

GOVERNANCE ASSESSMENT

KENYA: JANUARY 2013 – JULY 2016

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1 Introduction

This report focuses on politically significant developments in Kenya from 2013, when the country held its first general elections under the 2010 constitution. The constitution is considered to have markedly enhanced protection of basic rights, significantly constrained executive power, and provides limited devolution of powers across 47 newly created county governments.²

In 2013, Kenya held its first general election under the 2010 constitution. Kenyans cast their votes for president, national and county-level representatives, female representatives to the National Assembly, and governors. With 50.5% of the vote, Uhuru Kenyatta of the National Alliance (TNA), backed by the Jubilee Alliance, won the presidency. His opponent, Raila Odinga of the Orange Democratic Movement (ODM), backed by the Coalition for Reforms and Democracy (CORD), was second with 43.7%. The election of governors and local assemblies strengthened the position of county governments. Female representatives to the National Assembly were elected in all 47 counties³ while 16 more were nominated to the Senate.⁴

Following the vote, CORD and a civil society organization (CSO) challenged the outcome of the presidential election at the Supreme Court,⁵ which had only 14 days to consider their petition under the constitution.⁶ Moreover, the pay scale for members of parliament set by the Salaries and Remuneration Commission was rejected by legislators, forcing the SRC to approve higher salaries.⁷

Implementation of the constitution and additional reforms continued, including the vetting of police officers by the National Police Service Commission (NPSC) and scrutiny of judges and magistrates by the Judges and Magistrates Vetting Board (JMVB). A number of judges and magistrates were removed following the review,⁸ and the vetting of senior police officers revealed low levels of integrity in the service as Kenya faced security challenges posed by terrorism in various parts of the country.⁹

The frequency of terrorist attacks rose sharply between 2013 and 2015. In September 2013, almost 70 people were killed at the Westgate Shopping Mall in Nairobi.¹⁰ In June 2014, another 48 died at Mpeketoni, Lamu County.¹¹ In April, 2015, 148 people, mainly students, were killed during an attack at Garissa University College.¹² Insecurity led to calls for dialogue from the opposition,¹³ which placed part of the blame for these incidents on high-level corruption within the government. In March 2015, Kenyatta revealed to parliament that a number of cabinet officials and principle secretaries were under investigation, resulting in increased public debate on corruption and the administration's perceived lack of commitment to good governance.

As 2016 approached, the political scene remained tense with CORD calling for change through the Okoa Kenya referendum initiative. Constitutional amendments proposed by CORD included those that would address issues of insecurity, claims of ethnic bias in public appointments, the high cost of living, corruption and the independence of the Independent Electoral and Boundaries Commission (IEBC). In early 2016, CORD staged weekly protests calling for the removal of IEBC commissioners from office, leading parliament to form a joint select committee to handle the crisis.¹⁴

It is within this broad context that this assessment was undertaken. It sought to evaluate Kenya's progress towards enhancing government accountability, promoting civic liberties, human rights, rule of law and transparency over a three-year period, between January 2013 and July 2016. The methodology for this report was drawn from Freedom House's Countries at the Crossroads methodology. The report relied on documented (secondary) sources and key informant interviews. The interviews targeted various key stakeholder groups working in the governance and human rights sector, as well as government officials.

2 Civic space

Kenya boasts a vigorous civic space where political parties, CSOs, the media, and various social groups interact in a relatively accommodating legal and institutional environment. The 2010 constitution and relevant electoral laws facilitate free and fair elections that feature a variety of political parties. Distribution of state power across the executive branch, the legislature, the judiciary, and independent commissions discourages governmental excesses. Protections for civil society, the media, and individual rights exist and are taken seriously.

However, political and bureaucratic corruption and regular state overreach prevent the full promise of Kenya's legal and institutional framework from being realized. The 2013 elections, though judged free and fair by international monitors, were undermined by administrative problems and bias toward the incumbent party. The executive branch, while not authoritarian, is able to exert undue influence on the legislature, judiciary and bureaucracy. Ethnic politics, criminal cartels, and big business play an outsize role in public life. Freedoms of association, assembly, and the press are defended by civil society and some branches of the government, but are subject to the repressive impulses of others. This section discusses both the virtues and challenges in Kenya's civic space and offers suggestions for improvement.

Elections and Electoral Law

Taking part in elections is a key civic responsibility. The 2010 constitution, and the laws enacted thereafter such as the Elections Act, 2011, created an electoral framework largely capable of facilitating regular, free and fair elections. An independent electoral management body, the IEBC, was established. Electoral laws were largely implemented and the principle of universal suffrage observed. The 2013 elections and all subsequent by-elections were by secret ballot. Both domestic and international observers monitored the election.

Nearly all observers found the 2013 elections to have been free and fair¹⁵ despite serious challenges,¹⁶ such as widespread misuse of public resources,¹⁷ violence and intimidation during political party nominations,¹⁸ and the failure of the Electronic Voter Identification (EVID) and electronic transmission systems, which cast suspicion on the tallying process.¹⁹ CSOs also queried the existence of ‘multiple’ voter registers.²⁰ The IEBC exposed major problems with the voter registration process²¹ and the loss of important registration data.²² The management of results and tabulation at the national level were “marred by inconsistencies.”²³ Despite the Supreme Court having resolved the presidential election dispute after CORD’s petition, these issues dented the IEBC’s credibility. Remedial action is therefore critical before the 2017 elections.

Kenya’s electoral framework provides opportunities for all political parties to campaign. The Election Campaign Financing Act, 2013 represents a crucial positive step in further improving electoral governance.²⁴ As required by the law, the IEBC presented the Election Campaign Financing Regulations, 2016, to parliament for debate.²⁵ If implemented, the regulations will further level the playing field for political parties and candidates, particularly those with limited resources outside the main coalitions.²⁶ It is paramount that the implementation of the entire legal framework, including these regulations, be monitored by CSOs and other election observers to guide their strengthening.

Structure of Government

The 2010 constitution created an elaborate system of checks and balances complete with independent offices (auditor general and controller of the budget) and 10 independent commissions.²⁷ The reintroduction of bicameralism also allows for each arm of the legislature to check the power of the other. In the National Assembly, the Jubilee Alliance (currently transforming into Jubilee Alliance Party - JAP) holds 167 seats; CORD Coalition holds 132, while Amani Coalition holds 21, with other parties dividing the remainder.²⁸ During the review period, the executive forced through a number of bills that diminished the power of the legislature and ran counter to provisions of the 2010 constitution. These included the Kenya Defence Forces (Amendment) Bill, 2015; the Kenya Information and Communication (Amendment) - KICA Act; and the Security Laws (Amendments) - SLAA Act. In the case of the latter two, the High Court²⁹ later overturned several sections found to violate freedoms of expression and the press.³⁰

Critically, the 2010 constitution reintroduced the Judicial Service Commission (JSC)³¹ with the mandate of promoting the independence, effectiveness, and accountability of the judiciary.³² The Judicial Service Act decrees robust public participation in the recruitment of the chief justice (CJ), deputy chief justice (DCJ) and other judges by inviting any member of the public to avail, in writing, any information of interest to the JSC in relation to any of the applicants,³³ which adds a layer of accountability for the judiciary. The JSC recruits and makes the recommendation for formal appointment by the president of the CJ and DCJ. After the JSC recruits and recommends a CJ or DCJ for appointment, parliament vets the candidate and the president ultimately approves the appointment. Though the judiciary can now administer its own finances, parliament must approve its budgetary allocation, a potential threat to judicial independence.³⁴ The president is mandated to appoint a tribunal to investigate a judge if the JSC petitions for removal of that judge from office. Most appointments made by the president require approval by the National Assembly, while the National Assembly and the Senate can impeach the president.

