

KENYA

Governance
Report **2011**

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Abbreviations and Acronyms

AfriCOG	Africa Center for Open Governance
AG	Attorney General
AMISOM	African Union Mission in Somalia
AML	Anti-Money Laundering
ALRMP	Arid Lands Resource Management Project
CDF	Constituency Development Fund
CFT	Combating the Financing of Terrorism
CIC	Commission for Implementation of the Constitution
CID	Criminal Investigation Department
CIDA	Canadian International Development Agency
CIOC	Constitutional Implementation Oversight Committee
CIPEV	Commission of Inquiry into the Post-Election Violence
CJ	Chief Justice
CMA	Capital Markets Authority
CMC	Cooper Motor Corporation
DFID	Department for International Development
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
FATF	Financial Action Taskforce
GJLOS	Governance Justice Law and Order Sector
GoK	Government of Kenya
HELB	Higher Education Loans Board
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent Electoral Commission
IPOA	Independent Policing Oversight Authority
IPI	International Peace Institute
JSC	Judicial Service Commission
CAA	Kenya Airports Authority
KACC	Kenya Anti-Corruption Commission
KDF	Kenya Defence Forces
KENGEN	Kenya Electricity Generating Company
KESSP	Kenya Education Sector Support Program
KMJA	Kenya Magistrates and Judges Association
KNDR	Kenya National Dialogue and Reconciliation
KPC	Kenya Pipeline Company
KPLC	Kenya Power and Lighting Company
KRA	Kenya Revenue Authority
LSK	Law Society of Kenya
NARA	National Accord and Reconciliation Act
NLM	Nairobi Law Monthly
NSIS	National Security Intelligence Service
OLN	Operation Linda Nchi
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority
PRIC	Police Reform implementation Committee
UNICEF	United Nations Children's Fund

Foreword

The Annual Governance Report, 2011 is intended as the first report in a new series by the Africa Centre for Open Governance. Every year, AfriCOG plans to review the events of the past year as they relate to critical issues and developments in governance reform and efforts against corruption, analyse their implications and make recommendations for the future.

It is hoped that the reports will over time develop into a key resource on matters of governance and anti-corruption for our partners in civil society, the public sector, the international community and the general public. This report was finalised in early 2012 and covers the period from January to December 2011.

AfriCOG would like to thank its Board of Directors, Stella Chege, John Githongo, Maina Kiai and Funmi Olonisakin for their support to our work. In addition AfriCOG thanks Maina Mutuaruhiu and Wachira Maina for their contribution and present and former members of its team for their dedication.

Gladwell Otieno

Executive Director

1. Introduction

The year 2011 saw significant developments in the long struggle for reform and against corruption. Great strides were taken towards reforming the judiciary, electoral environment, security sector and areas relating to leadership and integrity and access to information. These changes are expected to have far reaching consequences in terms of governance in Kenya in the coming years. In addition, the developments at the International Criminal Court (ICC) regarding the prosecution of those alleged to be the most responsible for post-election violence by the Special Prosecutor have the potential to deal a fatal blow to impunity.

This report documents events in 2011 that were significant in terms of governance, leadership, integrity and accountability. It is divided into four parts. The first examines key reforms arising from the implementation of the new constitution in 2011. The second section examines some of the external processes that had an impact on the culture of impunity. The third highlights some of the key setbacks in the fight against corruption and the final section concludes with some recommendations.

2. Key Reforms Arising from the Implementation of the New Constitution in 2011

The Kenyan Constitution of 2010 contains provisions that raise the bar considerably with specific reference to integrity and transparency. Chapter Six of the constitution provides guiding principles on leadership and requires persons that hold public office be selected on the basis of personal integrity, competence and suitability, or through election in free and fair elections. It also requires public officers to be objective and impartial in decision making and ensure that their decisions are not influenced by nepotism, favouritism, corruption or other improper motives. Leaders are also required to offer selfless service based solely on the public interest, to demonstrate honesty in the execution of public duties, to submit the declaration of any personal interest that may conflict with public duties and to be accountable to the public for decisions and actions.

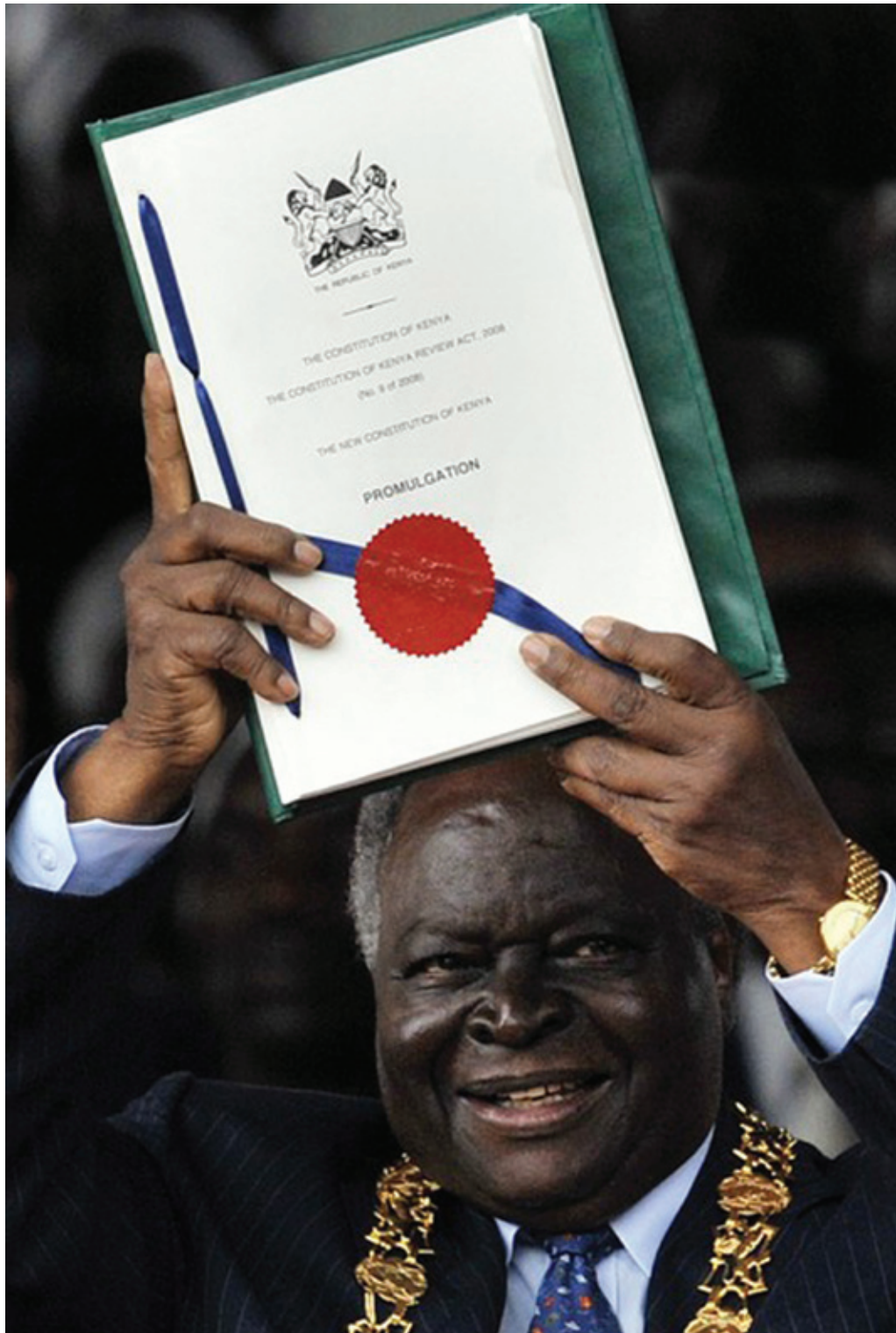
Chapter thirteen sets out the values and principles of public service to include high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making, accountability for administrative acts; transparency and provision to the public of timely, accurate information.

The constitution further compels the government to be more transparent by providing citizens with greater access to information. It provides that “every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas.”¹ In addition, it provides every citizen with the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom.² It compels the State to publish and publicize any important information affecting the nation. These rights present potentially vital weaponry for the fight against corruption. Corruption thrives on secrecy as the persons responsible for perpetuating it are able to hide their corrupt actions and are therefore not held accountable for them. The right to access information will ensure that the public is aware of the actions and decisions of their leadership. This knowledge forms the basis upon which the public can hold their leaders accountable for their actions thereby strengthening the fight against corruption.

To give effect to these and other provisions, the constitution compels Parliament to enact legislation within set timelines. Several of the laws which the constitution required to be enacted in the course of 2011 gave effect to Chapter 13 which relates to reforms in the Judiciary, vetting of those seeking public office and the establishment of the Ethics and Anti-Corruption Commission (EACC). The year saw a record number of bills enacted into law including the Independent Offices (Appointment) Act, 2011; the Supreme Court Act, 2011; the Judicial Service Act, 2011; the Vetting of Judges and Magistrates Act, 2011 and the Ethics and Anti-Corruption Commission Act 2011.

1 Article 33 (1) (a)

2 Article 35 (1)



President Mwai Kibaki holding up the constitution

http://4.bp.blogspot.com/_TbdFt5C7WiQ/THuEVdiBczI/AAAAAAAAABB4/Qeq78VyzVpo/s1600/Kibaki+holds+up+constitution+close+up.jpg, August 2010

2.1. Reforms in the Judiciary

Kenya's Judiciary has long been perceived as opaque, corrupt and lacking in integrity and independence. Its history is littered with attempted reforms that came unstuck. Between 1960 and 1998, eight different committees and/or commissions were established to examine the state of the Judiciary and to make proposals for reform.³ Most of the recommendations in the reports made by these committees/commissions never saw the light of day. Years of corruption, ineptitude and manipulation by the Executive and prominent personalities had led to a crisis of confidence in the Judiciary's ability to dispense justice.

In his speech to mark 120 days in office, the newly appointed Chief Justice (CJ), Dr. Willy Mutunga, emphasized the need for reform stating that, "The ends of justice cannot be met when the Judiciary not only suffers an integrity deficit but is also perceived as the playground of the corrupt and the refuge of the inept. Corruption corrodes our humanity, undermines our institutions and sabotages our economy."⁴

3 UNDP Kenya, "Judicial Integrity and the Vetting Process in Kenya." *Amani Papers*, Volume I No. 6, September 2010

4 Dr. Willy Mutunga, *Progress Report on the Transformation of the Judiciary - The First Hundred and Twenty Days*, http://www.africog.org/reports/CJ_SPEECH.pdf (October 2011)



"...We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.... We found a Judiciary that was designed to fail. The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralized. Accountability mechanisms were weak and reporting requirements absent".

Speech by Dr. Willy Mutunga, Chief Justice of the Republic of Kenya on the occasion to mark his 120th day in office.

