

KENYA GOVERNANCE REPORT | 2013



AFRICA CENTRE FOR OPEN GOVERNANCE (AfricOG)

About Us

The Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors so as to address the structural causes of the crisis of governance in this country. The overall objectives of our programme activities are: to promote the implementation of the Constitution of Kenya 2010; strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy and to build Kenyans' capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors in Kenya. We also work with others at regional and

international levels to promote collective efforts towards anti-corruption, accountability, transparency and openness in governance. Our reports, policy briefs, advocacy and overall work add value to anti-corruption and governance reform processes in Kenya and the region by stimulating policy discussion and supporting evidence-based advocacy and the mobilisation work of our partners.

AfriCOG is grateful to its Board of Directors for their commitment and guidance. The members are John Githongo (Chairperson), Maina Kiai (Vice – Chairperson), Prof. Funmi Olonisakin, Don Deya and Stella Chege.

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GOVERNANCE
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Abbreviations and Acronyms

ACECA	Anti -Corruption & Economic Crimes Act	KARI	Kenya Agricultural Research Institute
AfriCOG	Africa Centre for Open Governance	KICA	Kenya Information and Communication Amendment
AU	African Union	KNCHR	Kenya National Commission on Human Rights
BBC	British Broadcasting Corporation	KNDR	Kenya National Dialogue & Reconciliation
BVR	Biometric Voter Registration	KPA	Kenya Ports Authority
CIC	Commission for the Implementation of the Constitution	KPRL	Kenya Petroleum Refinery Limited
CIPEV	Commission of Inquiry into the Post-Election Violence	KPTJ	Kenyans for Peace with Truth and Justice
CORD	Coalition for Reforms and Democracy	KRA	Kenya Revenue Authority
CPJ	Committee to Protect Journalists	KWS	Kenya Wildlife Service
DPP	Director of Public Prosecutions	NACADA	National Authority for the Campaign Against Alcohol and Drug Abuse
DSL	Discount Securities Limited	NARA	National Accord and Reconciliation Act
EACC	Ethics and Anti-Corruption Commission	NHC	National Housing Corporation
ECK	Electoral Commission of Kenya	NHIF	National Hospital Insurance Fund
ELOG	Election Observation Group	NLC	National Land Commission
ERT	Electronic results transmission	NSSF	National Social Security Fund
EVID	Electronic voter identification	ODM	Orange Democratic Movement
GOK	Government of Kenya	OGP	Open Government Partnership
GSU	General Service Unit	OTP	Office of the Prosecutor
ICC	International Criminal Court	PAC	Public Accounts Committee
ICD	International Crimes Division	PBO	Public Benefits Organization
ICJ	International Commission of Jurists	PEV	Post Election Violence
IEBC	Independent Electoral and Boundaries Commission	PFM	Public Finance Management
IMF	International Monetary Fund	PIC	Public Investment Committee
IPRS	Integrated Population Registration Systems	PSC	Parliamentary Service Commission
JSC	Judicial Service Commission	SEPU	Secondary Equipment Production Unit
KACC	Kenya Anti-Corruption Commission	SRC	Salaries and Remuneration Commission
KANU	Kenyan African National Union	TNA	The National Alliance

Foreword

The Africa Centre for Open Governance (AfriCOG) is a non-profit organization that addresses the structural causes of corruption and poor governance in Kenya. AfriCOG envisions a country in which citizens and civic institutions are vigilant over public life and actively scrutinise and demand accountability for the management of the politics and economy of Kenya.

Every year, AfriCOG reviews governance challenges and anti-corruption efforts, analyses their implications and makes recommendations. This is the third in the series of AfriCOG's annual governance reports. Issues arising during this period included those surrounding the conduct of the 2013 general elections and the historic devolution process that followed. Of further concern were attempts to roll back constitutional rights and freedoms, including an attack on the media, efforts to close civic space, and a glaring lack of accountability and transparency in the use of public finances at both national and devolved levels.

The year 2013 was a significant turning point for Kenya's governance framework. The first elections under the Constitution of Kenya 2010 ushered in a new bicameral legislature, 47 devolved units of government and a comprehensive bill of rights.

However, the elections were marked by weaknesses and corruption, e.g. in the procurement of equipment, and practices that failed constitutional standards of transparency, accountability, efficiency and verifiability.

Post-election governance brought a claw-back of constitutional gains through the actual and proposed passage of repressive legislation designed to cripple the media and civil society through draconian state regulation.

The devolved government, introduced by the Constitution of Kenya 2010 to ensure equitable delivery of services in all regions of the country, has been plagued by corruption, waste, and mismanagement of public funds at county level.

This report lays out challenges and opportunities in all these areas in 2013.

Executive Summary

The Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both public and private sectors, so as to address the structural causes of the crisis of governance in the country. The overall objectives of our programme activities are: to strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy; and to build Kenya's capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors. Our reports, policy briefs and overall work add value to anti-corruption and governance reform processes in Kenya by stimulating policy discussion and supporting evidence-based advocacy and the mobilisation work of our partners.

The Kenya Governance Report 2013 is the third in a series by AfriCOG. Since 2011, AfriCOG has reviewed events of the previous year as they relate

to critical issues in governance reform and anti-corruption, analysed their implications, and made recommendations. These reports are a key resource for our partners in civil society, the public sector, and the international community, informing interventions and programming.

This edition of the Kenya Governance Report is the first to examine a highly contested general election process. The report examines the electoral campaigns, legal infrastructure, nominations, day of election, and Supreme Court challenge, in which AfriCOG played a central role.

Beyond elections, the report revisits thematic areas examined in previous editions, reviewing the new government, the rollout of devolution, the Judiciary, the fight against corruption, the claw back of constitutional gains and the continued plunder of public funds.

1 Elections



March 4th 2013 was Kenya's date with destiny. This particular election was unique for two reasons:

- 1) It was the first to be conducted under the new constitutional dispensation.
- 2) It was Kenya's most complex election, with six elective seats on the ballot: President, Governor, Senator, Member of Parliament, Women Representative and County Representative.

1.1 The Campaigns

The months leading up to the election were characterised by unprecedented campaign activity. The 10th Parliament failed to enact the Election Campaign Financing Bill 2012, which sought to regulate campaign financing and candidates' conduct. Thus, there were no limitations on campaign finance during the 2013 elections. Millions of shillings were spent on branded vehicles, aircraft, pages of full colour newspaper ads, lengthy radio and TV spots, and campaign merchandise. The East African newspaper estimated that each of the main presidential candidates required between US\$100 million and US\$150 million to run effective campaigns.¹

Such unregulated spending not only tilts the scales in favour of moneyed candidates; it creates a strong incentive for potential candidates to build election 'war chests' through corruption. The Goldenberg and Anglo Leasing scandals, and the looting of the National Social Security Fund (NSSF), have all been linked to campaign and political financing.²

Beyond the glamour of the campaigns, little differentiated the presidential candidates from a policy point of view. All promised youth empowerment, jobs, and economic growth.

Predictably, and continuing past trends, candidates capitalized on their respective ethnic blocks. Opinion polls suggested a very close contest between the CORD and Jubilee coalitions. A poll released by Ipsos Synovate about two weeks before the election, rated the popularity of Uhuru Kenyatta (Jubilee) at 44.8%, and that of Raila Odinga (CORD) at 44.4%.³ A pre-election poll by AfriCOG put them at 45% and 46% respectively⁴. All indications were that none of the candidates would meet the 50% +1 constitutional threshold for an outright win. Regardless of outcome, with such narrow margins, the polling was always going to be a deeply polarised affair.

The trials of Uhuru Kenyatta and William Ruto at the International Criminal Court (ICC) became the rallying point for the Jubilee Coalition. Civil society and diplomatic quarters questioned the ethics and legality of candidates indicted for crimes against humanity vying in the election. While maintaining that Washington did not endorse any particular candidate, US Assistant Secretary of State Johnnie Carson cautioned Kenyans:

"We live in an interconnected world and people should be thoughtful about the impact that their choices have on their nation, on the region, on the economy, on the society and on the world in which they live. Choices have consequences."⁵

The Jubilee Coalition successfully turned this logic on its head. It depicted the ICC as a neo-colonial institution being used by its opponents, in cahoots with Western governments, to block their ascent to power. The coalition appealed to its supporters' nationalism, asking them to reject 'imperialistic' schemes, and called on the international community to respect

¹ Mwaure Kimani and Christine Mungai, The East African, February 5, 2012, *Campaign finance: Price tag of Kenya 2012 presidential race likely to hit \$130 million*

² Coalition for Accountable Political Finance, CAPF Bills Digest, Issue No. 01/12, August 2012, *Transparency in Campaign and Political Financing*

³ Dave Opiyo, Daily Nation, February 14, 2013, *Uhuru, Raila locked in dead heat race poll*

⁴ AfriCOG, 2013, *Pre-Election Poll* Available at: <http://www.africog.org/sites/default/files/AFRICOG%20-%20POST-ELECTION%20PUBLIC%20OPINION%20POLL%20REPORT%20-%20MARCH%2005%20-06,%202013-1-2.pdf>.

the sovereignty and democratic will of the Kenyan people. Ironically, the Jubilee campaign was advised by a team of British PR consultants, BTP Advisers.⁶

There were some positive aspects of the campaigns. Violence remained low, except in mid-August 2012 when conflict in Tana River left scores dead. Past clashes in the region were over land and water; this instance was reportedly larger in scale and intensity, and linked to the election⁷. For the first time ever, presidential candidates took part in a live, nationally televised TV debate. It would appear that the threat of ICC action had a sobering effect on politicians long accustomed to the deploy violence and informal militias to mobilise and intimidate the electorate.

