backdrop, the clamor for constitutional reform resurfaced, leading to the promulgation of the Constitution in 2010. The Constitution creates well-structured governance mechanisms which entrench accountability in leadership.

Following the Constitution's promulgation, Kenyans were optimistic of a promising future where governance would be anchored in integrity, and leadership structures would be constitutionally-rooted. They envisaged the re-birth of a new Kenya; one in which the rule of law would be upheld, and human rights and fundamental freedoms respected and guarded ardently. This has however not been the case, as demonstrated by this report.

Since the promulgation ceremony, the optimism and high hopes that Kenyans held have been systematically dashed. It all began with a 2012 court ruling clearing President Uhuru Kenyatta and his deputy to contest for office in the 2013 General Elections. Subsequently there were efforts

by the Jubilee Government to frustrate the ICC proceedings at The Hague against the duo – the President and the Deputy President.

In just three years, the Constitution and general governance thereof, have been bedeviled by numerous challenges. The question then is whether these are genuine teething problems, or deliberate attempts by dark powers that are aimed at frustrating the full implementation of the Constitution.

5.2 Thwarted Momentum for Constitutionalism

During the early days, commendable progress was realized in the implementation of the Constitution, through legal reforms in Kenya. In 2010, the CIC steered various processes for the establishment of independent constitutional commissions and institutions, key among them being the IEBC, the JSC including establishment of the Supreme Court, the IPOA, and NPSC. These led to notable institutional reforms in the criminal justice sector as a whole (particular the Judiciary and Police), electoral reforms, among others.

However, the implementation of the Constitution has gradually run into multiple hurdles which have impeded the realization of reforms in total. Key among these hurdles is first and foremost, inadequate institutional funding from the exchequer, which has crippled many institutions. Secondly, political interference such as threats of disbandment directed at constitutional commissions such as the SRC, for its bold attempt at clipping legislators' powers to increase their salaries and withdraw themselves from being categorized as State officers. Thirdly, the despotic retention of County Commissioners whose role remains blurred vis-à-vis the constitutionally entrenched County Governments led by Governors as elected representatives.

5.3 Leadership and Integrity

Chapter 6 of the Constitution reflects the aspirations of Kenyans to achieve responsible, transparent, and accountable leadership guided by the rule of law as reflected in the Preamble and Article 10, on values and principles of governance. This chapter envisages leadership that is exercised on the basis of public trust, and sets the criteria for recruitment and appointment of holders of public office. Key among these attributes is integrity, competence, and suitability.

These standards were the genesis of an era of unprecedented vetting of candidates for public and state offices. They were preceded by the creation of constitutional oversight organs such as parliamentary oversight committees.

There is a glaring contrast in the performance of oversight bodies in the Kibaki administration and the current administration; oversight roles were exercised more robustly in the former administration. The vetting of State officers has heralded an era of disqualification for appointment to public office on account of questionable integrity, corruption, and impunity in the public sector. The tale of the removal of Nancy Baraza (former Deputy Chief Justice) from office on account of unsuitability to hold office following a public spat with a security guard is one such instance.

In an unfortunate twist of events, momentum for the quest for high integrity in public office plunged with the 2013 Parliament. The Jubilee Government seems to seek recourse in its 'tyranny of numbers' in endorsing virtually all their political nominees in total disregard of the requirements of Chapter 6 of the Constitution. Despite critical integrity questions raised regarding the suitability of some candidates for public positions, Parliament has proceeded to endorse their nomination. Parliament's approval of Ferdinand Waititu's nomination to head a parastatal is one such instance. The approval was however quashed by the High Court on grounds of serious integrity failings on the part of the candidate.

Other vetting processes under the Jubilee Administration have demonstrated miniature decisiveness on the part of the vetting bodies. This is manifest in the ongoing Police, Judges and Magistrates' vetting whose recommendation for approval have been termed as unfounded in the face of glaring integrity questions.

The problem is further compounded by the lack of a cross-cutting legislation to consolidate minimum vetting standards for public officers and candidates for public office. Various legislations establish conflicting governance organs and structures. This makes vetting processes susceptible to abuse.

Additionally, the just concluded debate on the inflated Public Wage Bill cast doubt on the extent to which holders of public office embrace the call for selfless service. This is further exacerbated by the fact that public office holders have opposed the President's call to take a pay cut. The recent revelation that more than 55 percent of the total budget is spent on recurrent expenditure is concerning for a nation that has been described as being on the verge of a take-off towards economic development.