Chief Justice Willy Mutunga

<http://www.nation.co.ke/News/We-will-deliver-fair-judgments--says-CJ-/-/1056/1261958/-/g1bdfsz/-/index.html>, October 2011

Specific reform initiatives

Noteworthy reforms have taken place at the Judiciary since the appointment of the new CJ. One significant initiative relates to the structure of the court. Whereas the structure of the court previously concentrated power on the CJ, and to some extent on the Registrar of the High Court, the new structure of the court is more decentralized, with the Supreme Court and the Court of Appeal having their own Presidents and the High Courts having a Principal Judge at their respective helms. An Ombudsperson was also appointed to receive and respond to complaints by staff and the public. In just three months, the office received over 700 complaints of various categories.⁵

The Judicial Service Commission (JSC) released a Code of Ethics and Conduct for judicial officers, and established a standing committee to handle enforcement and disciplinary issues. This action was particularly important due to the corruption and abuse of office that had taken hold in the Judiciary.

Further, the Judiciary has sought to leverage technology so as to facilitate its primary mandate: the administration of justice. By the end of October 2011, the Judiciary had completed digitizing 60 million pages of cases for the High Court across Kenya while the Court of Appeal had digitized 10,000 records covering the years 1999 to 2010.⁶ A process of creating an electronic-based system for monitoring and tracking overdue judgments and rulings with a view to taking remedial action was also initiated in order to reduce the incentive for corruption through queuing. In addition, the judiciary embarked on a major computerization programme to ensure that proceedings are recorded electronically. One of the aims of the computerization programme is to establish the Supreme Court as a paperless Court.⁷

5 Dr. Willy Mutunga, *Progress Report on the Transformation of the Judiciary - The First Hundred and Twenty Days*, <http://www.kenyalaw.org/kenyaLawBlog/?p=227> (October 2011)

6 Ibid

7 Ibid

2.2. Vetting

The new order brought in the vetting of public officials as a prerequisite for persons aspiring to hold public office. Candidates for high public offices now have to produce clearance certificates from the heads of the Criminal Investigations Department (CID), the EACC, the Higher Education Loans Board (HELB), the Kenya Revenue Authority (KRA), the Director of Public Prosecutions (DPP), and the Chief Executive Officers of their professional organizations.

The constitution provides specifically that judges and magistrates should be subjected to a vetting procedure to establish their suitability to continue serving in the Judiciary.⁸ Consequently, Parliament enacted the Vetting of Judges and Magistrates Act to provide the legal framework under which the vetting process would be conducted.

The Act establishes an independent board, the Vetting of Judges and Magistrates Board,⁹ to “inquire into and determine the suitability of serving judges and magistrates to continue serving in the Judiciary”.¹⁰ Among the issues that the board must consider are:

- pending or concluded criminal cases before a court of law against the concerned judge or magistrate;
- recommendations for prosecution by the Attorney-General or Kenya Anti-Corruption Commission (KACC)¹¹ (sic);
- the track record of the concerned judge or magistrate including prior judicial pronouncements, competence and diligence.

Pending complaints that are to be considered are those from any person or body including, but not limited to, the Law Society of Kenya (LSK), EACC, Disciplinary Committee, Advocates Complaints Commission, Attorney General, Public Complaints Standing Committee and Kenya National Commission on Human Rights, National Security Intelligence Service (NSIS), the Police and the Judicial Service Commission (JSC).

The vetting commenced in earnest during the year and received live media coverage and intense public interest. The highlight of the vetting process was the appointment of Dr. Willy Mutunga, a renowned reformist and human rights defender,¹² as the Chief Justice of the Republic of Kenya.

Naturally, the vetting exercise faced opposition from some quarters. The Kenya Magistrates and Judges Association (KMJA) for example viewed the vetting of judicial officers as “punitive, degrading and discriminatory” and intended to condemn all of them as “corrupt and buyable”.¹³

8 Article 23 (1) of the Sixth Schedule

9 Section 6 (1)

10 Section 2

11 While the Act states Kenya Anti Corruption Commission, KACC has since been replaced by the Ethics and Anti-Corruption Commission

12 AfriCOG wrote to the Judicial Service Commission commending the process of nominations of both Dr. Willy Mutunga to the position of Chief Justice of Kenya and that of Nancy Baraza to the position of Deputy Chief Justice

13 “Judiciary not happy with vetting plan,” *Daily Nation*, 14 October 2011



Why Vet?

The principal purpose of vetting is to examine the past conduct of public employees or candidates for public employment in order to determine their suitability for working in public institutions. In the process of assessing individual integrity to determine one's suitability for public employment, a person's compliance with relevant standards of human rights, professional conduct and financial propriety are put to the test. In the process, persons with dubious integrity are excluded and the legitimacy of public institutions is strengthened.

Research also suggests that vetting is an important element of institutional reform because even basic vetting efforts lead to changes in the makeup of the personnel of a public institution. In addition, vetting can make an important contribution towards re-establishing civic trust and re-legitimizing previously abusive public institutions, disabling structures within which individuals carried out serious abuses, and removing obstacles to transitional reform.

The High Court buildings

http://upload.wikimedia.org/wikipedia/commons/4/43/Kenya_High_Court.JPG

2.2.1. Vetting of Other Officials in the Justice Sector

The nomination of Keriako Tobiko as Director of Public Prosecutions (DPP), unlike that of the CJ, attracted criticism from independent observers and several civil society organizations that cited a lack of transparency in the process that led to his nomination and appointment. In particular, critics of his nomination and appointment as DPP argued strongly that Mr. Tobiko's alleged lack of professional integrity and dismal record of lack of meaningful action against corruption were raised on several occasions during the vetting process but inadequately interrogated or altogether dismissed.

The following were the main concerns highlighted with respect to the appointment of Tobiko as DPP:

- a. The panel gazetted by the President to shortlist names for the position of DPP failed to permit public participation - one of the national values under Article 10 of the constitution.
- b. The panel failed to pay due regard to at least one complaint received from the public in connection with Tobiko's suitability for possible nomination.
- c. The selection panel conducted its proceedings in an opaque manner and one open to question.
- d. The panel failed to examine Tobiko's record in respect of prosecutions which, it was alleged to the Constitutional Implementation Oversight Committee (CIOC), was extremely poor.
- e. The CIOC failed to investigate allegations about Tobiko which spoke directly to his leadership and integrity.¹⁴
- f. The CIOC had a split vote with respect to its review of the nomination of the DPP, and it was seen as quite inappropriate for such a result to be reported to the House as a recommendation to approve the nomination, especially bearing in mind that, in normal parliamentary practice, if there is a split vote on any motion, the motion is lost.¹⁵

14 Former DPP, Mr. Philip Murgor, pointed out during Tobiko's vetting that the existence of conflicts of interest, which had been admitted by Mr. Tobiko himself, would render effective exercise of his duties difficult and therefore jeopardise the prosecution of major cases which the public want solved, such as the Goldenberg scandal and the Anglo-Leasing affair

15 Kenyans for Peace with Truth and Justice, *Press statement on petition to Parliament on Keriako Tobiko's nomination*, www.khrc.or.ke/media-centre/press-releases/89-kptj-press-statement-on-petition-to-parliament-on-keriako-tobikos-nomination.html (June 2011)



The Acquittal of William Ruto

The acquittal of politician William Ruto of corruption charges early in 2011 was another entry in Tobiko's and the AG's poor prosecutorial record. Ruto and others faced charges of fraudulently obtaining KES 96 million from (Kenya Pipeline Corporation) KPC by claiming that they were in a position to sell 1.745 hectares of land belonging to the Ministry of Natural Resources situated in Ngong' forest. The case was, however, dismissed in April 2011 for lack of evidence. In acquitting the accused persons, the magistrate said the prosecution failed to call its star witness, KPC's Finance Officer Hellen Njue, who allegedly released the money to the accused persons.

William Ruto

<http://kenyadiasporaalliance.org/two-kenyan-ministers-named-in-%E2%80%98ruto%E2%80%99s-network%E2%80%99/>, September 2011



Amos Wako: Poisoned Legacy

Another significant development in the justice sector occurred when the curtain finally came down on the tenure of the country's long serving Attorney General. To mark the change of guard at the office of the Attorney General, AfriCOG made a critical assessment of the tenure of Amos Sitswila Wako who was the Attorney General of Kenya from May 1991 to August 2011. In a publication titled 'Poisoned Legacy' AfriCOG narrates how, under Amos Wako's watch, the credibility of the office of the Attorney General was destroyed as a result of his complete failure to exercise authority in a way that imposed on the Kenyan political system the values for which the office was first established. The report analyses Wako's performance in main areas and concludes by warning that the struggle to achieve the full promise of Kenya's new Constitution could fall prey to Wako's poisoned legacy of protection of incompetence, impunity, corruption and massive human rights abuses.

See *Poisoned Legacy: Assessing Amos Wako's Performance*

<http://africog.org/sites/default/files/Poisoned%20Legacy.pdf>

Amos Wako

<http://africanpress.me/2009/11/07/wako-ready-to-call-it-a-day/>, by Stephen Mudiari, November 2009

2.3. Police Reforms

The great strides made in reforming the Judiciary may ultimately be useless without requisite reforms in other institutions in the justice sector that support and complement its work. Police reforms are viewed as especially critical in ensuring greater access to justice and enhancing transparency and accountability through thorough effective investigation and prosecution of economic crimes. These reforms, however, need to be extensive and might require an overhaul of the entire policing system currently in place.

The Kenya Police Force has traditionally been polled as the most corrupt of Kenya's public institutions and been indicted for the abuse of human rights and the disregard of due process.¹⁶ The new constitution aims to change this situation by setting standards for undertaking of national security exercises in the country. Specifically, it provides that national security must be pursued in utmost respect for the rule of law, democracy, human rights and fundamental freedoms.¹⁷ It also requires the National Police Service to prevent corruption and to promote and practice transparency and accountability.¹⁸

The need for police reforms had been highlighted prior to the enactment of the new constitution. The report of Governance, Justice, Law and Order Sector (GJLOS) Reform Programme commissioned by the Government of Kenya made several recommendations for the reform of the culture and attitude in the police force, recognizing that there are deep-rooted structural rigidities in the organization that shaped its culture.¹⁹

The reports of the Commission of Inquiry into the Post Election Violence in Kenya (CIPEV)²⁰ and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions²¹ also offered recommendations for the overhaul of the existing policing system. In 2009, the government set up the National Task Force on Police Reforms (also known as the Ransley Task Force) to follow through on the two sets of recommendations. Subsequently a Police Reform Implementation Committee (PRIC) was established to fast-track and coordinate the implementation of the 200 recommendations of the Ransley Task Force in line with the new constitution. The PRIC prepared five bills to this end, three of which were passed by Parliament during the last quarter of 2011. These are: the National Police Service Act, the National Police Service Commission Act and the Independent Policing Oversight Authority (IPOA) Act.