The campaigns and elections were not entirely devoid of violence, as there had been reports of sporadic clashes in the previous year, some of which were attributed to border disputes and terrorism, though they may well have been a cloak for politically motivated violence.

1.2 Prelude to the Elections

The lead-up to the 2013 Kenyan General Elections was fraught with anticipation. The new Independent Electoral and Boundaries Commission (IEBC), the successor to the much-maligned Electoral Commission of Kenya (ECK), enjoyed over 90% public confidence as of January 2013.⁸ This ranked the IEBC above all other institutions included in the survey carried out for the Kenya National Dialogue and Reconciliation team, including Parliament, political parties, the police force and the Judiciary.⁹

The 2013 electoral process was expected to be groundbreaking, featuring digital registration, voter identification and results transmission technology. To ensure transparency and accountability, IEBC Chairperson Isaak Hassan explained, sophisticated electoral technology would act as a check on manual systems. In a public statement at the end of October 2012, Hassan explained that capturing individual fingerprints and personal biographic information, biometric voter registration (BVR) kits would “ensure that all those who enrol themselves for the elections are entitled to vote, and to vote only once.”¹⁰

Despite these assurances, the technology associated with the election was besieged with challenges from the beginning. After a much-delayed procurement process, the IEBC cancelled the bid for BVR kits in August 2012, intending to revert to manual registration. A number of actors, including civil society, voiced strong disapproval of this suggestion. Soon after, the Executive insisted on the use of BVR technology and acquired the kits through a ‘government-to-government’ transaction with Canadian authorities. Even after the deal was concluded, the technology did not arrive in Kenya until November, two weeks before voter registration was to commence. As a result of the procurement delays, the voter registration timeline was continuously amended, and staff training on the use of BVR delayed. In the end, a process intended to begin in September 2012 did not start until November 2012. Public verification of the register therefore had to be reduced from 30 to 14 days. The election itself was extremely expensive, indeed among the most expensive in the world, estimated to cost about US\$10 per voter, as compared to US\$3.7 per voter in Uganda and US\$2.7 in Botswana¹¹.

⁵ Gabe Joselow, Voice of America, February 7, 2013, *US Official Says Kenya's Elections Have 'Consequences'*

⁶ Leela Jacinto, France 24, March 8, 2013, *Kenyatta blasts UK-with a little help from British PR*

⁷ KNCHR Report, 2012, *29 days of Terror in the Delta*

⁸ KNDR Review Report 2013, Katiba Institute, *Kenya's 2013 General Election*, vii.

⁹ *ibid* p. 38.

¹⁰ Hassan, Ahmed Issack, 2012, *Biometric Voter Registration (BVR) to Enhance Credibility of Elections*

¹¹ The Standard, March 11, 2012, *Kenya's poll among world's most expensive*

1.3 Electoral Laws

The 2010 Constitution of Kenya sought to streamline election-related activity: specifically, to level the playing field and institutionalize political parties. The resultant legislation, the Elections Act, set out rules regarding diversity for political parties and other electoral institutions, and also stipulated timelines to be adhered to. Important timelines included the rule that party membership lists be finalised at least three months before an election, and that candidates on party lists be members of the political party for at least three months prior to the submission of the list.¹² These laws were intended to prevent the opportunistic party hopping that was typical in the lead-up to previous elections, ensuring that candidates were genuinely committed to the membership and goals of their parties. They were also designed to give the IEBC sufficient time to address errors and grievances. In an act of self-interest, MPs destroyed the spirit of such laws with a series of amendments passed just before the election. The Elections Act was amended to allow politicians to change their party allegiances up to two months before the election and one day before parties were required to submit their membership lists to the Registrar of Political Parties. MPs also added a proviso excluded MPs and members of county assemblies standing in the first elections under the new constitution from the education requirement under law requiring proof of post-secondary school education.¹³

1.4 Nominations

The party nominations that ensued were chaotic¹⁴. Most parties waited until one day before the deadline to hold their nominations, meaning they were left with only 24 hours to hold nominations, count and

tally the votes, deal with disputes and submit finalised lists to the IEBC. Moreover, this was the first time parties were holding nominations under the new constitution and coordinating multiple nominations for ward, county and national representatives. Allegations of vote rigging and ethnic zoning were rife, and violence was reported in some areas.¹⁵

1.5 Voter Registration

The registration process fared marginally better. Beginning on November 19, 2012, from 8 am to 5 pm over a period of 30 days, eligible voters had the opportunity to electronically register in preparation for the 2013 General Elections. While problems were apparent from the beginning, most were quickly resolved. A number of faulty BVR kits were reported, and at least one BVR kit was reported stolen, and later recovered.¹⁶

Other problems were more difficult to resolve. For example, there were striking differences in the percentages of eligible voters registered per county, which may have been a result of the fact that BVR kits were shared among various polling stations. The IEBC had only 15,000 kits for approximately 25,000 centres. In a public statement, the IEBC Chair Isaak Hassan explained there would be some sharing of BVR kits between centres, especially in rural and sparsely populated areas. He did not, however, explain the criteria that were used to allocate kits across the country. Some regions had more kits than others with the result that they were able to register more voters. In the end, a county like Kakamega, the most populous rural county in Kenya, had less registered voters than Kiambu County, which registered more than 116% of the projected voters.

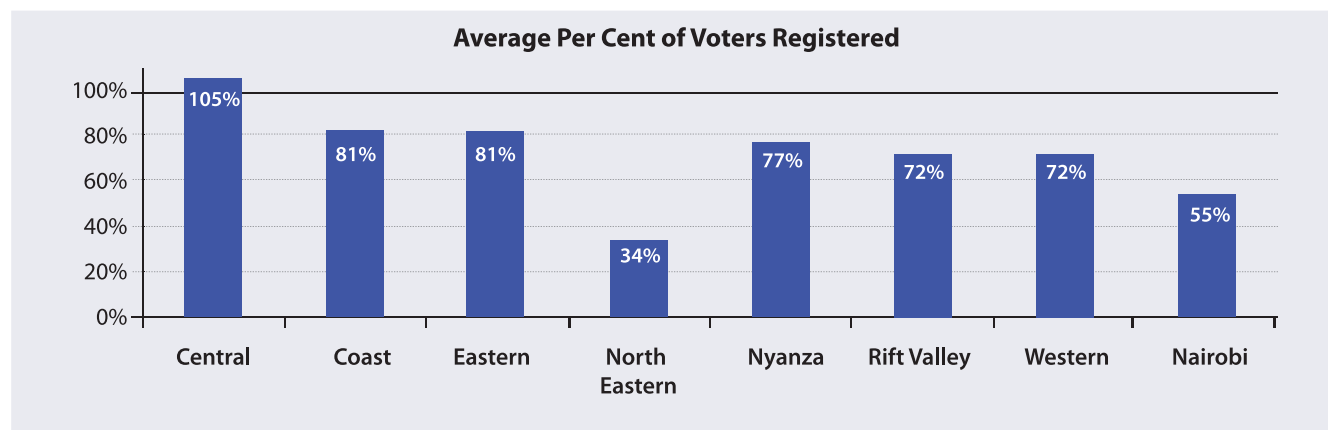
¹² Elections Act, 2011 Section (28) and (34)(8).

¹³ Elections Act, 2011 Section 22(2)(b) and Section 22 (2A).

¹⁴ KPTJ, 2013, *Concerns over Nomination exercise*. Available at: <http://africog.org/new/wp-content/uploads/KPTJ%20PRESS%20STATEMENT%20ON%20THE%20PARTY%20NOMINATIONS.pdf>.

¹⁵ Seema Shah, Kenyan General Elections: Pre-Election Report II, February 5, 2013 Available at: <http://themonkeycage.org/2013/02/05/2013-kenyan-general-elections-pre-election-report-ii/>.

¹⁶ Standard Digital, November 27, 2012, *IEBC falls behind target for voter registration*



Furthermore, there were no special provisions to facilitate voter registration in largely pastoralist constituencies. The Election Observation Group (ELOG) noted the vast distance between centres in outlying areas as a serious obstacle to voter registration.

Finally, low voter registration rates were reported due to the lack of identity (ID) cards. The Elections Act was amended to allow those in possession of an acknowledgement of registration certificate, which indicates that the holder has applied for an ID card, to register to vote. To cast a ballot, however, an actual ID card or passport is required by law.

Historically, voter registration has always been problematic, as noted by the Kriegler Commission, set up through the National Dialogue and Reconciliation process in 2008 to examine the 2007 elections and make recommendations to improve future electoral processes. It noted that continual registration at ECK offices accounted for only about 3% of all registrations. Instead of continual registration, the Kriegler Commission recommended that voter registration be automated, to occur at the same time as acquisition of a national ID card.

A permanent solution will necessarily involve moving to an alternative system, based on other population databases, particularly that related to the national ID card and, when implemented, to the proposed Integrated Population Registration Systems (IPRS).¹⁷

To date, this recommendation has not been adopted.

By the end of the process, on 18 December 2012, the IEBC had registered 14,340,036¹⁸ voters, representing approximately 80% of its overall target.

1.6 Election Day: Systems Failure

On 4 March, Kenyans went to the polls in record numbers, with a reported 80% voter turnout. Domestic and international monitors observed a number of problems. The most serious were: extremely long queues, names of registered voters not appearing on the register, the breakdown of technology, inadequate polling station materials, IEBC staff incompetence, lack of ballot secrecy, voter bribery, and some violence.

