REALISATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE AND FULFILMENT OF KENYA’S INTERNATIONAL OBLIGATIONS FOR THE PERIOD 2013-2017

JUBILEE GOVERNMENT SCORE CARD
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JUBILEE GOVERNMENT SCORE CARD

DECEMBER, 2017
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>ATM</td>
<td>Automated Teller Machine</td>
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<td>ACHPR</td>
<td>African Charter on Human and People's Rights</td>
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<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>AFRIGOC</td>
<td>Africa Centre for Open Governance</td>
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<td>CAJ</td>
<td>Commission on Administrative Justice</td>
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<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>CRA</td>
<td>Commission on Revenue Allocation</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRSR</td>
<td>Convention Relating to the Status of Refugees</td>
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<td>CSO</td>
<td>Civil Society Organisations</td>
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<td>Counter Violent Extremism</td>
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<td>eKLR</td>
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<td>Ethics and Anti-Corruption Commission</td>
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<td>Federation of Women Lawyers Kenya</td>
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<td>FY</td>
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<td>Non-governmental Organisation</td>
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<td>National Values and Principles of Governance</td>
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<td>NPS</td>
<td>National Police Service</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ-K</td>
<td>Kenyan Section of International Commission of Jurists</td>
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<td>ICT</td>
<td>Information Communication Technology</td>
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<td>IEBC</td>
<td>Independent Electoral and Boundaries Commission</td>
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<td>IFMIS</td>
<td>Integrated Financial Management Information System</td>
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<td>IPOA</td>
<td>Independent Policing Oversight Authority</td>
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<td>HC</td>
<td>High Court</td>
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<td>KHRC</td>
<td>Kenya Human Rights Commission</td>
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<td>KIPPRA</td>
<td>Kenya Institute for Public Policy Research and Analysis</td>
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<td>KLR</td>
<td>Kenya Law Reports</td>
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<td>Acronym</td>
<td>Full Form</td>
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<td>KLRC</td>
<td>Kenya Law Reform Commission</td>
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<td>Kenya National Commission on Human Rights</td>
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<td>MDAs</td>
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<td>MUHURI</td>
<td>Muslims for Human Rights</td>
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<td>NCAJ</td>
<td>National Council on the Administration of Justice</td>
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<td>NCIC</td>
<td>National Cohesion and Integration Commission</td>
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<td>NGEC</td>
<td>National Gender and Equality Commission</td>
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<td>OAG</td>
<td>Office of the Attorney General</td>
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<td>PBO</td>
<td>Public Benefits Organisations</td>
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<td>POTA</td>
<td>Prevention of Terrorism Act</td>
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<td>PWD</td>
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<td>SDG</td>
<td>Sustainable Development Goals</td>
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<td>SGBV</td>
<td>Sexual Gender Based Violence</td>
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<td>SRC</td>
<td>Salaries and Remuneration Commission</td>
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<td>TJRC</td>
<td>Truth Justice and Reconciliation Commission</td>
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<td>UNCAC</td>
<td>United Nations Convention against Corruption</td>
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<td>UPR</td>
<td>Universal Periodic Review</td>
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EXECUTIVE SUMMARY

The Constitution of Kenya 2010 aims to infuse the national values and principles of governance (NVPG) in Kenya’s socio-economic and political sphere. Article 10(2) of the Constitution stipulates seventeen (17) NVPG that State and public officers, as well as every person is bound to adhere to, but these are not exhaustive and can be built upon. As an inbuilt mechanism to track Kenya’s progress on realisation of NVPG, the Constitution binds the President of the Republic of Kenya to report every year, in an address to the nation, on the measures undertaken and progress made in realising these NVPG. Kenya is a signatory to various international and regional treaties which are part of the laws of Kenya by virtue of Article 2(6) of the Constitution. By the same token the President is bound to report to the National Assembly on Kenya’s progress in fulfilling its international obligations.

In line with its constitutional and statutory mandates, the Kenya National Commission on Human Rights undertook research that is documented in this report. This report is an aggregate alternative report that explores measures and progress in realisation of NVPG and fulfilment of Kenya’s obligations for the period 2013-2017. The report also illuminates gaps and challenges in realisation of NVPG and Kenya’s international obligations in the period under review.

During its first tenure, the Jubilee government undertook various measures and made progress to realise NVPG. These include: adoption of key policies; enactment of laws; building capacity of State and public officers on NVPG; devolving services of ministries, departments and agencies (MDAs) and constitutional commissions to the counties; and awareness creation on NVPG. The government also made efforts to fulfil its international obligations. Albeit these measures and progress, there is still significant gaps and challenges in realising NVPG, and for Kenya to fulfil its international obligations. These gaps and challenges include; weak implementation of policies and laws; endemic corruption; various human rights violations; government’s inordinate delay to implement the Truth, Justice and Reconciliation Report, and conducts of impunity by State and public officers. Cumulatively, these gaps and challenges weaken Kenya’s social, economic and political fabric and by extension erode the culture of constitutionalism. It is imperative that the government urgently addresses these identified gaps and challenges so as to foster a culture of constitutionalism. The Commission through recommendations in this report provides a roadmap on how this can be attained.

In the course of conducting this research, the reports on NVPG and Kenya’s fulfilment of its international obligations were not easily available, and as well
pertinent policies on NVPG. This could be one of the reasons as to why the members of public and private sector have not actively engaged in realisation of NVPG notwithstanding the clear constitutional provisions that binds them as well.

As a starting point, the Commission recommends that the government ensures relevant documents including policies touching on NVPG are easily accessible to the public. This will not only promote the right to information guaranteed in Article 35 of the Constitution but also support government's efforts to foster a culture of constitutionalism.
ACKNOWLEDGEMENTS

The Kenya National Commission on Human Rights acknowledges with appreciation the hard work and contributions of the consultant, research and editorial team as well as all individuals and institutions towards the preparation and production of this Report.
PREFACE

The General elections of 4th March 2013, the first under the Constitution of Kenya, 2010 marked a radical shift in Kenya’s governance in many ways including the ushering in of office bearers to county governments. One of the noble foundations in the Constitution is the anchoring of the National Values and Principles of good governance in Article 10 of the Constitution. This was informed by Kenya’s checkered past history of poor governance by successive regimes. Through her transformative Constitution, Kenya sought to infuse the National Values and Principles of Governance (NVPG) as part of its socio-economic and political pulse and thus codified them as such in the supreme law.

A nation without values and principles is one without a conscience, without direction. Article 10(2) of the Constitution stipulates the National Values and Principles of Governance to include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development. These principles are the fulcrum to the Constitution; indeed, it is their lack or insufficiency that triggered the clamour for constitutional reforms. It is important to note that the NVPG are binding and mandatory on all State Organs, State Officers, Public Officers and all persons whenever any of them applies, or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Article 132(1) (c) (i) of the Constitution requires the President to report once every year, in an address to the nation, on all measures taken and the progress achieved in the realisation of NVPG.

Kenya is a signatory to various international and regional treaties which are part of the laws of Kenya by dint of Article 2(6) of the Constitution. Article 132(5) of the Constitution obliges the President to ensure that international obligations of the Republic are fulfilled through the actions of relevant Cabinet Secretaries. The President is required to submit a report to the National Assembly for debate on the progress made in fulfilling Kenya’s international obligations. Article 21(4) further obliges the State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

The Jubilee Government, under the leadership of H.E President Uhuru Kenyatta became the first elected government under Kenya’s 2010 Constitution. This
Report is a cumulative assessment of the first five years of Jubilee Government’s administration (2013-2017) in fulfilment of the National Values and Principles of Governance as demanded by the Constitution. The report reveals that the President has regularly complied with the constitutional obligation to submit reports on measures undertaken and progress made towards realisation of NVPG and on Kenya’s fulfilment of its international obligations. The research Report however notes that whilst progressive measures have been undertaken in so far as adopting policies and enacting laws to give effect to NVPG and human rights treaties and conventions that the Republic of Kenya is a State Party to, there remains wide gaps in translation of the same values and policies on the ground. In terms of International Obligations, Kenya has done fairly well in state reporting obligations, a number of reports however have been submitted overdue. Furthermore, a lot more requires to be done to follow through the recommendations of regional and international body mechanisms to ensure compliance. Kenya should also ratify and implement the several international and regional conventions and relevant Protocols as part of its fulfilment of its national and international treaty obligation.

The Kenya National Commission on Human Rights hopes that this comprehensive Report, presents a self-assessment and reflection tool for the Jubilee administration regarding its first term in government with the aim of consolidating the gains made as well as addressing the identified gaps and challenges.

Kagwiria Mbogori
Chairperson,
CHAPTER 1

REALISATION OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE FOR THE PERIOD 2013-2017

1.0 BACKGROUND

The Kenya National Commission on Human Rights (the Commission or KNCHR) is an independent National Human Rights Institution established under Article 59(1) as read together with Article 59(4) of the Constitution of Kenya, 2010 (hereinafter referred to as Constitution) and the Kenya National Commission on Human Rights Act No. 14 of 2011 (revised 2012). The Commission has two broad mandates: to advise and support state and non-state actors to discharge their obligation to respect, promote and fulfil human rights and to play a watchdog role over government organs with respect to human rights in the Republic of Kenya. KNCHR is a constitutional Commission mandated under Article 254(1) of the Constitution to submit report to the Parliament and the President of the Republic of Kenya. By virtue of this constitutional provision and that within Section 8 of KNCHR Act, KNCHR has undertaken various research studies and submitted reports to the President and the Parliament. In this regard, the most relevant research is, National Values & Principles of Governance: An Alternative Report of State Compliance on Obligations under Article 132(c)(i) Constitution of Kenya 2010 on Realisation of Article 10. This research is alternative report generated by KNCHR in 2016 on the government of Kenya’s implementation of the national values and principles of governance (NVPG) enshrined in Articles 10(2)(a)(b)(c)(d) of the Constitution.
In fulfilment of its mandate, KNCHR has in the recent past implored the President of the Republic of Kenya H.E. Uhuru Kenya to ensure realisation of NVPG, and that Kenya fulfils its pending international obligations. KNCHR submitted its recommendations before the President delivered the State of Nation Address in the confidence that the President will address them in his State of Nation speech, particularly commit to undertake specific measures either legislative and policy or other appropriate measures.

It is in this context that KNCHR undertook the following activities in 2017 aimed at:

1. Documenting progress made in the implementation of NVPG under Article 10(2) of the Constitution between the period 2013 and 2017.
2. Exploring the progress made by the Jubilee administration with regard to Kenya’s compliance with its international obligations as specified under Article 132 (c) (iii) of the Constitution.
3. Identifying gaps and challenges faced in actualizing Articles 10(2), 132 (1)(c)(i) and 132 (1)(c)(iii) of the Constitution and generate implementable recommendations.

This alternative report which is a culmination of these three (3) aforementioned activities is essentially a scorecard on Jubilee government’s realisation of NVPG, and fulfilment of Kenya’s international obligations.

The President as a State officer is mandated by Article 132(5) of the Constitution to ensure that international obligations of the Republic are fulfilled through the actions of relevant Cabinet Secretaries who by the definition of Article 260 of the Constitution are also State officers. On its part, Parliament has been mandated by Article 94(4) of the Constitution to protect the Constitution and promote democratic governance. Further, Article 95 of the Constitution stipulates the role of the National Assembly to include: enactment of laws; allocation of revenue; appropriation of funds for expenditure by the national government and other national State organs; oversight over national revenue and its expenditure; review conduct of State officers; and oversight of State organs. Article 96 of the Constitution stipulates the role of the Senate to include: representing counties and their interests; law-making; and allocation of national revenue among counties.

In view of the functions of the President and Parliament, KNCHR will present

the recommendations of this report to the President and the Parliament (as per Article 93(1) of the Constitution Parliament consists the Senate and the National Assembly) with a view to have them undertake relevant and specific measures for optimum realisation of the NVPG, and fulfilment of Kenya’s international obligations.

2.0 INTRODUCTION TO NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

Kenya’s history is replete with poor governance, abrogation of rule of law and systematic injustice that has been attributed to absence of enforceable NVPG. Through its transformative constitution, Kenya sought to infuse NVPG as part of its socio-economic and political pulse, and thus codified them therein. Article 10(2) of the Constitution stipulates the national values and principles of governance to include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability, and sustainable development.

These NVPG are not exhaustive as they are bare minimum. Kenyan courts have rightly noted, “By employing the use of the term “include” the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exhaustive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing a public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words, the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.”

The Constitution of Kenya gives prominence to NVPG. Its Article 4(2) stipulates

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that the Republic of Kenya shall be a multi-party democratic state founded on the national values and principles of governance. Further, the Constitution binds all State organs, State officers, public officers and all persons to adhere to the national values and principles of governance whenever they: apply or interpret the Constitution;\(^4\) enact, apply or interpret any law;\(^5\) and make or implement public policy decisions.\(^6\) In a nutshell, the NVPG are a benchmark of good practices to be employed by all persons and a yardstick for evaluating performance of State and public officers.

The Constitution has an inbuilt mechanism for ensuring that Kenya tracks its progress on realising NVPG. One of such mechanism is the obligation imposed on the President of the Republic of Kenya to once every year report in an address to the nation on all the measures undertaken and progress achieved in the realisation of NVPG enshrined in Article 10(2) of the Constitution.\(^7\) Further, the President is obligated to publish the report in the Gazette\(^8\), and to submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.\(^9\)

### 3.0 NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE; FURTHER ANCHORAGE IN THE CONSTITUTION

Prostitution and Child Pornography, United Nations Convention Relating to the Status of Refugees (CRSR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the African Charter on Human and Peoples’ Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol). These treaties and conventions guarantee the rule of law, democracy and participation of people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability, and sustainable development.

Further, the Jubilee Manifesto of 2013 stipulates the need to enhance the promotion of national values and principles of governance under its first pillar of Umoja.

For ease of reference, this report has three sections. Section one has summary findings in respect to the four annual reports submitted by the President of the Republic of Kenya to the National Assembly on measures taken and progress made on realisation of NVPG. In this regard, the section highlights overarching measures and progress on realisation of NVPG; and the gaps and challenges on realisation of NVPG. Section two discusses the specific findings in respect of the four annual reports submitted by the President of the Republic of Kenya to the National Assembly on measures taken and progress made on realisation of NVPG. In this regard, the section examines NVPG implementation; gaps and challenges on implementation of NVPG; and enumerates implementable recommendations. Essentially, the section inter-alia elaborates on section one of this report in great detail. Section three of the report is a discourse on reports submitted by the President of the Republic of Kenya to the National Assembly in respect of Kenya’s fulfilment of its international obligations.

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16 Kenya became a signatory on 8th September 2000.
17 Kenya acceded on 16th May 1966.
21 Kenya ratified on 6th October 2010.
4.0 SUMMARY FINDINGS

The following are summary findings on the measures and progress made on realisation of the NVPG; and challenges and gaps in respect of their realisation during the Jubilee administration:

4.1 Overarching Measures and Progress on Realisation of National Values and Principles of Governance

1. The President of the Republic of Kenya, in line with his constitutional obligation has generated annual reports on the realisation of the NVPG in 2014, 2015, 2016 and 2017 thus summing up to 4th annual reports generated during the tenure of the Jubilee administration. A common and commendable feature of the annual reports is that each report generated recommendations and commitments by the government to ensure realisation of the NVPG in the subsequent years. In turn, the subsequent reports illuminated the progress made in fulfilment of those recommendations and commitments. These recommendations and commitments were compounded and aggregated into commitments that ministries, departments and agencies (MDAs) were required to implement.

2. In a bid to promote NVPG, the government developed and adopted National Values and Principles of Governance Sessional Paper No. 8 of 2013. The aim of the policy is to operationalise NVPG. One of the commendable provisions of the Policy is that it identifies value-drivers and value carriers of NVPG to include national and county governments, families and communities, professional associations, media communities, civil society organisations (CSOs), religious organisations, private sectors and educational institutions.

3. During the reporting period, MDAs undertook various administrative actions towards implementing NVPG. These administrative actions include:

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28Note 23 at Para. 6.
continuous training, creation of awareness and dissemination of programmes on NVPG; development of service delivery charters; developed information, education and communication materials on NVPG; established code of conduct; established administrative actions to hold state and public officers to account on the NVPG; directed professional bodies for accountants, engineers, architects and lawyers to monitor and discipline their members working in public institutions for violating NVPG; and through the State Department of Basic Education undertook needs assessment so as to reform educational curriculum to incorporate NVPG.

4. The government through its MDAs conducted continuous sensitisation and civic education to State and public officers on the constitutional provisions on NVPG. For example, in 2014 the Ministry of Interior and Coordination of National Government trained 32 County Public Service Boards on their role in promoting national values and principles of governance. The Ministry of Interior and Coordination of National Government through directorate of National Cohesion and National Values built capacity of County Public Service Boards, Governors, County Commissioners, County Executive Committee members and Members of County Assemblies.

5. The Ministry of Interior and Coordination of National Government procured the services of Kenya Institute for Public Policy Research and Analysis (KIPPRA) that conducted a baseline survey on the prevailing status of NVPG. KIPPRA’s research findings determined that there is low compliance to NVPG and made recommendations for comprehensive multi-sectoral civic education to be conducted on NVPG; development and mainstreaming of Kenya National Values Standards; continuous research to be undertaken on NVPG so as to inform interventions in respect of NVPG; and implementation of policies and enforcement of laws touching on NVPG.

6. The Office of the Attorney General and Department of Justice (OAG), the Commission on the Implementation of Constitution (CIC) and Kenya Law Reform audited and reviewed legislations to facilitate adherence to Article 10 of the Constitution.

7. The government developed Kenya National Values Standards to

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29Note 23 at Para. 11.
30Note 25 at Para. 23.
31Note 25 at Para. 32.
33Note 24 at Para. 27.
operationalise and enforce the NVPG; as well as developed the Mwogonzo Code of Governance to entrench principles and values of public service and address challenges of governance in State Corporations. Consequently, 1600 board members of State Corporations were trained on Mwongoz Code of Conduct.34

4.2 Overarching Gaps and Challenges on Realisation of National Values and Principles of Governance

The Jubilee government made remarkable progress towards actualising NVPG embodied in Article 10(2) of Constitution. The first tangible mark of this progress are the laws and policies the government adopted and enacted respectively that aim to facilitate realisation of NVPG. However, implementation of these policies and laws remains largely poor. This is coupled by absence of cogent monitoring and evaluation on the implementation of NVPG.

The government has acknowledged that the awareness on the NVPG remains low due to inter-alia inadequate funding for it to conduct training and civic education on these values and principles.35 It is therefore rather curious that during the reporting period, the government curtailed CSOs’ operations thus shrinking the operating space for CSOs yet in Kenyan history, CSOs have either collaborated and partnered with the government or supplemented the government’s effort to create awareness among citizenry on pertinent issues.