16 Transparency International, *Kenya Bribery Index Reports*, http://www.tikenya.org/index.php?option=com_content&view=article&id=72&Itemid=66

17 Article 238 (2) (b)

18 Article 244 (b)

19 Government of Kenya through the Governance Justice Law and Order Sector (GJLOS) Reform Programme, *Kenya Police Culture and Attitude Change Pilot Training Programme*, http://www.gjlos.go.ke/gjlos_Kenya_police_report.pdf (September 2007)

20 Commission of Inquiry into the Post-Election Violence in Kenya, "CIPEV Report," <http://www.dialoguekenya.org/Commission%20reports/October-15th-2008%20-%20Report%20of%20the%20Commission%20of%20Inquiry%20into%20Post-Election%20Violence%20%28CIPEV%29.pdf> (October 2008)

21 Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Mission to Kenya*. <http://www.protectionline.org/IMG/pdf/report.pdf> (May 2009)



The logo of the Kenya Police

<http://starfm.co.ke/wp-content/uploads/2012/10/kenya-police-logo.jpg>, October 2011

These laws provide an overall framework that could lead to the reform and transformation of the criminal justice system. The creation of the Independent Policing Oversight Authority, for example, will provide much needed accountability and monitoring functions over the Police Service through civilian oversight.²² The laws will also affect the management of the Police Service, through the introduction of a single police command structure headed by an independent Inspector-General of Police, who will be appointed under the advice of the Police Service Commission as well as the transformation of the police, from a 'force' into a 'service'.²³

In addition to the bills passed by Parliament, a vetting process for senior police officers commenced in June 2011 in line with the recommendations of the Ransley Report. A panel drawn from the Public Service Commission, Police Reform Implementation Committee, the Kenya Anti-Corruption Commission, National Security Intelligence Service, Administration Police, Kenya Police and the University of Nairobi began to interrogate the officers of the rank of superintendent and above. The process was, however, faulted for lacking transparency and clear criteria for determining suitability of the officers to continue serving in the police force or their fate if found to be unsuitable.²⁴ In July 2011 it was suspended altogether due to the lack of legislation to guide it²⁵ and the delay in setting up of the body tasked to undertake the vetting, the National Police Service Commission. Since then, there have been disagreements between the two Principals as to the persons who should be nominated to form part of the Commission as well as complaints from sections of the public on the same issue.²⁶

22 Sections 6 and 7, Independent Policing Oversight Authority Act, The functions and powers of the Authority allow it to investigate and act on complaints received from members of the public.

23 Irene Ndungu, "Police Reforms in Kenya Crucial to Restore Public Confidence", Institute for Security Studies, Pretoria, South Africa, October 2011.

24 International Centre for Transitional Justice, "One Year Since Promulgation: Assessing the Reform Process in the new Constitutional Dispensation", *The Kenya Transitional Justice Brief*, Vol. 1 No.2 (August 2011)

25 Cyrus Ombati, "Ongoing police vetting suspended indefinitely", <http://www.standardmedia.co.ke/InsidePage.php?id=2000038628&cid=4>, (July 2011)

26 Caroline Wafula, "Groups demands fresh vetting of police service team," *Daily Nation* 25 April 2012.

2.4. Integrity and Leadership: The Ethics and Anti-Corruption Commission

In August 2011, Parliament passed the Ethics and Anti-Corruption Commission Act. This Act establishes the Ethics and Anti-Corruption Commission (EACC) replacing the KACC as the anti-corruption body in Kenya. The new body is mandated to oversee the fight against corruption as well as execute Chapter Six of Kenya's new constitution which establishes ethical standards for persons seeking public office.

The Act, among other things, widens the scope of crimes that constitute corruption from the current four listed to twenty nine. The list of crimes includes influence peddling, bribery of foreign nationals, bid rigging and cheating of public revenue. The Act has, however, been faulted in some respects as having significantly weakened the institutional as well as legal framework for the fight against corruption. In a glaring omission it did not effectively provide for transition of the KACC to become the EACC.

When the Bill came up for debate, Parliament opted against granting the new body a prosecutorial mandate. In the view of some,²⁷ this was a missed opportunity to strengthen the fight against corruption; the ability of the new body to combat corruption effectively would ultimately be undermined.

The case for or against granting the powers to prosecute to EACC is controversial. The argument for granting prosecutorial powers was based on the view that the organization was hamstrung by its lack of 'teeth' and thus continued to place blame on the Attorney General and DPP for its poor performance. Consequently, a view came to gain currency that to be more effective and avoid the blame game, the organization should be given power to investigate as well as prosecute corruption cases. There is, however, an equally persuasive case for separation of powers and when Parliament debated the Bill, it rejected the proposal for powers to prosecute arguing that this would create a conflict with the office of the DPP. On the surface, Parliament's argument appears justified, but a closer look at the prevailing political climate is instructive. Prior to the Bill's passing, the then KACC Director PLO Lumumba, alleged, in a press briefing that the husband to an Assistant Minister had hatched a plot to bribe him and other anti-corruption officers in connection with a scandal that was under investigation. He claimed that the Assistant Minister and her husband were the subject of a sting operation to expose them, but that the plan was halted, after they allegedly received information about the intention to have them arrested once they presented themselves at the anti-corruption offices.²⁸ Parliament's decision to do away with the proposed prosecutorial powers for EACC, therefore, appears to have been driven more by a political vendetta against the KACC and its former director Lumumba, than by concern for the effectiveness of the organisation.

27 James T. Gathii, "Kenya's Long Anti-Corruption Agenda — 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission under the 2010 Constitution," *The Law and Development Review*: Vol. 4: No. 3 (November 2010)

28 Mosoku Geoffrey, "Mbarire tried to bribe me, Lumumba", <http://www.the-star.co.ke/national/national/37210-mbarire-tried-to-bribe-me-plo> (August 2011)

Parliament also declined to allow the EACC powers to conduct lifestyle audits. Lifestyle audits involve the interrogation of how closely the expenditure and official incomes of public officers match and is an instrument that many countries around the world, including the US, have used in the fight against corruption.

Further, no proper provisions were made with respect to the transition of KACC to the EACC that would have guaranteed the protection of on-going investigations. This not only resulted in virtually halting the Commission's momentum in on-going investigations of corruption but also created a destabilising uncertainty among its staff, a situation which persisted for months on end. There have been efforts to reconstitute the Commission and have it start work as soon as possible.²⁹ According to the Commission, the failure to grant it the power to prosecute, to perform lifestyle audits and to use new investigative techniques was a blow to the Commission's desire to escalate the fight against corruption. The recommendations to grant the Commission these powers had been discussed and deemed appropriate for incorporation into the proposed legislation by various stakeholders including the Ministry of Justice National Cohesion and Constitutional Affairs, the State Law Office and the Kenya Law Reform Commission.³⁰

2.5. Electoral Reforms

If Kenya is to avoid a recurrence of the turmoil that followed the 2007 general elections, reforms to ensure that elections are free, fair and credible in 2013 are imperative. The new constitution recognises the role played by the failure of various institutions to faithfully carry out their mandates with respect to the 2007 general elections and the need for fundamental change in the way elections are conducted. Accordingly, it provides for the establishment of a new, independent electoral commission. Furthermore, it requires that new legislation on electoral units, nomination of candidates, registration of voters, efficient supervision of elections and regulation of political parties be passed.

In fulfillment of these requirements, Parliament passed the Independent Electoral and Boundaries Commission Act in June 2011. With the coming into effect of this law, the Interim Independent Electoral Commission (IIEC), a provisional body which had been created after the disbandment of the now infamous Electoral Commission of Kenya (ECK), transitioned to the Independent Electoral and Boundaries Commission (IEBC).

The IEBC comprises of eight Commissioners and a Chairman, who were appointed on 8th November, 2011 and sworn in on 14th November, 2011. It is mandated to ensure free and fair elections, conduct delimitation of electoral units, spearhead legislation on elections, register voters, conduct voter education and resolve electoral disputes among other issues concerning electoral systems and processes. The law contains stringent provisions on the conduct of the members of the Commission and clearly separates their personal and institutional roles.

29 Alex Ndegwa, *Treasury to give IEBC Sh 18 billion for elections*, <http://www.standardmedia.co.ke/standarddigitalworld/?articleID=2000057566&pageNo=2> (May 2012)

30 Ethics and Anti-Corruption Commission, Annual Report 2010/2011

The Registrar of Political Parties, an office established under the Political Parties Act of 2007 to register political parties, maintain records of political parties and arbitrate disputes between political parties, called upon parties to apply for registration, without which they would not take part in elections.

The Political Parties Act was also enacted in 2011. The law contains important provisions to streamline political party operations as provided for under Article 91 of the constitution. It provides for the registration, regulation, and funding of political parties and other connected purposes.

While these laws went some way towards improving public confidence in the electoral process, it was not lost on keen observers that many amendments had been made to the original bills and that short-term interests may have informed their enactment. The Political Parties Bill, for example, was amended to exclude strict control over matters such as party-hopping and formation of alliances.³¹ Other analysts also raised concerns with provisions of the IEBC Act.

In particular, it was argued that the standards set for the qualifications of the chairperson were not sufficiently high and that Parliament compromised the independence of the Commission by overly directing it in connection to delimitation of boundaries of constituencies.³²

2.6. Legislative Challenges

The Constitution of Kenya 2010 compels Parliament to enact a number of laws within the timelines set out in Schedule 5.³³ Parliament does, however, have the power to extend the timeframes stipulated in Schedule 5 by passing a vote supported by at least two thirds of the National Assembly for a period not exceeding one year where the matter is certified to be exceptional by the Speaker of the National Assembly.³⁴

In order to ensure that all laws are passed in time, the constitution makes the following provisions: The constitution charges three institutions with timely preparation of laws: the Office of the Attorney General, the Commission for the Implementation of the Constitution (CIC) and the Kenya Law Reform Commission.³⁵ These institutions are required to work together at various stages of the preparation of the legislation for submission to Parliament.³⁶ It should be noted, however, that the constitution does not impose any sanctions on these institutions should they fail to carry out this mandate.

If Parliament fails to enact any particular legislation within the period specified in the Fifth Schedule, the constitution provides that one may petition the High Court for an order directing Parliament and the AG to ensure that the laws are passed within the time frame stipulated.

31 The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, "Progress in Implementation of the Constitution and other reforms. Review Report", October 2011

32 International Centre for Transitional Justice, "One Year since Promulgation" (August 2011)

33 Article 261

34 Article 261 (2) (3) "Exceptional circumstance" is not defined and this provision is entirely dependent on the Speaker not abusing his discretion

35 Article 261 (4); , Article 5 (6) (b), Sixth Schedule

36 Ibid

If Parliament still fails to enact a law within the stipulated timeframe, the Chief Justice “shall advise the President to dissolve Parliament and the President shall dissolve Parliament.”³⁷

The new Parliament formed thereafter is then required to pass the outstanding legislation within the timeframes laid out in Schedule 5. The time, however, begins to run from the date that the new Parliament commences its term.³⁸

Despite these provisions, there have been a number of concerns raised regarding the quantity and quality of laws that have been passed since the promulgation of the constitution and of those that are yet to be passed. These concerns arise from the number of laws to be passed, the time within which they are required to be enacted and the performance of the key legislative elements in carrying out their legislative role.