¹⁷ IREC, December 27, 2008, Final Consolidated Report, p. 80.

¹⁸ While this was the number published on December 18, 2012 by the IEBC, the Commission later said that it had also registered 36,236 voters whose biometric details could not be captured. If true, then the IEBC had actually registered 14,376,272 voters by the end of voter registration.

Anxiety arose when the much-touted electronic voter identification (EVID) system, which was intended to identify registered voters based on their biometric features such as fingerprints, failed at most polling stations, prompting poll officials to revert to the manual system. In some areas EVID had not been distributed nor set up; or even when set up, the systems were not supplied with sufficient battery power to last through the voting day, a factor that affected numerous polling stations.¹⁹

The failure of the electronic system generated suspicion in some quarters. It was also later to cast doubt on the election outcome, since the register used by the IEBC was not the same as the legally gazetted version. It later came to light that besides the gazetted register and the 'Green Book', made up of manual records of voters at each registration centre drawn up by IEBC staff during registration, there were several other lists of voters in use, each with different totals making verification impossible. A poll conducted after the elections revealed that 16% of respondents, all of whom were registered voters, witnessed or knew of people who had registered to vote but were turned away from the polls on Election Day because their names did not appear in the register.²⁰

A survey commissioned by AfriCOG for the period 4–6 March 2013 also showed that 35% of voters polled experienced or witnessed challenges as they voted.²¹

1.7 Inconsistencies and Self Restraint

The magnitude of the electoral issues became increasingly clear as tallies began streaming in. On television screens across the country, the gap between Kenyatta and Odinga remained constant, inexplicably, and the numbers of valid, rejected and cast votes did not add up.

Reacting to criticism of its role in the 2007 elections, the media also exercised a great deal of restraint and even self-censorship in its reporting, ostensibly in the interest of maintaining peace. One international journalist, Michaela Wrong, reported that the "feisty" Kenyan media had been replaced with a "zombie army", revealing "a society terrified by its own capacity for violence"²². Wrong went on to describe glaring irregularities, including results on the screen above the IEBC chairman's head inconsistent with what he was announcing, even as he congratulated the media on its "exemplary behaviour". She noted that "self-censorship comes at a price: political impartiality", and asked whether the media's behaviour "allowed another major abuse to occur right before their eyes."²³

In the midst of the counting, the IEBC announced that the electronic results transmission (ERT) system had encountered a 'glitch'. Eventually, it conceded that the entire system had failed and polling officers would resort to manual counting and tallying. The failure of the ERT system left Kenya as it was in 2007,

¹⁸ While this was the number published on December 18, 2012 by the IEBC, the Commission later said that it had also registered 36,236 voters whose biometric details could not be captured. If true, then the IEBC had actually registered 14,376,272 voters by the end of voter registration.

¹⁹ Ayesha Chugh and Katherine Krueger, The Electoral Knowledge Network, March 27, 2014, *The Role of Technology in the Outcome of the Kenyan General Election*. Available at: <http://aceproject.org/today/feature-articles/the-role-of-technology-in-the-outcome-of-the/>

²⁰ Dr Seema Shah, The Star, August 10, 2013, *Zimbabwe And Kenyan Elections Compared*

²¹ AfriCOG, Post-election Public Opinion Poll, March 5, 2013. Available at: <http://www.africog.org/sites/default/files/AFRICOG%20-%20POST-ELECTION%20PUBLIC%20OPINION%20POLL%20REPORT%20-%20MARCH%2005%20-06,%202013-1-2.pdf>.

²² Michela Wrong, New York Times, March 14, 2013, To be prudent is to be partial

²³ *ibid*

reliant on thousands of overworked electoral officials to manually count and tally the ballots from 34,000 polling stations across the country. As in 2007, and against the Kriegler Commission's recommendations, there was no independent safeguard to verify manually tallied results.

This problem was exacerbated by the IEBC's decision to evict all observers from the National Tallying Centre. The IEBC claimed that party agents became "rowdy" and thus had to be expelled. International observers acknowledged that this was a serious breach of the transparency process.²⁴

Citing errors and miscounts, ODM raised the alarm. After an examination of a sample of Forms 34, used to tally results at the polling stations, Kenyans for Peace with Truth and Justice (KPTJ) filed a case in the High Court²⁵. The High Court Application requested that counting be stopped until problems with the Forms 34 (declaration of results for presidential election from polling station) and Forms 36 (declaration of aggregate results from constituency level) could be resolved. The High Court ruled that it did not have jurisdiction to grant KPTJ's prayers, but it did state that the issues raised were "not idle" and should be raised in the correct forum.

In a press release shortly after the poll, the Carter Center initially concluded that the paper-based procedure for counting and tallying presented enough guarantees to preserve the expression of the will of Kenyan voters. The same press release however, highlighted that several key areas related to the tabulation of results did not receive

sufficient attention; that a lack of transparency in the national tally marred the final stages of the process; and that party agents and observers were unable to observe proceedings adequately.²⁶

The Center's final report was more critical and concluded thus:

"Overall, Kenya partially fulfilled its obligations to ensure that the will of the people, as expressed through the ballot box, is accurately recorded and communicated."²⁷

1.8 Challenging the Results in the Supreme Court

On March 9, 2013 the Chairman of the IEBC, announced the presidential results. The Jubilee Coalition's candidate, Uhuru Kenyatta, had won the popular vote, and also surpassed the constitutional threshold of 50% plus one of the vote. The announcement caught many by surprise, given that all indications from pre-election polls were that neither of the two leading presidential candidates would meet the 50% plus one threshold.

Given the narrow margin and the irregularities observed, it was inevitable that the outcome would be challenged. Three separate petitions were swiftly filed at the Supreme Court by AfriCOG, Raila Odinga and another jointly by three individuals, Dennis Itumbi, Moses Kuria, and Florence Sergon on the question of whether rejected votes ought to have been included in the tally of the final presidential results. The three petitions were ultimately consolidated and heard concurrently.

²⁶ The Carter Center Press Release, April 4, 2013, *The Carter Center Finds Kenya Election Results Reflect Will of Voters*. Available at: <https://www.cartercenter.org/news/pr/kenya-040413.html>.

²⁷ Carter Center. *Observing Kenya's March 2013 National Elections*. Final Report pg. 57. Available at: http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf.

On March 16, 2013, AfriCOG and Zahid Rajan, on behalf of KPTJ, filed a petition in the Supreme Court, which argued that the presidential election process was in direct violation of the Constitution, as follows:

- i) The election was not free and fair, nor was it transparent.
- ii) The election was not administered in an impartial, efficient, accurate or accountable manner.
- iii) The electoral management system was not simple, accurate, verifiable, secure, accountable or transparent.
- iv) The counting and tallying of votes was neither open nor prompt and structures and mechanisms meant to eliminate electoral malpractice were lacking. In sum, AfriCOG argued that the administration of the presidential election was in direct violation of Articles 38(2), (3), 81 and 86 of the Kenyan Constitution.²⁸

In particular, AfriCOG relied on an in-depth analysis of the voters register, which showed unexplained, geographically strategic changes to the register after the official close of registration. As a result of such alterations, AfriCOG argued that the IEBC had failed to comply with its legal obligation to establish and maintain an accurate and credible register.²⁹ In addition, AfriCOG asserted that the failure of the electronic voter identification and results transmission systems effectively eliminated all checks on the manual system. This failure made it impossible

for anyone to verify that the IEBC conducted the election in an accurate and secure manner.³⁰

Indeed, AfriCOG's analysis of Forms 34 and Forms 36 showed widespread inconsistencies and errors in counting and tallying.

The petition filed by Raila Odinga challenged the results on largely similar grounds: that the IEBC did not carry out a valid voter registration, that it failed to carry out a transparent, verifiable, accurate and accountable election as required under the Constitution, and that the electronic systems were poorly designed and implemented and were designed to fail. Odinga also challenged the claim that the declared winner attained the constitutional threshold of 50% plus one by pointing to irregularities such as the reduction of votes during the tallying in certain stations, the expulsion of presidential party agents from the National Tallying Centre, and alterations in material documents. The documents cited were Forms 34, which were filled in to reflect results at every polling station, and Forms 36, which aggregated results recorded on Forms 34.

1.9 Supreme Court Decision

On 30 March 2013, the Supreme Court ruled that the country's elections had been free, fair and in compliance with the Constitution; that Uhuru Kenyatta and William Ruto had been legitimately elected and that rejected votes should not have been included in calculating the final vote tallies. All six judges concurred in this unanimous decision.

²⁸ Civil Society Election Petition Paragraph 14, <http://www.africog.org/content/civil-society-election-petition>

²⁹ *ibid* Paragraphs 21-22

³⁰ *ibid* Paragraph 31

...We will, therefore... uphold the Presidential-election results as declared by IEBC on 9th March, 2013....In unanimity on the matters brought before us in these proceedings, we make orders as follows:

1. Petition No. 5 of 2013 in the Consolidated Petitions be and is hereby dismissed.
2. Petition No. 4 of 2013 in the Consolidated Petitions be and is hereby dismissed.
3. Petition No. 3 of 2013 in the Consolidated Petitions, and with regard to the prayer for Orders for the re-computation of vote-tally percentages by the 2nd Respondent, is declined, for want of jurisdiction....³¹

The Supreme Court's judgment left many questions unanswered. In the view of legal and electoral experts, the Court neither addressed the evidence questioning the integrity of the voter register and tallying forms, nor the important question of voter turnout of over 100% in numerous polling stations, which, in and of itself, ought to have resulted in the cancellation of results under the Elections (General) Regulations 2012. Given the narrow margin by which the winning candidate cleared the 50% hurdle, this was significant.