While it is commendable that the President has consistently fulfilled his obligation under Article 132(1)(c) (i) of the Constitution, and thus submitted reports, there are noticeable gaps and shortcomings in respect to the four (4) annual reports.

4.3 Overarching Shortcomings of the Annual Reports

1. Whereas Article 10(2) of the Constitution binds all persons to adhere to NVPG, all the four (4) annual reports have focussed on actions undertaken by MDAs and make marginal reference on compliance by private sectors and citizens. It is therefore not surprising that to-date, four years from the time the President made his inaugural report on NVPG, there is no constructive engagement with and response to the reports by non-state actors, particularly CSOs and the citizens at large.36

34Note 25 at Para. 43.
35Note 23 at Para. 161.
36So far the evidence of engagement with State of the Nation Address is commentary of Society for International Development which is marginal as it is a blog on its website based on the comments made during Citizen TV Cheche Show on 30th March 2016 http://dialogues.sidint.net/community/content/thoughts-ahead-2016-state-nation-address-kenya-31-march-2016 [accessed on 10th May
2. Unlike the 1st and the 2nd annual reports which enumerated the challenges to the realisation of NVPG and therefore engendering recommendations and government’s commitments to addressing those challenges, the 3rd and the 4th annual reports do not enumerate any challenges rather they simply outline government’s commitments without delving into what challenges those commitments will address. This brings to fore the question ‘What is the premise upon which the commitments were made?’ By the same token, some of the commitments are rather generic and simply replicated in subsequent annual reports. These commitments are: implementing key policies to enhance ethnic relations and address abuse of social media;\textsuperscript{37} prioritising resource allocation for continual promoting of NVPG;\textsuperscript{38} continual creation of awareness;\textsuperscript{39} enhancing public participation and access to information;\textsuperscript{40} and addressing existing and emerging security challenges.\textsuperscript{41}

3. The annual reports have focused on the bare minimum NVPG. In this regard, it is instructive to note the wording of Article 10(2) of the Constitution, “The national values and principles of governance \textit{include}…” (Emphasis added) and as has been rightly noted by Kenyan courts ‘the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.’\textsuperscript{42}

4. The Constitution imposes a solemn obligation on the Judiciary as the custodian of NVPG. According to Article 259 of the Constitution, Kenyan courts are enjoined to interpret the Constitution in a manner that promotes NVPG. The Judiciary is further mandated under Article 159(2) (e) of the Constitution to protect the principles of the Constitution. Against this constitutional backdrop, it would be expected that the reports would include measures and progress by the Judiciary through its judgments and the compliance to those judgments. However, the reports marginally chronicle Judiciary’s efforts to expansion of courts and employment of more judicial officers which minimises Judiciary’s progress on realisation of NVPG considering that in the period 2013-2017, the Judiciary heard and determined approximately one hundred (100) cases aimed at securing compliance to NVPG by MDAs.\textsuperscript{43}

\textsuperscript{37} Note 24 at Para. 516 and Note 25 at Para. 634.
\textsuperscript{38} Note 25 at Para. 518 and Note 26 at Para 639.
\textsuperscript{39} Note 24 at Para. 524 and Note 25 at Para. 641.
\textsuperscript{40} Note 24 at Para. 533 and Note 25 at Para. 624.
\textsuperscript{41} Note 3 above.
\textsuperscript{42} www.kenyalawreport.org [accessed on 10th May 2017].
5. While it is commendable that the President in his 1st annual report articulated that the purpose of the report is to provide direction, strategies and interventions that will enhance the promotion of the NVPG, the reports are not easily available to the members of the public, in the fashion envisaged in Article 35 of the Constitution that guarantees access to information. It is worth pointing out that the report is only available in the English language and not Kiswahili and in a form for use by Persons with Disabilities (PWD), yet the Article 7(2) provides both English and Kiswahili are official languages of Kenya. By not facilitating access to the reports, the government is not in compliance to NVPG on access to information that is ensconced under human rights. Similarly, the President’s report on the fulfilment of Kenya’s international obligations is not easily available to members of the public including relevant MDAs and Constitutional commissions such as KNCHR.

6. The reports highlight various measures undertaken by the government towards realisation of NVPG and not all of them, without explaining the criteria used for leaving out some measures and progress made on implementation of NVPG.

The next section of the report examines the measures and progress made by government in implementing NVPG, as well challenges and gaps and makes implementable recommendations.

5.0 SPECIFIC FINDINGS

5.1 Article 10(2) (a) Patriotism, National Unity, Sharing and Devolution of Power, the Rule of Law, Democracy and Participation of the People

5.1.1 Measures Undertaken and Progress on National Unity and Patriotism


*Note 23 at Para. 16.*
processed 152 such complaints of which 69 were on hate speech, 46 on ethnic and racial contempt and 23 on discrimination.

The national government through its legislative arm, Parliament, enacted National Honours Act No. 11 of 2013 that establishes procedures and mechanism for conferring of national honours by the President under Article 132(4)(c) of the Constitution. Parliament also reviewed the National Flags, Emblems and Names Act Chapter 99 Laws of Kenya so as to mitigate improper use of flags and emblems; and National Cohesion and Integration Act No. 12 of 2008 to proscribe discrimination on ethnic grounds.  

Kenya has grappled with historical land injustices that not only violate a raft of economic, social and cultural rights but also posed a threat to national unity due to marginalisation and dispossession of community land. The reports of the Truth Justice and Reconciliation Commission and the Commission of Inquiry into Illegal /Irregular Allocation of Land examine in detail Kenya’s historical land injustice and urge Kenyan government through their comprehensive recommendations to address those injustices. During the reporting period, Parliament enacted the Community Land Act No. 27 of 2016 that gives effect to Article 63 of the Constitution of Kenya. Parliament also amended the National Land Commission Act 2012 and the Land Act 2016 so as to establish mechanism for adjudication of claims arising from historical land injustices. 

The government, in a bid to promote national unity held Annual National Prayer Breakfasts that brought together persons with diverse political views and from different social and economic backgrounds.

The Ministry of Interior and Coordination of National Government through the National Registration Bureau amended sections 9(1)(b) and 16(a) of the Registration of Persons Act Chapter 107 Laws of Kenya to ease the registration process, and the vetting process for Not Previously Registered. Thus during the reporting period, the Bureau issued National Identity Cards to 1,489,457 males and 1,211,782 females. Following protracted advocacy by the Kenya Human Rights Commission, the government also issued National Identity Cards to the Makonde community that have been traditionally marginalised, and were not recognised by the Kenyan government. 

45Note 23 at Para. 21.  
46Note 25 at Para. 122.  
47Note 25 at Para. 113.  
The government launched the Integrated Population Registration Systems on 11th March 2015 to create a single database on all people residing in Kenya to make it easy to verify identity and improve security.

Gaps and Challenges to National Unity and Patriotism

Notwithstanding the measures and progress by the government there were various gaps and challenges in respect of NVPG on national unity and patriotism.

During the reporting period, Kenya continued to experience high crime rates of which both civilians and police were victims of crime. There were incidents of incitement, violence and hate speech including by State and public officers who made inflammatory remarks thus undermining NVPG of national unity.

A poignant case is that of Member of National Assembly Hon. Moses Kuria who incited youth in Gatundu South constituency to slash critics of the National Youth Service with machetes, and remained unrepentant for his hate speech. Also Hon. Johnstone Muthama made remarks in Busia town in June 2016 that violated the NCIC Act. Unfortunately, no prompt action was taken against such officers, save against Moses Kuria, therefore rendering the President’s commitment to foster national unity mere rhetoric and an indictment on weak implementation of the Sessional Paper No. 9 of 2013 on National Cohesion and Integration, and the Sessional Paper No. 5 of 2014 on Peace building and Conflict Management. These situations were compounded by the fact that that President Uhuru Kenyatta’s commitment in March 2016 to implement the two Sessional Papers did not fully materialise during the year. Moreover, Parliament inordinately delayed reviewing the National Cohesion and Integration Act No.12 of 2008 so as to bring about amendments aimed at providing holistic and coordinated framework for peace building and promoting national cohesion.

Although NCIC initiated investigations of allegedly 119 cases of violations to the National Cohesion and Integration Act No. 12 of 2008, there is no report on the outcome of these cases. Absence of this report and visible robust implementation of NCI Act reinforce public perception that NCIC is a weak agency as such violators of NCI Act continue to enjoy impunity as NCIC conducts its ‘slow'

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51End Political And Ethnicity Bigotry In Kenya: Systematic Incitement to Violence and Hate Speech 10th July 2015 www.khrc.or.ke[accessed on 20th May 2017].
52Note 24 at Para. 341.
investigations. It is therefore not surprising that there remains deep concerns of possible eruptions of election related unrest and conflicts⁵³ ostensibly fomented by slow investigations, prosecution and punishment of past violations under NCI Act.

The government’s attempts to address incitement, violence and hate speech has been autocratic: the government developed the Kenya Information and Communication Bill, 2014 and Cyber and Computer Crimes Related Bill, 2014 whose effect were to curtail freedom of expression.⁵⁴ The draft laws were not enacted following successful advocacy including by human rights CSOs in Kenya.

The President in his State of Nation Address on 26th March 2015 directed Parliament to ‘process without undue delay’ the report of the Truth Justice Reconciliation Commission (TJRC).⁵⁵ The TJRC was mandated to inquire into gross violation of human rights and historical injustice that occurred from 12th December 1963 to 28th February 2008⁵⁶ and in its report made vast recommendations that included an implementation framework on measures to be undertaken by government.⁵⁷ It is indisputable that there is no intention to implement the TJRC report that is evident by the government’s protracted efforts to enact and implement Regulations for the Reparation of Historical Injustices,⁵⁸ and by the fact that to-date, Parliament has not tabled the TJRC report to usher in its comprehensive implementation. It can therefore be argued that due to failure to implement the TJRC report, it has engendered current persisting injustices that include resource-based tensions and conflict in Baringo due to marginalization; tensions surrounding elections to be conducted on 8th August 2017; and continued marginalisation of special interest groups in socio-economic and political sphere. There is near global consensus that failure to address historical injustices sustains a narrative that fuels violent extremism.⁵⁹ Therefore, it can be argued that failure to holistically implement the TJRC report has created a fertile ground for violent extremism that Kenya currently contends with. The Deputy President of Kenya William Ruto remarked during political campaigns in the run-up to 8th August 2017 general elections.

⁵⁶Section 5 of TJR Act, No.6 of 2008.
There were incessant conflicts between various MDAs as well as between MDAs and constitutional commissions because of their different understanding of their respective constitutional mandates, and the extent to which they ought to coordinate their functions. Poignant cases in point include the conflict occasioned between the Ministry of Lands Housing and Urban Development and the National Land Commission in relation to land administration and management functions, taxation and revenue, human resources and staff issues, land registration and issuance of titles and information management systems; and the tension between the executive and legislatures of county governments of Makueni, Nakuru, Kisumu and Embu as evidenced in the attempts to impeach the governors and the speakers of these counties.

During the reporting period, government’s efforts to promote patriotism and national unity were hampered by increased ethnicity, tribalism and ethnic intolerance that manifested on the social media, and led to eruption of tribal clashes. In the same vein, there were strong evidence that various MDAs did not fully infuse Article 10(2) NVPG and Article 232 values and principles of public service whilst making public appointments into their bodies whose effect were to discriminate against and marginalise certain ethnic groups, clans within particular ethnic groups and vulnerable persons because of their marital status. This vice was particularly prominent within county governments, and in higher learning institutions. Learning institutions are a crucible and value shaping avenue through which cohesion and national unity is nurtured, but Kenyan higher institutions of learning have not fulfilled this role. A survey conducted by the NCIC in 2015 and 2016 found twenty (26) institutions of higher learning have in their employment high proportion of the dominant ethnic community where
CSOs in Kenya are instrumental in mobilising communities to publicly participate in policy and law-making processes, budgetary and government decision-making processes such as implementation of projects. CSOs also act as public watchdog which at times puts them at variance with the government: nonetheless as the time of Kenya’s independence and at the height of fight for multi-party democracy in the 1990s, CSOs carried out their operations with a good measure of unrestraint. Under the Jubilee administration, the government took actions that systematically diminished the civic spaces for CSOs. Examples in point include when the Non-Governmental Organisation Coordination Board initiated the process of de-registering 957 CSOs without adhering to due processes. Among the 957 CSOs were those that had challenged the suitability of Uhuru Kenyatta and William Ruto as candidates for Presidency and Deputy Presidency on account of their implication in the post-election violence 2007/08. The government is yet to operationalise the Public Benefits Organisations (PBO) Act notwithstanding several court directives in this regard, yet paradoxically, Parliament attempted to amend the Public Benefits Organisations (PBO) Act ostensibly to restrict CSOs’ work. The government illegally froze accounts of PBOs to curtail their operations. The police also brutally disrupted CSOs that organised peaceful anti-corruption protests thus violating CSOs’ right to peaceful demonstration as enshrined in Article 37 of the Constitution. The Jubilee government also issued notice to show cause against select CSOs in ultra-vires manner on false allegations that they supported acts of terrorism.

At the commencement of his tenure, President Uhuru met with various actors at State House but did not meet with actors from CSOs. His conduct rendered NVPG of national unity as mere rhetoric at a time the country had been deeply divided following 2007/08 post-elections violence; and his indictment alongside six (6) other suspects at the International Criminal Court. This action communicated a strong negative message to PBO that the government begrudged some of its...
actors for demanding accountability for 2007/08 post-election violence, at both national and international platforms.

Cumulatively, these government actions were aimed at tarnishing the CSOs, retaliating against them, and intimidating them into silence.

While it is commendable that the government through the Kenya Literature Bureau has sought to integrate NVPG as a topic under the social studies curriculum for primary school curriculum.\(^{75}\) This has not been done through a consultative process drawing sharp reactions from experts in the education sector. Education experts have raised fundamental concerns that because history is an optional subject in Kenya’s educational curriculum, Kenya’s younger generation are ignorant of its defining moments such as fight for independence and the second liberation that ushered in the Constitution of Kenya 2010; this does not foster a sense of patriotism among the youth.

**Recommendations: National Unity and Patriotism**

1. There is need for NCIC to expeditiously conclude investigations conducted under the NCI Act and periodically report on its activities so as to boost public confidence in the institution and therefore make in-roads in ensuring cogent compliance to the NCI Act.
2. It is imperative that Sessional Paper No. 9 of 2013 on National Cohesion and Integration, and the Sessional Paper No. 5 of 2014 on Peace building and Conflict Management are implemented. Of significance, learning institutions which are drivers of NVPG should be proactively involved in the implementation of the Sessional Papers.
3. It would be critical for Parliament to adopt the TJRC report so as to address Kenya’s prolonged historical injustices and ensure reparation and non-repetition of similar injustices. Similarly, it is vital for the government to urgently enact Regulations for the Reparation of Historical Injustices and allocate enough resources to implement the Regulations; as well as to implement the TJRC report in its entirety.

\(^{75}\) Note 23 at Para. 27.
5.1.2 Measures Undertaken and Progress on Rule of Law

Following numerous calls for security sector reforms, the government undertook various initiatives: the Independent Policing Oversight Authority established under the Independent Policing Oversight Act (No. 35 of 2011) continued to hold the police accountable to uphold the rule of law and respect human rights in their line of duty. The National Police Service reviewed the National Police Service Standing Orders. The government formulated the National Community Policing Policy to promote community policing and the National Policy on Small Arms and Light Weapons to improve firearms accountability and control proliferation of illicit small and light firearms. It also embarked on constructing Forensic Laboratory, recruited 10,000 police officers to the National Police Service thus improving Police to Population ratio, and acquired security equipment such as armoured police fighting wagons, motor vehicles, and helicopter. For example in 2015, the government also leased 2,700 vehicles for the National Police Service. The government through Kiganjo Training Police revised the training curriculum for the police and continued to train the police on human rights.

The Judiciary strengthened the National Council on the Administration of Justice through which it coordinates and collaborates with actors in justice chain system to enhance the rule of law; operationalised 121 court users committees to foster democratic approach in addressing challenges affecting the justice system; and established the Office of the Judicial Ombudsman with the mandate to address complaints by members of public in respect of service delivery of the Judiciary.

The Commission on Administrative Justice (CAJ) promoted the rule of law by resolving 80% of complaints lodged by the public in respect public administration.

Article 159(2)(c) of the Constitution recognises Alternative Dispute Resolution (ADR) methods including mediation, reconciliation and arbitration. MDAs mandated with quasi-judicial authority breathed life to this constitutional provision by integrating it in their functions. For example, the National Land Commission settled land disputes using ADR. The Judiciary established a Taskforce on Alternative Dispute Resolution to provide a framework that links informal and formal justice system. The Judiciary also rolled out court-annexed mediation on a pilot basis at

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76 See www.ipoa.go.ke [accessed on 25th April 2017].
77 NVPG Annual Report March 2016 at Para. 32.
78 Ibid.
79 Ibid.
80 NVPG Annual Report March 2016 at Para. 67.
81 NVPG Annual Report March 2016 at Para. 342.
82 Ibid.
the Milimani Law Courts’ Commercial and Family Divisions as well as maintaining a register of accredited mediators by the Mediation Accreditation Committee.\textsuperscript{83} The government initiated the process of institutionalising the Council of Elders to provide structures for ADR mechanism at County level. Furthermore, the Nairobi Centre for International Arbitration (NCIA) established under the Nairobi Centre for International Arbitration Act No. 26 of 2013 provides a Centre for promotion of international commercial arbitration and other domestic alternative forms of dispute resolution.