Judicial independence was challenged during the assessment period. Through the Statute Law (Miscellaneous Amendment) Act, 2015, the executive sought to amend the Judicial Service Act, 2011 to increase the powers of the president in appointing the chief justice and deputy chief justice by requiring the secretary of the JSC to forward names of three qualified persons for each position instead of one. The Law Society of Kenya (LSK) and other CSOs successfully challenged this amendment in court,³⁵ demonstrating³⁶ the power of the current system to check executive excesses.

Devolution and County Governments

Article 6 of the 2010 constitution created a decentralized system of government that devolved administrative and political authority to 47 semi-autonomous counties. These counties are intended to devolve power, resources and representation to the local level. Parliament has enacted various laws to create an implementation framework to achieve devolution. Such laws include: the County Government Act, 2012; the Intergovernmental Relations Act, 2012; the Transition to Devolved Government Act, 2012; the Urban Areas and Cities Act, 2011; the Public Finance Management Act, 2012; the Transition County Allocation Revenue Act, 2013; the National Government Co-ordination Act, 2013; the Constituencies Development Funds Act, 2013; and the Transition County Appropriation Act, 2013³⁷.

The devolution of the state further into communities has made resources more discernible at the county level and there is concrete development that communities see as positive gains. However, the process has faced a number of critical challenges during implementation. The national government has mismanaged the process of transferring government functions to the counties and there is growing concern about whether the treasury can handle the extra costs of so many new political offices.³⁸ The issue of revenue allocation is also divisive. The constitution mandates that county governments receive at least 15% of the revenue raised nationally and an additional 0.5% as the equalisation fund. The Commission on Revenue Allocation (CRA) proposes the sharing formula for the 15% county allocation, which the Senate then approves.

While many counties currently enjoy funding as stipulated in the constitution, the Council of Governors (CoG) has always opined that budgetary allocations should be increased and that the national government is reluctant to do this because it is attempting to frustrate the effectiveness of devolved units. While some county governors have pushed for increased funding at the county level, an EACC survey conducted in 2015 exposed rampant corruption at the county level owing to lack of transparency in service delivery.³⁹ Additionally, 59% of Kenyans regard corruption as the biggest threat to devolution.⁴⁰ With very progressive guidelines of public participation that counties are adopting, corruption may be extinguished if the vigilance by grassroots communities persists. Unfortunately, this growing vigilance – particularly in the marginalized counties – remains undocumented.⁴¹

In addition to questions of capacity, appropriate political representation of ethnic minorities remains a concern in the devolution process. County administrative territories are based on post-independence Kenyan districts that are dominated by single ethnic groups. On average, the dominant ethnic group of each county is overrepresented in its county government composition.

All governors are male and all have appointed county executive committees with a majority of members from their own ethnic group.⁴² When labour migration and economic opportunity naturally resulted in mixture of ethnic groups, local politics became fixated with the question of who counts as indigenous and who is an outsider.⁴³ This has created spates of ethnic intolerance; border conflicts; political party zoning; and competition over land and other resources. Such manifestations of ethnic polarization have been witnessed in Baringo, Homabay, Isiolo, Kisii, Kisumu, Mandera, Marsabit, Migori, Nakuru, Narok, Samburu, Tana River, Turkana, Vihiga, Wajir, Lamu, West Pokot and other counties that the National Cohesion and Integration Commission (NCIC) identifies at risk of violence in 2017.⁴⁴

Ethnicity, Crime, and Big Business

Political parties in Kenya are largely based on ethnic constituencies, including the four largest parties that participated in the 2013 elections.⁴⁵ High ethnic mobilization means Kenyans often cannot exercise real political choice, especially when unpopular candidates are nominated by dominant parties. There is also a manifest shortage of ideological platforms that would rally electorates around issue-based politics. Ethnicity, however, is only one of the factors that influence public life in Kenya.

Kenya's public life is also heavily colored by organized crime,⁴⁶ though the extent of its power remains unclear. However, the drug trade has been known to fund political activities,⁴⁷ meaning drug lords and their agents influence politics to some extent. There is also evidence that businesses fund political campaigns. Although the military in Kenya is not known to be a potent political force, Kenyan soldiers fighting al-Shabaab terrorists in Somalia operate a charcoal and sugar smuggling cartel worth about \$50 million a year. Senior military officials are implicated in illicit dealings in which al-Shabaab is also a beneficiary.⁴⁸ Before retiring from the judiciary, former chief justice Willy Mutunga pointed out the “overwhelming” influence of mafia-style cartels on Kenyan politicians.⁴⁹

A key principle of public service in Kenya is that appointments and promotions be merit-based. Many high-level interviews and vetting processes are done openly and with a degree of public participation. Use of “selection panels” with multiple stakeholders has increased transparency and focus on merit. Though the constitution also mandates gender and ethnic balance and inclusion for persons with disabilities,⁵⁰ observers say implementation of these provisions is lacking. A report by the Public Service Commission (PSC) revealed that of the 42 Kenyan ethnic groups, members of the Kikuyu, Kalenjin, Luhya and Kamba communities hold 58% of all government jobs. Those overrepresented were the Kikuyu (by 5.5%), the Kalenjin (by 1.57%) and the Kamba (by 0.76%).⁵¹ Future advocacy work must focus on inequality and resolving issues of merit and ethnic balance.

Civil Society Organizations and Unions

During the assessment period, CSOs and other non-state actors actively sought to influence government policy and legislation. The Civil Society Reference Group, a CSO coalition, led efforts towards the enactment of the Public Benefits Organizations Act, 2013, which provides for the establishment and operation of public benefits organizations (PBOs), previously known as nongovernmental organizations (NGOs).⁵² CSOs litigated against the Security Laws (Amendment) Act, 2014, which led to some sections being found unconstitutional. Civil society also challenged

the appointment of Mumo Matemu as chair of the Ethics and Anti-Corruption Commission (EACC) because of alleged integrity issues.⁵³ The Kenya Private Sector Alliance (KEPSA) influenced a cabinet decision to adopt the Bribery Bill, 2016.⁵⁴ These cases and others demonstrate the positive influence CSOs and other non-state actors have had on the government's policy and legislative agenda.