5.4 Corruption

Be as it may, the Ethics and Anti-Corruption Commission (EACC), and the DPP have somewhat embraced the spirit of a corruption-free public sector as envisaged by Article 10 and Chapter 6 of the Constitution, when pursuing high profile investigations and prosecutions.

Reports indicate that over the past year, ODPP has received up to 56 corruption cases of which 34 have been referred to prosecution. A notable high profile prosecution is that of the then Chairperson of the Kenya Tourism Board, Achieng' Ong'ong'a and the then Permanent Secretary in the Ministry of Tourism, Rebecca Nabutola, who were jointly charged with fraudulently obtaining Kshs 8.9 Million from the Ministry of Tourism. There are also ongoing criminal proceedings against key IEBC officials including the current Chief Executive, James Oswago, on corruption charges relating to a Kshs 1.3 Billion tender for the acquisition of BVR kits for the 2013 General Elections. These two examples mark a clear milestone in the fight against corruption in Kenya.

Regardless, the fight against corruption has been greatly underpinned by the lack of political will in both the Kibaki and Uhuru Governments. Kibaki's Government was accused of weakening EACC's institutional frameworks whereas Uhuru's Government has been accused of denying it the requisite funding. Parliament in both administrations rejected the call to give the EACC powers to prosecute hence it still refers cases to the DPP.

The debacle relating to the appointment of Patrick Lumumba as the Director of EACC is another case in point. His appointment came after Parliament rejected unilateral attempts by former President Kibaki's attempt to renew Aaron Ringera's contract. Lumumba reopened the Goldenberg and Anglo-Leasing affairs and indicated that he would investigate at least four Cabinet Ministers, 50 senior officials, and parliamentarians. Following that announcement, the political elite schemed to remove Lumumba from office and this was successful.

The Jubilee Government, under President Uhuru Kenyatta's stewardship, is already exhibiting laxity akin to the old order of condoning corruption. Concerns have been expressed over bidding and tendering processes in a number of key Government development contracts. For instance, the award of the contract for construction of the standard gauge railway (Mombasa-Nairobi phase) is perhaps the most controversial. The magnitude of controversy and vested interests surrounding the contract is best mirrored by the altercation between the legislators and the Executive.

The NSSF Tasia Development Project, which was halted after red flags were raised by Central Organizations of Trade Unions (COTU), is another manifestation of corruption that is deeply ingrained in Government agencies. Similarly, the award of the tender for the primary schools laptops project to Olive International was shrouded in controversy culminating in its cancellation by the Public Procurement Administrative Review Board on March 11th, 2014. It ruled that the relevant ministry did not award the

tender to Olive according to merit. The probe unearthed irregular dealings, some of which were that the firm did not have the required financial standing, and that it appeared to have received more information about the tender than did other companies.

5.6 Limited Civic Space

The role of the media in any democracy is revered. However, the Jubilee Government, in 2013, introduced draconian amendments to the Kenya Information and Communications Act. The net effect is that media freedom in Kenya has been shackled contrary to the fundamental rights and freedoms enshrined in the Bill of Rights. The effect of the amendment was to create a Government-dominated tribunal, with powers to punish journalists and media houses for their reporting, by imposing punitive and exorbitant charges on both.

Interestingly, the National Assembly also passed a law which establishes a self-regulatory mechanism for the media but placed it under the oversight of a Government-dominated tribunal. With a provision for a KSh20 Million fine against media houses and an expansion of offences for which media houses and individual journalists can be punished by a Government-dominated tribunal, constitutional protections granted to journalists have been breached; these provisions severely restrict press freedom.

In the same breadth, the Jubilee Administration attempted to stifle the operation of Public Benefits Organizations (PBOs) in Kenya through the infamous Miscellaneous Amendments Bill of 2013, published on October 30th, 2013. The Government sought to amend the Act to cap total foreign funding for PBO's at 15 percent of their total budget. Any receipts of funds in excess of the 15 percent capping would only be authorized by the Government upon demonstration by a PBO that it requires the funds for legitimate and compelling reasons. Actors in the Civil Society engaged in extensive lobbying and targeted advocacy which fortunately bore fruit when legislators voted to reject the Bill in its second reading.