\textit{Challenges and Gaps to Rule of Law}

Security sector reforms have not had an enduring impact as envisaged in the Constitution, laws and policies governing the sector. It is because the reforms undertaken so far have focused on hardware improvements such as acquiring equipment, housing, recruiting more personnel rather than software aspect of reforms such as enhancing accountability and professionalism,\textsuperscript{84} which would invariably translate to optimal realisation of NVPG. Recruitment of additional police officers for instance has had minimal impact in terms of improving security for the people of Kenya as police were deployed to non-core policing duties.\textsuperscript{85} According to KNCHR, approximately ten thousand (10,000) police officers have been deployed to provide personal security and protect properties of State and public officers, and dignitaries.\textsuperscript{86}

The police training curricula on human rights has not translated to improved human rights standards among the police. Senior police officers perceive it as basic and not applicable to some of their work situations and called for its revision.\textsuperscript{87}

Police continue to be implicated in human rights violations as evidenced by prevalence of torture, cruel and inhumane and degrading treatment in the criminal justice system\textsuperscript{88} and various human rights violations such as murder and grave assault.\textsuperscript{89} There were also established incidents of misuse of firearms by

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\textsuperscript{83}www.judiciary.go.ke [assessed on 20\textsuperscript{th} April 2017] \\
\textsuperscript{84}Kenya National Commission on Human Rights Commission \textit{Baseline Survey Report: Monitoring and Evaluation Department 2016} p.10 \\
\textsuperscript{85}KNCHR Alternative Report on NVPG (2016) at p.11.  \\
\textsuperscript{86}ibid. \\
\textsuperscript{87}ibid. \\
\textsuperscript{88}ibid.  \\
\textsuperscript{89}Independent Policing Oversight Authority \textit{Press Advisory-Police Charged for Grievous Bodily Harm on Matatu Driver} –28\textsuperscript{th} October 2016; \textit{Press Advisory—Reported Cases of Alleged Police Shootings} -28\textsuperscript{th} September 2016; \textit{Press Advisory—Update on Investigation Files by IPOA-7\textsuperscript{th} September 2016; Press Advisory –Update on Investigation Files by IPOA-17\textsuperscript{th} August 2016. http://www.ipoa.go.ke/press-releases/ [accessed on 23\textsuperscript{rd} May 2017].
\end{flushleft}
the police; For example, in 2014 KNCHR recorded fifteen (15) such incidents. Following the surge of terrorism in the country, the government conducted security operation dubbed *Usalama Watch* aimed at flushing out foreigners linked to terrorism in Nairobi and Mombasa: during the implementation of the Usalama Watch, KNCHR and Amnesty International recorded more than one hundred and twenty (120) cases of serious human rights violations that included twenty-five (25) extra-judicial killings, and eighty one (81) enforced disappearances. In 2015 and 2016, Kenya experienced crime wave in which the police responded by allegedly issuing ‘shoot to kill orders’ hence in violation of the rule of law resulting into 2070 complaints touching on police being lodged with Independent Policing Oversight Authority (IPOA). Cumulatively, police remains one of the governmental agencies with poor record on implementation of NVPG. Indeed, it will be noted that according to the CAJ, the violations by the police were the second highest by category of all report violations in 2014.

Judiciary continued to grapple with case backlog. Although Judiciary’s delivery of justice is hinged upon other chain justice actors executing their functions effectively, the Judiciary has often been entirely blamed for case backlog without examination on the role and functions of other chain justice actors in facilitating expeditious delivery of justice. As a result of this, the justice sector has had piecemeal rather than holistic sustainable interventions to address the problem of case backlog.

Fidelity to the rule of law remains a challenge particularly in so far as compliance to courts’ orders by State and public officers against whom the judgements are rendered. Under Jubilee administration, there was manifest disobedience of court orders thereby a threat to the rule of law that by implication is an affront and threat to judicial independence. In this regard, incidents and cases that stand out include:-

1. The government failed to comply with the court orders to increase teachers’ salaries, whose effect was to protract teachers strike for more than a month.

90 Note 84.
91 Ibid.
93 Note 25 at Para. 381.
94 Teachers Service Commission v. Kenya National Union of Teachers & 2 Others, Employment and Labour Relations Court at Nairobi, Petition No. 72 of 2015[2015]eKLR.
2. The Leader of Majority in the National Assembly Hon. Aden Duale threatened to institute impeachment motion against Justice George Odunga which drew a sharp rejoinder from the Chief Justice of the Republic of Kenya, David Maraga. Hon. Duale made these threats in December 2016 when Judge Odunga was preparing to hear and determine an application filed by the opposition parties in respect of amendments to the Election Act.

3. The Leader of Majority in the National Assembly Hon. Aden Duale dismissed the court orders in Centre for Rights Education and Awareness & 2 Others v. Speaker the National Assembly & 6 Others, Petition No. 371 of 2016 at H.C of Kenya at Nairobi that ordered the Parliament and the Attorney General to put in place legislative mechanism that would ensure the two thirds gender rule is operational within 60 days as from 29th March 2017 to advance women’s political rights. In the Leader’s words, ‘Members of Parliament cannot be blackmailed on how to legislate. We are telling the great women of Kenya to vote for them on 8th August. It is not for the court to fill this House.

4. The Chairperson of the NGO Coordination Board defied the courts’ judgement and continued to harass Kenya Human Rights Commission (KHRC).

5. During the financial year 2015/2016 the Commission on Revenue Allocation used the adjusted census result of the published 2009 Population and Housing Census results for the Counties of Garissa, Wajir and Mandera to determine revenue to be shared to the three counties for the financial year 2017/2018. The adjusted census of 2009 had been successfully challenged in Judicial Review Miscellaneous Application No. 309 of 2010 at the H.C of Kenya wherein on 7th February 2012, the High Court issued an order of certiorari quashing the minister’s decision to cancel the 2009 Population and Housing Census results for the Counties of Garissa, Wajir and Mandera among other counties. Therefore, when the CRA used the adjusted 2009 Population and Housing Census results
for the Counties of Garissa, Wajir and Mandera figures for purposes of determining shareable revenue to the counties for financial year 2017/2018 whose effect was to reduce their revenue, CRA did so in blatant violation of the courts orders in *JR Msc Application No.309 of 2010*.

Subsequently, the three counties successfully contested CRA’s use of the 2009 adjusted census results of 2009 in *County Government of Mandera & 2 Others v. Commission on Revenue Allocation & 4 Others, H.C of Kenya at Nairobi, Constitutional & Human Rights Division, Petition Number 514 of 2016*.

6. The Cabinet Minister for Transport and Infrastructure failed to comply with the court’s order in *Kenya Country Bus Owners’ Association (Through Paul G. Muthumbi-Chairman, Samuel Njuguna-Secretary, Joseph Kimiri-Treasure & 8 Others v. Cabinet Secretary for Transport & Infrastructure & 5 Others, H.C of Kenya at Nairobi, Judicial Review Case No. 2 of 2014* of which the court observed “The principle of accountability mandates that State and public officers be prepared to face the consequences of their actions when such actions are manifestly taken with impunity and *mala fides*. It is only when such officers are personally made to take the responsibility for their actions that the rule of law shall be upheld.”

7. In 2017 prior to the conduct of 8th August 2017 general elections political leaders from Jubilee Party and National Super Alliance Coalition hurled attacks on the Judiciary. In May 2017, the National Super Alliance Coalition leaders Raila Odinga and Kalonzo Musyoka urged their supporters to protest in the streets in the event the Court of Appeal ruled in favour of IEBC on the question on who should declare the final presidential poll. In July 2017 when the High Court ruled that the IEBC must re-advertise tender for printing of presidential ballot papers President Uhuru Kenyatta and Deputy President William Ruto accused the Judiciary of working with the opposition; and they further accused the Judiciary of working with the opposition so as to postpone the 2017 general elections.

Given the courts are the custodian of the Constitution as an arbiter between the

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right-holders and the duty-bearers who have arsenal of powers and resources at their disposal, failure and blatant impunity by duty-bearers to adhere and execute court orders is a tragedy. Not only does contempt of court by duty-bearers render court orders ‘empty-court victories’ but also erodes public confidence in the Judiciary since there is no persuasive reason for citizens to resolve their disputes through judicial processes if they will not enjoy the force of law—a recipe for anarchy to set in. Already Kenyan courts have underscored the need for compliance with courts’ orders to maintain rule of law; In County Government of Mandera & 2 Others v. Commission on Revenue Allocation & 4 Others the court emphatically stated,

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times...It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle...A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realize that once they are brought to court they are subject to the jurisdiction of the Court.”

Prior to 2016, Kenyan courts have employed the Common Law in respect of contempt of court proceedings. In 2016 Parliament enacted Contempt of Court Act No. 46 of 2016. Section 30 of the Contempt of Court Act requires issuance of not less than (thirty) 30 days’ notice to State organs, government departments, ministry or corporation prior to institution of contempt proceedings against them. The Act does not extend this notice period requirement to private citizens notwithstanding the fact that Article 10(2) NVPG binds the State and public officers, and all persons in the equal measure. Apart from Section 30 of the Contempt of Court Act being discriminatory, it can be argued that it is aimed at shielding the State and public officers that opt not adhere to courts’ orders. This is a grave concern against the backdrop of a history checkered by contempt of court by State and public officers.106

106See for example, Republic v. Kenya School of Law &2 Others Ex-Parte Juliet Wanjeru & 5 Other High Court of Kenya Miscellaneous Application No.58 of 2014[2015]eKLR. Also Republic v. Chesang Resident Magistrate & Another Ex-Parte Paul Karanja Kamunge t/a Davisco Agencies & 2 Others [2016]eKLR.
**Recommendations: Rule of Law**

1. There is need to revise the human rights curricula for the NPS so that it equips the police to handle all situations in accordance with human rights standards. There is also need for adequate resources to be allocated to implement the curricula after its revision.

2. There is need to implement reforms within justice sector in a holistic manner to ensure expeditious delivery of justice is an actual reality for the people of Kenya. In this regard, it is imperative that the laws, policies and guidelines that aim to ensure justice is delivered expeditiously are implemented; Some of these include the Guidelines for Active Case Management of Criminal Cases in Magistrate Courts and High Courts of Kenya that were gazetted by the former Chief Justice of the Republic of Kenya in March 2015 and that aim to ensure criminal cases are determined expeditiously.

3. There is need for the Kenya Law Reform Commission (KLRC) and the OAG to amend the Contempt of Court Act by repealing the requirement that not less than thirty (30) days’ notice be given to MDAs prior to instituting contempt of court proceedings against them. This would advance Article 10(2) NVPG of good governance, rule of law and equality.

4. The government ought to create conducive environment for CSOs to carry out their operations free from intimidation and retaliation. This would contribute to significant realisation of the Sessional Paper No. 8 of 2013 on National Values and Principles of Governance that recognises CSOs as value drivers and key players in the implementation of NVPG. It would also cohere to the President’s report that recognised CSOs as key players in the implementation of the Constitution.  

5. Given that Parliament had threatened to institute removal of Salaries and Remuneration Commission (SRC) when it generated a Gazette Notice in 2013 in respect of Salaries and Allowances of State Officers, it is critical constitutional commissions and non-state actors heighten their watchdog role. This would ensure that SRC is not subjected to intimidation and threats as they implement the Gazette Notice Vol. CXIX of 7th July 2017 which reduced the salaries and allowances for state and public officers.

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6. It is imperative that State and public officers who act in impunity are held personally responsible for their conduct of impunity. This would be in line with recommendations that have been made in numerous research by Kenyan state and non-state actors that include KNCHR’s *Cost of Impunity, Revisiting the Nyayo House*. It would also be in line with various decisions by Kenyan courts such as *Kenya Country Bus Owners’ Association*. It is imperative that the recommendation is heeded to in view of current worrying trend of impunity by State and public officers.

5.1.3 Measures Undertaken and Progress on Sharing and Devolution of Power

During the reporting period, the government embarked on establishing and strengthening through policy, legal, and administrative measures on sharing and devolution of power. These measures include enactment and implementation of: Transition to Devolved Government Act No. 1 of 2012 that provided a framework for transition to county government; County Governments Act No. 17 of 2012 that stipulates county governments’ powers, functions and responsibilities; Urban Areas and Cities Act No. 12 of 2012 that provides for classification, governance and management of urban areas and cities; Intergovernmental Relations Act No. 2 of 2012 that establishes a framework for consultation and cooperation between national and county governments; the Public Financial Management Act No. 18 of 2012 that provides for effective management of public finances by the national and county governments; and the County Government Public Transition Act No. 8 of 2013 that provides a framework for establishment and functions of transition of county treasuries, transition county budget process and transition revenue raising measures. Also Parliament passed twelve (12) legislations to entrench devolution, these are: the County Governments(Amendment) Bill (No. 1 of 2016); County Governments(Amendment) Bill (No. 2 of 2016); County Assembly Bill 2014; County Hall of Fame Bill 2014; Petition to County Assemblies(Procedures) Bill 2014; Public Appointments(County Assembly Approval) Bill 2014; County Governments Disaster Management Bill 2014; County Industrial Development Bill 2014; County Library Service Bill 2015; County Outdoor Advertising Control Bill 2015; County Statistics Bill 2016; and County Boundaries Bill 2016.

Through the Ministry of Devolution and Planning, the government established the Transition Authority to facilitate establishment of the county governments. The Transition Authority was subsequently succeeded by the Inter-Governmental

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Relations Technical Committee that is in-charge of the administration of the National and County Governments Coordinating Summit.\textsuperscript{109}

The Ministry of Devolution and Planning developed draft Devolution Policy to guide the devolution process by \textit{inter-alia} clarifying the roles and relations between the national and county governments, and addressing conflicting institutional mandates between national and county governments. Further, the Ministry offered technical support on the development of strategic plans to select counties,\textsuperscript{110} issued guidelines for Mid-Term Review of County Development Integrated Plans, and offered technical assistance to counties to undertake those reviews.\textsuperscript{111}

KLRC developed and disseminated over 50 County Model Laws premised on the functions of County Governments as stipulated in the Fourth Schedule of the Constitution, to all the 47 County Governments. KLRC also provided technical assistance to County Governments for them to harmonise their laws to the County Governments Act No. 17 of 2012.\textsuperscript{112} Also, the Senate through its County Liaison Office supported Committees in the County Assemblies governments to discharge their functions through capacity building.\textsuperscript{113}

To fulfil the Constitution’s Chapter Eleven provisions on devolution, the National Treasury allocated county governments financial resources incrementally during the financial years (FY) 2013-2017.\textsuperscript{114}

Table 1: Funds Disbursed to Counties in FY 2013 to 2017

<table>
<thead>
<tr>
<th>FY</th>
<th>Funds Disbursed to County Governments</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013/2014</td>
<td>Kshs. 210 Billion</td>
</tr>
<tr>
<td>2014/2015</td>
<td>Kshs. 227 Billion</td>
</tr>
<tr>
<td>2015/2016</td>
<td>Kshs. 294 Billion</td>
</tr>
<tr>
<td>2016/2017</td>
<td>Kshs. 307 Billion</td>
</tr>
</tbody>
</table>

In 2016, the National Treasury also allocated Kshs. 6 Billion as Equalisation Fund to be allocated to fourteen (14) counties\textsuperscript{115} that had been identified by CRA.\textsuperscript{116}

\textsuperscript{109}NVPG Annual Report March 2016 at Para. 170.
\textsuperscript{110}Nairobi, Mombasa, Kisumu, Kakamega, Eldoret, Wajir, Mandera, Kitui, Mwingi, Nakuru and Garissa counties.
\textsuperscript{111}NVPG Annual Report March 2016 at Para. 36.
\textsuperscript{112}NVPG Annual Report March 2016 at Para. 169 and also see http://www.klrc.go.ke/index.php/bills [accessed on 10th June 2017].
\textsuperscript{113}NVPG Annual Report March 2016 at Para. 162.
\textsuperscript{115}Turkana, Mandera, Wajir, Marsabit, Samburu, West-Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, Taita-Taveta, Isiolo and Lamu.
\textsuperscript{116}NVPG Annual Report March 2016 at Para. 388.
The Public Service Commission enhanced the capacity of the County Public Service Boards from all the 47 Counties on how to discharge human resources management functions efficiently through training and technical assistance. The Commission also entertained appeals arising from disputes determined at the County Public Service Boards.\(^{117}\)

MDAs and Constitutional Commissions decentralised their offices in the counties. For example, CAJ opened three (3) branch offices in Mombasa, Eldoret and Isiolo, established four (4) desks at Huduma Centers in Nakuru, Kakamega, Embu and Kisii and partnered with County Governments of Bomet, Siaya, Makueni, Kajiado and Kiambu to establish County Ombudsman offices. As mandated under the Inter-Governmental Relations Act 2012, the government established framework for consultation and co-operation between the national and county governments; conducted continuous capacity building for MDAs at national and county governments; and established mechanisms for resolution of intergovernmental disputes. In a bid to realise devolution, the CRA facilitated the drafting of County revenue laws in all 47 Counties.\(^{118}\) Additionally, the National Gender and Equality Commission (NGEC) provided technical assistance to select counties to develop model laws on Persons with Disabilities (PWD).\(^{119}\) The Judiciary of Kenya also established more Court of Appeals, High Courts and mobile courts at counties and therefore enhanced access to justice at county level. This includes for example, establishment of High Courts in Garissa, Turkana, Marsabit and West Pokot counties that traditionally have been marginalised causing litigants to travel for more than one hundred kilometres to access justice.\(^{120}\)

Cumulatively, the measures and progress made by the government in respect of devolution has had positive impact in the lives of members of public. According the Africa Centre for Open Governance (AFRICOG) Perception Survey of 2016, 51% members of the public indicated that devolution has brought positive change in their lives.\(^{122}\)

\(^{117}\)NVPG Annual Report March 2016 at Para. 172.

\(^{118}\)NVPG Annual Report March 2016 at Para. 106.

\(^{119}\)Meru, Nyandarua, Migori, Kajiado and Tharaka Nithi.

\(^{120}\)NVPG Annual Report March 2016 at Para. 171.


Challenges and Gaps to Sharing and Devolution of Power

There were perceptible threats and challenges to the realisation of the sharing and devolution of power in particular, realisation of the objects of the devolution as envisaged in Article 174 of the Constitution, which essentially expounds NVPG on sharing and devolution of power. These threats and challenges included: delays in establishing the county governments for example the seventeen (17) activities stipulated under the Transition to Devolved Government 2012 were not undertaken under phase one as mandated; delay in transferring responsibilities from national to county government; conflict between national and county governments; lack of cooperation, collaboration and harmonious working relations; inadequate awareness on devolved government; and lack of understanding of financial and budgetary regulations of the county.

Further, during the nascent stages of establishing devolved government, the National Assembly did not adhere to the constitutional provisions in Articles 109 and 110 of the Constitution. Such instances include: when the National Assembly enacted the Division of Revenue Act, No. 31 of 2013 without the participation of the Senate in violation of Articles 109 and 110 of the Constitution that require it to work in cooperation with the Senate whilst discharging their mandate to enact legislation concerning county government; when the National Assembly amended the Constituency Development Fund Act 2013 without involving the Senate and in violation of division of powers between national and county governments, culminating to the courts rendering the amendments to the Act unconstitutional and invalid; when the Senate and the National Assembly amended the County Government (Amendment) Act to extend its powers into the county executive by assigning the County Development Boards a role in planning and budgetary processes of counties which was unconstitutional as it undermined devolution. The Speaker of the Senate sought an advisory opinion at the Supreme Court of Kenya, *Speaker of the Senate & Another v. Attorney General & 4 Others Advisory Opinion Reference No.2 of 2013 in the Supreme Court of Kenya at Nairobi* for determination on the constitutional process of enacting the Division of Revenue Act, in particular, whether the National Assembly by forwarding the Division of Revenue Bill for presidential assent without incorporating the Senate’s
amendments of the Bill had violated the provisions of Articles 109 and 110 of the Constitution. The Supreme Court rendered an advisory opinion that affirmed the role of Senate to safeguard devolution by participating in the enactment of legislations concerning operations of county governments.