A prominent constitutional lawyer was critical of the judgment, citing the Supreme Court's reliance on suspect Nigerian precedent, the use of subsidiary legislation to limit the meaning of the constitutional phrase 'votes cast,' and its unquestioning acceptance of the IEBC's explanations of its various failures.³²

"Overall the, the Supreme Court's detailed judgment is disappointing, mostly for its simple failure to confront the evidence questioning the credibility of the electoral process. When considered in the context of Kenyan political history, this is not just disappointing but negligent. Sadly, the Court's judgment implies that it is acceptable to run a deeply flawed election. The precedent has now been set, and there is little incentive for the IEBC to improve its conduct in the future"

Seema Shah, March 2013

The consequences of the elections and the Supreme Court ruling for governance in the country are far reaching. The court process did provide a 'safe' avenue to resolve the dispute, and the country avoided the violence and strife witnessed after the 2007 elections, but there was a lingering perception that the Court dealt with the petition casually. The judgment appears to have impacted negatively on public perceptions of the Supreme Court. In the aftermath of the case, almost one-third of respondents to a survey said that they were "not confident" in the Supreme Court.³³ More than half of respondents reported that they are "not confident" in their elected MPs.³⁴ The exclusive prioritisation of peace that prevailed during the period preceding the elections was called into question, as numerous electoral irregularities came to light, and the lack of violence slowly turned into shock and anger.³⁵

"Peaceful elections on their own do not make a democracy, and the root causes that led to violence in 2007/2008 in the first place remain unaddressed."

³¹ Excerpt from Judgment on Petition No.5 of 2013. Available at:<http://www.judiciary.go.ke/portal/assets/files/NEWS/FULL%20JUDGEMENT-PRESIDENTIAL%20ELECTION%20PETITION%202013.pdf>.

³² Wachira Maina, East African, April 20, 2013, *Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test*

³³ AfriCOG perception poll, 2013. Available at: <http://www.africog.org/content/africog-infotrak-perception-poll-may-2013>.

³⁴ Ibid.

³⁵ Seema Shah, Foreign Policy, March 18, 2013, *Trading Peace for Justice in the Kenyan Elections*



2. Governance Reforms in 2013

2.1 The New Government

The government system in Kenya changed significantly with the adoption of the Constitution in 2010. The new constitution created a presidential system of governance, a bicameral legislature comprising the National Assembly and the Senate. It also provided for a devolved system of government with two levels, which are distinct, independent but interdependent - the national and county governments. The Constitution maintained separation of powers between the three arms of government i.e. Executive, Legislature and Judiciary.

2.1.1 The Executive

One of several innovations introduced under the new constitution was the appointment of Cabinet Secretaries from outside Parliament. Hitherto, Kenyans had been accustomed to the division of executive spoils amongst tribal barons who commanded a significant political following. The new appointees by the new Jubilee coalition government, with a few exceptions, were little known technocrats, academics and professionals. While the gender equality provision was not satisfied, several women were appointed. The new cabinet was also drastically reduced in size from the bloated coalition government formed under the mediation agreement, to a cabinet with only 18 secretaries. The appointments seemed to herald a new era focused on service delivery. However, poor implementation of the new governance model, and the marshalling of government representatives into championing the anti-ICC narrative, weakened their performance and credibility.

Rather than supporting devolved governance, the Executive preferred to unconstitutionally maintain a semblance of the old provincial administration, actualised through a new structure of county commissioners.

2.1.2 Appointments to Commissions

The Constitution of Kenya 2010 recommends that the chair and members of constitutional commissions and independent offices be identified and recommended for appointment in a manner prescribed by national legislation, approved by the National Assembly and appointed by the president.³⁶ Controversy surrounding appointments to state agencies arose throughout the year. Power brokers in the Executive continued to discount merit and hand out jobs to supporters and cronies in direct violation of the provisions of the Constitution. At the Teachers Service Commission, for example, despite being the leading candidate, the Kenya Institute of Curriculum Development Director was not nominated as chairperson³⁷. The selection panel also picked a nominee for the position of commissioner who reportedly came last in the interviews.

According to press reports, a nominee, not among the 13 names shortlisted by the selection team, was eventually picked by the president and his name forwarded to Parliament.³⁸ Similar intrigues caused gridlock at other commissions, such as the Kenya National Commission on Human Rights, which was left without a full complement of commissioners for most of the year.

³⁶ Constitution of Kenya 2010, Article 159

³⁷ Martin Mutua, Standard Digital, August 7, 2013, Rejected TSC chair candidate re-interviewed

³⁸ Martin Mutua, The Standard, September 26, 2013, Grim details emerge of TSC officials selection process

2.1.3 The Legislature

The 2013 elections also rang in the historic transition from a mixed parliamentary–presidential system to a fully presidential system with a bi-cameral Parliament made up of the National Assembly and the Senate. In the presidential system, the Executive is not present in the National Assembly; the president’s mandate is derived directly from the voter and is independent of Parliament. The new constitution transformed the role of Parliament, giving it much greater powers, especially in the areas of budget and oversight. The implication of this shift is that Parliament is now a policy-making body, constitutionally independent of the Executive. However, Parliament did not appear to fully appreciate this shift. Poorly prepared for the shift to a presidential system, despite significant time and resources spent on travel to countries with presidential systems (and some without), Parliament attempted to operate under the old system, with damaging consequences for its oversight role of the Executive. The clearest example of this is the fact that attitudinally, MPs still consider themselves as either ‘Government’ or ‘Opposition’, constructs that do not exist in a pure presidential system. In debate and legislation, MPs have also tended to strictly follow ‘government’ and ‘opposition’ lines, which should not be the case in a presidential system where legislators are required to consider legislation on its merit.

2.1.4 New skins, old wine

Expectations were high that the new crop of 349 elected members of the National Assembly and 67 Senators would break with the past. However, as with previous Parliaments, the National Assembly’s first order of business was to address their salaries and emoluments.

Next to attract the attention of the 11th Parliament was the Salaries and Remuneration Commission (SRC), mandated under Article 230 of the Constitution of Kenya 2010 to set, and regularly review, the remuneration and benefits of all state officers and to advise the national and county governments accordingly. Pursuant to this mandate, SRC had, through a Gazette notice published just before the elections, set the legislators’ monthly salary at Ksh 532,500, down from the Ksh 851,000 paid to MPs in the previous Parliament. The MPs pursued the SRC with gusto. In early May, they unanimously engineered a move to disband the SRC through a petition tabled in the House. The petitions ought to dismiss the SRC chairperson and 14 commissioners on 18 counts of “gross violation of the Constitution and gross misconduct”. These included failure to respect the MPs as elected representatives of the people, manifesting the sovereign power of the people in accordance with Article 1 of the Constitution. MPs also claimed violation of fair labour practices, which dictate that salaries of persons are not to be reduced to their disadvantage.³⁹ In truth, MPs aimed to neutralise the Gazette notice issued by the SRC, which sought to reduce their salaries. They subsequently achieved this when the Committee on Delegated Legislation recommended the annulment of the Gazette notice.

The MPs continued to defy the SRC, when the Parliamentary Service Commission vice-chair tabled a Ksh24.5 billion budget that included salaries and allowances fixed at the rates earned by Members of the 10th Parliament. Senators were even more ambitious: they tabled a budget that entitled them to a monthly package of Ksh1.36 million, including Ksh812,525 in allowances and a basic pay of Ksh550,875 for each of the 67 members and the Speaker. If passed, the proposals would effectively overturn the SRC’s effort to reduce and rationalise their pay.⁴⁰

³⁹ The Petition is available at: <http://www.parliament.go.ke/plone/national-assembly/business/petitions/petition-for-removal-of-sarah-jepkemboi-chumoserem-as-chairperson-of-the-salaries-and-remuneration-commission-and-the-removal-of-daniel-ogutu-sellestine-kiuluku-serah-kinyua-rtd-brig-samuel-ndururi-isaiah-kubai-jacqueline-mugo-ann-elizabeth-owuor-p/view>.

⁴⁰ Edwin Mutai, Business Daily Africa, May 2, 2013, *Parliament reinstates fat salaries at expense of taxpayers*

The MPs did not spare other Constitutional Commissions, such as KNCHR, which issued a statement condemning the proposed salary increments and the Commission on the Implementation of the Constitution (CIC), which cautioned the Parliamentary Service Commission (PSC) against making unlawful payments of salaries and benefits to state officers contrary to the determination of the SRC. The CIC warned that public officers would be personally responsible for making good the loss occasioned by such illegal payment.⁴¹ Various MPs threatened to slash the Commissions' budgets and to vet and reduce their numbers, claiming there were too many of them. When the president attempted to come to the SRC's rescue, the MPs threatened to cut his salary by more than half. They further vowed to paralyse government operations, abolish VAT and exempt any Kenyan earning Ksh50,000 and below from paying taxes.⁴²

The greed and self-interest of the legislators sparked protests by members of civil society who unleashed pigs, and poured pigs' blood, outside Parliament to symbolize the legislators' greed. The demonstrations attracted much attention and were widely covered by the local and international media.⁴³

The protests seemed to halt the legislators' efforts and embolden the SRC, which stood its ground despite the threats and intimidation. After three months of agitation, reason seemed to prevail when it was reported that Parliament had finally agreed to the revised salaries, following talks between the SRC and the PSC, headed by the National Assembly Speaker, mediated by Deputy President Ruto.