Despite these victories, the watchdog role of CSOs has led to tensions between them and government. CSOs led the quest for justice for victims of the 2007-8 post-election violence and the 2013 petition challenging the outcome of the presidential election. In response, the government made several attempts to amend the PBO Act before implementation to restrict their operation and increase state control over the sector.⁵⁵ Civil society resisted these attempts by organizing street protests, lobbying parliament and engaging in litigation. Ultimately, CSOs were able to obtain a conservatory order from the High Court that restrained the attorney general from making any amendments to the act before resolution of the case. However, more interventions are needed to avoid undue restrictions on CSO activism.

Civic groups, PBOs, religious and business organizations were largely free from onerous legal impediments during the review period. However, threats of deregistration and negative profiling of organizations became more pronounced. After the terrorist attack on Garissa University, the inspector general of police designated 85 companies and CSOs, including Muslims for Human Rights (MUHURI) and Haki Africa, as "specified entities" under the Prevention of Terrorism Act, a step before classification as a terrorist organization.⁵⁶ Based on allegations of misuse of funds and funding of terrorism, the NGO Coordination Board notified 957 organizations in October 2015 to submit their audited bank accounts within two weeks or face deregistration.⁵⁷ That order was later revoked after widespread local and international outcry. Deregistration threats and attempts to pass restrictive legislation indicate a negative trend toward curbing the role of civil society. Public interest litigation (PIL) provides an effective recourse to attempts by the government to limit civil liberties, yet its use as a tool for change in Kenya is still developing.

The 2010 constitution guarantees the right to form and join trade unions, which are prolific in Kenya and play an important advocacy role.⁵⁸ The courts have had a positive impact in protecting this right. In February 2014, the Court of Appeal upheld the right to form a union when it quashed a lower court ruling not to register the Kenya Export Floriculture, Horticulture and Allied Workers' Union (KEFHAW).⁵⁹ However, in 2015 the Teachers Service Commission (TSC), which employs teachers, withheld salaries from members of the Kenya National Union of Teachers (KNUT) after they launched a strike, despite a court ruling⁶⁰ that the withholding was impermissible.⁶¹

Freedoms of Assembly, Belief, Speech, and the Press

Though Article 34 of the constitution guarantees media freedom, numerous attempts have been made to restrict the press. Parliament enacted the Media Act, 2013; the Kenya Information and Communications (Amendment) Act - KICA, 2013; the Parliamentary Powers and Privileges Bill, 2014,⁶² and the Security Laws (Amendment) Act, 2014,⁶³ which all included punitive provisions against the media.⁶⁴ Section 90 of KICA allows for the search of broadcasting establishments and seizure of equipment and section 17 provides for high fines and imprisonment for offences related

to the use of radio frequencies. In January 2016, four individuals were detained on the basis of section 29 of KICA for “improper use of a licensed telecommunication gadget” as a result of their online commentary, a flagrant violation of constitutional guarantees of freedom of expression. However, in April 2016, the High Court declared section 29 (b) of KICA unconstitutional.⁶⁵ The Communications Authority (CA) of Kenya has vowed to challenge the ruling.

Further attacks on the media came in the form of illegal terminations of employment and even physical assaults. A leading cartoonist and senior journalist sued a media house, alleging he was unlawfully fired as a result of government pressure.⁶⁶ Two journalists were attacked by officers from the General Service Unit (GSU) in Tana River in 2015.⁶⁷ The period between August 2014 and September 2015 saw at least 66 journalists attacked, harassed, threatened, and jailed, including one killed.⁶⁸ Attacks were accompanied by hostile comments from senior government officials.⁶⁹ Such events have had the effect of creating fear and inducing self-censorship. Should they continue, constitutional safeguards for freedoms of expression and the press will be further eroded.

The state also largely failed to recognise the constitutional right to freedom of association and assembly. Though many protests took place during the review period, such as the “pig protest” over MPs’ pay in May 2013, the “my dress, my choice”⁷⁰ protest against harassment of women in January 2015, and the “occupy playground” protest against land grabbing, police often used force to disperse demonstrators.⁷¹ Police also used excessive force against CORD-led anti-IEBC protesters in June 2016, resulting in 4 deaths. The consistent pattern of recourse to excessive force has raised concerns that security agencies may attempt to intimidate opposition supporters around the 2017 elections.

During the review period, the state largely upheld the right to free religious belief and practice under Article 32 of the constitution, placing few restrictions on religious observance, ceremony, and education. Attempts by the attorney general to require clerics to submit certificates of good conduct and theological training was met with harsh resistance from various faiths, demonstrating the effectiveness of mobilization on the part of diverse religious communities.

However, Kenya’s anti-terrorism strategy has been criticized for negatively profiling and indiscriminately targeting Muslim communities, especially of Somali origin. Following grenade and gun attacks in Mombasa and Nairobi that killed 12 and injured 8 in March 2014, the government launched Operation Usalama Watch in April. More than 6,000 police officers were deployed to track down and arrest undocumented foreign nationals and anyone suspected of terrorist links. The operation particularly affected Somalis, ethnic Somali Kenyans, Ethiopians, South Sudanese, and Kenyan Muslim populations in Nairobi’s Eastleigh and “South C” neighborhoods, Mombasa’s Likoni area, and in other towns in central Kenya and coastal region.⁷²

3 Security and human rights

Kenya’s democracy is substantially impaired by persistent and serious abuses by the security services, often justified in the context of combatting crime and terrorism. Despite constitutional and other legal safeguards against violence and ill treatment, civilians experience regular hostility from state authorities, most frequently the police. Extrajudicial killings and custodial torture are not uncommon. Police have used excessive force against political protestors and vulnerable

populations such as immigrants, ethnic minorities, and incarcerated persons. This section discusses these abuses in detail while offering suggestions for curtailing them and ending the impunity that frequently protects their perpetrators.

Police Abuses

The expanded bill of rights⁷³ in the 2010 constitution created safeguards against arbitrary arrest (29(a)), detention without trial (29(b)), subjection to any form of state or non-state violence (29(c)), subjection to physical and psychological torture (29(d)), or treatment or punishment in a cruel, inhuman or degrading manner. However, there were numerous violations of these protections during the review period. In a 2013 survey by the Independent Policing Oversight Authority (IPOA) that polled 5,082 households in 36 counties, 33% of respondents mentioned that they had experienced a form of police malpractice within the year, including assault, falsification of evidence, bribery and threat of imprisonment.⁷⁴

According to the Independent Medico Legal Unit (IMLU), close to 60% of incidents of torture in Kenya are committed by police officers.⁷⁵ The macabre torture and killing of three Kenyans in June 2016 made starkly clear that the fundamental rights guaranteed in the constitution are not always respected in practice. The three were reportedly abducted by Administration Police officers after a court appearance at Mavoko Law Courts.⁷⁶ The outcome of the case will greatly test government commitment towards ending impunity for human rights abuses. Organizations such as the LSK and other CSOs must exert appropriate pressure in pursuing justice.