Law Making Process

1. A layman’s or Raw draft Bill emanates from the line Ministry, Government Department or any Institutions mandated with the generation of Bills. The draft is then released to KLRC and AG’s office for preparation of the Bill.
2. The draft Bill from the KLRC and the AGs office is released to CIC. CIC uploads the draft on its website and releases it to the widest possible range of stakeholders to allow the public to review and give feedback on how best to improve the draft Bill.
3. CIC convenes a series of stakeholder consultations to seek consensus and/or fill any gaps of a constitutional nature which will not have been addressed during the Line Ministry public consultations.
4. CIC then convenes the AG, KLRC, Line Ministry and any Institution involved in the generation of the Bill to a roundtable over the draft Bill to finalize the Bill by making various amendments which will have been informed by the internal and external consultations. The CIC oversees this final development of the proposed Bill to ensure it is in line with the letter and spirit of the Constitution.
5. The AG prepares the Bill and the Bill is then released to Cabinet for approval.
6. Cabinet receives the proposed Bill, if need be, changes to the Bill are made and finalized before it is approved.
7. The AG then publishes the Bill as approved by Cabinet and the Bill is then tabled in Parliament for debate.
8. Parliament passes the Bill and it is taken back to the AG for preparation of the vellum copy before being handed over to the President for assent.
9. The President assents to the Bill by signing it. Thereafter, the Attorney-General, without delay, ought to publish the new law.

Source: <http://cickenya.org/law-making-process>

37 Article 261 (7)

38 Article 261 (8)

In December 2011, the AG and the CIC clashed over delays in the legislative process. Specifically, the CIC accused the Executive of sidestepping the Commission in the preparation of bills in violation of the constitution. The CIC further accused the AG of failing to advise the Government appropriately. In response, the AG was categorical that his office was independent and could not be supervised by the CIC which was, according to him, overstepping its mandate.³⁹

The public clash between these two elements of the legislative process over their roles exposed a tendency that emerged in 2011 and that seems to be hampering faithful implementation of the constitution: disregard of the provisions of the constitution. In this instance, whereas the AG's office is primarily responsible for preparation of bills for debate in Parliament, this function cannot be disposed of without consulting the constitutionally created and mandated Commission, the CIC. Purporting to by-pass the CIC in the performance of this particular function of the AG's office would, therefore, be unconstitutional.

Concern has been raised over the congested parliamentary calendar and delays in preparation of draft legislation which have both resulted in bills being passed in a rushed manner. Between January and December 7th 2011, Parliament debated 97 bills and passed 50⁴⁰ of them largely in an effort to beat constitutional deadlines. In the previous year Parliament had dealt with only 31 bills.⁴¹ This compromised the quality of passed legislation and made it difficult to coordinate and seek input from the institutions involved in drafting. The Kenya National Dialogue and Reconciliation panel for example reported that the CIC complained about the Executive by-passing it in drafting and publishing some of the bills.⁴² Public participation in the development of some of the bills was also compromised.⁴³

2.7 Open Government

Open government holds that citizens have the right to access the documents and proceedings of the government to allow for effective public oversight.⁴⁴ It is viewed as the most cost effective method of promoting good governance. Corruption, poor service delivery and undemocratic governance thrive where systems keep information hidden from the public, and where near-unfettered power to control this information is placed in the hands of a few public officials. In the past, many government contracts and affairs were kept secret, a situation which made it difficult for perpetrators of economic crimes to be identified and held accountable.

39 Felix Olick, *AG fights back, terms CIC claims 'irresponsible'*, <http://www.standardmedia.co.ke/InsidePage.php?id=2000048831&cid=4&story=AG%20fights%20back,%20terms%20CIC%20claims%20%E2%80%98irresponsible%E2%80%99> (December 2011)

40 Kenya National Assembly, 10th Parliament, 4th session, (*Bill Tracker* as at 7th December 2011), http://www.parliament.go.ke/index.php?option=com_content&view=article&id=113:bill-tracker&catid=46:house-business, (December 2011)

41 Kenya National Assembly, 10th Parliament, *Bill Tracker* (various)

42 KNDR Monitoring Project, "*Review Report*", October 2011

43 Commission for the Implementation of the Constitution, *Status of Implementation of the Constitution, One year after the establishment of the CIC*, www.cickenya.org/status_december_22, (December 2011)

44 Daniel Lathrop & Ruma, Laurel, eds, *Open Government: Transparency, Collaboration and Participation in Practice* (O'Reilly Media, 2010)

The new constitution recognized the citizens' right to know and the state's duty to provide information to those who seek it.⁴⁵ Citizens need to be empowered to hold their leaders and public service institutions to account. Access to government information enhances public participation, while enabling more robust scrutiny and discussion of government actions. The right to information is therefore regarded as a fundamental human right and is guaranteed under a raft of regional and international instruments including Article 19 of the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *African Charter on Human and Peoples' Rights*.

Kenya took a key step toward the institution of open governance when, in July 2011, it launched the Open Data portal, making a variety of voluminous data held by Government accessible to the public online for free.⁴⁶ In taking this step, the Government "opened itself to greater scrutiny from citizens and oversight institutions by providing them better access to the information in its hands, including on expenditure and procurement."⁴⁷ As of November 2011, close to 390 datasets had been uploaded to the site. There had been over 17,000 page views and over 2,500 dataset downloaded and embedded to various websites and portals. Over a hundred requests for new data sets were received from the public following the launch of the portal.⁴⁸

In September 2011, Kenya also sent a letter of intent to join the **Open Government Partnership**, launched by co-chairs US President Barack Obama and Brazil's Dilma Rousseff at the UN General Assembly in September 2011. The Open Government Partnership or OGP, is a new multilateral initiative that aims "to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance."⁴⁹

It should be noted, however, that despite these efforts, a lot remains outstanding in relation to open government. Open Data is necessary but not sufficient to fulfil the state's obligations towards its citizens. The Freedom of Information Bill which gives effect to Article 35 of the constitution is yet to be passed. Without this law, access to information will continue to be frustrated by the arguments that have traditionally been employed to deny it. Most significantly, the Bill contains provisions that will amend the Official Secrets Act which, until the Bill is passed, provides a statutory haven for all public officers that seek to keep information inaccessible to the public.

AfriCOG is one of the 15 founding members of the Steering Committee which oversees the OGP. The Committee is co-chaired by the United States and Brazil, and membership from other founding governments and civil society organizations, including Twaweza-an East Africa wide citizen agency and public accountability initiative.

45 Article 35 of the new constitution guarantees every citizen, the right to information not just from the state but even other parties. It states: Every citizen has the right of access to (a) Information held by the State; and (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom

46 <https://opendata.go.ke/>

47 CIPESA ICT Policy Briefing Series, "Open Government: Which Way Africa? Collaboration on International ICT Policy for East and Southern Africa" September 2011

48 Ministry of Information and Communication/Kenya ICT Board/ Open Data Portal, <http://opendata.go.ke/>

49 www.opengovpartnership.org

Beyond the letter of intent sent by the Government committing to join the OGP, the Government of Kenya is required to prepare a country action plan that will detail what challenges it seeks to address by leveraging technology to open government up to the public; what actions it has taken to date to address these challenges and what it intends to do in future to address the challenges identified. As the preparation and submission of this action plan are government led processes, political will to commit to truly open up government is required. Unfortunately, this political will is currently insufficient and successful completion and submission of the action plan is dependent on continued effective lobbying by champions of open government in the public, private and non-state sectors.

3. The Long Arm of the Law

Kenya has a deep-rooted culture of impunity with its political class having long evaded justice for numerous violations of human rights and major economic crimes. In 2011, however, a number of local and international interventions were encouraging in terms of addressing this situation.

3.1. The ICC Cases

Failure to conduct criminal investigations and prosecute key perpetrators of the 2008 post election violence, the subsequent ICC intervention in the country and attempts to block it⁵⁰ speak volumes on how deeply rooted the culture of impunity is in Kenya, and are an indictment of the country's political and judicial systems.

The Commission of Inquiry into the Post-Election Violence (CIPEV) was established in 2008 to investigate the 2008 post-election violence, in keeping with the National Accord mediated by Kofi Annan and signed by the two Principals. This Commission, popularly known as the Waki Commission after its chair, Justice Philip Waki, produced a report listing the names of those it considered to be most responsible for the violence, recommending that a special tribunal to prosecute these persons be established.⁵¹ The idea of a local tribunal was, however, rejected by Parliament and the report was then passed to the ICC in accordance with the Accord. On 31 March 2010 the ICC granted a request by the Office of the Prosecutor to open an investigation into alleged crimes against humanity in Kenya. In a majority decision, the ICC held that there was reasonable basis to believe that crimes against humanity had been committed on the territory of Kenya and that jurisdictional requirements for its involvement had been satisfied. The threshold for opening an investigation had therefore been met.

The investigation was carried out by Prosecutor Louis Moreno Ocampo and in December 2010, Ocampo requested the Pre-Trial Chamber of the ICC to issue summonses to appear to six prominent Kenyans on the basis that "there existed reasonable grounds to believe that they were criminally responsible for crimes against humanity, pursuant to Article 7 of the Rome Statute."⁵² Summonses to appear before the International Criminal Court were issued in March, 2011 to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali.

The six made their initial appearances before the Court in April. Though these appearances attracted much attention, it is the confirmation of charges hearings held in September and October 2011 that had Kenyans riveted to various media channels transmitting the proceedings live. For the first time, Kenyans watched as influential and powerful people were put to task on charges of crimes against humanity of murder, forcible transfer, persecution, rape, and other inhumane acts.

50 Government and Parliament appealed to both the United Nations Security Council and the ICC itself regarding the admissibility of the Kenyan case

51 The names were not made public but handed over to Kofi Annan in an envelope which was later passed on to the Office of the Prosecutor thus triggering action by the ICC

52 The Hague Justice Portal, *Situation in Kenya*, <http://www.haguejusticeportal.net/index.php?id=11604> (June 2011)

Whereas the ICC intervention may indeed be a “watershed moment in the fight to end political impunity in the country”⁵³, it does not cure the political and judicial deficiencies of the country in dealing effectively with impunity. Reforms of various sectors remain outstanding. In addition, accountability for the 2008 post election violence is not limited to the suspects alleged to have engineered the violence. The investigation and prosecution of others who have not been summoned and those that actually carried out the violence on the ground remains outstanding. This failure to effectively pursue accountability for violence does not bode well for the next general elections.

AfriCOG, through Kenyans for Peace with Truth and Justice (KPTJ), engaged in various activities during the year in support of the ICC process.