Some County Public Service Boards failed to execute their functions in line with law as a result appeals were filed against them at the Public Service Commission. Further, MDAs’ decentralised services had to contend with inadequate skilled human resources and budgetary allocations: these include the NPS and National Government Administration.

Vast majority of County Governments operated without legal technical expertise, and as a consequence they enacted laws that contradicted the Constitution and national laws, and were unable to pass County revenue raising legislations and appropriation bills thus hampering service delivery at county. County governments grappled to deliver service that required specialised expertise in procurement, accounting and ICT due to lack of personnel with expertise in these areas. The impact of County governments’ inadequate human resource skills was also manifest in delay by the Counties to formulate or review their policies; failure by Counties to fully implement their strategic plans but rather undertook projects that were out of touch with the counties development priorities; and Counties making illegal procurements.

According to the Ethics and Anticorruption Commission (EACC), there were reported incidents of corruption in the county governments, of which the prevalent forms were bribery, theft in revenue, nepotism, shoddy work for counties infrastructure such as roads and bridge construction, conflict of interest and forgery of documents. These findings are confirmed by KNCHR’s survey wherein 40% of populace opined corruption was prevalent in the management of public affairs of their county governments. Due to corruption in the County Governments, the citizens’ access to basic services such as safe water, quality elementary education, healthcare services were severely curtailed; also corruption in county governments engendered food insecurity in counties that

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133 NVPG Annual Report March 2016 at Para. 523.
134 Ibid.
136 Ethics and Anti-Corruption Commission, Corruption and Ethics in Devolved Services: County Public Officers’ Experiences, 2015.
137 Note 83 at p. 25.
are the conventional food basket for the country resulting to Kenyans suffering ravages of famine and shortage of maize (Kenya’s staple food).\textsuperscript{138} According to the Economic Survey 2017, Kenya’s agriculture sector experienced decelerated growth of 4.4\% from 7.2\%.\textsuperscript{139} This could be attributed to failure by national and county governments to implement sectoral policies due to \textit{inter-alia} various forms of corruption.

One core increasing discontentment by Kenyan tax payers is the huge wage bill they have to bear largely due to hefty salaries and allowances for State officers particularly the ones in the legislature. This huge wage bill has contributed to spiralling inequality gap, and at the expense of full realisation of right to quality education and healthcare. It is worth-emphasising that during Jubilee’s administration, medical doctors and teachers’ demands for better working conditions were rebutted by government as onerous on argument that the government had no money, yet other State and public officers continued to receive emoluments that was not commensurate to delivery of essential services to the people of Kenya.\textsuperscript{140} As at 2013, Kenya’s wage bill stood at Ksh. 458 billion accounting for approximately 12\% of Kenya’s Gross Domestic Product making it above the international recommended threshold of 7\% of a country’s Gross Domestic Product.\textsuperscript{141} During the reporting period, the National Assembly nullified the Gazette Notices issued by the SRC in respect of salaries for State officers. Parliamentarians also threatened to institute impeachment proceedings against the Salaries and Remunerations Commissioners.\textsuperscript{142} However, the National Assembly’s action of nullifying the SRC’s Gazette Notices was successfully challenged in court in \textit{Okiya Omtatah Okoiti & 3 Others v. Attorney General & 5 Others, H.C of Kenya at Nairobi Constitutional and Human Rights Division Petition No. 227 of 2013.}\textsuperscript{143} The President in his 4\textsuperscript{th} State of Nation Address committed that the SRC will review the salaries and allowances of State and public officers so as to reduce the current wage bill.\textsuperscript{144} It is worth mention that this commitment has not only drawn sharp criticisms as an unviable measure, but came in rather late after the 11\textsuperscript{th} Parliament awarded itself hefty take-home package to the consternation of right-bearers. At the time of concluding this research, the SRC released a reduced salaries’ structure for public officers that include Members of

\begin{footnotes}
\item[139]NVPG Annual Report March 2016 at p. 145-152.
\item[142]Ibid.
\item[143][2014]eKLRwww.kenyalaw.org [accessed on 10\textsuperscript{th} April 2017].
\item[144]Note 26.
\end{footnotes}
Parliament and County Assemblies.\textsuperscript{145}

\textit{Recommendations: Sharing and Devolution of Power}

1. There is need to strengthen collaboration and synergy among public institutions to enhance quality service delivery at county level.
2. It is essential to enhance institutional capacity for public institutions and increase public awareness on devolution processes so as create demand for realisation of NVPG within institutions at county level. In this regard it is imperative that the government collaborates and partners with both private sector and CSOs.

\subsection*{5.1.4 Measures Undertaken and Progress on Democracy and Participation of People}

The government put in place various frameworks on public participation. Transition Authority established the National Public Participation Framework.\textsuperscript{146} OAG developed a National Policy on Public Participation.\textsuperscript{147}

Participation of people, and realisation of political rights by women, youth, PWD, ethnic minorities and marginalised groups who are defined as special interest groups has always been curtailed by inter-alia election-related offences and weak nomination and election rules of political parties. To address this, Parliament reviewed the Elections Act No. 24 of 2011 to usher in application of fair nomination and elections rules by political parties, and enacted the Election Offences Act No. 37 of 2016 to criminalise election related offences. Parliament also amended the Political Parties Act No.11 of 2011 by way of Political Parties (Amendment) Bill 2016 so as to obligate political parties to ensure its membership and the composition of their boards has equitable representation of special interest groups; and that political parties promote inclusion of special interest groups in their activities.

\begin{thebibliography}{9}
\bibitem{146} Note 23 at Para. 70.
\bibitem{147} Note 25 at Para. 142.
\end{thebibliography}
Challenge and Gaps to Democracy and Participation of People

Parliament did not adhere to the principle of public participation as it gave short notices to members of public to give their views on Bills it was developing. These short notices were not feasible for members of public to scrutinise the Bills, give comprehensive evidence-based views and participate in development of Bill as envisaged in the Constitution. Notable examples in this regard is when Parliament gave short notice to members of public to give their views on the Security Laws (Amendment) Bill 2014, in December 2014. Given December is a month wherein most members of public are on leave/vacation, a vast majority of members of public did not give their input to the Bill. Parliament then proceeded to hastily pass the Security Laws (Amendment) Bill 2014 on 10th December 2014. In 2016, Parliament also brought about amendments to the Independent Electoral Boundaries Commission Act No.9 of 2011 and the Election Act No.24 of 2011 which was not done in a consultative manner thus drawing contestation and protests by the opposition party, the Coalition for Reforms and Democracy that lasted for more than one month in 2016.\textsuperscript{148}

Public participation goes hand-in-hand with being seized of relevant information in order to secure meaningful public participation in policy, legislative and decision-making process as envisaged in the Constitution of Kenya and various Kenyan laws. Because access to information law was not in place during the 2013-2015, the realisation of public participation remained a major challenge during the reporting period.\textsuperscript{149}

Section 87 of the County Governments Act No. 17 of 2012 has descriptive provision on the modalities of public participation at county level; nevertheless, realisation of public participation remains a challenge. Research conducted by KNCHR in 2016 revealed that county governments do not undertake appropriate measures to facilitate public participation. Only 30% of county governments have County Budget and Economic Forum which would enable the public to participate in budget-making process. The county governments also do not provide requisite information to the public to enable them participate in their budget making process; and tend to hold their public hearings in remote places –out of reach for the public.\textsuperscript{150} Undeniably, these adverse findings on public participation are further attested by citizen perceptions conducted in 2016 by AFRICOG that


\textsuperscript{149}See for example, \textit{Mui Coal Basin Local Community} v Permanent Secretary Ministry of Energy & 14 Others(2014) eKLR.

\textsuperscript{150}KNCHR Baseline Survey Report at p. 22.
established 73% citizens find it difficult to participate in county planning and budgeting; 76% of citizens find it difficult to influence county decision making, while 47% of citizens find it difficult to access information on county budgets, legislations and projects plans.151 All this is strongly attributable to the fact that 50% of Kenyans are not satisfied with the level of participation organised by their county governments.152

This level of dissatisfaction is evident in the numerous cases filed by citizens against county governments for failure to engage the citizenry in project identification, implementation, monitoring and evaluation; to avail reliable and updated information on their priorities, plans, budget and expenditure; and not establishing feedback mechanisms for citizens in contravention of the Constitution’s Article 10(2)’s NVPG of public participation.153 Such cases include:


2. *Garissa County Government v. National Land Commission & 3 Others, H.C of Kenya at Nairobi, Constitutional and Human Rights Division Petition No. 401 of 2014*155 wherein the court found that the National Land Commission did not comply with Article 10(2) NVPG of good governance, integrity and transparency, and public participation while undertaking administrative action to remove the names of persons submitted to be interviewed for membership to Garissa County Land Management Board.

3. *Andrew Ireri Njeru & 34 Others v. County Assembly of Embu & 3 Others H.C of Kenya at Embu,*156 wherein the court found that the principle of public participation had not been applied in the process of removing the Governor of Embu County Assembly.

4. *Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 Others, ELC No. 195 of 2014 in the H.C of Kenya at Nairobi,*157 the court held that a mining licence was *void ab initio* as it was not in compliance
with Article 71 of the Constitution that requires public participation, and therefore liable to be revoked.

5. **Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others H.C of Kenya Petition No. 532 of 2013, Consolidated Suit**\\(^5\) wherein the court held the Kiambu County Government had enacted its Finance Act 2013 without public participation and hence declared the Act in violation of the Constitution and the Finance Act as null and void. These are just but a few of such cases. ^159

Kenyan courts have resoundingly affirmed that the manner in which public participation is exercised varies from one situation. ^160 However, it is apparent that the methods, mechanisms and modalities of public participation is not clear to the vast majority of citizenry, and remains a tense public discourse. This could be attributed to the fact the National Values and Principles of Governance Sessional Paper No. 8 of 2013 is not easily accessible to the public; and the fact that the legal provisions on public participation are scattered in various policies which are not also easily available to the public. The outcome of limited comprehension on the principle of public participation is illustrative in the number of cases wherein citizens unsuccessfully took various MDAs and State and public officers to courts on allegations that the principle of public participation was not adhered to. Such cases include **Lucy Wanjiru & another v. Attorney General & Another, H.C of Kenya at Kajiado, Constitutional Petition No. 3 of 2015,** ^161 **Pharmaceutical Society of Kenya v. National Assembly & 3 Others H.C of Kenya at Nairobi, Constitutional Petition 557 of 2015,** ^162 **Ali Said Mohamed Al-Mandhry & 3 Others v. Attorney General & Another, H.C of Kenya at Mombasa, Judicial Review No. 46 of 2016,** ^163 **Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 Others.** ^164

The common feature in these cases is that the core of contention was what constitutes reasonable level of public participation? How wide the consultation of the public should be? Whether public participation denotes only involving stakeholders in a subject matter or whether public participation denotes involving the public at large. Cumulatively, these are pointers that there is great need for principle of public participation to be defined in an unequivocal manner.

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\(^{158}\) [www.kenyalaw.org](http://www.kenyalaw.org) [accessed on 19th May 2017].

\(^{159}\) See [www.kenyalaw.org](http://www.kenyalaw.org) [accessed on 19th May 2017].

\(^{160}\) See for example, **John Muraya Mwangi & 495 Others & 6 Others V Minister For State For Provincial Administration & Internal Security & 4 Others (2014)** eKLR and Mui Coal Basin Local Community constitutional petition No. 305 of 2012

\(^{161}\) [2016]eKLRwww.kenyalaw.org [accessed on 19th May 2017].

\(^{162}\) [2017]eKLRwww.kenyalaw.org [accessed on 19th May 2017].

\(^{163}\) [2016]eKLRwww.kenyalaw.org [accessed on 19th May 2017].

\(^{164}\) [2014]eKLRwww.kenyalaw.org [accessed on 19th May 2017].
During the reporting period, the Independent Electoral Boundaries Commission conducted 10 by-elections in 2014. According to the Kenya Human Rights Commission the nominations leading to the by-elections were marred with violence.\textsuperscript{165}

\textit{Recommendations: Democracy and Participation of People}

1. In a positive step, the President committed in March 2016 to address the shortcomings in public participation by directing the national and county governments to: have clear guidelines and minimum standards on public participation; avail information on their priorities, plans, budgets and expenditure; and establish feedback mechanisms for citizens.\textsuperscript{166} There is need to follow up on this commitment to ensure MDAs implement it. In particular, it is imperative that envisaged public participation law being drafted by OAG is comprehensive, it augments and (where possible it consolidates) the existing policies and legislations on public participation.

2. Although the courts found that in some instances the MDAs and the State/ public officers complied with the Constitution’s Article 10’s NVPG of public participation, the number of cases filed against the government are a pointer on the need to create awareness on what constitutes public participation and fortify the existing legal framework on public participation so as to enhance diverse modalities of public participation.

3. There is need for both national and county governments to implement the commitments made in the NVPG Annual Reports of March 2016 and March 2017 so as to realise the objects of devolution. Notably, for county governments need to create and implement elaborate legal and institutional frameworks for devolution; encourage public-private partnerships so as to provide enabling structures and resources for implementing devolution, equip all institutions to adopt the use of ICT, and conduct periodic monitoring and evaluation on the status of devolution.\textsuperscript{167}

\textsuperscript{166}NVPG Annual Report March 2016 at Para. 524.
\textsuperscript{167}NVPG Annual Report March 2014 at Para. 189-192.

Equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised are core tenets that underpin human rights: they are guaranteed as rights under Kenya’s Bill of Rights. Human rights are the cornerstone of Kenya’s democracy. Indeed, Article 19(1) of the Constitution stipulates that the Bill of Rights ‘is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’. For ease of reference and readership of this session, this category of NVPG is discussed as follows: 1) human rights other than socio-economic rights; 2) Article 43: socio-economic human rights; and 3) equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised.

5.2.1 Measures Undertaken and Progress of Implementation on Human Rights

In response to recommendations for Kenya to develop a policy governing human rights, the government developed the Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights that aims to foster a culture of human rights among State and non-state actors so that they respect, protect and promote human rights in all sectors. By the same token, the KNCHR developed Equality Policy, Gender Mainstreaming Policy, Human Rights Defenders Policy and Human Rights Based-Approach Policy Guidelines to facilitate realisation on the Bill of Rights. Parliament also adopted Sessional Paper No.4 of 2014 on Governance, Justice, Law and Order that aims to enhance cross-sectoral linkages amongst actors in governance, justice, law and order.

Realisation of the right to access to justice, as anchored in human rights standards, has traditionally been hampered by absence of cogent policy and legal framework to: fully equip actors in the justice system to satisfy their constitutional mandates of delivering people-driven justice expeditiously to all regardless of their status; and facilitate easy access to justice particularly by indigent persons. To address these challenges and in a strong step in the right direction the government undertook various measures that notably include:-

169NVPG Annual Report March 2016 at Para. 418.
1. Parliament: adopted the Legal Aid Policy and enacted the Legal Aid Act No. 31 of 2016 to provide a legal aid scheme to indigent persons; revised and introduced amendments into the Witness Protection Act No. 16 of 2006 to enhance witness protection mechanism: enacted the Victim Protection Act No. 17 of 2014 to give effect to rights of victims enshrined in Article 50(9) of the Constitution; the Persons Deprived of Liberty Act No. 23 of 2014 to give effect to Articles 29(f) and 51 of the Constitution that guarantee the rights of persons deprived of liberty; the Fair Administrative Action No. 4 of 2015 to give effect to Article 47 of the Constitution that guarantees the right to fair administrative action; and the Protection against Domestic Violence No. 2 of 2015 to provide a comprehensive framework for prevention and response to gender based violence.

2. The Office of the Director of Public Prosecution (ODPP) generated the National Prosecution Policy to guide the prosecution to safeguard rights of arrested persons enshrined in Articles 49 and 50 of the Constitution.

3. The Judiciary developed and operationalised; the Bail and Bond Policy Guidelines which entrench human rights standards in respect of granting of bail to arrested and accused persons; Sentencing Policy Guidelines to entrench human rights standards to guide courts' discretion while imposing sentence on accused persons; and Guidelines for Active Case Management of Criminal Cases in Magistrate Courts and High Courts of Kenya aim to ensure criminal cases are determined expeditiously.

4. Parliament enacted the Small Claims Court No. 2 of 2016 to avert case backlogs by establishing a mechanism for settling small claims disputes whose pecuniary jurisdiction does not exceed Kshs. 200,000.

5. Judiciary established High Courts in each and every county, and the ODPP also established offices and deployed officers in each and every county.

6. The Judiciary established a Taskforce on Sexual and Gender based Violence aimed at supporting evidence-based amendments to the Sexual Offences Act No. 3 of 2006 (SOA) to ensure human rights are observed in combating sexual violence. The Judiciary also supported entrenchment of human rights culture by resolving human rights related
cases through its Human Rights Division at the Milimani Law Courts within a lean lead time. In 2015 the division resolved 2,413 human rights related cases.\textsuperscript{170} Further, the Judiciary launched and commenced implementing its Strategic Plan Sustaining Judiciary Transformation Framework (SJT), A Service Delivery Agenda (2017-2021) that builds on the Judiciary Transformation Framework 2012-2016.

7. In June 2017, the Chief Justice appointed (vide Gazette Notice no. 5857) a multi-agency Committee namely, the National Council on the Administration of Justice (NCAJ) Committee On Criminal Justice Reform (NCCJR) tasked with spearheading the comprehensive review and reform of Kenya’s entire criminal justice system.

8. Parliament also initiated amendments to the following existing laws to strengthen human rights protection: the Basic Education Act No. 14 of 2013 by way of Basic Education(Amendment) Bill 2014, and Persons with Disability Act No. 14 of 2003 through Persons with Disabilities(Amendment)Bill 2015 to ameliorate implementation of PWD’s rights;

The National Council on the Administration of Justice (NCAJ) that comprises actors in the criminal justice system and operates under the aegis of the Judiciary established and strengthened court users’ committees at county levels. These court users’ committees consist \textit{inter-alia} the Judiciary, Kenya Police Service, ODPP, Probation and Aftercare Services, Kenya Prison Services, Children’s Department, and Law Society of Kenya. Through the NCAJ, the Judiciary engaged members of public via radio shows and held open days where members of public interact with judicial officers- thus demystifying justice through courts as cryptic dispute resolution mechanism.