However, the deal struck between the SRC and MPs was suspect. In return for agreeing to the taxable Ksh532,500 monthly salary set by the SRC, the PSC convinced the SRC to shelve the ceiling on the number of committee sittings the MPs could hold in a week. This concession was a serious error of judgment on the part of the SRC. The MPs quickly took advantage of it to increase their earnings well beyond their initial demands.

Investigations by the *Star* newspaper revealed that MPs swiftly resorted to holding unnecessary and uncontrolled committee meetings to increase their monthly earnings. Some committees scheduled as many as 12 meetings a week: four meetings per day for the three days to transact parliamentary business. Many MPs reportedly made 'technical appearances', signing the attendance sheet then leaving without conducting any serious business. For three days' 'work' an MP sitting in only one committee earned Ksh60,000 in allowances, the deputy chairman Ksh96,000, while the chairman claimed Ksh120,000.⁴⁴

Later in the year MPs initiated moved to amend the Constitution to remove themselves, members of county assemblies, and judges and magistrates from the list of state officers as defined by the constitution. This would pave the way for them to determine their own remuneration.

The legislators' example was followed by agitation for higher wages by other public servants, such as teachers and doctors, who are paid a pittance in comparison.

⁴¹ Commission on the Implementation of the Constitution, May 27, 2013, *Statement on the role of senate in revenue bills and on salaries of MPs*. Available at: <http://www.cickenya.org/index.php/newsroom/item/316-cic-statement-on-the-role-of-senatein-revenue-bills-and-on-salaries-of-mps#.Uw30llczIU>.

⁴² Jerry Okungu, *The Star*, June 7, 2013, *Disband The National Assembly, Not Senate*

⁴³ See international coverage of the demonstration at the following sites:

<http://www.bbc.co.uk/news/world-africa-22522846>

<http://www.ctvnews.ca/world/kenyan-protesters-spill-cow-blood-over-mps-push-for-higher-salaries-1.1321064>

<http://news.sky.com/story/1090968/pig-protest-against-kenyan-mps-wage-demands>

<http://www.reuters.com/article/2013/05/14/us-kenya-protests-idUSBRE94D0DE20130514>

⁴⁴ David Mwere and Gideon Keter, *The Star*, August 27, 2013, *MPs increase sitting for more cash*

2.1.5 Senior state officials retirement benefits

As earlier mentioned, the SRC is exclusively granted the mandate to “set and regularly review the remuneration and benefits of all State officers” and advise government on the remuneration and benefits of all other public officers.

A Presidential Retirement Benefits Act, first adopted in 2003, extended a generous monetary pension and myriad additional benefits to retiring presidents. In January 2013, President Kibaki signed an amendment to it, effecting significant changes to the president’s retirement benefits without proper consultation with, and recommendation from the SRC. The Act was amended ‘to take into account inflation trends’, and generously increased the monetary and in-kind benefits of a retired president. Thus, former President Kibaki assented to his own retirement benefits, while neglecting to sign a bill to increase benefits to his deputy, the former Prime Minister and outgoing Members of Parliament. This generated a public debate on retirement benefits.

Apart from the lack of consultation prior to signing the Bill into law, the content of the law itself, in some places, was also unconstitutional. It reads: “notwithstanding the provisions of any other law to the contrary” ... “the pension and other benefits conferred by the Act shall be exempt from tax”, while Article 210 (3) of the Constitution requires that “No law may exclude or authorise the exclusion of a state officer from payment of tax by reason of – (a) the office held by that state officer; or (b) the nature of the work of the state officer”.

According to the Constitution, Article 230 (5), the allocation of benefits to state officials and public servants should recognise the following principles: productivity, performance, transparency and fairness.

Even after leaving office, a former president is expected to serve as an advisor to the people of Kenya and its government. He or she may also perform specific official functions for which he or she will receive “a reasonable allowance”. This reasonable allowance for specific official engagements is to be paid in addition to the pension and benefits prescribed by the Presidential Retirement Benefits Act. Given that the former president is separately compensated for his performance and service to the state, the lavish retirement package he receives appears excessive

2.1.6 Launching Devolution

Kenya’s ambitious devolution project, ushered in by the Constitution of Kenya 2010, proved a monumental challenge from the beginning. First, judging from the initial budget proposals, some county governments appeared bent on wasteful expenditure. The budgets contained huge allocations for such items as top-of-the range vehicles, governors’ and speakers’ residences, entertainment and in one instance, even a monument.⁴⁵ Yet Section 162 of the Public Finance Management (PFM) Act requires all public officers to comply with the Constitution and the Act to ensure that “resources are used in such a way that” is lawful, authorised and “effective, efficient, economical and transparent”. They must “ensure adequate arrangements are made for proper use, custody, safeguard, and maintenance of property” and use their “best efforts to prevent damage to county government financial interest”.

However, if the new county governor had their way:

- Nairobi’s county government would have spent Ksh462 million on renovating the debating chamber, Ksh100 million on new vehicles; Ksh 172 million on maintenance of vehicles and Ksh 30 million on transport allowances for county representatives.

Washington Akumu, East African, June 29, 2013, *Devolving profligacy: Who will watch over the counties’ \$2.5 billion?*

- Nakuru's county government would have spent Ksh40 million on the governor's residence and Ksh 33.5 million on the governor's entertainment allowance.
- Kisumu's government would have spent Ksh72 million on a fleet of Toyota Prados for its executive committee members.
- Homa Bay County would have spent Ksh 70 million on new vehicles and Ksh 2.5 million on the construction of a fitness centre for the county's executive committee members.
- Bungoma County would have spent Ksh53 million on the governor's entertainment expenses.
- The main spending units were the County Assembly Services, the County Executive Services and the Financial Management Service. The counties spent a total of Ksh 6.5 billion on personnel emoluments, Ksh 6.7 billion on operations and maintenance and Ksh 1.3 billion on development. As at 30 June 2013, most counties had not utilised the infrastructure funds from the Transition Authority while some counties spent funds meant for infrastructure development on recurrent activities.⁴⁸

The planned extravagance was evident in a number of other counties. According to the Controller of Budget⁴⁶, with the exception of eight counties, all the others had huge budget deficits without explanations as to how the deficits would be financed.⁴⁷

By the end of the first quarter, the Controller of Budget reported the following on county funds:

- Excessive hiring of staff by county governments exerted unbearable pressure on the wage bill. The bulk of monies disbursed to governors was spent on wages, leaving very little for operations, service delivery and development.
- The total locally collected revenues declined from a high of Ksh 2.1 billion in March 2013 to a low of Ksh 1.5 billion in June 2013. This decline may be attributed partly to revenue leakages and general apathy among the county residents and revenue collectors, due to transitional uncertainties on how levies previously charged by defunct Local Authorities were now payable.

Devolution teething problems escalated into supremacy battles between the National Assembly and the Senate, both of which spent weeks embroiled in a heated debate over which of the two Houses was superior. The debate was sparked when MPs questioned why the Senate was debating the Division of Revenue Bill 2013, after the National Assembly had already debated and passed it. The MPs' view was that the Senate had overstepped its mandate to assume powers it did not have under the Constitution. The fight degenerated, with MPs claiming that the Senate was redundant, and suggesting it should be abolished, ostensibly to reduce the wage bill.

Senators and Governors responded by closing ranks in an attempt to engineer an amendment to the Constitution of Kenya, 2010. They threatened to seek one million signatures to amend the Constitution to give the Senate powers to introduce bills and pass laws to strengthen the counties without reference to the National Assembly. The suggested amendment also included plans to raise revenue allocated to counties to at least 40% of the national budget.⁴⁹

⁴⁶ The Office of the Controller of Budget is an independent office established under Article 228 of the Constitution of Kenya 2010 with the core mandate to oversee implementation of the budgets of the national and county governments, authorize withdrawals from public funds and report on budget implementation to Parliament every four months.

⁴⁷ Office of the Controller of Budget, County Budget Implementation Review Report, First Quarter, FY 2013/2014

⁴⁸ Office of the Controller of Budget, County Budget Implementation Review Report, First Quarter, FY 2013/2014

⁴⁹ Moses Njagih, The Standard, June 13, 2013, *Senators mull county referendum to decide the fate of devolution*.

The MPs accused Governors of greed and misplaced priorities in their budgetary allocations. The wrangle took on a political dimension when the Jubilee government accused its opponents, CORD, of manipulating calls for a referendum to push for its own political agenda.⁵⁰

2.1.7 County Representatives

County Representatives, also seeking their cut of public funds, went on a go-slow from September 2013 to demand higher salaries and perks. The Members of County Assemblies (in excess of 2,000) demanded that their salaries be tripled from Ksh79,200 to Ksh257,500 per month, in addition to Ksh2 million each in car grants. They demanded that the state pay their domestic staff, offer the Representatives an annual medical insurance cover of Ksh 5.3 million each and special duty allowances of Ksh77,523. The 47 County Assembly Speakers, on the other hand, demanded that their salaries be doubled from Ksh225,000 to Ksh512,800 per month.⁵¹ Attempts to work out a deal were unsuccessful as County Representatives rejected offers made by the SRC. By the close of the year, the matter had not been resolved and the operations of the devolved governments were greatly hampered. This was largely occasioned by the delay in establishment of the Transition Authority, which ought to have undertaken comprehensive preparatory work for the launch of county governments ahead of the elections.⁵²

2.2 Clawing Back Constitutional Gains

Perhaps of greatest concern under the new Jubilee regime have been retrogressive measures to claw back gains made under the new constitution. The Media Bill and the Public Benefits Organisation Amendment Bill were cases in point that arose early on in the administration.