When it emerged that some Kenyan government officials were engaging in a diplomatic campaign to enlist the support of other governments for a United Nations (UN) Security Council deferral of the Kenyan cases under Article 16 of the Rome Statute, AfriCOG partnered with other civil society organizations in urging the Kenyan Government and Parliament to reaffirm their support for the ICC and put a stop to any attempts to undermine the Rome Statute system and the ICC’s Kenya investigation, including through withdrawal or seeking deferral.

On the 4th of March the Permanent Mission of the Republic of Kenya presented to the United Nations President of the Security Council a letter requesting an Article 16 (of the Rome statute) deferral on the International Criminal Court (ICC) Kenyan case. In response, KPTJ wrote to the President of the Council strongly objecting to the arguments raised in letter, noting that they were erroneous and in manifestly bad faith. KPTJ respectfully requested the United Nations Security Council to reject the application by the Government to defer the ICC Cases and support the establishment of a credible local accountability process for the crimes, not as an alternative to the ICC process but rather as imperative to bridging the impunity gap between the lower, mid level perpetrators and those who bear the greatest responsibility for post-election violence.

Through its bulletin, ‘The ICC and Kenya-Understanding the Confirmation of Charges Hearings’ KPTJ sought to address common misconceptions about the confirmation of charges hearings and answer frequently asked questions raised by participants during country wide outreach sessions on the ICC. AfriCOG/KPTJ also engaged the Kenya National Dialogue and Reconciliation panel by making submissions which highlighted, among other things, the importance of the pursuit of accountability for the post-election violence, the suspects exploitation the ICC proceedings to make political capital, an increasing level of malevolence along ethnic lines on the internet (blogs, forums and social media sites) from the supporters of the ICC suspects, the need for a local justice mechanism, and concerns around witness protection.

53 “How The Hague has transformed Kenya,” *The Standard*, 7 October 2011



Beside the ICC intervention, there were two other external developments in 2011 which bode well for the future of accountability in Kenya.

3.2. Foreign Arrest Warrants for Corrupt Kenyan Officials

On April 15, 2011 a warrant of arrest signed by the Bailiff and Chief Justice of the Island of Jersey, was issued for Samuel Gichuru, former head of Kenya's Power Company, and former Energy Minister and current chairman of the Parliamentary Committee on Finance Chris Okemo. The two were accused of money laundering, fraud and corruption. They are alleged to have received kickbacks from companies to influence the award of long-term contracts to set up independent power plants that supplied electricity to the Kenya Power and Lighting Company (KPLC). They are suspected to have received millions of shillings in kickbacks from British, Norwegian and German engineering firms as well as a US communications giant, and of hiding the proceeds in the Island of Jersey.⁵⁴

Jersey authorities believe Mr. Gichuru used a chain of intermediaries to receive payments from companies that did business with Kenya Power. This was achieved by causing foreign contractors to make corrupt payments into bank accounts belonging to Winward Trading in Jersey Island. The authorities believe Mr. Gichuru was the beneficial owner of Winward, which he controlled through agents. The charge sheets also allege that the payments to Winward were calculated as a percentage of the payment made by KPLC to the contractors and that the costs were passed on to KPLC in the form of inflated invoices.

Mr. Gichuru is said to have used a Gibraltar company called Arus Management Services to layer payments from Winward to Mr. Okemo who was then Energy Minister, despite the fact that both Okemo and Winward banked at the same institution in Jersey. The trail suggests that the aim was to detach the payments to Mr. Okemo from the contractors that had paid Winward. Arus Management Services took a fee of about two per cent of the transfers for the service.

The public funds reportedly misappropriated by the two as bribes between February 1998 and June 2002 were reportedly in excess of KES 900 million.⁵⁵ Despite the AG instituting an extradition trial for the two in May 2011, the case had not been concluded by the end of the year. It remains to be seen how the political and judicial establishments of the country will perform in 2012 over the issue.

3.3. Extradition of Architect of the Triton Oil Scandal

Impunity suffered another blow in May 2011 when the proprietor of Triton Petroleum Ltd Mr. Yagnesh Mohanlal Devani was arrested and remanded in custody in London to face court hearings to determine whether he should be extradited to face fraud charges in Kenya.

Devani was Triton's executive chairman and Managing Director and is the suspected architect of Kenya's KES 6 billion oil scandal. The scandal dates back to 2008 when an internal audit of oil stocks by Kenya Pipeline Company (KPC) revealed that stocks amounting to 126.4 million litres were irregularly and illegally released to Triton Petroleum Limited between November 2007 and November 2008.⁵⁶ Triton was not entitled to the stocks, nor did financiers authorize the release as required under contractual arrangements.

⁵⁴ The information in these and the following sections was compiled from various newspaper articles in *The Daily Nation*, *The Standard* and *The Star* on varying dates between May and August 2011

⁵⁵ *Business Daily*, 11 July 2011

⁵⁶ AfriCOG, "An Analysis of the Triton Oil Scandal", July 2009

Devani and several other suspected co-conspirators were charged with various counts of stealing but by the time the scandal broke, he had fled the country. The Government then sought the help of Interpol to track him down.

His arrest and expected extradition was a significant development in view of the fact that, in a way, he epitomizes the culture of prominent persons getting away with economic crimes in Kenya. Mr. Devani enjoyed good political connections. As AfriCOG reported in its publication *"An Analysis of the Triton Oil Scandal"*, for example, a ceremony to open Triton's LPG depot in 2006 was attended by several political bigwigs, including then Vice-President Moody Awori, several cabinet ministers at the time, such as Hon. Raila Odinga, Hon. Uhuru Kenyatta and several permanent secretaries.

The company's past transactions with the Government also tend to support the widespread perceptions of links with key political players. During the regime of President Daniel arap Moi, Triton clinched the lucrative contract to supply petroleum products to the KPLC several times. It was the local partner of The Reliance Consortium (led by India's largest private telecom service provider, Reliance Telecoms), which was poised to take up the second national telecom operator license in 2007 for KES 12 billion. Triton was also among the firms named in Parliament as having received large loans from Charterhouse Bank in contravention of banking regulations and in what was suspected to have been money laundering.⁵⁷ Complaints from other oil marketers strongly suggest that Triton Ltd had an undue advantage over other players in the use of KPC facilities as it reportedly often held stocks that took up as much as half the space at Kipevu Oil Storage Facility, well above its market share, which is the determining factor in allocating storage space to companies.

AfriCOG expressed concerns regarding the handling of the Charterhouse Bank issue by the relevant government ministries and parliamentary committee in its report, *Smouldering Evidence: The Charterhouse Bank Scandal*. The report takes issue with the collective amnesia displayed by public institutions summoned before the Parliamentary Committee which, just a few years prior, had instituted investigations into the bank and recommended its closure. These institutions suddenly appeared to have no problem with the Bank being reopened despite the fact that there had been no resolution of the issues that led to its closure. AfriCOG also found it disturbing that the Parliamentary Committee seemed to be lobbying for the re-opening of a bank in spite of continuing investigations.

cf. AfriCOG, "Smouldering Evidence. The Charterhouse Bank Scandal," http://www.africog/reports/smouldering_evidence_the_charterhouse_bank_scandal.pdf



57 AfriCOG, "Smouldering Evidence: The Charterhouse Bank Scandal" http://www.africog.org/reports/Smouldering_Evidence.pdf (June 2011)

4. Setbacks in the War against Corruption

Major corruption scandals continued to bedevil Kenya in critical areas of governance. This next section focuses on three: service delivery, procurement and security.

4.1. Service Delivery

The Government of Kenya has for years struggled with its public service performance across all ministries, departments and agencies. There have been recent attempts at reform, including the institution of results based management, the Rapid Response Initiative (RRI), performance contracting and the development of service charters.

Despite these initiatives, however, 2011 saw a number of setbacks in the Government's endeavour to improve public service delivery.

4.1.1. Kenya Education Sector Support Programme (KESSP)

The Kenya Education Sector Support Programme (KESSP) is part of a multidonor sector-wide approach supporting Kenya in its efforts to reach the education Millennium Development Goal by 2015. In July 2009, informed by revelations of misappropriation of funds and possible fraud arising from a routine internal audit, the Ministry of Finance commissioned an in-depth audit of the Ministry of Education. This initial fiduciary audit released in October 2009, carried out by the Treasury's Internal Audit Department (IAD), unearthed a significant financial management problem at the Ministry of Education and prompted development partners to suspend disbursements to KESSP. A later extended forensic audit of KESSP commenced in 2010, indicated that documentary justification was not fully in order for expenditures totalling close to KES 8.2 billion for the four year period covering fiscal years 2005/2006 to 2008/2009.

In 2011, the Minister for Finance released a report on the results of the final audit of the KESSP. The report confirmed ineligible expenditure of KES 4.6 Billion, reducing the loss substantially from the original figure of KES 8.2 billion. Physical visits to the schools during the audit confirmed that KES 1.9 billion did not reach schools and had either been paid to institutions which were not registered or that the bank accounts into which disbursements were made were not genuine school bank accounts. In addition, some of the funds totalling KES 3.1 million were deposited into bank accounts for schools which did not have TSC codes implying that the schools were not officially recognized. The money was subsequently withdrawn by individuals. Further imprests amounting to KES 8.2 million could not be accounted for. The audit also revealed manipulation of cash books to cover up discrepancies between Ministry records and financial monitoring reports amounting to KES 2.27 million.⁵⁸

58 Hon. Uhuru Kenyatta, *Press Statement on The Final Audit Report Addressing The Governance Challenges in Education Sector*, http://www.treasury.go.ke/index.php?option=com_docman&task=doc_details&gid=333&Itemid=54 (June 2011)

Following the release of this audit report, various development partners demanded a return of their money. The Kenya Government has so far refunded the following amounts:

1. Department for International Development (DFID), United Kingdom - KES 164.5 million
2. World Bank - KES 144.2 million
3. The Canadian International Development Agency (CIDA), Canada - KES 47.5 million; and
4. The United Nations Children's Fund (UNICEF) - KES 1.8 million⁵⁹

The Government has also committed to refund the Fast Track Initiative (through the World Bank) over KES 2 Billion.⁶⁰

The refund of these monies to the donor organizations, using taxpayers' money, not only presents a worrying trend of the Government, in effect, underwriting corruption, but also takes away funds that are vital for providing basic services.

In addition, though the Minister reported that the names of those culpable were known and that their particulars had been forwarded to relevant state agencies, no legal proceedings were instituted in 2011 to hold them to account. The inaction of the Government in prosecuting those involved reflects badly upon its declared commitment to fighting corruption and improving public service delivery for Kenyans.