In a strong step in right direction, the ODPP established Sexual and Gender Based Violence(SGBV) Unit so as to accord the accused persons a right to fair hearing enshrined in Article 50 of the Constitution and to promote the rights of victims of SGBV\textsuperscript{171} whose rights have often been undermined within the criminal justice system due to weak implementation of relevant laws.\textsuperscript{172} The ODPP also established the Anti-Human Trafficking Unit so as to facilitate effective

\textsuperscript{170} NVPG Annual Report March 2016 at Para. 374.
\textsuperscript{171} NVPG Annual Report March 2015 at Para. 88.
\textsuperscript{172} www.fidakenya.org [accessed on 11th June 2017].
investigation and prosecution of the human trafficking; the Anti-Female Genital Mutilation Unit so as to facilitate effective investigation and prosecution of female genital mutilation crimes;\footnote{173} and the Victims and Witness Facilitation Unit to promote humane engagement with victims of crime by actors in justice chain.\footnote{174}

Various MDAs and Constitutional Commissions used the ICT platform, particularly Twitter and Facebook as interactive platforms for the public to engage with them. For example, the CAJ created Twitter and Facebook accounts as interactive platforms for the public to communicate with Commission on matters of public service delivery and maladministration.\footnote{175} Similarly, IEBC, KNCHR, IPOA and NGEC used Facebook and Twitter as platforms to interact with the public and as a means of enhancing accountability. However, the response by most MDAs through these platforms to public enquiries has not been prompt and often drawing criticisms that they were merely created as public relations exercise rather than as a tool to enhance accountability.

The government rolled out Integrated Financial Management Information System (IFMIS) to introduce electronic procurement system to eliminate manual procurement system and curb corruption.

The government also developed a Code of Conduct for state corporations, \textit{Mwongozo}, that aims to promote governance in state corporations.

\subsection*{Challenges and Gaps to Realisation of Human Rights}

Notwithstanding Kenya being a signatory to key international and regional human rights instruments, boasting of an elaborate Bill of Rights in Chapter Four of the Constitution, and vast laws to advance the Bill of Rights, during the tenure of the Jubilee administration there were deliberate violations of human rights by State and public officers. These human rights violations undermined the commitments made by the President of the Republic of Kenya in his 3\textsuperscript{rd} Annual Report 2015\footnote{176} and 4\textsuperscript{th} Annual Report 2016\footnote{177} on the Measures Taken and Progress Achieved in the Realisation of the National Values and Principles of Governance, to enhance implementation of policies, legislation, programmes and projects that promote the Bill of Rights. The state of human rights violations is evident in the number of

\begin{thebibliography}{99}
\bibitem{173} www.odpp.go.ke (accessed on 11\textsuperscript{th} June 2017).
\bibitem{174} NVPG Annual Report March 2015 at Para. 528.
\bibitem{175} NVPG Annual Report March 2016 at Para. 142. Also www.odpp.go.ke (accessed on 11\textsuperscript{th} June 2017).
\bibitem{177} NVPG Annual Report March 2015 at Para. 528.
\bibitem{178} NVPG Annual Report March 2016 at Para. 636.
\end{thebibliography}
complaints lodged with constitutional offices, and filed in courts\textsuperscript{178} against duty-bearers (State and public officers) that has been incremental. For example, in line with its mandate, KNCHR received and undertook appropriate actions on 1908 cases of alleged various human rights violations in 2014; in 2015, it received and undertook appropriate actions in respect of 2559 complaints on human rights violations; and in 2016 it received and undertook appropriate actions on 2497 complaints on human rights violations.

Further, policy, legislative and administrative measures undertaken in respect of human rights by the government has not had an enduring positive impact, particularly at the grassroots level. According to countrywide citizen perception survey conducted by AFRICOG in 2016: only 33.1\% of citizen perceive human rights as provided for in the Constitution of Kenya has brought positive changes in their lives;\textsuperscript{179} 47\% of the respondents perceived the right to peaceful demonstration is under threat;\textsuperscript{180} 42\% members of public perceive that the freedom of media is under threat;\textsuperscript{181} 41\% of the members of public perceive the freedom of expressions is under threat;\textsuperscript{182} and 43\% felt that the right to public participation in legislative process is under threat.\textsuperscript{183}

Despite the capacity building efforts and significant resources directed to enhance rule of law within police, during the reporting period the police used unlawful and excessive force to disperse protests by CSO and students.\textsuperscript{184} There were also disturbing patterns of enforced disappearances and extrajudicial executions implicating police officers,\textsuperscript{185} who by definition of Article 260 of the Constitution are public officers. Therefore it could be argued that police officers violated Article 26 of the Constitution that safeguards the right to life and the National Police Service Act No. 11A of 2011.\textsuperscript{186} Poignant cases in this regard include the execution of Hassan Guyo a human rights defender;\textsuperscript{187} Willie Kimani, a lawyer who worked with the International Justice Mission alongside his client Josephat Mwangi and taxi driver Joseph Muiruri;\textsuperscript{188} and summary execution of young men in Eastleigh by

\textsuperscript{178}See for example, Boniface Mwangi v. Inspector General of Police & 5 Others, In the High Court of Kenya at Nairobi, Constitutional and Human Rights Division Petition No. 544 of 2015 [2017]eKLR. www.kenyalaw.org (accessed on 27\textsuperscript{th} June 2017).

\textsuperscript{179}AFRICOG Perception Survey, 2016.

\textsuperscript{180}Ibid.

\textsuperscript{181}Ibid.

\textsuperscript{182}Ibid.

\textsuperscript{183}Ibid.

\textsuperscript{184}Ibid.


\textsuperscript{186}Section 6(8)


\textsuperscript{188}Ibid.
police officer on 31st March 2017. Although criminal proceedings have been instituted against alleged the police officer in *Republic v. Lelimani & 3 Others, Criminal Case No. 57 of 2016 H.C of Kenya at Nairobi* it remains a glaring and deep concern whether there is a cogent disciplinary framework to deal with cases wherein police officers are alleged to have violated the Constitution and Kenyan laws. For instance, what actions are taken in respect of police officers that have carried out extrajudicial executions? Are their firearms confiscated from them and are they suspended from duties and members of public notified of such actions? And are these decisions made public so as to curb incidents wherein police officers under disciplinary action fleece uninformed members of public that they have powers to carry out their functions when in fact they are restrained from being on duty on account of the disciplinary actions imposed on them?

Insecurity remains a major threat to the people of Kenya. Despite the measures undertaken by the government to address insecurity, there abounds major human rights concerns, in respect of those measures. These include: selective disarmament of civilians; whether procedures for deployment of Kenya Defence Forces for example to Kapedo and Lamu in 2015 to deal with insecurity in those places were done with Parliament’s approval as required by the law; failure to investigate and prosecute perpetrators of violence even wherein KNCHR shared the names of such perpetrators with law enforcement agencies; and use of excessive use of force by the police. And ironically on 10th December when International Human Rights Day is observed annually worldwide, the Kenyan Parliament hastily introduced raft amendments in 2014 through the Security Laws (Amendment) Bill 2014 whose import was to infringe the right to privacy, freedom of association and freedom of expression. The Bill was successfully challenged in court on account its proposals sought to infringe on the fundamental rights and freedoms safeguarded in chapter four of the Constitution of Kenya 2010, notably the right to privacy, and freedom of association.

Kenya, like the rest of the world grapples with the threat of terrorism and violent extremism. There is near global consensus that efforts to combat terrorism should not oust safeguard of human rights and adherence to the rule of law. During
the reporting period, Kenya experienced repeat terrorist attacks whose effect was to divide the country along ethnic and religious lines. During the reporting period, KNCHR established that a narrative was created to focus on terrorism menace as being supported by Muslims fundamentalists; and that a lot of youth were reported have been conscripted into militia groups and radicalised.\textsuperscript{194} There were incidents when government’s action to deal with terrorism were conducted in contravention of Constitution and the Prevention of Terrorism Act No. 30 of 012(POTA). These include: the Inspector General’s blanket order to shoot and kill\textsuperscript{195}; when the government froze bank accounts of Muslims for Human Rights (MUHURI) and Haki Africa without following the due process as stipulated in the Constitution and POTA; and also when the government designated MUHURI and Haki Africa as specified entities under POTA without following the due process of the law. The government’s action against MUHURI and Haki Africa were challenged in court in the case of \textit{Muslims for Human Rights & Another v. Inspector-General of Police & 5 Others H.C of Kenya at Mombasa Petition No. 19 of 2015}\textsuperscript{196} wherein the court held that the government had violated the fundamental rights and freedom of MUHURI and Haki Africa.

EACC and Article 59 Commissions - namely KNCHR and NGEC, and CAJ - have few offices at county level and they have not been allocated adequate funding to enable them effectively discharge their mandates that essentially facilitate realisation of NVPG. As a result, the Commissions have not devolved to each and every county in Kenya as anticipated in their strategic plans. Adequate funding would for instance enable KNCHR to robustly conduct investigations into human rights violations, NGEC to effectively combat retrogressive cultural practices such as gender based violence and CAJ to effectively carry out its mandate of investigation and enforcement of NVPG within the public service.

During the reporting period, the Witness Protection Agency Regulations were revised to fortify them so as to afford protection to witnesses to crimes and human rights abuses by making proviso for witness protection arrangements within foreign countries.\textsuperscript{197} However, victims of human rights abuses within MDAs did not report their plight out of fear, intimidations, and stigmatisation.\textsuperscript{198}

\textbf{Notwithstanding the roll out of Mwongozo, MDAs were riddled with corruption}\textsuperscript{199}

\textsuperscript{194}ibid at p.18-22.
\textsuperscript{196}[2015]eKLRwww.kenyalaw.org (accessed on 27\textsuperscript{th} May 2017).
\textsuperscript{197}NVPG Annual Report March 2016 at Para. 237.
\textsuperscript{198}NVPG Annual Report March 2016 at Para. 354.
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in core service delivery. According the EACC, services that were most prone to corruption are those related to investigations and issuance of bond bailing, medical services, recruitment of staff in MDA, issuance of land title deeds, project implementation by MDAs and national identity cards.\(^{199}\)

IFMIS failed to function and halted operations of government, the County Governments were particularly the most affected by IFMIS failure. Also IFMIS was utilised to siphon off public resources for example, nineteen (19) county government officers hacked into the IFMIS and fraudulently transferred more than Kshs. 98 Million. Thus, the system has not attained the object to reduce corruption.\(^{200}\)

Other challenges and gaps that featured during the reporting period that remain unaddressed in respect of human rights include :-

1. Facilities in prisons and remand remained congested. Male Prisoners and children in borstal institutions are held in conditions that do not meet international human rights standards. These facilities are congested operating at three (3) times of their intended capacities.\(^{201}\) It is because the Persons Deprived of Liberty Act No. 23 of 2014 has poorly been implemented, and the impact of implementation of the Bail and Bond Policy Guidelines is yet to be fully felt in terms of decongestions of remands.

2. During the reporting period, Parliament unsuccessfully attempted to amend the SOA to lower consensual age from eighteen (18) years to sixteen (16) years. This attempt was opposed by child-rights advocates and women’s organisations on grounds that the amendments would be inimical to the best interest of the child as enshrined in the Constitution and the Children’s Act No.8 of 2001.\(^{202}\) Further, during the reporting period SGVB\(^{203}\) remained highly prevalent whose consequence is to violate the rights of the victims.\(^{204}\)

\(^{199}\) Note 156.
\(^{200}\) NVPG Annual Report March 2016 at Para. 535.
\(^{201}\) KNCHR Baseline Survey Report at p. 17.
\(^{203}\) As broadly defined in Section 3 of the Protection Against Domestic Violence Act No. 2 of 2015.
\(^{204}\) See generally, National Gender and Equality Commission, Gender Based Violence in Kenya: The Economic Burden on Survivors (2016).
5.2.2 Measures Undertaken and Progress Made on Article 43: Socio-economic Rights

The government through the State Department of Agriculture formulated the Veterinary Policy 2015 and the Cereals Policy 2013.

To promote the right to education, the Ministry of Education undertook a number of measures: it continued to provide free primary and free secondary day education; provided school meals to disadvantaged and vulnerable children; and distributed sanitary towels to female pupils and students. For example, in 2015 the government provided school meals to 812,715 disadvantaged and vulnerable learners; and in 2016 it distributed sanitary towels to 1.3 millions learners.\(^{205}\)

The Commission on the Implementation of the Constitution reviewed the Kenya Health Policy 2014-2030 that prescribes how the highest attainable standard of health enshrined in Article 43(1)(a) of the Constitution is to be realised. Parliament enacted Health Records and Information Managers Act No.15 of 2016 that make provisions for licensing of health records and information managers. The government also strengthened National Hospital Insurance Fund so as to facilitate free access to healthcare by way of provision of reproductive health insurance cover to poor women through Output Based Approach and provide health insurance to elderly people aged sixty-five (65) years and above and persons with severe disability.

In a bid to promote dignity of police and prison officers that have worked under poor working conditions, the government rolled out police insurance scheme and exempted seventy-seven (77) police officers living with disabilities from Pay As You Earn tax; and constructed housing for staff at the Kamiti Main Prison, Shimo la Tewa Main Prison and Ruiru Prison. The State Department of Housing and Urban Development in a bid to give effect Article 43(1)(b) of the Constitution on the right to accessible and adequate housing developed National Building Maintenance Policy, National Slum Upgrading and Prevention Policy, Leasing and Accommodation Policy; and reviewed the National Housing Policy.\(^{206}\)

The government reviewed the National Policy on Older Persons and Aging, and the National Children Policy that aim to protect the elderly and children from

\(^{205}\)NVPG Annual Report March 2016 at Para. 442.
\(^{206}\)NVPG Annual Report March 2016 at Para. 124.
social injustices respectively. It also developed the National Child Labour Policy to promote the dignity of disadvantaged and marginalised children. The government also continued to support the right to social security by operating cash transfers for orphaned and vulnerable children, Older Persons Social Protection Funds and Bursaries for orphaned and vulnerable children.207

At the time of reporting, the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2015(Kenya Gazette Supplement No. 69 (Senate Bills No. 8) of 29 May 2015) which aims to give effect to Article 43 of the Constitution had already undergone a third reading. If enacted into law, it will provide a framework for the realization of economic and social rights by the National and County Governments as well as provide a mechanism of monitoring the realization of economic and social rights by county governments.

Challenges and Gaps to Realisation of Article 43 Rights: Socio-economic Rights

Although the expenditure of the health functions was incremental as FY 2013/2014 was at Kshs. 8.49 Million, FY 2014/2015 at 54.67 Million, and FY 2015/2016 70.7 Million208 it has not translated towards realisation of highest attainable standard of health both at national and county levels, as envisaged in Article 43 of the Constitution; various indicators point to this. First, Kenya is yet to attain the Sustainable Development Goal of 12 per 1000 for infant mortality, and 25 per 1000 for under five (5).209 This can be attributed to inter-alia corruption within the Ministry of Health of which it is alleged that Kshs.5 billion allocated to it by the National Treasury were misappropriated210 including through double payment of goods and manipulation of IFMIS.211

Second, in 2016 the Ministry of Health disbursed only Kshs. 3.8 Billion to Counties to continue the implementation of Free Maternity Service Programme but this falls short of Kenya’s international obligation to allocate 15% of its annual budget as mandated under the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases.212

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212Para 26 of the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases
Third, while it is commendable that the government waived maternity fees in all public health facilities, the quality of services that child-bearing women receive in hospital has been of poor quality as the women experience abuse and disrespect during childbirth. This is aggravated by poor working conditions of health practitioners in the public health facilities. Although the presidency through the Office of the First Lady during the reporting period contributed towards maternal and child health, this initiative has caused deep concern among medical practitioners that its very existence disincentives the Ministry of Health to improve public health facilities. For example, in 2013 the presidency through the Office of the First Lady generated 40 million in 2013, yet ironically in 2016-2017, one of the reasons Kenyan doctors went on a 100 days' strike is because of poor working conditions in health care system that negatively impacts on patients’ right to highest attainable standard of health as envisaged in Article 43 of Constitution. This right to highest attainable standard of health that includes the right to health care service is not only elusive to childbearing women but also to a vast majority of Kenya because of poor state of public hospitals.

Access to clean water remains a scarce commodity for majority of Kenyan households. The national budgetary allocation for water services and infrastructure has not been in line with Articles 20(5) and 21(2) as read with Article 43 of the Constitution that require the government to ensure progressive realisation of the right to clean, safe water in sufficient quantities. For example, the budgetary allocation for water and infrastructure for 2014/15 was Kshs. 32.6 billion which was a reduction of 2013/2014 allocation of Kshs. 32.9 billion. There was no justification for reduction of this budgetary allocation particularly in view of the fact that Kenya is yet to fully integrate comprehensive water, sanitation and hygiene as envisaged in Target 6 of the Sustainable Development Goal that aims to ‘ensure availability and sustainable management of water and sanitation for all.’ As a result, residents of several parts of the country had to contend with severe water shortages, which triggered outbreak of cholera, in 2017, in nine (9) counties that include Nairobi, Mombasa, Nakuru and Kericho.

Kenya still grapples with food insecurity because of the piecemeal manner in which the government is addressing it. The focus has tended to be on distribution

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214Ibid.
216KNCHR Baseline Survey Report at p. 73.
of relief food in marginalised areas rather than proactive and sustainable approaches to guarantee food security. As a consequence, communities in arid and semi-arid areas still contend with hunger. This piecemeal approach to food insecurity is for example evident in the President Executive Order No.1 of 2017 that declared drought a national disaster, after drought occurred, for which Kshs. 5.4 billion worth of relief food was distributed whereas the government had been forewarned of eminent food shortage.

Despite the positive measures undertaken in the education sector, Kenya is yet to achieve the global standard of pupil to teacher of 35:1 and therefore school environment remain unconducive to learners particularly in public schools. As a result of this, public learning institutions tend to be shunned by vast majority of population who can afford private learning institutions’ services. This creates two parallel education systems (within public and private schools) of varied quality in terms of standards inimical to the constitutional NVPG of equality; and the United Nations Convention on the Rights of the Child (CRC) that require free and compulsory education afforded by governments should be quality. Further, there were incidents wherein public schools’ playgrounds were grabbed thus violating children’s right to leisure as enshrined in the Children’s Act No. 8 of 2001 and CRC since the children had no playground to engage in leisure activities. The children’s right to participation was further violated when the police violently broke up the protests held by children challenging grabbing of their school playgrounds. The government rolled-out project to supply laptops to lower primary that has been criticised by experts in education sector as unviable and not reflective of Kenya’s education priorities. Rightfully so, because teachers in public schools have to contend with poor working conditions that include low teacher-student ratio and poor pay. As a result of which teachers went on strike for more than one month to demand better working conditions. During the teachers’ strike children’s right to access quality education was impaired as they missed classes.