According to the IMLU, 126 people were killed by police from January to December 2015. Out of these, 97 were summarily executed, 20 were shot to protect life and 9 were shot under unclear circumstances.⁷⁷ Violations linked to counterterrorism operations were also reported. A September 2015 report of the Kenya National Commission on Human Rights (KNCHR) documents over 120 cases of egregious human rights violations that include 25 extrajudicial killings and 81 enforced disappearances since the start of the crackdown against terrorism in 2013.⁷⁸

Violence against Protestors, Immigrants, and Incarcerated Persons

The right to freedom from violence was also undermined by police brutality during CORD's anti-IEBC protests in April and May 2016. A number of demonstrators were injured and several killed when state forces both engaged in and turned a blind eye toward attacks on political opponents and other peaceful activists.⁷⁹ Empty promises of investigations served no purpose but to acknowledge limited culpability.⁸⁰ Physical attacks on two journalists by GSU officers in Tana River in 2015 also demonstrated weak commitment to protecting human rights. Constitutional safeguards are not currently sufficient to prevent abuses. Strict monitoring by human rights organizations is required to hold the government to its stated commitments. This can only happen when the government purposefully strengthens independent institutions and allows them to execute their mandates.

During the view period, the KNCHR noted regular incidents of arbitrary arrest, particularly of hawkers and other traders.⁸¹ A baseline survey by the IMLU in 2014 further revealed that more than 22% of the traders had seen colleagues die at the hands of the state.⁸² Police also violated the rights of more than 1,000 ethnic Somalis in response to grenade attacks in Nairobi,⁸³ and arbitrary

arrests were documented in the aftermath of terrorist attacks in Lamu and Tana River counties. Human Rights Watch (HRW) and the Kenya Human Rights Commission (KHRC) noted that at least 60 people were detained at the Gamba police station and held for more than 24 hours without a court order. In Lamu County, up to 24 residents were held at the Mpeketoni police station for between three days and two weeks.⁸⁴

Concerns also persist in relation to the rights of detained persons. Article 51 of the 2010 constitution protects the rights of detained persons. In addition, the Persons Deprived of Liberty Act, 2014 provides for humane treatment of anyone in state custody.⁸⁵ Prison conditions in Kenya are characterized by poor diet, infectious diseases, unsanitary conditions, intense overcrowding, and routine beating of inmates.⁸⁶ However, some improvements have been noted in areas like sanitation, meals, accommodation and education in prisons. Even though Kenya is a signatory to the United Nations Standard Minimum Rules for the Treatment of Prisoners, implementation of these provisions is extremely weak. During the period under review, roughly 36.5% of the prison population was in pre-trial detention, a proportion that sparked concern among rights advocates.⁸⁷

Remedies and Challenges

Besides the courts, the constitution provides several avenues for Kenyans to seek redress when their rights are violated, such as the IPOA in cases of violations by police. Independent commissions such as the KNCHR and the Commission on Administrative Justice serve a similar purpose. These bodies have been successful in highlighting human rights abuses, but are unable to take direct action to curtail them as they lack prosecutorial powers. They have also faced challenges in delivering on their mandates. The IPOA, for instance, has faced resistance from the police service in conducting investigations. The Authority, just like the KNCHR, faces challenges of funding which links as well to inadequate staffing⁸⁸. This is seen as government strategy: to starve independent institutions from cash and allocations thus debilitating their efforts using legal channels.

4 Rule of Law and Independence of the Judiciary

Kenya's judiciary is robust, and has made strides toward greater independence, effectiveness, and fairness in recent years. An increase in the number of judges and courts, in addition to stronger vetting and training processes for judges and magistrates, has expanded citizens' access to an improved legal system. The courts have also been a critical defender of civil rights, blocking implementation of repressive legislation and ruling in favor of individuals and CSOs in their disputes with the government.

However, bureaucratic and political obstacles prevent the judiciary from consistently asserting its authority. High court fees and institutional corruption impede public access to justice. The executive branch has attempted to manipulate and undermine the judiciary by expanding its powers of appointment and ignoring rulings with which it does not agree. Additionally, political considerations often color prosecutorial decisions, negatively impacting the rule of law. This section discusses both the strengths and weakness of Kenya's judiciary while suggesting avenues for improvement, which include changes to the country's courts, prosecutors' offices, and legal regime.

Judicial Independence

Constitutional safeguards and implementation of the Judiciary Transformation Framework (JTF) have improved judicial independence. The JTF, which covers the period from 2012 to 2016, adopts a holistic approach to the judiciary's development built on sector-wide collaboration, strategic and technical partnerships, and the use of metrics based on widely accepted best practices.⁸⁹ It has also improved access to justice by increasing the number of judicial officers and courts across the country. The hiring of additional judges helped to partly mitigate the challenge of backlogged cases.⁹⁰ The JSC's involvement in the recruitment of judges greatly increased transparency in the process, and protections against arbitrary removal from office has freed judges from political interference. In June 2016, Dr. Willy Mutunga, the former chief justice, gave a positive assessment of the judiciary's improvements over the last five years, stating that it had become more independent and humane, defending the constitution while expanding access to justice.⁹¹

Judicial decisions that reversed executive overreach included the High Court's annulment of various sections of the Security Law Amendments Act, 2014⁹² and annulment of amendments to the Judicial Service Act.⁹³ The Constituency Development Fund was also declared unconstitutional.⁹⁴ The High Court temporarily halted implementation of the KICA Act, 2013 and Media Council Act, 2013 that had threatened media freedom. Some of those provisions were later overturned by the High Court in May 2016. In its ruling, the court upheld the majority of both laws but declared section 6(2) (c) of the Media Council Act unconstitutional for being vague in its definition of national security issues.⁹⁵

In 2015, the High Court in Mombasa also lifted a freeze on the bank accounts of Haki Africa and Muslim for Human Rights (MUHURI), which had been condemned for allegedly associating with terror groups. Furthermore, the courts ruled in favor of a petition against the decision by the NGO Coordination Board to deregister the KHRC,⁹⁶ concluding that the decision "was riddled with impropriety and procedural deficiencies."⁹⁷ These cases demonstrate that the courts were generally impartial in the administration of justice and vigorous in their defense of the constitution.⁹⁸

In Dr. Willy Mutunga's view judicial independence under the 2010 Constitution has a broader application going beyond institutional, financial, and decisional independence of judges and other judicial officers. According to Dr. Willy Mutunga, "It is independence of judicial officers from the forces of the executive, parliament, corporate interests, criminal cartels, civil society interests, communities of individual judicial officers that will readily ethnicize that public office, as well as independence of family, relatives, and friends."⁹⁹ To what extent this vision will be achieved remains to be seen and will depend, among other factors, on "accountability, integrity, and transparency values reflected by judicial officers,"¹⁰⁰ he said.