5.7 Final Word: State of the Nation?

The passage of the Constitution of Kenya 2010, brought with it renewed hope and belief by Kenyans that the rebirth of the Nation was in the offing. The President's State of the Nation Address to Parliament on March 27th, 2014, pursuant to Article 132(1) (c) of the Constitution, was therefore expected to highlight this growth in hope and belief. It was to give an

empirical and detailed account of the measures the Government has taken in promoting and protecting human rights as one of the national values set out under Article 10, and achievements thereof.

Unfortunately, the address was largely underwhelming, skeletal, and meager on human rights measures and achievements. The Constitution required the President to itemize and highlight measures taken in respect of each and every national value outlined under Article 10. The President's speech however only superficially touched on a few of the values. It was largely inadequate in highlighting measures to improve enjoyment of civil and political rights, access to socio-economic rights, and promotion of equality and non-discrimination.

The address was particularly bereft on civil and political rights confirming the fear expressed herein that the present Government is less concerned about improving civil liberties compared to its predecessor. The speech was proof that indeed this Government has no tangible plans or strategies to improve the civic space in areas such as freedom of the media or electoral governance. The Government has conveniently not undertaken any measures to address or even audit the glaring gaps in the electoral processes that came to fore in the 2013 Elections.

Despite the importance of security sector reforms to national development, the President's speech did not articulate how the Government has utilized the new security sector structures under the Constitution to address national security concerns, which are evidently growing out of proportion. Instead, it attributed the insecurity problems to 'under-investment of the past three decades', lack of coordination, and failures of the criminal justice system.

Land reform was equally given a wide berth by the President, despite the ongoing stalemate between the Ministry of Land and the National Land Commission which at the time of writing this report had stalled all land transactions nationwide. The only transitional justice element dealt with by the President in his speech was the incomplete resettlement of IDPs. Needless to say, the IDPs problem is only a subset and a manifestation of the bigger problems of inequalities, historical injustices, and negative ethnicity. The attempts at resettlement without implementation of the TJRC and NCIC recommendations to address historical injustices, is therefore a non-sustainable measure.

From the presidential address, it was clear that the Government's strategy in improving socio-economic welfare of Kenyans remains speculative and devoid of practical steps; it overlooks well rooted challenges in enabling access. For instance, the President highlighted the increase in hospital deliveries following the introduction of free maternal healthcare but made no mention of what the Government is doing to ensure that the entire spectrum of maternal healthcare (prenatal to postnatal) is covered, and that a high standard of healthcare is generally accessible. As pointed out in this report, access to healthcare remains a mirage and has become more precarious with failures in devolution of services, yet the Government had nothing to report on the measures it is undertaking to address this.

On devolution, the President only reported on the increase of revenue allocation to the County Governments from 15 percent to 32 percent. It was apparent that the Government had not taken any measures to deal with the core challenges facing devolution i.e. failure of coordination between Government structures and misappropriation of public funds. The address, while acknowledging the heightened cost of living caused by increase in tax portfolio, came off as nothing more than further promises on what the Government is planning to do to reduce the costs of basic commodities.

The measures to address poverty eradication as reported in the Presidential address were scanty and all futuristic without interim steps to address the present high cost of living, which the President chose to call 'a temporary and painful jab'. Further, while job creation initiatives such as the Uwezo Fund are plausible, the President and the Government failed to demonstrate why they were unsuccessful in creating jobs and reducing unemployment as pledged in their campaign manifesto.

The President's speech also exposed his Government as one that is not keen on ensuring inclusivity, equality, and non-discrimination. On inclusion of women and marginalized groups in governance and leadership, the address confirmed the concerns arising in this report. The Administration has settled for minimalist measures which do not go beyond the minimum Constitutional requirements of not more than two-thirds representation, by allocating women only one-third.

The Presidential address was tellingly silent on ethnicity and inclusion of PWDs in Government. It is clear that after one year in power, the Government does not consider this as an issue that warrants corrective

measures. It further goes to show why the Government has taken no steps towards implementing recommendations on ethnic balancing in public service as recommended by the NCIC.

This report and particularly the highlight of emerging governance issues paints a picture of a government that has taken very minimal steps towards building on the progressive platform provided by the Constitution. Several of the governance problems experienced before 2010 are recurring, and the reform momentum built by the Kibaki Government soon after coming to power is waning.

Finally, the Jubilee Government should take up the challenge and boldly implement the Constitution bearing in mind the aspiration of Kenyans to see governance that is anchored on respect for human rights, and promotion of equality, freedom, democracy, social justice, and the rule of law, as expressed in the Preamble to the Constitution.



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