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221KNCHR Baseline Survey Report at p. 75.
As alluded to above, although the government provides free primary education and free day secondary education, as well as free health care services, these have been criticised by key actors in education as being of low quality and do not cohere to human rights standards. Strangely, most of the State and public officers do not use the public education and medical facilities but rather access these services in private institutions and abroad, often at tax payers' expense and utter consternation. The impact of this is that it not only creates schism to the psyche of national unity and patriotism but also perpetuates inequality and discrimination. By having two different standards of basic services available on one hand to State and public officers, and on the other hand to the vast majority citizens who are not wealthy, the government is sustaining disparate and parallel standards of human rights, giving a new forlorn meaning to equality and entrenching inequality and discrimination. This ought to be challenged.

Efforts to upgrade housing in order to provide housing by upgrading informal settlements was not done within due process of the law as persons living in the Mombasa and Nairobi's Mathare and Mukuru informal settlements were unlawfully and forcefully evicted from their houses.

5.2.3 Measures Undertaken and Progress Made on Equity, Social Justice Inclusiveness, Equality, Non-Discrimination and Protection of the Marginalised

Women, youth and PWD have not exercised their rights equitably in social, political and economic sphere on account of various barriers that have been subject of vast research by both state and non-state actors, as well litigated in Kenyan courts. To address this inequity, the government adopted the National Gender Policy of 2011, National Youth Policy 2007, and National Disability Policy 2006 that seek to advance the rights of women, youth and PWD as a special interest groups, within the public sector. The government also adopted and implemented affirmative action policy for a minimum of 30% of government's tender to be reserved for women, youth and PWD. The government also established and administered the Uwezo and Youth and Women Enterprise Funds, the special funds for women and youth respectively to empower them economically. PWD have had immense challenges accessing essential services from the government.

See for example, Wandia Njooja, #LipakamaTenda: Our Politician and public health care [link](http://drkham.blogspot.co.ke/2017/01/) (accessed on 23rd May 2017).

Muugano wa wanavijiji on Mukuru Slums [link](http://www.katibainstitute.org/what-we-do/litigation/on-going-cases/) (accessed on 30th June 2017).
In response to these challenges and in line with the Constitution, the Council for Persons with Disabilities launched the National Action Plan of Accessibility and Disability Rights that obligates all government MDAs to ensure their programmes are accessible and inclusive of all disability concerns.\textsuperscript{229} The Council also supported disability mainstreaming in government services delivery by monitoring the MDAs implementation of disability mainstreaming plans.\textsuperscript{230} NGEC developed and rolled out gender mainstreaming tool which was integrated by vast majority of MDAs and Constitutional commissions in their operations.

In line with Article 204 of the Constitution, the government established and disbursed equalisation fund to marginalised counties for purposes of providing basic services in the counties such as construction of roads, provision of water, health facilities and electricity.\textsuperscript{231} In a strong constructive step, the government also established Huduma Centres across the country to facilitate access to basic services by members of the public in an open and expeditious manner. This has alleviated exclusion and discrimination to marginalised groups who traditionally encountered challenges in securing identity documents, namely the national identity cards, driving licenses and passports.\textsuperscript{232} During the reporting period, the Ministry of Public Service, Youth and Gender Affairs developed and rolled out National Equality Policy and National Women Economic Empowerment Strategy.

With regard to key populations (defined by as Female Sex Workers (FSW), Men who have Sex with Men (MSM), and People Who Inject Drugs (PWID)), the continued criminalisation of these groups under the country’s penal laws continues to further marginalise these groups and compromise on effective responses to combating HIV among the population.

On a positive note, courts have unleashed progressive jurisprudence towards realisation of rights relating to sexual orientation and gender identity. For instance, in Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR the courts compelled the national examinations body to reissue a certificate bearing the correct particulars of the applicant’s new name, that is Audrey Mbugua Ithibu from Ithibu Andrew Mbugua. In a subsequent judgment delivered on 5 December 2014, the High Court of Kenya in Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR affirmed the rights of intersex children to legal recognition and protection. KNCHR appeared as an interested party in this case. In Eric Gitari

\textsuperscript{229}\url{http://ncpwd.go.ke} (accessed on 20\textsuperscript{th} June 2017).
\textsuperscript{230}\url{http://ncpwd.go.ke} (accessed on 20\textsuperscript{th} June 2017).
\textsuperscript{231}NVPG Annual Report March 2014 at Para. 35.
\textsuperscript{232}\url{www.hudumakenya.go.ke} (accessed on 13\textsuperscript{th} June 2017).
v Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKLR
delivered on 24th day of April 2015, Courts recognised the right of association and compelled registration of an NGO seeking to address the violence and human rights abuses suffered by gay and lesbian people.

In May 2017, the Attorney General vide Gazette Notice No. 4904 of 2017 appointed a Task Force on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya to undertake comprehensive research on intersex persons and recommend comprehensive reforms to safeguard the interests of intersex persons.

Challenges and Gaps to Realisation of Equity, Social Justice, Inclusiveness, Equality, Non-Discrimination and Protection of the Marginalised

MDAs did not fully infuse the Bill of Rights’ requirement to ensure gender, ethnic and marginalised groups diversity during recruitment. There were incidents of discrimination in some counties, in the form of tribalism and nepotism, and exclusion of persons perceived as ‘outsiders’. At County Governments, there were instances of women being denied opportunities to serve in various positions of county governments on account of their marital status.233 The NPS has not complied with the requirement in the NPS Act that at least one of the deputy commissioners must be of the opposite gender; all the police commissioners are men.

MDAs were also found to have low level of awareness of their work place policies on Bill of Rights.234 This was compounded by absence of coordinated sectoral approach in addressing human rights issues,235 and the fact that Article 59 Constitutional commissions with core mandates of addressing human rights issues have not devolved to each and every county.

Some institutions failed to adhere to the government’s procurement requirement for 30% quota for youth, women and PWD. As at 2014, only 10 MDAs had implemented this affirmative action.236 The impact and sustainability of government’s initiatives targeting the special interest groups remains minimal because these initiatives were straddled with incidents of graft. Because of graft, the cost-benefit of these initiatives are prohibitive. For example, whereas the government indicates that 5000 youths were engaged in the year 2013 through

234 NVPG Annual Report March 2015 at Para. 351.
the National Youth Service, it is alleged that Kshs. 1.8 billion was siphoned off from the National Youth Service through graft.\textsuperscript{237}

Kenya still contends with high rate of unemployment notwithstanding the Jubilee’s government promise to create jobs. 70\% of the unemployed persons are youth who are aged between eighteen (18) to thirty-five (35) years.\textsuperscript{238} Experts have argued that high unemployment rate among youth makes them vulnerable to commit crimes, radicalisation and drug abuse.

Government’s measures namely Older Persons Cash Transfer, Orphaned and Vulnerable Cash Transfer, and Cash Transfer to Persons with Severe Disabilities has had miniscule effect to special interest groups.\textsuperscript{239}

Gender inequality in political sphere is one of the most visible manifestations of inequality in Kenya that merits substantive mention. The realisation of gender equality is a bane challenge in Kenya. In particular, Kenya’s landscape is littered with gender inequality making the country to not only trail behind within the Eastern Africa region but in Africa as well.\textsuperscript{240} this inequality cuts across all arms of government-the Judiciary, Executive, and the National and County Legislatures. It is because women have systematically been marginalised within Kenya’s political system,\textsuperscript{241} coupled by social, economic and cultural barriers that hinder their full representation and participation in decision making processes.\textsuperscript{242}

\textit{Gender Inequality in Kenyan Legislatures-Parliament and County Assemblies}

The Constitution of Kenya 2010, through its progressive provisions, particularly Articles 27(8) and 81(b) seeks to address gender inequality in political sphere by enshrining the principle that not more than two thirds of the members of public bodies shall be of same gender. Notwithstanding the Constitutional guarantee, gender equality remains an aspiration and not a reality-an unrealised constitutional promise for Kenyan women. The 11\textsuperscript{th} Kenyan Parliament (both Senate and National Assembly), had only 86 women out of 416 making up only 21\% of women: this did not meet the minimum constitutional gender minimum threshold of not more than two third being of the same gender constituting the

\textsuperscript{238}NVPG Annual Report March 2015 at Para. 360.
\textsuperscript{240}African Union Commission, \textit{African Gender Scorecard} (December 2015) p.12.
\textsuperscript{242}ibid.
Parliament as envisaged in Article 27(8) of the Constitution. To begin with, the Supreme Court of Kenya in advisory opinion no. 2 of 2012 dealt a blow to gender equality in political sphere in the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion No.2 of 2012, by rendering an opinion that the legislative measures for giving effect to the ‘not more than two-thirds of one gender principle’ enshrined in Article 81(b) of the Constitution in relation to the National Assembly and the Senate should be realised progressively [rather than immediately for purposes of elections that were held on 4th March 2013]. The Supreme Court set the deadline of 27th August 2015 as the date by which Parliament was to undertake the legislative measures. However, three (3) months towards the 27th August 2015 deadline, Parliament had not enacted legislation that would implement Articles 27(8), 81(b) and 100 as well as comply to the Advisory Opinion No. 2 of 2012. Accordingly, the Centre for Rights Education and Awareness took the government to court to compel it to put in place such legislative mechanism, in Centre for Rights Education and Awareness & 2 Others v. Speaker the National Assembly & 6 Others, Petition No. 371 of 2016 at H.C of Kenya at Nairobi. The court ordered the Attorney General and the Commission on the Implementation of Constitution to prepare a legislation for tabling in Parliament within forty (40) days. However, due to lack of political will, Parliament invoked Constitutional provisions to extend the deadline of 27th August 2015 by one year to 27th August 2016. Ironically, Parliament failed to put in place legislative framework by its own extended timeframe on 27th August 2016. In conclusion, Parliamentarians as State officers had once again violated the Constitution by failing to fulfil their obligation to observe, respect, protect, promote and fulfil equality, as enshrined in Articles 10(2), 21(1) and 27(8) of the Constitution.

After the 4th August 2013 general elections, the IEBC failed to ensure that political parties complied with constitutional provisions on inclusion of special interest groups (youth, women, PWD and marginalised groups) on their party-lists. Consequently, NGEC instituted court proceedings against the IEBC to compel it take appropriate action in ensuring persons nominated on political party-lists includes special interest groups.

Following successful petition by the KNCHR and Others in Centre for Rights Education and Awareness & 2 Others v. Speaker the National Assembly & 6 Others,
Petition No. 371 of 2016 at H.C of Kenya at Nairobi\textsuperscript{246}, the 11\textsuperscript{th} Parliament was compelled to put in place legislative measures within 60 days –by 29\textsuperscript{th} May 2017, putting it in similar circumstances as the 10\textsuperscript{th} Parliament that the Chief Justice Mutunga [as he then was] in his dissenting opinion in the Gender Representation Advisory Opinion had foreseen, “I take judicial notice of Parliament having a short period before it is dissolved….the current Parliament that is fully aware of the constitutional consequences of refusing to legislate. In the event that Parliament fails to do so, any of the elected houses that violate this principle will be unconstitutional and the election of that house shall be null and void.”

In the run-up to 8\textsuperscript{th} August 2017 general elections, Katiba Institute took the IEBC to court to compel it to regulate primaries of political parties so as to ensure that the lists submitted by the political parties for candidates lined up to contest in the 8\textsuperscript{th} August 2017 elections met the requirements. The court rendered judgement in that case Katiba Institute v. Independent Electoral and Boundaries Commission, High Court of Kenya Constitutional Petition No. 19 of 2017 that IEBC ought to regulate primaries of political parties so as to ensure that the lists submitted by the political parties did not constitute more than two-third of the same gender. The court went on to qualify that IEBC would conduct such regulation in forthcoming elections but not for the 8\textsuperscript{th} August 2017 general elections, because at the time the judgment was rendered, political parties were conducting their primaries.\textsuperscript{247}

**Gender Inequality in Judiciary and National Executive**

The Supreme Court of Kenya which is the apex court does not meet the constitutional gender equality threshold of not more than two-third being of same gender comprising the court as it only has two(2) female judges out of seven(7) of the court.\textsuperscript{248} Because of this, the Federation of Women Lawyers challenged the Supreme Court’s composition in Federation of Women Lawyers –Kenya & 5 Others v Attorney General & Another.\textsuperscript{249} It is not only the Parliament and Judiciary that does not meet this gender equality threshold but also the National Executive that has only five (5) female cabinet secretaries out of its total eighteen (18).\textsuperscript{250} The Executive’s composition which is in contravention of the Article 27(4) of the Constitution was challenged in Marilyn Muthoni Kamuru & 2 Others v. Attorney
**General & Another, H.C of Kenya at Nairobi Constitutional and Human Rights Division Petition 566 of 2012.**\(^{251}\) The composition of the national executive is a sharp pointer that the President as a State Officer has not adhered to the Article 10(2) NVPG of equality. By the same token, the President has not leveraged on his position as the chairperson of Jubilee Party to marshal his party members who were the majority in the 11\(^{th}\)Parliament to put in place legislative mechanism to ensure gender equity in Parliament.

Despite significant efforts being directed towards training, development and dissemination of gender handbooks, guidelines on gender responsive budget, and GBV monitoring and evaluation framework, the impact of these are yet to be optimally felt.\(^{252}\) According to research by NGEC, Kenya’s National Equality and Inclusion Index stands at 58.9% and this is due to the fact that significant proportion of women, youth, PWD, older members of society, ethnic minorities and marginalised groups have to contend with economic, cultural and social barriers while accessing essential services.\(^{253}\)


1. The Persons Deprived of Liberty Act No. 23 of 2014 and the Bail and Bond Policy Guidelines ought to be implemented robustly so as to decrease the number of arrested and accused persons held in custody particularly accused persons who have been charged with minor offences. This is imperative as there is global consensus that accused persons who have been charged with minor offences and have been either denied bail or issued custodial sentences are predisposed to recidivism because of poor remand conditions and weak rehabilitation programmes in prisons, respectively.

2. The Access to Information Act No. 31 of 2016 be fully operationalised. In particular, each MDAs, Constitutional commission and private institutions should designate information officer as mandated under the Act and put in place administrative measures that will facilitate members of public to access information from them, both at national and county levels as envisaged in the Act. This would promote transparency and accountability.

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\(^{251}\) [2016]eKLRwww.kenyalaw.org  
\(^{252}\)Note 253.  
3. The Ministry of Medical Services needs to ensure that delivery of medical services is anchored in human rights standards. In particular, the government should implement Collective Bargaining Agreements between the government and medical practitioners whose overall objective is to improve the status of public health facilities. In the same vein, there is need to impose a legal requirement for State and public officers to utilise public medical facilities so as to create a demand and urgency for mandated State and public officers to improve the facilities. This would also create a positive image of the public health facilities.

4. The Ministry of Education, Science and Technology needs to ensure delivery of education services anchored in human rights standards. In particular, government should implement Collective Bargaining Agreements between the government and teachers. The overall objective is to improve the standards of education afforded in public educational institutions. In the same vein, there is need to implore State and public officers, and their families to utilise public educational institutions so as to create a demand and urgency for mandated State and public officers to improve the status of public education. This would also create a positive image of the public educational institutions.

5. County Governments should be implored to enact and implement laws that advance the rights of women, youth and PWD within counties. These laws should adopt or adapt the Model Law on Persons Living with Disabilities, County Model Laws on Maternal Health Rights, County Model Law on Reproductive Health Rights and Model Law on Affirmative Action that the KLRC developed to guide the counties while making laws on PWD, maternal health and reproductive rights, and affirmative action.

6. There is need to robustly implement the Prevention of Torture Act and National Coroners Act that were recently enacted by Parliament and assented to by President Uhuru Kenyatta.254 In this regard, the President should establish an independent judicial commission of inquiry on extra-judicial killings; implore and provide support to IPOA and NPS to establish and strengthen mechanisms of investigating and taking cogent disciplinary actions against police officers who violate the Bill of Rights.

7. While it is commendable that the Ministry of Interior and Coordination of National Government formed a Taskforce for Prevention of Violent Extremism

to mainstream CVE prevention initiatives in MDAs, it is imperative the government addresses the marginalisation and historical injustice that fosters CVE by inter-alia implementing the TJRC report.

8. It is critical that the National Anti-terrorism Policy is reviewed so that it infuses human rights within it. This would ensure that the Policy is in compliance with Article 244 of the Constitution as currently the Policy does not address human rights within it.

9. The Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights envisages a coordinated approach towards realisation of the Bill of Rights. Therefore, it is critical that the following are undertaken:

i. There is need to widely disseminate Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights so as to enhance awareness among citizens of government’s obligations to observe, respect, fulfil, promote and protect human rights in all sectors. This would create demand for the government to bring about social, economic and political transformations envisaged in the Constitution, and as elaborated in the Sessional Paper.

ii. There is strong need for the Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights to be robustly implemented so as to mainstream human rights public policy development and resource allocation.

5.3 Article 10(2)(c) Good Governance, Integrity, Transparency and Accountability.

5.3.1 Measures Undertaken and Progress of Implementation Good Governance, Integrity, Transparency and Accountability

In order to realise the NVPG of good governance, integrity, and transparency and accountability, the government undertook various measures during the reporting period. The Presidency issued Executive Order No. 6 of 2015 on Ethics and Integrity in the Public Service cautioning MDAs on pilferage and requiring relevant institutions to investigate and prosecute all perpetrators of graft; and the Executive Order No. 7 of 2015 on the implementation of Mwangozo Code Article 10(2)(c).

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of Governance for State Corporations. The government also developed Whistle Blower Policy that provides a framework for protection of whistle blowers, and Conflict of Interest Policy that provides a framework to prevent and address situations of conflict of interest.  

In a bid to implement the President’s directive during the State of the Nation Address to Parliament on 26th March 2015, OAG established a Taskforce to Review the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (Anti-corruption Taskforce). During the reporting period, the Taskforce initiated review of the Leadership and Integrity Act No. 19 of 2012 and Public Officers Ethics Act No. 4 of 2003, and drafting of the Whistle Blowers Protection Bill 2015.

The Public Procurement Oversight Authority drafted a Code of Conduct for Suppliers in Public Procurement and Disposal, and established a tender portal and published contract awards in the websites. EACC developed guidelines on conflict of interest, gifts, and public collections that aims at ensuring State and public officers comply with provisions of Leadership and Integrity Act No. 19 of 2012. The Public Service Commission revised the Code of Ethics and Conduct for Public Servants to align it with the Leadership and Integrity Act No.19 of 2012. Parliament enacted the Bribery Act No. 47 of 2016 that provides for investigations, prevention and punishment for bribery within public and private sector. Parliament also enacted the Public Service (Values and Principles) Act No. 1A of 2015 to give effect to the provisions of the Article 232 of the Constitution on values and principles of public service. The overarching architect of the Act is to promote integrity and enhance efficiency in the public service.