2.2.1 Media Bill

As the year came to a close, the President signed into law the Kenya Information and Communications Amendment (KICA) Bill 2013. The Media Bill, as it was commonly known, seemed aimed at paralysing the media by setting up a quasi-governmental body with powers to regulate and punish journalists and media houses. The Act provides that media groups can be fined up to Ksh20 million for code of conduct breaches. Any journalist adjudged to have violated the Act may also be fined up to Ksh500,000. The Act grants the President and the Cabinet Secretary for Information and Communication the final say on who will comprise the Communications Authority of Kenya and the Communications and Multimedia Appeals Tribunal. These two major bodies will manage the communications sector, regulate content, and regulate and punish journalists and media enterprises.

The Bill came under heavy criticism for its draconian provisions that amounted to attacks on democracy and free speech. Its constitutionality was questioned under Article 34 (2) (b) of the Constitution on the freedom of media, which prohibits the state from penalising any person for any opinion or view or the content of any broadcast, publication or dissemination. The powers given to the Executive by the Bill, and its punitive clauses raised fears of targeted state gagging of the media and individual journalists.

⁵⁰ East African Centre for Law & Justice Journal, May, 2013, *Supremacy Battle between the Senate and National Assembly*. Available at: <http://eaclj.org/constitution/20-constitution-feature-articles/136-supremacy-battle-between-the-senate-and-national-assembly.html>.

⁵¹ George Omondi, Daily Nation, September 18, 2013, *County assemblies strike set to derail key local services*

⁵² Africog, 2013, *Delivering on Devolution*. Available at: http://www.africog.org/sites/default/files/Delivering_on_Devolution_Report.pdf

The Bill caused a local and international outcry. The US-based Committee to Protect Journalists (CPJ) voiced concern that the laws would force journalists and news outlets to self-censor to survive.⁵³ The Daily Nation opined that “even one fine is enough to cripple most FM stations” adding that the Bill “puts the country in the same ranks with Zimbabwe, Cuba, Ethiopia and Kuwait” and that it had set Kenya “firmly on the path of regression into the era of darkness.”⁵⁴

The spokesman for the US State Department’s Bureau of African Affairs stated that the law would undermine the progress Kenya has made to promote media freedom, and give the government undue control over the media.⁵⁵ When the Bill was debated in Parliament, CORD MPs walked out enmasse, in protest at the government’s determination to force it through.

That the Bill was passed, and that the President assented to it in the face of such strong opposition, betrayed a dangerous and worrying trend: that the administration was prepared to ignore valid concerns and public sentiment on an issue of such national importance to force through laws which contravened the constitution.

2.2.2 PBO Amendment Bill

At the same time that the government seemed intent on muzzling the press, it essayed changes to legislation that would greatly hamper, if not render impossible, the work of civil society. In late October, the government quietly introduced amendments to the Public Benefits Organizations Act of 2012, which aimed at granting itself sweeping and arbitrary powers to deny registration to civil society organisations, to cap their foreign funding at 15% of their total

budgets, and to channel all their funding through a government body. The amendments were sneaked into the Statute Law (Miscellaneous Amendments) Bill, 2013.

Had the law been enacted, it would have effectively edged the country’s civil society organisations out of existence, with grave consequences. Experts estimated that it could have resulted in the loss of 240,000 jobs, reduced access to basic public health care for up to 20 million Kenyans, and deprived Kenya of at least US\$5 billion annually in foreign exchange that comes through the sector.⁵⁶

As with the Media Bill, outcry against the proposed amendments was widespread. A group of United Nations Special Rapporteurs urged the government to reject legislation stating that:

“...the amendments to the regulations of associations contained in the draft law could have profound consequences for civil society organizations in Kenya, including for those involved in human rights work, and could deter individuals from expressing dissenting views,”

(UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya).⁵⁷

Amnesty International described the attempts to muzzle NGOs as shameful, observing that the amendments, if passed, would dramatically undermine freedom of expression and human rights in the country. Amnesty argued that NGOs play a critical role in helping communities realise basic human rights through provision of health and education. A cap on their external funding would have a devastating

⁵³ Committee to Protect Journalists, December 5, 2013, *Kenyan Parliament Passes Draconian Media Laws*. Available at: <http://www.cpj.org/2013/12/kenya-parliament-passes-draconian-media-laws.php>.

⁵⁴ Lucas Barasa, Daily Nation, October 31, 2013, *Kenya joins states with repressive media laws*

⁵⁵ Agence France Presse (AFP), December 6, 2013, *US concern over ‘restrictive’ Kenya Media Bill*

Maina Kiai, Open Democracy, December 18, 2013, *In Kenya, averting a move to strangle civil society with the financial noose*

⁵⁷ See detailed statement at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14055&>.

impact on their capacity to help those most in need.⁵⁸ Human Rights First referred to the amendments as an attempt to silence critics through administrative repression.⁵⁹

Ultimately the amendments were narrowly defeated on 4 December 2013 following a local and international outcry, but the attempt to enact

such legislation portrayed a government intent on silencing dissenting voices. It was a clear indicator of the government's intolerance towards civil society, particularly those active on issues of human rights and governance, and its determination to claw back the democratic gains of past decades. Amendments to the Bill, and continuing threats to civil society, are an ongoing debate.

⁵⁸ Amnesty International, November 13, 2013, *Kenya: Proposed reforms will dramatically undermine human rights*. Available at: <https://www.amnesty.org/en/news/kenya-proposed-reforms-will-dramatically-undermine-human-rights-2013-11-13>

⁵⁹ Sarah Bessel, Human Rights First, November 15, 2013, *Kenya Civil Society Under Threat*. Available at: <http://www.humanrightsfirst.org/2013/11/15/kenyan-civil-society-under-threat/>



3. The Judiciary Fumbles

3.1 Criticism of the Supreme Court Ruling

The year 2013 was laden with difficulties for the Judiciary. The institution that Kenyans held in high esteem as leading reform was in the spotlight for all the wrong reasons.

Trouble began with the Supreme Court ruling on the Presidential election petition, which upheld the IEBC's announcement of the election results despite evidence of serious irregularities.

Critics argued that the ruling did not establish progressive or even useful jurisprudence—instead it set a poor precedent for other courts in Commonwealth countries.

“We saw a situation where substantive justice was not arrived at because of technicalities. What jurisprudence can be expected from a unanimous decision where judges did not lay down individual reasons and methods on how they arrived at that decision?”

Dan Ameyo, Advocate.

3.2 Damaging Controversy

The Supreme Court judgment was followed by judicial infighting during the second half of the year. At first, media reported⁶⁰ an elaborate scheme by people close to the Chief Justice (CJ) to oust the Chief Registrar of the Judiciary, Gladys Boss Shollei, and officers perceived to be close to her, ostensibly to allow the CJ to take control of the institution. The intervention of the Judicial Service Commission (JSC) was sought, to have the Chief Registrar dismissed or suspended.⁶¹

In early August, the JSC sent Shollei on compulsory leave, to investigate allegations of financial impropriety in contracts awarded by the Judiciary. The JSC accused her of misconduct and abuse of power related to expenditure on premises, vehicles, technology, failure to audit construction of Milimani Law Courts, authorising cabling of the Milimani complex, insubordination and irregular hiring of staff. Shollei was also accused of taking Ksh2.5 million in sitting allowances for meetings she did not attend. The Chief Registrar did not take the allegations lying down. Activating her own spheres of influence, she went to court to block her suspension and accused three commissioners, Ahmednasir Abdullahi, Emily Ominde and Mohammed Warsame, of pursuing a personal vendetta against her. She, in turn, demanded their removal from the JSC.

The feud found its way to Parliament. The Parliamentary Select Committee on Justice and Legal Affairs, chaired by Samuel Chepkonga, questioned the manner in which the JSC suspended the Chief Registrar and summoned the JSC on the matter. The JSC declined to appear before the committee, insisting that MPs did not have the powers to summon the Commission. A standoff ensued.

The parliamentary committee proceeded to table a motion for the removal of six commissioners. Parliament adopted and passed the motion, following which President Kenyatta appointed a tribunal to investigate the six JSC members. However, a High Court judge barred the tribunal from sitting and also suspended the gazette notice through which the six were suspended.