4.1.2. Operation Linda Nchi (OLN)

In early October 2011 Kenya invoked Article 51 of the United Nations Charter on the right to self-defence and embarked on a war on *Al Shabaab* in what has been described as the biggest security gamble Kenya has taken since independence. *Al Shabaab* is a radical "Islamist" group that had gained control of most of southern and central Somalia, and was fighting an insurgency against the Transitional Federal Government (TFG) of Somalia. The decision appears to have been made hastily without adequate political, diplomatic, and military preparation, leading to unnecessary diplomatic tensions, unclear planning and goals, and avoidable delays and setbacks. Parliamentary approval was not sought for this very costly venture and some were of the opinion that the justifications behind it were weak.⁶¹

Questions were raised on the constitutionality of the operation. Under the 2010 constitution, a declaration of war must be made by the President and approved by Parliament. Under Article 134 (4) on the functions of the President, the constitution provides that the President may, subject to Article 58, declare a state of emergency and also with the approval of Parliament, declare war. In violation of this constitutional provision, the nation was initially informed about OLN through a press conference by the Ministers for Internal Security and Defence.

The Government belatedly sought to address the apparent constitutional breach. It was at pains to explain the Kenya Defence Forces and the Kenya Government were not at war but were conducting a military operation engaging the *Al Shabaab* in defence of the sovereignty and the territorial integrity of the Republic.

59 Walter Menya, "Treasury Refunds Sh2.6bn Donor Cash," <http://www.nation.co.ke/News/Treasury+refunds+Sh2bn+donor+cash+/-/1056/1266894/-/8o7j7vz/-/> (November 2011)

60 Interview undertaken on 15-11-2011

61 International Crisis Group, "The Kenya Military Intervention in Somalia", Africa Report No.184, February 2012

A joint communiqué issued at the conclusion of a meeting between the Prime Ministers of Kenya and Somalia, attempted to clarify that the security operation which is aimed at eliminating the threat posed by a common enemy, to Kenya's national security and economic well being, is based on the legitimate right to self-defence under Article 51 of the UN Charter; and that operations were being led by the TFG of Somalia forces with the support of the Kenyan Defence Forces.

Subsequently, efforts to involve Parliament were also made. In December 2011 for example, the Minister of State for Defence sought the approval of Parliament for the deployment of the armed forces to serve under the auspices of the African Union Mission in Somalia (AMISOM), pursuant to provisions of Article 240 (8), (a) (i) and (ii) of the constitution which requires parliamentary approval for any regional or international deployment.

In addition to the constitutional issues arising from the war, the following matters of concern have been raised.

- The alarm has been sounded about the possibility of using the war to extend the term of Parliament using Article 102 (2) of the constitution which provides that when Kenya is at war, Parliament may, by resolution supported in each House by at least two-thirds of all the members of the House, from time to time extend the term of Parliament by not more than six months at a time.
- Risks of corruption - War involves considerable financial outlay. According to one estimate, it could be costing KES.10,000 per day to keep each soldier in the war.⁶² Other sources estimate OLN to be costing the Government at least KES. 210 million per month in personnel costs alone.⁶³ Given the secrecy and lack of transparency regarding expenditure by military, national intelligence and security services, fears have been expressed that the war could provide an avenue for those in power to engage in massive looting of public funds under the guise of protecting national security.⁶⁴ The fact that elections are around the corner deepened fears on the possible impact of the secrecy around expenditure on OLN. If funds were indeed being looted, these would be the same funds that could later on be used to finance electoral campaigns for some individuals.
- Concerns were also raised about violations of humanitarian and human rights laws by the KDF during the operation. In a letter to the Minister of State for Defence for example, Human Rights Watch alleged that on October 30th 2011, at least 5 civilians were killed and 45 people, including 31 children, wounded following a Kenya Air Force attack that struck a camp for internally displaced persons near the town of Jilib in Somalia. In another attack on a fishing boat near Kiunga, Kenya, a navy ship allegedly fired on a fishing boat, killing 4 Kenyans. Some fishermen who swam to shore following the attack (some with gunshot wounds) were allegedly detained and severely beaten by military personnel.⁶⁵

62 Irungu Kangata, "Kenya: Why Nation Should Pull Out of Somalia" *Daily Star*, 8th November 2011

63 International Crisis Group, "The Kenya Military Intervention in Somalia," February 2012

64 Onyango Oloo, "The Quixotic Invasion of Somalia will devastate Kenya," http://demokrasia-kenya.blogspot.com/2011/10/quixotic_invasion_of_somalia_devastate.html (October 2011)

65 Human Rights Watch, Letter to Yusuf Haji, Minister of State for Defence, 18 November 2011

4.1.3. *Kazi Kwa Vijana*

The Kazi Kwa Vijana initiative was designed under Agenda 4 of the National Accord and Reconciliation Act (NARA) of 2008 to address youth unemployment in Kenya. According to various media reports, more than KES 308 million of public money meant for the Kazi Kwa Vijana project was lost by the Office of the Prime Minister and related implementing ministries between 2008 and 2010. The amounts were stated to have been lost through irregular, unauthorized and otherwise dodgy payments made in breach of the Government's and the World Bank's procedures and regulations.

An interim report by the World Bank indicated that the money was disbursed to senior civil servants and other ineligible third parties, that millions were paid to unrelated project activities and that expenditures were incurred in excess of the approved limits. There were numerous payments made without proper supporting documents as well as payments made for contracts that contravened the World Bank and government procurement procedures.⁶⁶

Specific examples cited included KES 1.2 million meal allowances paid to employees while they were at their work stations, KES 173, 668 commuter allowance irregularly paid to employees at the PM's office and the unauthorized hiring of 26 interns. More than KES 1.5 million was allegedly paid out to unknown and unauthorized persons and retroactive payments made on apparently fraudulent invoices. A Mrs. Gesame, Director of Policy- was said to have misrepresented her status as local consultant so as to be hired as the project director while in fact she was still on GOK salary. She was allegedly paid KES 407, 000 per month as "top-up".

4.1.4. *Arid Lands Resource Management Project*

In July 2011, the World Bank released a Forensic Audit of the USD 1.9 billion Bank-funded Arid Lands Resource Management Project (ALRMP II) reporting fraudulent and questionable use of the Project's funds for the fiscal years 2007 and 2008, totalling KES 515 million. The audit covered only seven of the 28 districts where the project operated, plus project headquarters. In October 2011 Kenyan officials met with those of the World Bank to agree on a process of determining the actual project amount lost. The Government was liable to repay the World Bank for all funds classified as ineligible, including those deemed fraudulent and those lacking supporting documentation. In October 2011, the Government refunded KES 40 million to the World Bank.

Underwriting Corruption?

A disturbing practice emerged whereby the Government refunded money to donors after it was found to have disbursed "ineligible expenditure". Joint audits between Government and donors appear to have revealed that officers in line ministries misappropriated donor funds following which the donors threatened to stop the funding and demanded their money back. Treasury admitted to misappropriation and used tax payers' money to effect the refunds, citing the provisions in financing agreements and the importance of continued funding.

66 World Bank, "Kenya Youth Empowerment Project (KYEP): In-depth Review," August 2011

Responding to a question by private notice by MP John Mbadi, the Assistant Minister, Office of the Deputy Prime Minister and Minister for Finance Oburu Odinga, confirmed that on 24th October, 2011, the Permanent Secretary, Treasury, wrote to the Country Director of the World Bank committing to refund to the International Development Agency (IDA) and other development partners the following funds spent on payments that were verified and confirmed to be ineligible⁶⁷:

- **Arid and Semi-Arid Resources Management Project** (Ministry of State for the Development of Northern Kenya and Other Arid Lands) - KES 40 million refunded
- **Kenya Education Sector Support Project** (Ministry of Education) - KES 347, 972,827.38 was refunded, leaving a balance of KES 2, 192,202,728.38 for the Fast Track Initiative to be refunded later in the current financial year.
- **West Kenya Community-Driven Development and Flood Mitigation Project** (Ministry of State for Special Programmes) - KES 8.7 million refunded. KES 42.1 million to be refunded later in the year.
- **National Statistics System Project** (Ministry of State for Planning, National Development and Vision 2030) - KES 42 million refunded.

The practice raises concerns because the Government appears to be officially underwriting corruption and misuse of funds by its officers. Meanwhile, the services, which the funds were supposed to pay for are not provided and citizens have to dig deeper into their pockets to fill the fiscal gaps left by the refunds.

4.2. Procurement

Corruption is the most problematic factor for doing business in Kenya.⁶⁸ It increases the cost of doing business, adds to the cost of public tenders and leads to poor standards of project work. A majority of all cases before the EACC have had a procurement element. In particular, public procurement in Kenya has been the subject of corruption in the form of diversion of public funds to companies, individuals, or groups and government officials' favouritism towards well-connected companies and individuals when deciding upon policies and contracts.

The Public Procurement and Disposal Act (PPDA), was enacted in 2005 and became operational on 1st January, 2007 with the gazettelement of the Public Procurement and Disposal Regulations, 2006. The PPDA created the Public Procurement Oversight Authority (PPOA) mandated with the responsibility of:

1. Ensuring that procurement procedures established under the Act are complied with;
2. Monitoring the procurement system and reporting on its overall functioning;
3. Initiating public procurement policy; and
4. Assisting in the implementation and operation of the public procurement system by:
 - Preparing and distributing manuals and standard tender documents,
 - Providing advice and assistance to procuring entities, and
 - Developing, promoting and supporting training and professional development of staff involved in procurement

67 Hansard, "Kenya National Assembly Official Report," 15 November 2011

68 World Economic Forum, "The Global Competitiveness Report 2011-2012," http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf, (2011)

In 2011, major corruption cases with a procurement element were dealt with unsatisfactorily and presented a move in the wrong direction for governance in Kenya.

4.2.1. *Water Scandal*

The year 2011 saw some developments in the corruption scandals plaguing the Ministry of Water and Irrigation from 2010.

In September 2011, eight people including Water Minister Charity Ngilu's son-in-law and Tourism Assistant Minister Cecily Mbarire's husband were arrested and arraigned before a Nairobi court over corruption at the Water Ministry. They faced charges of conspiracy to defraud, violation of procurement laws and fraudulent acquisition of public property.

A parliamentary committee investigating the scandal had earlier found serious violation of the Public Procurement and Disposal Act 2005 and Public Officers Ethic Act 2003.⁶⁹ In particular, various officers of the Ministry of Water were found to have been involved in embezzlement, misappropriation of public funds and abuse of office.

The report stated that the Water Ministry's National Water Conservation Corporation may have lost millions of shillings through unexplained payments to water drilling contractors. The Ministry was hard put to explain debts, which are reported to exceed KES 930 million. According to media reports, an audit report by the Efficiency Monitoring Unit, which is based in the office of the Prime Minister and is mandated to monitor efficiency in the delivery of services, accuses the Corporation's board of supervising the near-collapse of the firm due to the debts.⁷⁰ The report, which focuses on the period before the 2007 General Election, reveals that large sums of money were paid out to contractors and suppliers without invoices or government Local Purchase Orders (LPOs). The Corporation was also accused of misappropriating KES 10 billion [approximately US\$ 140 million] meant for water storage dams.