The Judiciary established Corruption and Economic Crimes Division within the High Court to fast track dispensation of corruption and economic crime cases. So as to address prevalence of corruption within road traffic sector, the Judiciary launched the Traffic Policy Guidelines. To augment Judiciary’s disposal of corruption cases, the ODPP vetted and assigned ninety (90) Prosecution Counsels to handle anti-corruption and economic crimes.

In a strong positive step, OAG rolled out ICT platform to ease access of its services within a short time frame. Under this initiative, registration of companies was

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256 NVPG Annual Report March 2015 at Para. 29(b).  
257 NVPG Annual Report March 2016 at Para. 231.  
258 Ibid.  
reduced from 21 days to 3 days. Through its ICT platform, OAG addressed the vice of brokers who cashed in on the long period of time to register companies and physical long queues at the OAG, often times fleecing members of public of their monies.

Challenges and Gaps to Good Governance, Integrity, Transparency and Accountability

Kenya has grappled with corruption, including prior to the Jubilee administration, albeit it being among the first countries to ratify the United Nations Convention against Corruption (UNCAC) and having a robust policy and legal framework on anti-corruption. However, the levels of corruption became more entrenched during the Jubilee administration in 2013-2017. This is notwithstanding Jubilee’s promise to execute the third pillar of its 2013 manifesto dubbed Uwazi (accountability); the President’s Executive Order No. 6 of March 2015 to combat corruption; and vast policies and laws that safeguard good governance, integrity and transparency and accountability including the efforts of the Anti-Corruption Taskforce.

Erosion of Good Governance, Integrity, Transparency and Accountability at Jubilee’s Government Inception

Implementation of good governance, integrity, transparency and accountability were dealt a blow when Kenyan courts ruled in International Centre for Policy and Conflict & 5 Others v. Attorney General & 5 Others that Chapter six does not apply to elective positions but rather appointive ones. Whereas this case was rendered at the threshold of Jubilee assuming power in March 2013, it set the course for weak and non-enforcement of these NVPG. In this sense it could be argued that although Jubilee’s Manifesto stipulates accountability as one of its pillars, the foundation upon which Jubilee formed its government is not premised on NVPG of good governance, integrity, transparency and accountability. This negative start set on a trajectory that was replicated in Parliament, MDAs and Judiciary during the reporting period.

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262 http://www.statelaw.go.ke [accessed on 10th June 2017].
266 High Court of Kenya Constitutional and Human Rights Division, Petition No. 552 of 2012 consolidated with Petitions 554 of 2012, 573 of 2012 and 579 of 2013 [2013]eKLR.
Parliament’s Non-compliance to Good Governance, Integrity, Transparency and Accountability.

The National Assembly sought to amend Article 260 of the Constitution so as to remove Members of Parliament, Judicial Officers and Members of County Assembly from the definition of State Officers. According to the AFRICOG and Kenyans for Peace with Truth and Justice, as of 2016, 17 members of parliament had been charged for committing serious criminal offences that included fraud, forgery, hate speech, corruption and incitement to violence; and approximately 90 public officers were under suspicion of graft.267

In 2015, Parliament attempted to weaken the operations of the EACC when it sought to introduce amendments into the Ethics and Anti-Corruption Commission Act by way of Kenya Gazette Supplement 87 to change the terms of EACC commissioners from full-time to part time and increase the numbers from three(3) to five(5).268 Further, Parliament dealt a blow to fostering accountability and transparency when it suspended the application of the Campaigns Finance Act in respect to 8th August 2017 general elections.

IEBC’s Non-compliance to Good Governance, Integrity, Transparency and Accountability.

Efforts to foster transparency and accountability were whittled when IEBC failed to robustly implement Chapter Six of the Constitution and the Leadership and Integrity Act 2012 to vet out persons of questionable character from being political candidates but instead gave them clearance. For example, IEBC cleared Joshua Waiganjo who had been convicted of posing as a police officer to run for Member of the National Assembly seat.269

MDA’s Non-compliance to Good Governance, Integrity, Transparency and Accountability.

There was manifest non-compliance to good governance integrity, transparency and accountability by MDAs: State and public officers who misused public resources particularly within county governments;270 MDAs also conducted

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269Note 260.
271Report by Ethics and Anti-Corruption Commission to The Legal Affairs and Human Rights Committee on the Senate on Investigations Relating to Allegations of Corruption within The Counties 14 December 2016.
recruitments flouting the NVPG of good governance; and MDAs revoked or delayed in making public appointments as required by the law. These contraventions are illustrated in a number of instances and cases that include:-

1. Recruitments into the NPS conducted in 2014 that were challenged by KNCHR and IPOA on grounds they were riddled with serious malpractices such as corruption and discrimination. These recruitments were challenged in court of law that rendered them to be inconsistent with NVPG enshrined Article 10(2), illegal and unconstitutional thus quashed them.

2. Public entities breached integrity laws, and as a result, the EACC issued 563 Notices of Non-Compliance to these public entities. Ruefully, this included prosecution counsels that engaged in corruption related activities, of which the ODPP instituted corruption charges against three of its officers. Additionally, 127 traffic police officers were found unsuitable to hold office following vetting by NPS due to unexplained financial transactions and receiving bribes from transporters.

3. In the case of Republic v. Office of the Governor Nairobi City County Ex-Parte Japheth Muriira Muroko & Another, H.C of Kenya at Nairobi Judicial Review Application No. 467 of 2016 wherein the Court held that the State Officers within the Nairobi City County had violated the Article 10’s transparency and accountability when they revoked appointments of members and chairperson of the Starehe and Kibra Subcounty Alcoholic Drinks Control and Licensing Committee without disclosing reasons for the action.

4. In the case of Benson Riitho Mureithi v. J.W. Wakhungu & 2 Others, H.C of Kenya at Nairobi Constitutional and Human Rights Division Petition No. 19 of 2014 wherein the court held that the Cabinet Secretary for the Ministry of Environment had violated Article’s 10 public participation and

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274 Independent Police Oversight Authority & Another v. Attorney General & 660 Others High Court of Kenya at Nairobi Constitutional and Human Rights Division Petition No. 390 of 2014[2014]eKLR.
275 NVPG Annual Report March 2016 at Para. 514.
276 NVPG Annual Report March 2016 at Para. 519.
transparency and accountability when she appointed the Chairperson of the Athi Water Service Board without putting in place a process for public participation as required under Article 10(2) of the Constitution that would have facilitated public scrutiny of the personal integrity, character, competence and suitability of the applicants.

5. In the case of Republic v. Attorney General & 3 Others Ex-Parte Tom Odoyo Ololo, H.C of Kenya at Nairobi Judicial Review Application No.196 of 2015 wherein the court quashed gazette notice appointing Polycap Igathe as chairperson of the board of directors to the Anti-Counterfeit Agency because it was not in compliance with the Article’s 10(2) NVPG of good governance. Mr. Igathe had been appointed by the President to be the chairperson to the Anti-Counterfeit Agency through the provisions of the State Corporation Act instead of the one of Anti-Counterfeit Act that is the relevant substantive law for making appointments into the Anti-Counterfeit Agency.

6. In the case of Coast Water Service Board v. Alome Achayo & 5 Others, H.C of Kenya at Mombasa Petition No. 30 of 2014 wherein the court found appointments of board members into Mombasa Water Supply and Sanitation Company Limited did not comply with Article 10(2) NVPG of good governance, integrity, transparency and accountability.

7. In the case of Okiya Omtatah Okoiti & 3 Others v. Nairobi City County & 5 Others H.C of Kenya at Nairobi Constitutional & Human Rights Division Petition No. 143 of 2014 wherein the court declared that appointments of directors of the Nairobi Water and Sewage Company had been made in violation of the Constitution.

8. In the case of Dr. Fredrick NjeruKamunde v. Tharaka Nithi County Government & Another In the Employment and Labour Relations Court of Kenya at Nyeri Petition No. 6 of 2015 wherein the court held that the Governor of, and TharakaNithi County Government had conducted reshuffles of the positions of Chief Officers and County Secretary in manner that offended Article 10(2) NVPG of rule of law and human rights.

280 [2015]eKLRwww.kenyalaw.org [accessed on 10th June 2017].
281 [2015]eKLRwww.kenyalaw.org [accessed on 10th June 2017].
282 [2014]eKLRwww.kenyalaw.org [accessed on 10th June 2017].
283 [2016]eKLRwww.kenyalaw.org [accessed on 10th June 2017].
9. In the case of Republic v. Secretary County Board & Another Ex-Parte Hulbai Gedi Abdille H.C of Kenya at Nairobi Judicial Review Application No. 271 of 2014 wherein the court found that that County Public Service Board of Wajir conducted recruitment for the positions of Sub-County Administrators and Deputy Sub-County Administrator in manner that offended Article 10 (2) NVPG of transparency and accountability.

These are just but a few cases that illustrate non-compliance to NVPG by State and public officers in MDAs in the course of discharging their duties.

**Judiciary the Constitution’s Custodian Eschewing Transparency and Accountability**

Judiciary is the custodian of the Constitution. The Judicial Service Commission shortlisted some candidates to be interviewed for the positions of Chief Justice and Deputy Chief Justice, and left others who were perceived as more eligible candidates, without plausible reason and providing information on its decision. This raised monumental apprehension as to whether Judiciary could be trusted to discharge its solemn duty as custodian of the Constitution since it had not adhered to the Constitution, in particular Article 10(2) NVPG of rule of law, transparency and accountability, and non-discrimination. Following successfully petition against the Judicial Service Commission in Trusted Society of Human Rights Alliance &3 Others v. Judicial Service Commission & Another H.C of Kenya at Nairobi Constitutional Human Rights and Judicial Review Divisions Petition No. 314 of 2016, the court held that the Judicial Service Commission decision to shortlist some candidates and not others to be interviewed for the positions of chief justice and deputy chief justice had been done irrationally without an objective criteria.

Whereas President Uhuru Kenyatta has publicly acknowledged and documented in his 1st, 2nd, 3rd and 4th Annual Reports on Measures Taken and Progress Achieved in the Realisation of National Values and Principles of Governance that corruption is an entrenched endemic vice, it could be argued that this is because anti-corruption efforts have mainly been palliative, as evident by inter-alia:

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284(2015)eKLRwww.kenyalaw.org [accessed on 10th June 2017].
285(2016)eKLRwww.kenyalaw.org [accessed on 10th June 2017].
1. Anti-corruption measures by the government have heavily focussed on capacity-building and awareness creation on anti-corruption, and there have been miniscule registrable successful investigation and prosecution of high profile corruption cases during the reporting period.\textsuperscript{287} Such high profile cases include indictment of parliamentary committees that comprise Parliament’s Public Accounts Committees and Public Investment Committees; National Youth Service corruption scandal of approximately Kshs.1.7 billion; and Ministry of Health corruption scandal of approximately Kshs.5 billion. Further, State and public officers who were implicated in corruption have ‘stepped aside’ to facilitate investigations of their alleged graft conducts rather than resign to allow for speedy and credible investigation and prosecution of corruption allegations proffered against them.

2. Inadequate institutional capacity of institutions mandated to combat corruption and ineffective enforcement of legal and policy framework. For example, in 2014 EACC conducted 367 integrity tests on cases it was investigating, of which 72% failed. Rather than perceive this as mark of admission on EACC’s weak capacity, the 2014 Annual Report veils this as ‘the high rate of failure is a demonstration of enormity of corruption in the country.’\textsuperscript{288}

3. Corruption is a hydra that requires joint multi-sectoral efforts to combat it. It is therefore astonishing that the Jubilee government combatively excluded CSOs in anti-corruption efforts as evident in the brutal disruptions of CSOs peaceful anti-corruption demonstrations\textsuperscript{289} forceful interference of Langata Primary School pupils’ peaceful protest against grabbing of their land,\textsuperscript{290} and government’s disregard of CSOs efforts to petition the President to address graft.\textsuperscript{291}

4. President Uhuru Kenyatta’s Executive Order No.6 of 2015 on Ethics and Integrity in the Public Service cautioning MDAs on pilferage and requiring relevant institutions to investigate and prosecute all perpetrators of

\textsuperscript{287} Ibid at ODPP Report p. 2-12) and Kenya National Commission on Human Rights, Corruption: A Serious Threat to the Enjoyment of Human Rights that Must be Urgently Tamed (23rd March 2015).
\textsuperscript{288} Note 24 at Para. 298.
\textsuperscript{289} Hussein Khalid & 16 Others v. Attorney General & 2 Other, High Court at Nairobi, Constitutional and Human Rights Division Petition No. 324 of 2013 (2014)eKLR.
\textsuperscript{290} Kenya Police Tear Gas Children in Playground Protest, https://www.youtube.com/watch?v=Y9VuDhDfHlI (accessed on 10th June 2017).
\textsuperscript{291} Boniface Mwangi, and Also Petition to His Excellency the President Uhuru Kenyatta for Expedient and Decisive Action against Grand Corruption, 4th November 2016 www.khrc.or.ke (accessed on 10th June 2017).
and the Executive Order No.7 of 2015 on the implementation of Mwongozo Code of Governance for State Corporations have not been fully executed.

5. EACC has no prosecutorial powers. It conducts investigations and forwards the files to ODPP to prosecute corruption and economic crimes cases. This has often occasioned into delay in prosecuting corruption and economic crimes cases, as frequently ODPP return files to EACC for further investigations to be undertaken. A poignant case in point is that of allegations of misappropriation of Kshs. 25 billion proceeds of the sale of Sovereign Bond(Eurobond) by the national government, that has not been prosecuted and disposed in a court of law. Also EACC has not carried out lifestyle audit on State and public officers robustly.

Cumulatively because of non-adherence to good governance, integrity, transparency and accountability, the people of Kenya’s fundamental rights are violated and continue to remain unfulfilled, particularly the ones on healthcare, education, housing, social security and adequate clean water. At the centre of this are deep concerns regarding Kenya’s increasing public debts that as at March 2017 stood at Kshs. 4 trillion, which may negatively impact on the quality of lives of present and future generations given entrenched culture of corruption.

Recommendations: Good Governance, Integrity, Transparency and Accountability

1. The policies and laws on good governance, integrity, transparency and accountability ought to be fully implemented. In this regard, there is need to foster a culture wherein State and public officers implicated in graft resign or are dismissed from public service, so as to give gravitas to Chapter Six of the Constitution on Leadership and Integrity, the Leadership and Integrity Act No. 19 of 2012 and the Public Officer Ethics Act No. 2003.

2. Given the prevalence of corruption, in March 2016, President Uhuru Kenyatta directed all MDAs to submit reports on sanctioned officials that have flouted the NVPG. There is need for EACC to follow up on implementation of this
President's directive.

3. There is need to enhance the institutional capacity of anti-corruption agencies so that they garner high rate of successful prevention and prosecution of corruption. Such measures includes: to enhance the capacity of EACC to combat corruption by conferring it with prosecutorial powers rather than simply have them conduct investigations then hand over cases to be prosecuted by ODPP. This will not be an exception as other government agencies such as Kenya Wildlife Services and Kenya Bureau of Standards have prosecutorial powers.

4. The EACC working in conjunction with relevant MDAs such as OAG and OPPD ought to enforce anti-corruption provisions which include UNCAC to ensure that: wealth declaration forms are made public; EACC conducts timely lifestyle audit of non-state actors; bank accounts of persons implicated in corruption are frozen pending investigations; proceeds from anti-corruption activities are recovered; and a strong whistle-blower law is established and implemented. By the same token, there is need to monitor Kenya's implementation of recommendations arising from review on Kenya's implementation of UNCAC conducted in 2016 by the United Nations Office of Drugs and Crime.

5.4Article 10(2)(d) Sustainable Development

5.4.1 Measures Undertaken and Progress of Implementation of Sustainable Development

The government through the Ministry of Devolution developed and implemented the Kenya Vision 2030’s second Medium Term Plan (MTP II) that seeks to attain policy, legislations and administrative measures touching on sustainable development. Under the MTP II, the government undertook infrastructural projects to grow the economy that include Lamu Port-Southern Sudan-Ethiopia Transport (LAPSET) that seeks to link Kenya to South Sudan and Ethiopia through rail, road and pipeline; undertook various road infrastructure development through the Kenya Road Board and Kenya Urban Roads Authority for example completion of the Southern Bypass and the expansion of the Outer Ring Road; completion of the Jomo Kenyatta International Airport’s Terminal 1A and completion of the Manda Airport in Lamu; and completion of the phase I of the Standard Gauge Railway from Nairobi to Mombasa.
The government through the Ministry of Devolution and Planning is coordinating the implementation and monitoring Sustainable Development Goals (SDG) by MDAs, Constitutional Commissions, and the private sector. During the reporting period, the government carried out the following innovative initiatives aimed at fast tracking SDGs in health and water sector.297

1. The Beyond Zero Campaign: An Initiative by H.E. the First Lady, Mrs. Margaret Kenyatta that established mobile clinics for treating mothers and children in marginalised communities.

2. Mother waiting home (KIROR) which is an initiative of West Pokot County Government and is a home outside their home and a home outside the health facility. Expectant mothers move to KIROR near a health facility a few days to their expected day of delivery and are monitored during labour by the health personnel at the health facility thereby reducing congestion at the health facility while at the same time getting prompt services of a qualified personnel during delivery.

3. Water ATMs that have been installed by the Nairobi Water and Sewerage Company to enable city residents living in informal settlements to access quality water cheaply. The ATMs use AQtap technology and the residents pay for water using mobile technology. This has reduced the cost of water to the community as well as improved revenue collection by the company.

4. Social Protection Programmes to address poverty. The programmes include the Hunger and Safety Net Programme.

5. Further, in a bid to promote sustainable development, the Parliament adopted and enacted the following policies and laws:-

   i. Sesssional Paper No. 9 of 2013 on National Cohesion and Integration that seeks to ensure Kenya is cohesive and integrated.

   ii. Sesssional Paper No. 8 of 2013 on Sustainable Development of Northern Kenya and Other Arid Lands that aims to facilitate and fast-track sustainable development in Northern Kenya and arid areas.

iii. Wildlife Conservation and Management Act No. 47 of 2013 to facilitate protection of wildlife and promotion of tourism.

iv. Forest Conservation and Management Act No. 34 of 2016 to facilitate the conservation of forests and their sustainable development.

v. Climate Change Act No. 11 of 2016 to provide for a regulatory framework for enhanced response to climate change and to provide mechanisms and measures to achieve low carbon climate development.

vi. Fisheries Management and Development Act No. 35 of 2016 to provide for conservation, management and development of fisheries and aquatic resources and enhance the livelihood of communities depending on fishing.