⁶⁰ Jemimah Wangui, All Africa, September 27, 2013, *Chief Justice Complains His Email Account Was Hacked*. Available at: <http://allafrica.com/stories/201309280215.html>

⁶¹ Kipchumba Some, The Standard, September 27, 2013, *Hand-picked team comes up with a 6-page document titled 'War Strategy' advising CJ to kick Shollei*

While appearing before the Budget and Appropriations Committee of Parliament, the Chief Registrar made the damning revelation that members of the Judicial Service Commission had pocketed over Ksh125 million in just two and a half years through sitting allowances. She further disclosed that the commissioners held 467 meetings, some of which were baseless, for which allowances of Ksh80,000 were paid for each sitting.⁶² According to her, the inflated sitting allowances had been agreed on the understanding that the commissioners would meet not more than twice a month. Instead they met 16 times per month on average. The registrar detailed commissioners' junkets, alleging that between May and August, they travelled to Canada, USA, Cambodia, Sierra Leone and Tanzania; they also demanded allowances 'even when sitting in airplanes'. She attributed her woes to these acts of financial mismanagement.⁶³

The Chief Registrar was sacked by the JSC in mid-October 2013. In a press statement following the sacking, the Chief Justice said that the Registrar had admitted to 33 allegations in which Ksh1.7 billion was at risk or had been lost. The Chief Registrar reportedly denied another 38 allegations in which Ksh 250 million was lost. The JSC stated that her responses to allegations involving Ksh 361 million were 'mixed, flippant and flimsy'. The Registrar was found to have received Ksh2.56 million in sitting allowances when the JSC was conducting interviews for Court of Appeal and High Court judges, yet she did not participate in the process. In addition she was found to have wrongfully taken an eight-month salary advance of Ksh 3.5 million from the Judiciary's Milimani Court deposit fund. Her argument that the facility was

available to judges fell flat because government financial regulations state that salary advances may not exceed two months, and may only be granted when an officer has no other outstanding advances.⁶⁴

3.3 Diminishing Faith in the Judiciary

As if the Chief Registrar drama were not enough, four junior members of staff at the Judiciary were arrested for conspiring to steal Ksh 80 million from their employer in September 2013. In a strange turn of events, the JSC and the Chief Justice attempted to prevent their arrest and prosecution. The JSC reportedly met and resolved that the staff in police custody for the matter should not be charged in court until investigations were completed and the JSC fully briefed.⁶⁵ Though the four were subsequently charged in court, the attempt to shield them from due process raised disturbing questions.

The infighting was damaging to an institution that had for some time made considerable gains in the confidence of the public. A perceptions survey conducted by AfriCOG registered an apparent drop in public confidence in the Judiciary⁶⁶ The Ethics and Anti-Corruption Commission (EACC) in a study on corruption in the Judiciary,⁶⁷ showed that 58% of respondents thought corruption was reduced, while 10% thought that levels had increased. The three main forms of corruption reported were disappearance of files, abuse of office and bribing of judicial staff. Court users complained particularly about absenteeism, bribery and favouritism. A majority of 73% of users were concerned about laxity, while staff cited bribery, laxity, and nepotism as the main types of misconduct within

⁶² Alphonse Shiundu, The Standard, October 18, 2013, *Shollei lifts lid on Sh125m paid to JSC members*

⁶³ Ibrahim Oruko, The Star, October 18, 2013, *JSC members got sh128 million allowances*

⁶⁴ John Ngirachu, Daily Nation, October 18, 2013, *JSC sends Gladys Shollei packing over Sh2 billion scandal*

⁶⁵ The Standard, October 16, 2013, *Mutunga team fails integrity test*

⁶⁶ AfriCOG Perception poll, 2013. Available at: http://www.africog.org/newsletter/august_2013,

⁶⁷ Ethics and Anti-Corruption Commission, Annual Report 2012/2013, p. 43.

the Judiciary⁶⁸. The EACC identified the main effects of corruption as delays in delivering judgements, disappearance of evidence and documents, and undue variations in sentencing.

3.4 Vetting of Public Officers

Among the raft of reforms contemplated by the Constitution of Kenya 2010 was the vetting of public officers, designed to inspire the confidence and trust of the public in potential appointees. The planned vetting of magistrates stalled for the better part of the year. The vetting board blamed the delay on lack of foreign judges to complete the composition of the board, as required by the Vetting of Judges and Magistrates Act. At the beginning of September however, the vetting of senior resident magistrates commenced but did not attract much public interest. During this period, the vetting of police officers also commenced.

3.4.1 Judges and Magistrates

In January, two High Court judges, Muga Apondi and Abida Ali Aroni, were found unfit to serve the Judiciary, while Lady Justice Mary Kasango was found fit to serve. At the same time, the Judges and Magistrates Vetting Board, after conducting fresh vetting, found Supreme Court Judge Mohammed Ibrahim and Court of Appeal Judge Roselyn Nambuye fit to serve. They had previously been deemed unfit to serve due to inordinate delay in delivering judgements.

In March, the board dismissed a number of Chief Magistrates on the grounds of unprofessionalism and incompetence. They cleared 11 magistrates and 13 judges who had been promoted from magistrates in the recent past.

In December, the Board found a further nine magistrates unfit to serve on the basis of incompetence, poor writing skills, and questionable financial dealings, while 18 others were allowed to continue discharging their duties. Justice Joseph Serگون, on the other hand, resumed his judicial duties as a judge in Kericho after a review of the board's December 2012 recommendation to have him removed from office. Allegations had been made that Serگون received a bribe of Ksh 200,000 while serving as a judge in Mombasa, but the board found this could not be proved. He had also been accused of failing to remit money awarded to his former client at his former law firm in Nakuru. However the Board ruled that since he was no longer a lawyer with the said firm he could not be held responsible for the actions of those still at the firm.

The Board was supposed to conclude the vetting process by 31 December 2013, but did not. The Chairman, Sharad Rao, at the launch of the board's September 2011-February 2013 interim report in October, cited various reasons for the delay, including financial issues, unrealistic time frames set by the Vetting of Judges and Magistrates Act, and legal action against the board's jurisdiction. A proposal by the Justice and Legal Affairs Committee on the extension of the Board's term was presented to the National Assembly. If accepted, the Board's term was to be renewed for two years.

3.4.2 Police Officers

The commencement late in the year of the vetting of senior police officers attracted much public interest. The officers vetted included the Senior Deputy Commissioner of Police Francis Okonya, the General Service Unit (GSU) Commandant William Saiya, Kiganjo Police Training College Commandant, Peter Kavila, Director of the Small Arms Secretariat, John Patrick Ochieng, and Director of Reforms at police headquarter, Jonathan Koskei.

⁶⁸ Ibid.

While the delay in vetting of judicial officers was regrettable, the commencement of that of police officers was welcome. The exercise, required under Section 246 of the Constitution and the National Police Service Act Section 7(2) and (3), is critical to security sector reforms. If successful, it will go a long way towards ensuring that the police service complies with Chapter Six of the Constitution, the principles of public service in Article 232 of the Constitution, and those in the Public Officers Ethics Act.

Against expectations, the four most senior officers, namely Inspector-General of Police, David Kimaiyo, his two deputies Grace Kahindi and Samuel Arachi, and Director of Criminal Investigations, Ndegwa Muhoro, avoided the vetting. According to the chair of the National Police Service Commission, the four underwent rigorous employment vetting during their nomination and subsequent appointment to their newly created positions and were therefore not subject to transitional vetting.⁶⁹

3.5 The International Criminal Court Cases

If the defining moment in 2013 was the elections, the dominant recurring theme was the cases facing Uhuru Kenyatta, William Ruto and Joshua Sang at the International Criminal Court (ICC). It cast a long shadow over events before, during and after the elections.

Following the post-election violence in February 2008, the Government of Kenya and a mediation team led by Kofi Annan convened the Commission of Inquiry into the Post Election Violence (CIPEV), commonly known as the Waki Commission, named after its Chair, Justice Philip Waki. The Commission recommended a Special Tribunal for Kenya to try those most responsible for gross human rights violations during the post-election period in 2007. Three attempts to establish a tribunal were made by two Ministers of

Justice whose bills were rejected by the Cabinet and Parliament. An attempt by MP Gitobu Imanyara to form a local tribunal also failed. At the time, as the Waki Commission recommended a local tribunal, local politicians rejected it and vocally advocated for the ICC option. As a consequence of the failure to establish a credible domestic mechanism, the prosecution fell to the ICC as the court of last resort to pursue justice for the victims of the post-election violence (PEV).

As the cases unfolded, they took unexpected turns. A process that sought accountability and justice for victims of the post election violence ended with two of the accused ascending to the presidency.

The ICC cases formed the primary narrative in and around the presidential elections. Strong arguments were made that Uhuru Kenyatta and his co-accused, William Ruto, were ineligible to contest the presidency while indicted by the ICC. Their opponents reiterated these arguments and questioned whether they met the requirements of Chapter Six of the Constitution. The High Court of Kenya dismissed a petition filed by the International Center for Policy and Conflict on the eligibility of Kenyatta and Ruto to contest the elections. The petition was declared premature by the court, as the respondents had not yet officially declared their candidature⁷⁰. The Court stated, among other things, that the right of Kenyans to choose their leaders democratically would be infringed if the respondents were denied their right to seek elective office. The court ruled that the result of the cases instituted against them (which would have an effect on any declaration of integrity) could not at that point be presumed to be to their disadvantage, as the cases were at the early stages. In effect, although it made no findings on the integrity or lack of it of the two candidates, the High Court decision was interpreted

⁶⁹ Johnston M. Kavuludi, National Police Service Commission (NPSC) Statement, *The Vetting Process is Central to Police Reforms in Kenya*. Available at: <http://www.npsc.go.ke/index.php/2014-03-25-12-08-56/press-releases>.

⁷⁰ High Court Ruling on Petition No. 52 of 2012. Available at: <http://www.judiciary.go.ke/portal/assets/files/NEWS/Uhuru,%20Ruto%20Integrity%20Ruling.pdf>.

in the public mind to mean that indictment for crimes against humanity did not violate the integrity principle in Chapter 6 of the Constitution.

Civil society voiced concerns about the consequences for Kenya's domestic and foreign relations of electing a President indicted by the ICC for crimes against humanity. Some foreign governments made similar warnings, while the UN issued regulations stating that UN officials could interact, without conditions, with ICC indictees as long as they were co-operating with the Court.⁷¹ Kenyatta, Ruto and their teams dismissed the possibility of negative implications of an ICC presidency on foreign relations with Europe and the USA – some of Kenya's biggest development partners. Instead they highlighted the fact that other development partners such as China, were willing to work with Kenya.