Executive Overreach

Despite these improvements, high court fees required in civil matters and allegations of corruption within the judiciary¹⁰¹ undermine judicial independence and effectiveness.¹⁰² Executive interference also remains a challenge. In 2015, the president appointed two Jubilee Alliance party loyalists to the JSC, which was seen as an attempt to maximize the ruling party's influence on judicial

appointments after the exit of Dr. Willy Mutunga as chief justice.¹⁰³ The executive also routinely disregarded binding court orders,¹⁰⁴ revealing a lack of respect for the role and powers of the judiciary.¹⁰⁵ Despite these challenges, the JSC ensured judges were mostly appointed, promoted, and dismissed in a fair and unbiased manner.¹⁰⁶ It also facilitated “continuing education and training of judges and judicial officers.”¹⁰⁷ The Judiciary Training Institute (JTI) provides adequate infrastructure for training, and has in place a compulsory continuing judicial education program for all judges and magistrates to improve their service delivery and independence in decision-making.¹⁰⁸

The constitution guarantees the independence of the Office of Director of Public Prosecutions (ODPP). However, independence is yet to be embraced by all prosecutors working in the ODPP, making it vulnerable to political direction and control.¹⁰⁹ This impacts all prosecutions generally, but especially those involving corrupt public officials. When prosecuted, cases take unduly long to conclude. The case of Moses Kuria,¹¹⁰ a ruling coalition member of parliament facing several incitement charges, is illustrative of this trend. Two former two cabinet secretaries¹¹¹ cases are still stalled in court. Other cases that have been brought include: six governors¹¹²; a former Central Bank of Kenya governor¹¹³; and two former principal secretaries.¹¹⁴ All are facing delays, and, in some instances, the indicted have challenged their prosecution at the High Court.¹¹⁵

Rule of Law

The principle of presumption of innocence is well established in Kenya’s criminal justice system. In 2003, the High Court in Nairobi concretized this principle by stating that a fair hearing requires equality between the contestants, the presumption of innocence and that the guilt of the accused be proved beyond any reasonable doubt.¹¹⁶ Constraints to observation of this principle include trial delays due to backlog and cases of extrajudicial executions and disappearances.¹¹⁷ The enactment of the Legal Aid Act, 2016 and the Small Claims Court Act, 2016, are positive developments with the potential to enhance access to legal services.¹¹⁸ Civil society actors and the LSK need to keenly monitor their implementation and assess their impact.

Civilian control of the security services is exercised politically by elected leaders. The head of state chairs the National Security Council¹¹⁹ with supervisory control of all three national security organs.¹²⁰ It is noteworthy that the military has continued to respect civilian authority. Past abuses, especially by police, inspired the establishment of more civilian oversight institutions under the 2010 constitution, most prominently the IPOA¹²¹ and the National Police Service Commission (NPSC).¹²² But the executive has ignored the IPOA and interfered with the powers of the NPSC. In 2014, the IPOA obtained a court order stopping a disputed police recruitment exercise, which the president ignored¹²³ until public pressure forced him to relent. Amendments to the NPSC Act, 2011 limited the powers of the NPSC to oversee the appointment of the inspector general of police and exercise disciplinary control over police.¹²⁴ Due to these challenges, civilian control is precarious. Strong civil society backing is required for bodies like the IPOA to perform their functions.

There was no evidence of the police, military, intelligence services, and internal security services interfering in political processes during the review period. However, use of excessive force by police against CORD supporters during the anti-IEBC protests exposed significant anti-

opposition bias.¹²⁵ The withdrawal of police bodyguards for Mombasa CORD Governor Hassan Joho after a by-election in Malindi was partly associated with his political leaning.¹²⁶ Other arms of the security services, especially the military and intelligence services, have not been known to show political bias.¹²⁷

Like other state officials involved in abuse of power, members of the police, military, intelligence, and internal security services are rarely investigated or held accountable for abuses.¹²⁸ However, courts have been willing to convict police involved in rights abuses when there is overwhelming evidence. In 2014, the Court of Appeal upheld the conviction of a former police inspector for murder.¹²⁹ Cases involving these officials require strict monitoring and public interest litigation where appropriate.

5 Corruption and Accountability

Kenya continues to struggle with significant political and bureaucratic corruption. Cumbersome regulatory regimes undermine economic freedom and create opportunities for graft. Scandals involving embezzlement, misallocation of funds, and distribution of patronage have implicated elected officials, cabinet secretaries, the tax authorities, and other state agents. A counterfeit economy that is exacerbated by all manner of cartels with ethnic alliances dealing in sugar, charcoal, maize, water, etc. also contributes to political and bureaucratic corruption. The Kenya Association of Manufacturers (KAM) says the counterfeit economy in Kenya is worth 1.2 trillion shillings.¹³⁰ Impunity is the norm for corrupt practices, especially for the politically powerful and those connected to the ruling party.

A number of measures have been introduced in recent years to fight these trends, including stronger financial disclosure requirements, auditing mechanisms, supervisory bodies and witness protections. However, local and international observers agree that such reforms have been insufficient to meaningfully address corruption. This section discusses Kenya's challenges with corruption and attempts to improve government accountability, while addressing their shortcomings and offering potential solutions.

Graft, Embezzlement, and Patronage

Kenya still observes bureaucratic regulations and registration requirements that potentially encourage corruption. The World Bank's Doing Business 2015 report ranked Kenya 129 out of 189 countries while the 2016 report placed Kenya at 108.¹³¹ According to Doing Business 2015, it took an average of 125 days to secure a construction permit and 72 days to register property in Kenya.¹³² Doing Business 2016 showed a reduction in the number of days required to register property in Kenya to 61.¹³³ The improvements were partly attributed to the innovative *buduma* centers established in 2014 to enhance service delivery.¹³⁴ Even with these improvements, "businesses in Kenya still suffer from a multiplicity of licensing regimes and levies that open windows for corruption. While there is stated commitment to improve the situation, much more, needs to be done."¹³⁵

According to former chief justice Dr. Willy Mutunga, if Chapter 6 of the constitution were effectively implemented, 80% of politicians would not be suitable for office.¹³⁶ Corruption and lack of accountability were indeed major issues during the review period. Prominent scandals revolved around the use of Eurobond¹³⁷ proceeds, the NYS scandal which saw a number of

individuals charged for the theft of almost Ksh.2 billion, fraud at the Youth Enterprise Development Fund (YEDF) where at least Ksh.180 million was reportedly stolen, and payments of Ksh.1.4 billion from the Consolidated Fund to settle contentious claims by two leasing firms for the contracting of a loan in December 2003 by the Department of Immigration.¹³⁸