It is indisputable the bad practices in extractive industries pose a strong threat and challenge to sustainable development. In a bid to avert Kenya emulating bad practices in extractive industries, the Kenyan national executive adopted the Energy Policy 2015 and Mining Policy 2016; and Parliament enacted the Mining Act No. 12 of 2016 to give effect to Articles 60, 62(1)(f), 66(2) and 71 of the Constitution on sustainable exploration and management of minerals and mineral oils. The Ministry of Mining commenced implementing the Mining Act. For example, it developed Mining Regulations and Guidelines and Online Transactional Mining Cadastre Portal System to simplify licencing application and processes.298

**Challenge and Gaps to Sustainable Development**

1. During the reporting period the government did not undertake measures to ensure comprehensive environmental management and sustainable development. As such, forest areas declined to 3,456 thousand hectares in 2016 from 3464 thousand hectares in 2015.299 Similarly, indigenous closed canopy forest decreased to 1402 thousand hectares in 2016 from 1408 hectares in 2015.300

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298 [www.mining.go.ke](http://www.mining.go.ke) [accessed on 21st June 2017].
300 ibid.
2. During the reporting period, Kenya grappled with massive corruption and impunity that heavily impacts on sustainable development in the following ways. First, it wanes investors’ confidence who would rather work in a graft-free environment. Second, corruption starves off resources meant for development whose impact is to entrench inequality and marginalisation. Third, it utterly undermines the rule of law which is prerequisite for sustainable human and economic development.

- Kenya does not have cogent policy and legal framework to govern national resource exploitation. Although the Ministry of Mining has initiated the process of putting in place policy, guidelines and regulations to govern Kenya’s extractive sector, the process of finalising them has been inordinately delayed. As a result, Kenya grapples with conflict over exploitation of natural resources between communities and investor companies as illustrated in conflicts in Turkana County over oil and in Kwale County over titanium. Further, lacuna of the extractive industries’ policies, guidelines and regulations is a harbinger for poor practices in the extractive industries. The investor companies have not adhered to the NVPG as evident in the poor working conditions they subject their workers to, yet by definition of Article 260 of the Constitution are defined as person thus required to uphold human rights. KNCHR conducted a public inquiry, in 2017, in Kwale County that revealed workers of mining companies in the county are working under poor working conditions that expose them to health and occupational safety hazards. An earlier inquiry by the Commission on artisanal mining in Taita Taveta County revealed a similar state.

3. Kenya’s sustainable development is threatened by the fact that Parliament and relevant ministries mandated to develop requisite laws and regulations have not done so expediently. Pertinent laws that are yet to be enacted include the Petroleum (Exploration, Development and Production) Bill 2015 and Natural Resource Benefit Sharing Bill 2016.

4. Institutions mandated with environmental protection and sustainable development have not robustly enforced the policies and laws governing environmental protection. This weak enforcement is evident by: persisting depletion of non-renewable resources and destruction of the ecosystems through poor cultivation methods, charcoal burning and poor sewage
disposal; poaching of wildlife, and approvals of coal mining projects in Kitui and Lamu counties that pose threat of environmental and health hazard.

Recommendations: Sustainable Development

There is need for Parliament to enact the Energy Bill 2016, the Petroleum (Exploration, Development and Production Bill 2016, the Local Content Bill 2016 and National Resource (Benefit Sharing) Bill 2016 and National Sovereign Wealth Fund Bill 2014. Given the strong intrinsic link between human rights and extractive industries, Article 59 Constitutional commissions and relevant non-actors in human rights sectors should give input into these Bills and monitor their implementation once enacted.

5.5 Overarching Recommendations on National Values and Principles of Governance

There is need for the government to fulfil its commitments made under the annual reports of 2013, 2014, 2015 and 2016. These commitments include to: introduce the NVPG into performing contracting systems of MDAs; develop curriculum for primary, secondary and tertiary institutions; undertake forensic audit of all legislations, policies and institutional frameworks to ensure they adhere to Article 10 of the Constitution.

There is need for KLRC, OAG and pertinent MDAs and Constitutional commissions to develop a policy and legislative agenda that provides a roadmap on how to effectively implement the existing policies and laws so as to realise NVPG. This will avert Kenya’s current proclivity of developing additional policies and laws to address socio-economic and political challenges that could be effectively addressed by implementing the existing policies and laws. In this regard, it is worth-mentioning that the President committed in his Annual Report for 2015 to enact legislations to operationalise Article 10 of the Constitution, rather than ensure strong enforcement of laws that embody Article 10 of the Constitution. This policy and legislative agenda should be informed by the findings of the KIPPRA that inter-alia assessed the impact of existing policies, 301 NVPG Annual Report March 2015 at Para. 368.
302 Ibid.
304 Ibid.
305 NVPG Annual Report March 2014 at Para. 211.
306 See list of laws at www.kenyalaw.org [accessed on 20th May 2017].
legal frameworks and administrative actions in inculcating and enforcing NVPG.

In a positive step, the government has committed to continually create public awareness on NVPG. Throughout the reporting period, MDAs indicated that they had conducted awareness on NVPG. However, the baseline report by KIPPPRA indicates the awareness level of the NVPG is only at 38% and recommended for more awareness creation. It could be argued that it is because awareness creation on NVPG has been mainly done by MDAs without active partnership and collaboration of non-state actors. There is need for the government to collaborate and partner with non-state actors such as the private sector and CSOs to create awareness on NVPG.
REALISATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE AND FULFILMENT OF KENYA’S INTERNATIONAL OBLIGATIONS FOR THE PERIOD 2013-2017
JUBILEE GOVERNMENT SCORE CARD
CHAPTER 2

PROGRESS MADE IN FULFILLING THE INTERNATIONAL OBLIGATIONS OF THE REPUBLIC FOR THE PERIOD 2013-2017

1.0 INTRODUCTION

Kenya as a part of international community is a member to the United Nations, the International Court of Justice, the African Union, the East African Community, the Intergovernmental Authority on Development, the Common Market for Eastern and Southern Africa, and the New Partnership for Africa’s Development. These intergovernmental organisations have treaties and conventions that Kenya as a member-state has either acceded to, ratified or is a signatory to. KNCHR is designated by the Constitution, ‘as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights’ (Article 59(2)(g), as read with section 8(f) of KNCHR Act, 2011). As such, this report mainly focuses on pertinent human rights international and regional treaties and conventions that Kenya is a State Party to and assesses state compliance with the obligations emanating thereof.

Kenya is State Party to pertinent international and regional human rights treaties and conventions. These notably include: ICCPR, ICESCR, CERD, CEDAW, CRC, CRPD, Optional Protocol on the Involvement of Children in Armed Conflict, \(^{308}\) Optional Protocol on CRC on the Sale of Children, Child Prostitution and Child

\(^{308}\)Kenya ratified on 28th January 2002.
Pornography,


Articles 2(5) and 2(6) of the Constitution stipulate that ‘the general rules of international law and any treaty or convention ratified by Kenya shall form part of the laws of Kenya.’ Parliament enacted the Treaty Making and Ratification Act, No.45 of 2012 to enable Kenya fulfil its international obligations and streamline the treaty ratification process.

Article 132(1)(c)(iii) of the Constitution has mandated the President to submit a report for debate to the National Assembly on progress made in fulfilling the international obligations of the Republic. During the reporting period, President Uhuru Kenyatta submitted 1st, 2nd, 3rd and 4th Reports on Progress made in fulfilling the International Obligations of the Republic to Parliament. The reports highlight the progress and challenges made by Kenya during the period 2013-2015.

2.0 PROGRESS MADE IN FULFILLING INTERNATIONAL OBLIGATIONS OF THE REPUBLIC

During the reporting period, Kenya co-chaired the formulation of Sustainable Development Goals (SDG) by the United Nations. SDG are seventeen (17) goals which aim to end poverty, protect the planet and ensure prosperity for all, and essentially infuse human rights. Further, Kenya voluntarily subjected itself to be reviewed on how it has implemented the SDG. Kenya’s milestone in this regard include: SDG was mainstreamed in policy and planning by MDAs and Constitutional commissions; creation of awareness on SDGs to State and public officers; and each of the SDG seventeen goals were mapped with Vision 2030 Second Medium Term Plan objectives.

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309Kenya became a signatory on 8th September 2000.
310Kenya acceded on 16th May 1966.
311Kenya acceded on 13th November 1981.
312Republic of Kenya, The President’s Report on Progress Made in Fulfilling the International Obligations of the Republic (March 2014)
313Republic of Kenya, The President’s Report on Progress Made in Fulfilling the International Obligations of the Republic (March 2015)
314Republic of Kenya, The President’s Report on Progress Made in Fulfilling the International Obligations of the Republic (March 2016)
As mandated State Party, during the reporting period the government submitted the following reports:-

1. Kenya’s report on the International Convention on Elimination of Racial Discrimination (CERD) to the Committee on CERD.

Furthermore, OAG prepared and submitted Universal Periodic Review Report to the Human Rights Council. Following Universal Period Review on Kenya, the government under OAG generated a Universal Periodic Review Plan for Kenya (2015-2019) that outlines legislative and appropriate measures to be undertaken in order to fulfil Kenya’s international obligations. So far, the government has undertaken a number of the measures to address recommendations arising from UPR that include adoption of policies and enactment of laws to protect, respect and promote human rights: these have been enumerated in Section I above of this report under measures undertaken and progress to realise human rights.

In respect of Kenya’s international obligations under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Parliament enacted the Climate Change Act No.11 of 2016 to give effect to the Protocol.

Kenya was also subjected to review on its implementation of UNCAC. As a result of this review, the government under auspices of OAG developed an Implementation of Recommendations from UNCAC Review that it is implementing with the support of various actors that include United Nations Office of Drugs and Crime that drafted the UNCAC. Kenya also submitted its report on implementation of the Africa Union Convention on Preventing and Combating Corruption but is yet to receive feedback on this from the African Union.

Challenges to Fulfilling Kenya’s International Obligations

Albeit undertaking various measures to fulfil its obligations, the following prominent challenges and gaps remain unaddressed: -
1. In respect of ICCPR as alluded to in Section I above, there were violations
to right to life; freedom of expression including the media’s; and freedom
of association, of which the police were implicated. Further, due to
financial constraints legal aid programme established under the Legal
Aid Act has not been rolled out countrywide as envisaged. Similarly,
Victim Protection Act and Persons Deprived of Liberty Act have not been
effectively implemented due to financial constraint and lack of awareness
on the laws by key actors in the justice sector, particularly victims and
accused persons.

2. In respect of ACHPR, the government is yet to comply with the judgment
of Centre for Minority Rights Development (Kenya) and Minority Rights
Group (on behalf of Endorois Welfare Council), rendered by the African
Commission. Similarly, the government is yet to implement the
judgment of Minority Rights Groups International & 2 Others (on behalf of
Ogiek community) rendered by the African Court on Human and People’s
Rights.

3. In respect of ICESCR and as alluded to in Section I above, realisation
of highest attainable standard of health remains a challenge for vast
majority of Kenya; and correspondingly significant proportion of youth
grapple with unemployment and underemployment.

4. In respect of CEDAW and the Maputo Protocol, as alluded to in Section
1 above, the government is yet to put in place legislative measures to
ensure gender equality in political sphere.

5. In respect of CRPD, there is low level of awareness: on the Convention;
the rights of PWD guaranteed in the Constitution of Kenya 2010; pertinent
legislations on PWD; as well as measures undertaken by government
in respect of PWD. Because of this, PWD remain underrepresented
in political, social and economic sphere, their participation in these
spheres is minimal and they remain eclipsed in Kenya’s milieu where
social, economic and political transformation are being steered.

6. In respect of ACRWC, CRC, Optional Protocol on the Involvement of

319Note 306 at p.166.
321KNCHR Baseline Survey Report at p. 27.
322Note 306 at p. 303.
Children in Armed Conflict, Optional Protocol on CRC on the Sale of Children and Child Prostitution and Child Pornography there are various marks of non-compliance. During the reporting period, teachers went on strike on account of poor working conditions, such as poor infrastructure, large teacher and student ratio, and low remuneration, that impact negatively on their ability to discharge their duties effectively. The teachers strike impacted the children’s right to education as long protracted strike compromised the quality of education accorded to children. Another major challenge that featured during the reporting period is that the government through its Ministry of Education Science and Technology commenced the process of reviewing the curriculum for students which was undertaken in a manner that did not meet the threshold of public participation. This has raised concern among educationists as the proposals by the Ministry of Education Science and Technology seeks to introduce foreign materials that is not responsive to needs of Kenyan learners, and in disregard to comprehensive input of the Kenyan scholars in the subject matter.

There is no mechanism to monitor welfare of children affected by internal displacement. Kenya’s law in respect of children in conflict have been poorly implemented. Due to conflicting provisions between the CRC and Basic Education Act a number of children are still engaged in child labour. Kenya has not put in place cogent mechanism to combat child prostitution, particularly in terms of investigations and aftercare services for children in need of care and protection, as a result child prostitution continues to thrive.

for voluntary reparation of Somali refugees in safety and dignity. Following the terror attacks in Garissa University in April 2015 the Deputy President of Republic of Kenya William Ruto announced government’s intention to close Dadaab Refugee Camps within three (3) months which placed at risk 500,000 refugees being forcibly returned to their countries hence in violation of Kenya’s international obligations.\footnote{Amnesty International, Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp Kenya (2016).} Thus in May 2016, by way of Gazette Notice No. 4418 of 2016, the government through the Ministry of Interior and Co-ordination of National Government stipulated its intention to fast-track reparation of Somali refugees from Kenya and established the National Multi-Agency Refugees Reparation Team with the mandate to manage the process of reparation.\footnote{Note 306 at Para 140.} However, the government forcibly returned Somali refugees, and harassed Somali refugees.\footnote{Note 320.} These were in violation of Kenya’s international obligation and were successfully challenged in Kenya National Commission on Human Rights & Another v. Attorney General & 3 Others, H.C of Kenya at Nairobi Constitutional Petition No. 227 of 2016.\footnote{[2017]eKLRwww.kenyalaw.org [accessed on 20\textsuperscript{th} July 2017].}

8. In respect of UNCAC, Kenya has not stoutly implemented its legislations and as alluded to above in Section I corruption remains endemic and deeply entrenched. Kenya also had challenge in enforcing mutual legal assistance and transferring criminal proceedings as obligated under UNCAC.\footnote{Note 306 at p. 301.}

9. Kenya as a State Party to the international and regional treaties and conventions has an obligation to submit timely reports to the oversight committees established under the treaties and convention. At the time or reporting, Kenya was yet to submit its country reports on implementation of Convention against Torture to the Committee against Torture and ICCPR to the Human Rights Committee, which were due on 31\textsuperscript{st} May 2017 and 27\textsuperscript{th} July 2015 respectively.

10. Furthermore, Kenya, like many African states has not actively engaged with the African regional mechanism compared with the UN treaty bodies. Regional monitoring bodies include the African Commission and the African Committee on the Rights and Welfare of the Child (ACRWC). For instance, while Article 62 of the African Charter requires submission
of periodic state reports every two years, it has lagged behind in terms of reporting and submitted reports in clusters.

11. Albeit, its progressive Constitution, Kenya’s human rights situation, as alluded to in section I of the report is wanting. This has drawn strong recommendations for Kenya to improve on human rights situation including by ratifying optional protocols to the human rights treaties and conventions it has ratified, in order to fortify enforcement mechanism of Kenya’s international obligations. Kenya has not heeded to these recommendations that would provide an avenue for aggrieved citizens having exhausted domestic avenues to use regional and international enforcement mechanism to protect and promote their violated human rights. This remains a major obstacle for protection and promotion of human rights.

12. Although Kenya has signed the International Convention for the Protection of All Persons from Enforced Disappearance, it is yet to ratify it. It could be argued that failure to ratify it has sustained escalating cases of enforced disappearance and killings that featured during the year 2013 to 2016, under the watch of Kenya’s transformative Constitution.

Recommendations: Challenges to Fulfilling Kenya’s International Obligations

1. There is need to monitor Kenya’s implementation of recommendations that accrued from UPR on Kenya. In this regard, Article 59 constitutional Commissions working together with OAG should steer expeditious and full implementation of the urgent pending actions within the Universal Periodic Review Plan for Kenya (2015-2019). Such pending urgent actions include: full implementation of the Endorois and Ogiek decisions; enact laws that give effect to 2/3 gender rule; establish forensic laboratories in all counties so as to facilitate speedy and effective determination of gender-based violence cases; implement the TJRC report; and initiate efforts to abolish death penalty.

2. There is need to conduct sensitisation on Kenya’s International Obligations.

3. More CSOs ought to monitor Kenya’s fulfilment of its international obligations, which includes CSOs generating shadow reports on Kenya’s fulfilment of its international obligations.
4. The government should allocate adequate resources to ensure that Kenya fulfils its international obligations so as to address all the pending challenges and gaps, as well as fully implement the Universal Periodic Review Plan for Kenya.

5. There is need for Kenya to ratify the following human rights treaties so as to fortify the mechanism for enforcing Kenya’s international human rights obligations by providing citizens avenue for relief for human rights violations:

   a) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
   b) Optional Protocol to the International Covenant on Civil and Political Rights
   c) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of Death Penalty
   d) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
   e) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
   f) Optional Protocol to the Convention on the Rights of the Child on Communication Procedure
   g) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
   h) International Convention for the Protection of All Persons from Enforced Disappearance
CONCLUSION

President Uhuru Kenyatta fulfilled his obligations under Article 132(1)(c) (i) and 132(1)(c)(iii) of the Constitution and submitted reports to the Parliament on measures undertaken and progress made towards realisation of NVPG, and on Kenya’s fulfilment of its international obligations. Kenya has made progress in so far as adopting policies and enacting laws to give effect to NVPG and human rights treaties and conventions that it is a State Party to. The government has also built capacity of MDAs to equip them to discharge their functions in a manner that coheres to the NVPG. However, it is evident that training alone is not enough to infuse NVPG in public service. There is ostensible need for all State officers and public officers to demonstrate good will by adhering to NVPG and it is imperative that this is demonstrated by Presidency as a starting point. It is also imperative that the government involves all value drivers that include CSOs and private sector in advancing and upholding NVPG. By the same token it is critical that adopted policies and laws are robustly implemented so as to secure tangible and fully-fledged realisation of NVPG and fulfilment of Kenya’s international obligations.