The scandal will probably be remembered more for the drama, twists and turns that it took in 2011. Hon. Mwangi Kiunjuri, the then Assistant Minister in the Ministry of Water & Irrigation wrote and appeared before the parliamentary Departmental Committee of Land and Natural Resources in November 2010 alleging conspiracy to cover up issues of seriously flawed accountability and integrity in procurement of consultants for dams; procurement of goods at inflated prices as well as nepotism at the Ministry and its related agencies. He alleged that the Minister for Water & Irrigation and other officials were related to directors of firms doing brisk business with the Ministry and its parastatals.

The Committee accused the Hon. Kiunjuri of inappropriate relationships with some of the persons suspected of corruption at the Ministry. He allegedly played a game of golf with the Director and contractor of Umaa Dam, Chairman of National Water Conservation & Pipeline Corporation and a sitting Director, National Water and Pipeline Corporation on August 26 2010, during the course of which a deal to inflate the cost of Umaa Dam was hatched.

69 The Departmental Committee on Lands and Natural Resources, "Report on Alleged Corruption in the Ministry of Water & Irrigation and its Agents," <http://www.cofek.co.ke/REPORT%20ON%20ALLEGED%20CORRUPTION%20IN%20THE%20MINISTRY%20OF%20WATER%20AND%20IRRIGATION.pdf> (April 2011)

70 "Kenya: Water Ministry Has Lost Millions." *Daily Nation*, 25 October 2009

Faced with the accusations by her own Assistant Minister coupled with investigations by the Anti-Corruption Commission for abuse of office, the Minister, Charity Ngilu, accused the KACC of a witch-hunt, conducting investigations selectively, being “used badly by politicians to settle political scores and making deals with some people to finish her political career.”⁷¹ When summoned by KACC over allegations that she was threatening its officers, she snubbed the summons and lodged a complaint at the CID headquarters accusing the KACC of harassment and, for good measure, filed a case seeking the interpretation of whether the KACC has the jurisdiction to investigate alleged offences of obstruction and interference under Section 66 (1) (a) of the Anti-Corruption and Economic Crimes Act (ACECA).

4.2.2. *Embassies Scandal*

The fight against corruption suffered another setback following the decision by the two Principals to recall Sirisia MP Moses Wetangula to the cabinet. Foreign Affairs Minister Moses Wetangula and Permanent Secretary Thuita Mwangi had stepped aside from Government to pave the way for investigations into a multi-billion shilling scam involving the alleged purchase and disposal of Kenyan assets abroad at prices significantly above their true value.

The duo had come under scrutiny by the Departmental Committee on Defence and Foreign Relations for their role in procurements involving Kenya’s missions in multiple countries in 2010. The Committee’s report claimed that the Government of Kenya lost over KES 1.1 billion in the procurement of the Kenyan embassy in Tokyo, Japan and close to KES 84,150,000 in the purchase of a chancery in Brussels, Belgium. The Committee also found that Hon. Moses Wetangula MP, Minister for Foreign Affairs deliberately misled the Committee by informing it that the Government received value for money while their investigations had found that the Government actually lost over KES 1.1 billion. They found the Minister in breach of Section 21 of the National Assembly [Powers and Privilege] Act, Chapter 6 of the Laws of Kenya which provides that: “any person who, before the Assembly or any committee, intentionally gives a false answer to any question material to the subject of inquiry which may be put to him during the course of any examination shall be guilty of an offence under Section 108 of the Penal Code and liable to the penalty prescribed by the appropriate section for that offence.” They further found the Minister, as a public servant, in breach of Section 19 of the Public Officer Ethics Act, which provides that “a public officer shall not knowingly give false or misleading information to members of the public or to any other public officer.”⁷²

The Committee’s findings were confirmed by a special audit conducted by the Auditor General which found that the Government incurred excess expenditure of KES 185 million above the value of KES 1.2 billion approved by the Commissioner of Lands on the acquisition of the Kenya embassy in Japan. Though the estimated loss was much less than that alleged by the parliamentary committee, the audit reported further findings that of the KES 1.43 billion spent on the new building, only KES 80 million was paid by cheque and KES 1.35 billion was paid in cash. The rationale behind transferring such a substantial sum in cash was not explained.⁷³

71 Bernard Momanyi, Ngilu now claims she’s being harassed, www.capitalfm.co.ke/news/2011/10/ngilu_now_claims_she_s_being_harassed/ (October 2011)

72 Departmental Committee on Defence and Foreign Relations, *Report on the procurement, disposal and construction of properties of Kenya’s Diplomatic Missions*, <http://www.mzalendo.com/Files/MissionsReport.pdf> (October 2010)

73 Francis Mureithi, “Audit Report Pins Kibaki on Wetang’ula, *Nairobi Star*, 7 September 2011

In arguing for reinstatement, the Prime Minister explained to Parliament that no domestic inquiry into the scandal surrounding the purchase and disposal of embassies abroad ever implicated the Sirisia MP saying- "Honourable Wetangula has neither been recommended for prosecution nor charged with any crimes before a court of law."⁷⁴ He further said that the Ethics and Anti-Corruption Commission in its interim report to the Attorney General had observed that at the end of the domestic investigations their findings were inconclusive and that the role of Wetangula in the transaction was yet to be ascertained as there was no correspondence directed to or emanating from him.⁷⁵ MPs however argued that investigations into the controversial purchase had not been concluded and that so far no investigating agency had cleared either Wetangula or Thuita.

4.2.3. Milimani Law Courts

The good news on reforms in the Judiciary were somewhat dampened by reports that over KES 1 billion of tax payers' funds could have gone down the drain following shoddy construction work on the Milimani Law Courts. Less than one year after renovation of the former Income Tax House meant to convert it to an ultra modern courthouse, reports indicated that the roof had caved in, sewers were broken, lifts had stopped working and staff lacked access to the internet.⁷⁶

Digital locks in sensitive areas were not working and leaking water often caused electric faults. A police officer had been hurt in one of three occasions when the roof caved in. Perhaps the saving grace was the fact that the Chief Justice personally blew the whistle on the scam and one hopes that this was just a legacy of the old order. In response to the media reports, the Ministry of Public Works, which was responsible for the construction work, indicated that the disrepair on the Milimani courts building was a normal occurrence and as such seemed to justify the breakdown of the building.⁷⁷

4.3. Corruption and Organized Crime

Some of the most unsettling news regarding corruption in Kenya in 2011 related to revelations of the extent to which organized crime has infiltrated state institutions. Corruption that is associated with organized crime has been described as "the most insidious, socially deadly and institutionally destructive form of corruption...it eats up governance institutions starting with police, customs and immigration and then moves up the food chain into the Judiciary, revenue authorities and then into Parliament and always makes a move to be on the right side of State House or right inside it."⁷⁸

74 David Ochami and Peter Opiyo, "Raila defends Wetangula's reinstatement to Cabinet", *The Standard*, 9 November 2011

75 Ibid

76 Bernard Momanyi, "Ultra Modern Milimani court building falling apart," <http://www.capitalfm.co.ke/news/2011/11/%E2%80%98ultra-modern%E2%80%99-milimani-court-building-falling-apart/> (November 2011)

77 Obure, "State of disrepair at Milimani law courts 'normal,'" <http://www.ntv.co.ke/News/Obure+Sate+of+disrepair+at+Milimani+law+courts+normal/-/471778/1285548/-/ia1285z/-/index.html> (December 2011)

78 John Githongo & Ndungu Wainaina, "Drugs: The Final Frontier in the War Against Corruption," *Nairobi Star*, 17 December 2011

A research study by the International Peace Institute (IPI) released during the year painted a very grim picture of the threat posed by organized crime in the country.⁷⁹ According to the report, powerful transnational criminal networks constitute a direct threat to the state itself, not through open confrontation but by penetrating State institutions through bribery and corruption and by subverting or undermining them from within.

The report alleged that rampant corruption in the police, Judiciary, and other state institutions has facilitated criminal networks' penetration of political institutions, such that endemic corruption and powerful transnational criminal networks are "white-anting" state institutions and public confidence in them. The study found that increased volumes of heroin and cocaine are being transited through Kenya, using networks involving Kenyans who have strong links with members of the law enforcement agencies and the Judiciary. It identified a trend whereby drug money is used to help the corrupt attain positions of influence, particularly in politics.

The report noted that Mombasa port has become notorious for its abuse by organized crime networks for the smuggling of drugs, counterfeit goods, and other illicit commodities. Well-connected business people and top politicians including, allegedly, an assistant minister, three members of Parliament, several political activists with connections to senior politicians, and two former members of Parliament in Mombasa are suspected of controlling networks involving police, customs, immigration officials and clearing and forwarding agents, among others.

On human trafficking and smuggling, Kenya was reported to be, not only a source but also a destination country for men, women and children being trafficked for forced labour and sex trade, as well as a transit point for an estimated 20,000 Somali and Ethiopian male migrants smuggled from the Horn of Africa to South Africa every year. Corrupt police and immigration officers facilitate the trafficking in collaboration with "respected" and well-known figures in society who operate "legitimate" businesses with connections with top government and political figures. It has been reported that the Government is now making efforts to curb trafficking through enacting legislation to prosecute trafficking and establishing anti-trafficking campaigns and offices, housed in the Ministry of Gender, Children and Social Services.⁸⁰

79 Peter Gastrow, "Termites at Work: Transnational Organized Crime and State Erosion in Kenya," New York: International Peace Institute, October 2011. Also available at <http://www.africog.org/partners/termites-work-transnational-organized-crime-and-state-erosion-kenya>

80 United States Department of State, "2011 Trafficking in Persons Report-Kenya," June 2011

Research also suggests that Kenya is developing into a major money laundering country and concludes that powerful criminal networks with links to Parliament, rather than conventional firms, currently pose the bigger threat to shaping the laws, policies, and regulations of the State to their own advantage.

It is not a coincidence that four Members of Parliament, one of them a former Assistant Minister for transportation, were under investigation for drug trafficking during the year. In June 2011. The former Assistant Minister and current Member of Parliament for Kilome, John Harun Mwau, was also one of two Kenyans designated by the US government as a foreign narcotics “kingpin” under the US Foreign Narcotics Kingpin Designation Act.⁸¹

AfriCOG partnered with IPI pursuant to its mandate to address the causes of corruption in Kenya through informed and determined public action, both in the public and private sectors and hosted the launch of the report. The event was attended by Rt. Hon. Raila Odinga, Prime Minister of the Republic of Kenya, who gave a candid speech on the relevance of the issue, and commended IPI and AfriCOG for the steps they have taken in creating an avenue for dialogue on the matter.