The EACC acknowledges that the procurement sector is the most corruption prone in the country. It states that “bribery in public procurement is estimated to be adding 10 - 20% of total contract costs.¹³⁹ In spite of the legal and institutional reforms carried out in the public procurement sector in Kenya, corruption continues to thrive in the sector.”¹⁴⁰ The chair of the EACC revealed in early 2016 that up to one-third of the annual budget is lost to corruption.¹⁴¹ Even though the law has minimized direct bidding in preference for open bidding, this demonstrates that the state does not ensure transparency and effective competition in awarding government contracts. This was evident with the NYS scandal and on the \$3.8 billion railway construction contract the government signed with a Chinese state enterprise in which the bid was limited to that single company.¹⁴²

Allegations of corruption during the review period also touched on the education sector. Widespread leak of examinations in 2015¹⁴³ led to calls that the examinations to be postponed. A spate of arson at school facilities across the country in 2016 was partly associated with activities of cartels and leaks of examinations.¹⁴⁴ The education sector has suffered from other recent incidents, such as when the treasury was forced to return foreign development aid due to rampant corruption in the management of the Free Primary Education (FPE) program.¹⁴⁵ Bribery, favouritism, procurement irregularities, bid rigging, embezzlement of public funds, shoddy implementation of projects, abuse of office, conflict of interest, misuse of public resources, delay in service delivery and discrimination are the most prevalent forms of corruption in the counties making harder for the local citizens to fully enjoy the benefits of devolution.¹⁴⁶

The Tax Regime

Even though the Kenya Revenue Authority (KRA) has significantly increased revenue collection in recent years, reforms such as expanded use of the innovative “iTax” program have failed to help realise set targets.¹⁴⁷ Allegations of corruption at the KRA were underscored by Kenyatta’s order in 2015 that its staff face lifestyle audits.¹⁴⁸ Possible corruption signifies weak internal controls and little accountability in tax, royalty, and tariff collection. As noted by a civil society observer, “KRA personnel have been culpable in many tax-related malpractices and they are not subject to strong enough mechanisms for wealth declaration and lifestyle audits.”¹⁴⁹ There is urgent need to make public the findings of such audits as a basis for accountability advocacy by CSOs.

Transparency and Financial Disclosure

The conflict of interest provision in the Anti-Corruption and Economic Crimes Act, 2003¹⁵⁰ is designed to separate individuals’ private and public interests, as is the wealth declaration requirements in the Public Officers Ethics Act (2003). Regulations promulgated in 2011 allow the public to access wealth declaration information. However, the lack of ability of responsible commissions to share this information publicly makes the requirements ineffectual.¹⁵¹ Civil society has recommended strengthening the legal regime by introducing lifestyle audits.^{152 153} Critics have also called for a law making it illegal for civil servants to operate businesses.¹⁵⁴ Existing financial

disclosure procedures are simply not adequate to prevent conflicts of interest among public officials.

Impunity and the Weakness of Anti-Corruption Mechanisms

Similarly, the framework for detecting, preventing and punishing corruption remains ineffective. PriceWaterhouseCoopers has ranked Kenya as the third most corrupt country in the world.¹⁵⁵ Transparency International's 2015 Corruption Perception Index ranked it 139 out of 168 countries.¹⁵⁶ Substandard vetting of police, judges and magistrates continues to point to lack of integrity, highlighting the importance of continued civil society interventions.

Both the EACC Act, 2011 and the Leadership and Integrity Act, 2011, were enacted to guide the fight against corruption. The Office of the Auditor General and the Office of Controller of Budget also have roles to play in this regard. Both offices have relentlessly exposed corruption and misuse of resources at the national and county levels. By contrast, the EACC, the main investigative body, has been completely ineffective. Its handling of the NYS scandal exposed a troubling lack of independence. It first purported to exonerate a cabinet secretary from involvement, only to change that position after one of the key suspects implicated the official.¹⁵⁷ The chair of the EACC also faced scrutiny arising from past business associations with NYS. A company associated with the chair was investigated by the Directorate of Criminal Investigations (DCI), the Assets Recovery Agency (ARA) and the KRA in relation to dealings with the NYS.¹⁵⁸ The state does not provide any recourse to victims of corruption, and government officials are rarely investigated or prosecuted.

Kenya's media has endeavored to vigorously expose corruption. However, their efforts have been undermined by regular state attempts to curtail media freedom, resulting in increased self-censorship.¹⁵⁹ Likewise, whistleblowers, anti-corruption activists, and investigators lack necessary protections. Speculation that businessperson Jacob Juma was killed for exposing corruption underline the risks involved in whistleblowing.¹⁶⁰ Juma used social media to vocally critique the government and leak sensitive information, especially in connection with the Eurobond scandal.

The Witness Protection Act, 2006 established the Witness Protection Agency (WPA) and has the potential to protect whistleblowers facing risk or intimidation. However, because the WPA is housed at the Office of the President and its board consists of officials including the attorney general, the head of the National Intelligence Service (NIS) and the head of the National Police Service (NPS), persons with information against the state fear coming forward.¹⁶¹ Transparency International - Kenya (TI - K) has criticized the WPA for failing to promote a culture of whistleblowing.¹⁶² TI - K and the International Commission of Jurists - Kenya (ICJK) are among organizations that continue to advocate for a specific law on whistleblower protection. In November 2015, the Witness Protection Rules became operational, and are intended to create a secure environment for witness testimony. Their practical benefits are as yet unclear.

Access to Information

Article 35 of the constitution guarantees the right to access "information held by the State" and "information held by another person and required for the exercise or protection of any right or fundamental freedom."¹⁶³ While a lack of implementing legislation for Article 35 undermines legal, regulatory, and judicial transparency, jurisprudence on the issue demonstrates the value of Article

35.¹⁶⁴ Further, the Open Government Program (OGP) and the Kenya Open Data Initiative (KODI) have made significant progress in releasing information to the public. Under the JTF, the judiciary has also opened various channels of communication with the public. Though citizens have a constitutional right to petition authorities for specific information, some institutions simply ignore such petitions.¹⁶⁵ Passage of an access to information law is critical.

Kenya's budget-making process is guided by the Public Finance Management (PFM) Act, 2013 and subject to review by the legislature, which approves the budget. In section 35(2), the cabinet secretary for treasury is to ensure public participation in the budget-making process. Public participation in budgeting could enhance equitable distribution of resources and increase the transparency of the budgeting systems for the treasury and parliament.¹⁶⁶ Public participation guidelines that counties are adopting, for instance, remain extremely progressive because they devolve the state further into communities for purposes of participation in the budget-making process. Although the government continues to produce a shortened budget for public consumption, the Open Budget Index 2015 found that Kenya had made little progress in providing citizens with sufficient information.¹⁶⁷ Civil society observers have also noted that "the public is not provided with adequate information, in the right form and in good time to be able to participate meaningfully. Also, forums that can effectively interrogate budget are either not fully constituted or are dysfunctional."¹⁶⁸

The Office of the Auditor General also has a role in ensuring transparency in public expenditures. The Public Audit Act, 2015 complements the provisions of the constitution and has been described as "a big step in empowering the Office of the Auditor General to effectively deliver on his mandate."¹⁶⁹ Critics point out that the framework may not always translate to efficient accounting of expenditures. In practice, the Kenya National Audit Office (KENAO), charged with the responsibility for expenditure verification, suffers from a lack of adequate funds and staff.¹⁷⁰ Furthermore, "although KENAO does independent audits, its reports are still subject to discussion by parliament. Follow up processes of audit reports and findings are generally very weak."¹⁷¹ The executive has made attempts to interfere with the independence of the office by making it subordinate to the Public Service Commission in recruitment of staff.¹⁷²

During the period under review, it remained unclear whether the government enables the fair and legal administration and distribution of foreign assistance because of low levels of disclosure.¹⁷³

¹ Roland Ebole is a program officer at Freedom House office in East Africa. Morris Odhiambo is the President of the National Civil Society Congress (consultant)

² Freedom House, "Countries at the Crossroads 2012: Kenya Report," 2012, pg. 1

³ Article 97

⁴ Article 98

⁵ Anthony Kariuki, "CORD moves to Supreme Court over Uhuru poll victory", March 16, 2013: <http://www.nation.co.ke/News/politics/-/1064/1721666/-/b012m8/-/index.html>

⁶ This is one of the issues that has been considered for review towards the 2017 elections with the aim of allowing the Supreme Court more time to consider evidence in such petitions and render sound decisions. The Legal and Judicial Affairs Committee, for instance, has formulated a bill to amend the Constitution. See, Oliver Mathenge, "Bill wants apex court to take 30 days to rule on Presidential poll", June 23, 2016: http://www.the-star.co.ke/news/2016/06/23/bill-wants-apex-court-to-take-30-days-to-rule-on-presidential-case_c1373687

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- ¹⁰ Daily Nation, Westgate: Timeline of Events, September 21 to October 20: <http://www.nation.co.ke/news/specials/Westgate-mall-attack/-/2101466/2453986/-/ygeg2jz/-/index.html>; Mutuma Mathiu, “Why military response to Westgate attack was delayed”, September 18, 2014: <http://www.nation.co.ke/news/Why-police-response-to-Westgate-attack-was-delayed/-/1056/2457462/-/99cdv2z/-/index.html>
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- ¹³ For example, Edmund Blair, “Kenyan Opposition leader demands dialogue after spate of attacks”, Reuters, June 24, 2014: <http://www.reuters.com/article/us-kenya-attacks-politics-idUSKBN0EZ1UA20140624>; No meeting with CORD over IEBC, Jubilee meeting resolves, Daily Nation, June 3, 2014: <http://www.nation.co.ke/news/politics/Jubilee-meeting-asks-Linturi-to-drop-Waiguru-motion--IEBC/-/1064/2335926/-/rtidb8/-/index.html>
- ¹⁴ Peter Leftie and Isaac Ongiri, “Joint House team to address IEBC crisis, President Kenyatta announces” Daily Nation, June 9, 2016: <http://www.nation.co.ke/news/politics/Joint-House-team-to-address-IEBC-crisis--President-Kenyatta/1064-3240300-o7gok1/index.html>
- ¹⁵ See, for example, ELOG, “ELOG Statement”: <https://www.ndi.org/files/Kenya-ELOG-PVT-statement-030913.pdf>; ELOG, “The ELOG Report”: http://www.gndem.org/ELOG_Report_2013; Commonwealth Secretariat, “Report of the Commonwealth Observer Group, Kenya General Elections, 4 March 2013”: <http://thecommonwealth.org/sites/default/files/news-items/documents/KenyaCOGFinalReport.pdf>
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- ¹⁷ The Commission on Administrative Justice, “Championing Values in Hard Times: Election Monitoring and Observation Report”, No. 4/2013
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- ²⁴ CLARION’s 2010 publication on corruption, for instance, focused the country’s attention on the relationship between campaign financing and corruption concluding that the inadequacy of legitimate funding often “creates an incentive for corruption”. See, Lucky Waindi, “Political Financing and Corruption in Kenya”, in Joshua Kivuva and Morris Odhiambo, *Integrity in Kenya’s Public Service: Illustrations from Goldenberg and Anglo-Leasing Scandals*, CLARION, 2010, pp. 31—61
- ²⁵ The regulations can be found on the website of the IEBC at: <http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/election-laws-regulations/item/election-campaign-financing-regulations-2016>
- ²⁶ The two leading coalitions are the Coalition for Reforms and Democracy (CORD) and Jubilee Coalition

²⁷ the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission (IEBC); the Parliamentary Service Commission; the Judicial Service Commission; the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission; and the National Police Service Commission

²⁸ IFES, “Election Guide,” 2016, <http://www.electionguide.org/elections/id/540/>

²⁹ Civil Society and the Opposition had contested 20 clauses in the Act which they felt were unconstitutional.

³⁰ The ruling on the Security Law Amendment Act (SLAA) was delivered on February 23, 2015 by the High court sitting in Nairobi. The five judges Isaac Lenaola, Mumbi Ngugi, Hedwig Ong'udi, Hillary Chemitei and Joseph Louis Onguto made the following declarations

³¹ Article 171

³² Article 172

³³ First Schedule (Section 30), Judicial Service Act: Provisions Relating to The Procedure for Appointment of Judges

³⁴ Geoffrey Mosoku, “CJ: Public will suffer the most if MPs slash court’s budget”, March 3, 2014: <http://www.standardmedia.co.ke/article/2000105902/cj-public-will-suffer-the-most-if-mps-slash-courts-budget>;

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³⁵ Kamau Muthoni, “Law Society in court over JSC changes”, Standard Digital, January 7, 2016: <http://www.standardmedia.co.ke/article/2000187268/law-society-of-kenya-in-court-over-jsc-changes>

³⁶ Other cases that have gone against the desires of the executive include the ruling on the CDF Act and rulings in relation to executive decisions in the case of CSOs including MUHURI, Haki Africa and KHRC (see subsequent paragraphs under this section)

³⁷ TI, “Devolution Handbook 2014,” Published in February 2014

³⁸ Dominic Burbidge, “The Dawn of Devolved Government in Kenya,” Research Literature Digest 2015 – 2016, 2016, pg. 13

³⁹ EACC, “National Ethics and Corruption Survey, 2015 Report,” 2016

⁴⁰ TI, “Corruption biggest threat to devolution, more Kenyans engaging at county level,” July 2, 2015