In a press statement issued on 28 October 2011, the Financial Action Task Force (FATF), a body that has significant influence in how financial and other institutions assess risk notes that certain strategic anti-money laundering (AML/Combating the Financing of Terrorism (CFT) deficiencies persist in Kenya. In particular, it highlights critical deficiencies in the criminalization of terrorist financing; the establishment of a fully operational and effectively functioning Financial Intelligence Unit; the establishment and implementation of an adequate legal framework for identifying and freezing terrorist assets; raising awareness of AML/CFT issues within the law enforcement community; and the implementation of effective, proportionate and dissuasive sanctions in order to deal with natural or legal persons that do not comply with the national AML/CFT requirements.⁸²

81 Star Team, “Obama names Mwau in ‘Drug Kingpins’ list”, <http://www.the-star.co.ke/national/national/26697-obama-names-mwau-in-drug-kingpins-list-> (June 2011)

82 FATF Public Statement, http://www.fatf-gafi.org/document/55/0,3746,en_32250379_32236992_48966519_1_1_1_1,00.html (October 2011)

4.4. Corporate Governance

4.4.1. CMC Wrangles

Jersey, it seems, has been a choice destination for money illicitly exported from Kenya. The Island featured again in boardroom wars at the Cooper Motors Corporation (CMC) when a new CEO Mr. William Lay, alleged that a former Chairman, Mr. Jeremiah Kiereini and former CEO (Martin Forster) had siphoned off hundreds of millions of shillings and hidden them in off-shore accounts in the Island. The existence of the off-shore accounts was neither disclosed to the Board of Directors nor were they included in the company's financial statements.⁸³ The controversy afforded a troubling insight into the conflicts of interest that appear rife in the private sector in Kenya. Involving, as it did, some of Kenya's wealthiest names, the scandal also pointed to the degree to which such misdeeds may have played a role in the creation of some of Kenya's largest fortunes.

Peter Muthoka replaced Kiereini as Chairman of the Board of Directors in March 2011. He in turn was accused by some directors of defrauding CMC through his company Andy Forwarders. The company allegedly overcharged CMC by KES 2 billion on logistic services over a period of 5 years. Following the allegations, Muthoka was replaced by Joe Kibe in September 2011. Muthoka subsequently called an extraordinary general meeting through his company Andy Forwarders who are the largest shareholders, allegedly to reverse the decision and oust the new CEO. The wrangles culminated in the intervention of the Capital Markets Authority (CMA) which suspended trading of CMC's shares at the stock exchange for seven days.

The CMC saga highlighted key deficiencies inherent in corporate governance laws and regulatory oversight over listed companies. CMA's attempts to force the resignation of the entire CMC board had to be rescinded as they appeared to have been in conflict with interim orders from the courts.⁸⁴ Additionally, there seems to be little or no protection accorded to small shareholders. While seeking to appoint new directors of integrity, the CMA once again sought nominees from the majority shareholders, whose previous infighting had led to the crisis at CMC.

In a candid admission CMA revealed that it lacked adequate enforcement power against breaches of corporate governance regulations.⁸⁵ It went further to note that its mandate is limited, that it is largely unable to intervene in the internal management of listed firms and that minority shareholders are thus exposed to risks of malfeasance by majority shareholders.

Curiously, the Immigration Minister, Mr. Otieno Kajwang', entered into the fray in December by writing to the immigration services to revoke the work permit of the new CEO, Bill Lay, but reversed the orders one week later. The wrangling even found its way to Parliament where the Speaker said the Committee on Finance Trade and Planning was free to investigate the issue.⁸⁶ Ironically, the Committee's Chair Hon. Chris Okemo, was himself facing extradition to Jersey as discussed above.

83 Peter Kiragu, "CMC Says Kiereini Hid Millions in Jersey," *The Star*, 31 October 2011

84 "Regulator changes tune on CMC board ouster," *Business daily*, 9 February 2012,

85 Moses Michira, "Regulator seeks more power to rein in errant directors," <http://www.businessdailyafrica.com/Regulator+seeks+more+power+to+rein+in+errant+directors+/-/539552/1309268/-/97j61iz/-/index.html> (January 2012)

86 Francis Mureithi, "State Probing CMC Accounts," *The Star*, 4 November 2011

4.4.2. KENGEN

Grave allegations of corruption were leveled against the MD of Kenya Electricity Generating Company (KenGen) Mr. Eddy Njoroge. According to the *Nairobi Law Monthly* (NLM), there were serious irregularities surrounding the award of a multi-million dollar contract to Green Energy Group AS of Norway, which the magazine describes as a nondescript Norwegian company with no track record of handling large infrastructure projects. Green Energy AS was awarded the contract 18 months after being registered, suggesting that it may have been formed and designed for the sole purpose of channeling such dubious contracts.

The company was initially awarded a contract to supply one wellhead in Olkaria in December 2009. The contract was shortly after varied to enable the company supply and install 14 additional wellheads at KES 8.5 billion. The first issue raised by NLM arose from the fact that though the initial wellhead turned out to be defective, KenGen went ahead and awarded the company a bigger contract to supply and install more. The contract also raised alarm due to the alleged association of Green Energy's Indian subsidiaries which were to manufacture and install the wellheads, with Mr. Deepak Kamani, one of the key players in the Anglo Leasing scandal.⁸⁷

In a separate issue, the NLM further alleged serious breaches of the law and other irregularities in the award of a contract for drilling wells to Great Wall Drilling Company of China between 2007 and 2008.

The initial award to the company was for the drilling of 6 wells. However, without competitive bidding, the company was given a further 15 wells to drill at an increased cost of 11.2 per cent of the initial contract. This was a blatant violation of Sections 59(3) and 70 of the Public Procurement and Disposal Act (PPDA), which prohibit any entity from changing the substance of a tender once it has been awarded. While the PPDA allows variations to a maximum of 15%, the contract, worth about KES 8 Billion, had a variation of over 300%. To authorize the variation of the contract, the Managing Director bypassed the legally constituted tender board and appointed one consisting of his allies and co-directors. This also contravened the PPDA which expressly prohibits directors of State corporations and their chief executive officers from sitting in tender boards.⁸⁸

4.5. The Legacy of Corruption in the Lands Ministry

Land in Kenya has been poorly managed by various political regimes for decades. A particularly harmful aspect of this is the rampant corruption in the management of land.

4.5.1. SyoKimau Demolitions

There was an outpouring of public sympathy and anger as the government forcefully evicted people and demolished structures worth billions of shillings ostensibly on security grounds in areas such as SyoKimau, Sinai and Eastleigh. Having commenced Operation Linda Nchi/ war on the *Al Shabaab*, the Government alleged that the settlements in Syokimau posed a security threat as they were on Jomo Kenyatta International Airport's flight paths. The other reason given for the said evictions was that the Syokimau settlements were located on land owned by the Kenya Airports Authority (KAA). While the victims argued that they held genuine title, evidence provided to a joint Parliamentary Committee probing the demolitions by senior government officials such as the Internal Security PS, Lands PS and the Commissioner of Lands pointed to massive corruption involving the Ministry of lands, Mavoko County Council and well-organized land cartels.

87 NLM special correspondent, "Return of Mega Scandals," *Nairobi Law Monthly*, October 2011.

88 Michael Rigby, "Power Play: Behind Kengen's Great Wall of Corruption," *Nairobi Law Monthly*, January 2012.

5. The Year Ahead

Some progress was made in the year 2011 in the establishment of laws, policies, institutions and practices that have the potential to significantly improve governance in Kenya, but the war against corruption is far from won.

The gains made in the implementation of the new constitution must be jealously safeguarded. Although the new constitution establishes principles and mechanisms that may enhance government accountability, there is need to further align the statutory order with its values and principles if abuse of power and corruption are to be curbed.

The positive changes that have manifested themselves in terms of transformation of the Judiciary and those that are set to be rolled out to reform the Police Service offer grounds for hope. However, the Judiciary and the Police Service, in providing services need to show that they are committed to positive change and that they are independent and ethical. This will provide Kenyans with the zeal to continue to be vigilant in following up the reforms processes aimed at achieving well and fully functioning Judicial and Police Service systems. During the year, the Judiciary performed much better on this score than the Police.

2012 poses some challenges that Kenyans need to be wary of. First, in anticipation of the elections, the demands for campaign financing create strong incentives for those in positions of power to dip into public coffers. Secondly, in line with the new demands for those seeking public office, there will be need for vigilance to ensure that all the myriad candidates undergo some transparent, hopefully rigorous, vetting process to test their eligibility to hold public office. In addition, with regard to preparation for elections, the IEBC has a heavy task ahead of it; there is hope that the reform in the Judiciary will enable faster resolution of the legal disputes arising from the delineation of boundaries done by the IEBC. Only if this is done, and if sufficient funds are allocated through the national budget, can the IEBC continue to effectively prepare for elections. It is worth noting, though, that the work of the IEBC continues to be marred by attempts to politically influence IEBC's decisions and even call into question the election date supported by the IEBC.

It will also be the year during which the groundwork for county government structures will start to be laid out. The country's history with the management of decentralized funds such as the CDF provides cause for concern with reports from the National Taxpayers Association revealing that large amounts of CDF funds are, with each financial year, increasingly being misappropriated at local levels of government. Local authorities, for example, are widely viewed as corrupt and inept and face challenges such as weak oversight; poor planning and the non-existence of monitoring and evaluation frameworks⁸⁹, all of which provide ground upon which corruption and misappropriation of devolved funds can occur. The question therefore is: - will corruption be devolved from the centre along with the Government? The economic burden that must be shouldered so as to facilitate the working of the new expanded bureaucracy cannot be ignored. Indeed, it poses a further governance risk in the year ahead.

89 Allan Odhiambo, "Poor Management and Corruption Threaten Future of Devolved Funds," http://www.nta.or.ke/mediamentions/Allan_Odhiambo_Analysis_On_CDF.pdf (2010)

While the move towards more open governance is positive, the Government should take further measures to enhance the right to access information. The Government must be guided by the principle of maximum disclosure, which establishes a presumption that all information will be disclosed, subject only to narrowly drawn exceptions to protect overriding public and private interests. Further, while the right is most commonly understood as an obligation to respond to requests for information, the constitution obliges the Government to disseminate, proactively and in the absence of a request, information of key public interest. This can be taken further to imply, as Article 19 has argued, an obligation on officials to create, compile or collect information in certain contexts such as the aftermath of massive human rights abuses, where it has been described as ‘the right to truth.’⁹⁰ Finally, a Freedom of Information Act, a draft of which has been sitting with the Government for years, which needs to be strengthened, must be enacted. This would be in keeping with Kenya’s commitment in 2011 to open up government.

Kenya runs the risk of becoming a criminalized or captured state. Evidence points to the existence of systemic corruption with organized crime networks that have links to state institutions including the police, immigration, customs, and even the Judiciary. The Government must enhance its capacity to counter such penetration. The consequences of failing to do so are unimaginable.

In conclusion then, there are things in the year ahead that spell positive development for the country in terms of governance. However Kenyans need to remain vigilant and guard against actions bound to be detrimental in the struggle towards achieving good governance and better welfare for the population at large. Above all, Kenyans must continue to fight for the effective and faithful implementation of the new constitution, which offers the best hope of addressing our historical governance challenges decisively.

90 Article 19, “Humanitarian Disasters and Information Rights: Legal and ethical standards on freedom of expression in the context of disaster response,” http://www.article19.org/data/files/pdfs/publications/freedom_of_information_humanitarian_disasters.pdf (2005)

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