⁴¹ Dr. Willy Mutunga, (Former Chief Justice and President of the Supreme Court of Kenya) emailed responses to the Freedom House, September 16, 2016

⁴² Supra note 37

⁴³ Ibid

⁴⁴ Stephen Ole Letoo, “NCIC identifies 19 counties at risk of violence in 2017”, April 26, 2016 http://www.the-star.co.ke/news/2016/04/26/video-ncic-identifies-19-counties-at-risk-of-violence-in-2017_c1338824

⁴⁵ Orange Democratic Party (largest single political party) is linked with the Luo ethnic group and larger Western region support; The National Alliance Party is linked with the Kikuyu ethnic and larger Central Kenya (also attributed as Mt. Kenya) region; the United Republican Party is linked with the Kalenjin ethnic group and the larger Rift Valley region; while the Wiper Democratic Movement – Kenya is linked with the Kamba ethnic group and Eastern region support; Michael Bratton Michigan, Mwangi S. Kimenyi, “Voting in Kenya: Putting Ethnicity in Perspective,” State University of Connecticut Economics. Working Papers Department of Economics, March 1, 2008.

⁴⁶ See, for example, Peter Gastrow, “Termites at Work: Transnational Organised Crime and State Erosion in Kenya”, September 2011: https://www.ipinst.org/images/pdfs/ipi_epub-kenya-toc.pdf

⁴⁷ International Narcotics Control Strategy Report (INCSR), “Country Report: Kenya. Bureau Of International Narcotics And Law Enforcement Affairs 2014,” 2015,

<http://www.state.gov/j/inl/rls/nrcrpt/2015/vol1/238969.htm>

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⁴⁸ Journalists for Justice Report, “Black and White: Kenya’s Criminal Racket in Somalia,” Nairobi November 2015 <http://www.jfjustice.net/en/about-us/exactly-what-are-kenyan-forces-doing-in-somalia#sthash.BI4M7Zym.dpuf>

⁴⁹ African Arguments, “Kenya has become a “bandit economy”, says Chief Justice Willy Mutunga,” Posted on January 11, 2016 by Koert Lindijer (Quoted from a recent interview with Dutch newspaper, NRC Handelsblad), <http://africanarguments.org/2016/01/11/kenya-has-become-a-bandit-economy-says-chief-justice-willy-mutunga/>

⁵⁰ Constitution of Kenya; Article 232(1)(g)(h) and (i)

⁵¹ Samwel Born Maina, “Revealed: How ethnic groups share public jobs”, January 7, 2015: <http://mobile.nation.co.ke/news/Revealed-How-ethnic-groups-share-public-jobs/-/1950946/2581834/-/format/xhtml/-/iy56g6/-/index.html>

⁵² The Bill informing the PBO Act was tabled in Parliament in 2012 by a private member after its formulation by the civil society in participatory processes.

⁵³ Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR

⁵⁴ Maureen Murimi, “Cabinet approves Bribery Bill, 2015, to curb graft”, Citizen Digital, March 23, 2016: <http://citizentv.co.ke/news/cabinet-approves-bribery-bill-2015-to-curb-graft-119481/>

⁵⁵ Morris Odhiambo, “People Centred EAC: Perspectives on the Operating Environment for Civil Society Organisations (CSOs) in EAC Partner States”, Paper presented during the 3rd EAC Secretary General’s Forum at the Imperial Resort Beach Hotel, Entebbe, Uganda, 12th to 13th September 2014; *Act!*, National Coalition of Human

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⁵⁶ Amnesty International Annual Report: Kenya 2015/2016: <https://www.amnesty.org/en/countries/africa/kenya/report-kenya/>

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⁵⁸ Article 41(2)(c)

⁵⁹ Kenya Law, “David Benedict Omulama & 8 Others v Registrar Of Trade Union & Another (2014)”: Appeal No. 7 of 2011: <http://kenyalaw.org/caselaw/cases/view/94824/>

⁶⁰ *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR*

⁶¹ Lynet Igadwah, “TSC says will hold union dues longer amid COTU protests”, Business Daily, October 28, 2015: <http://www.businessdailyafrica.com/TSC-says-will-hold-union-dues-longer-amid-Cotu-protests/-/539546/2933744/-/10lmucn/-/index.html>

⁶² The Bill imposes overly harsh disciplinary sanction for some offenses, it protests public bodies from defamation, it fails to sufficiently protect the right to freedom of assembly and it restricts the possibility of broadcasting on parliamentary proceedings. Part IV of the Bill touching on publications and broadcast, and particularly Clause 34 is a serious affront to press freedom and seeks to constrain journalists from doing their work. The clause provides for a fine of KES 500,000 (USD 5000) or a two-year jail term or both for a journalist deemed to have defamed parliament or members of the House or its committees.

⁶³ Security Law Amendment Act 2014 had draconian provision against the media, which among others, sought to bar journalists from publishing information and pictures on terror attacks and victims without permission from the police. The sections were however expunged by the High Court.

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⁶⁵ *Geoffrey Andare v Attorney General & 2 others [2016] eKLR*

⁶⁶ Dickens Kasami, Uhuru not interfering with press freedom, says State House, <https://tuko.co.ke/109205-denis-galava-govt-talks-of-uhurus-link-to-firing-of-nation-media-group-editors.html>; William Mwangi, “Nation fires editor Galava over editorial criticising Uhuru,” The Star, January 20, 2016 http://www.the-star.co.ke/news/2016/01/20/nation-fires-editor-galava-over-editorial-criticising-uhuru_c1280305; “Blow to Kenyan media after editor sacked for criticizing Uhuru”, The Guardian, January 27, 2016 <https://www.theguardian.com/world/2016/jan/27/blow-to-kenyas-media-after-editor-sacked-for-criticising-president>

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⁶⁸ UNESCO, “Supporting Safety of Journalists in Kenya,” An assessment based on UNESCO’s Journalists’ Safety Indicators. Published in 2016. Pg. 17

⁶⁹ Nancy Agutu, “Nkaissery attacks media over Sh3.85 billion spending story, wants Muturi to probe leakage of confidential report”, The Star, November 5, 2015 http://www.the-star.co.ke/news/2015/11/05/nkaissery-attacks-media-over-sh385-billion-spending-story-wants-muturi_c1237605; Ramenya Gibendi, Uhuru pour his anger to the media in Jamuhuri Day Speech <https://tuko.co.ke/75887-how-uhuru-poured-his-anger-to-the-media-in-jamhuri-day-speech.html>; Nzau Musau, “President Uhuru Kenyatta hits out at Opposition, media over graft reports” December 13, 2015: <http://www.standardmedia.co.ke/article/2000185204/president-uhuru-kenyatta-hits-out-at-opposition-media-over-graft-reports>

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