Ironically, the ICC cases appeared to be the glue that bound the Jubilee Coalition. They formed the main plank of their campaign by championing a narrative of victimhood and anti-Western rhetoric. It would have been difficult to predict that two leaders who represented the two ethnic groups at opposing ends of the post-election violence in 2007-8, the Kalenjin and the Kikuyu, would soon thereafter share a platform. Thus the ICC cases against Kenyatta and Ruto were turned on their heads, to become a major factor in garnering support for their election.

Following their electoral victory, Kenyatta and Ruto set about scuttling the ICC cases. The pair presented the victory as proof that Kenyans believed in their innocence and painted the ICC as an illegitimate and irrelevant arbiter in relation to Kenya.

First, they sought excusal from continuous presence in all stages of the trial on the basis of their newly acquired responsibilities. They also asked that the hearings of the cases be conducted either in Kenya, Tanzania, or via video link.

When this failed, they took their assault to the African Union (AU) and the United Nations Security Council to have their cases deferred or terminated. They marshalled state machinery to mobilise support from the African Union. The AU obliged, with irate speeches branding the court as a Western imperialist institution. It even held an extraordinary summit at which it resolved that no serving AU Head of State or Government, or anybody acting, or entitled to act in such capacity, shall be required to appear before any international court or tribunal during his term of office, ostensibly to safeguard the constitutional order, stability and integrity of member states.

At the UN General Assembly, the AU heads of state called on the ICC to terminate the cases against President Uhuru Kenyatta and his deputy, William Ruto. They accused the ICC of targeting African leaders and even threatened mass withdrawal from the Court.

“.....no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.....the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office.....”

AU Declaration, October 12, 2013

⁷¹ Rasna Warah, Sahan Journal, September 2 ,2013, Kenyan Civil Society's Sense of Betrayal During 2013 Elections. Available at: <http://sahanjournal.com/kenyan-civil-society-sense-of-betrayal-during-2013-elections/#.UycJW87dXIU>

Prior to the UN meeting, the Permanent Mission of Kenya to the United Nations submitted a letter to the UN Security Council, asking for the “immediate termination” of the ICC cases, claiming that the Court was irrelevant and that it threatened peace and security in the entire region.

Locally, a chorus to drop the cases was maintained from supporters of the Jubilee Coalition. In September, the National Assembly and the Senate approved a motion calling on the Kenyan Government to withdraw from the Rome Statute, the treaty that established the ICC.

The demands met strong opposition. When the court appeared to acquiesce to the request for excusal or trial via video link, KPTJ wrote to the President of the ICC with strong objections. KPTJ argued that if granted, the request would amount to preferential treatment, and send the wrong signal to victims, in addition to placing witnesses and affected communities at risk.⁷² KPTJ also lobbied the UN Permanent Representatives and the Security Council against efforts to terminate the cases.⁷³

At its 12th annual session, the Assembly of States Parties to the Rome Statute of the International Criminal Court made changes to the ICC Rules of Procedure and Evidence, which allowed an excusal from presence at trial for high ranking officials charged at the ICC, and also allowed their trial through video technology.

By the end of the year, the cases against Kenyatta and Ruto seemed to be floundering. The Office of The Prosecutor (OTP) admitted that it had insufficient evidence to prosecute President Kenyatta.

“Having carefully considered my evidence ..., I have come to the conclusion that currently the case against Mr. Kenyatta does not satisfy the high evidentiary standards required at trial.”⁷⁴

In retrospect, it was always going to be an uphill battle to rely on state cooperation to prosecute a sitting president who controls state instruments. The consequence of the troubled ICC process is that for the many victims of post election violence, justice remains elusive. A trial would at the very least provide them with a truthful, albeit partial, account of events and perhaps lay a basis for sustainable peace and reconciliation. It was also unfortunate that States Parties bowed to political pressure and allowed changes to the rules of procedure in favour of powerful individuals— changes that were in fact inconsistent with the Rome Statute. The ICC cases also had an effect on civil society, which became the target of an all-out propaganda war, as a result of its support for the process.

Perhaps the silver lining is that the peace that prevailed during the 2012-13 election period was the result of the realisation that violence could attract grave consequences for the perpetrators. Consequently, and in order to foster reconciliation, justice for post election violence is still necessary. It is important to ensure that the ICC cases are prosecuted to their logical conclusion; such that there is genuine accountability at the local level, and justice is not only done but is also seen to be done.

⁷² KPTJ, Open Letter to the President of the ICC on the Decision on William Ruto’s Excusal from Continuous Presence at his Trial and the forthcoming Decision on in situ Hearings. Available at: http://www.africog.org/sites/default/files/KPTJ_Open_Letter_to_the_President_of_the_ICC-Excusal_Decision_and_In_Situ_Hearings.pdf.

⁷³ KPTJ, Kenya Civil Society Memorandum to the UN Security Council against Deferral of the Kenya cases before the ICC. Available at: http://www.africog.org/kptj/statements/kenyan_civil_society_letter_memorandum_to_the_UNSC_on_Deferral_of_ICC_Cases

⁷⁴ Statement by Fatou Bensoudawhilerequesting an adjournment of the provisional trial date in the case of the Prosecutor v. Uhuru Muigai Kenyatta (ICC-01/09-02/11). Available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-19-12-2013.aspx.

4. The Continuing Plunder of Public Funds



Corruption continues to plague all areas of Kenyan public and private life, at a phenomenal scale. Crime, insecurity, terrorism, can all be attributed, to some extent, to corruption, or are exacerbated by it. In 2013, the Transparency International Corruption Perception Index ranked Kenya 136 out of 177 countries, the same position as the 2012 ranking, indicating little improvement. Indications that corruption continued unabated in mainstream government and its agencies throughout the year were numerous, as demonstrated by these examples.

4.1 The Report of the Auditor General

The most shocking revelations of embezzlement were those reported by the Auditor General's report covering the 2011-2012 financial year.⁷⁵ The report revealed that of 252 financial statements audited, only 15 (6%) had unqualified or clean reports. The rest either had qualified or adverse opinions and in the case of 83 statements, a disclaimer of opinion.

A qualified opinion is issued when the financial statement presents the correct financial position with a few exceptions. The Auditor General issued such an opinion with regard to 130 statements (51%) mainly arising from issues unsupported or unauthorised expenditures and non-surrender of imprests.

An adverse opinion is a more serious indictment. It is expressed where the financial statements do not present the correct financial position. Adverse opinions were expressed on 24 (10%) of the statements audited, on the basis of material misstatements, unexplained discrepancies and omissions of expenditure.

The Auditor General further issued disclaimers on 83 (33%) of the financial statements. Auditors issue a disclaimer when unable to arrive at any meaningful opinion, largely due to a lack of documentation and explanations to support the figures in financial statements. In his own words, the Auditor General was not able to establish whether the expenditures reflected in the 83 statements were incurred lawfully and in an effective way as required by Article 229(6) of the Constitution. By implication, the expenditures amounting to Ksh303.6 billion in the accounts with a disclaimer of opinion, can be regarded as not having been accounted for.

Among the excesses included in the report, in a budget whose net approved expenditure was just under Ksh957 billion, were:

- Ksh7 billion spent by five government ministries without parliamentary approval. Leading the pack was the Ministry of Education (5.5b) followed by the Ministry of Justice National Cohesion and Constitutional Affairs (1.1b).
- Expenditure of Ksh5.2 billion where no documentary evidence could be found. The Ministry of Public Health and Sanitation topped the list, failing to account for close to Ksh2 billion.
- Over Ksh2.1 billion in imprests not recovered or accounted for. The Ministry of Agriculture had total outstanding imprests of over Ksh773 million; the Ministry of Finance had advances of Ksh490 million.
- Pending bills, amounting to Ksh 4.5 billion, were carried forward to the next year. The main culprit in this category was the Ministry of Provincial Administration and Internal Security with Ksh 1.25billion, followed by the Ministry of Public Works- with Ksh960 million.

⁷⁵ Report of the Auditor-General on the Appropriation Accounts, Other Public Accounts and the Accounts of the Funds of the Republic Of Kenya for the Year 2011/2012. Government Printer, Nairobi. Available at: http://www.kenao.go.ke/index.php/reports/cat_view/2-reports

Specific cases queried by the Auditor General:

- ksh690 million incurred on interest and principal loan repayments towards settlement of government guaranteed debts incurred in 1970 on behalf of the Ken-Ren Chemical and Fertilizer Company. The Auditor General has over the years observed that the government continues to service debts incurred on a project that never took off, and against which no value for money was realised.⁷⁶
- contract to enhance security at the vice president's residences in Karen, Yatta and Tseikuru, where the contractor abandoned the project after being paid Ksh 93.8 million. Additionally, the tender, which was awarded at a contract sum of Ksh102.7 million, was varied by Ksh11.7 million (11%) without approval.
- misuse of revenue collected at Law Courts. At the Eldoret Law Courts, Ksh1.2million in revenue collected was not banked, while at Thika Law Courts Ksh4.7 million was misappropriated.
- unexplained transfers of Ksh1.03 billion from the Ministry of Energy to three parastatals—the National Oil Corporation of Kenya, the Rural Electrification Authority and KenGen.

At the Commission for the Implementation of the Constitution (CIC) the Auditor General queried:

- Ksh1.3 million spent on air tickets and *per diems* for commissioners and members of staff attending the burials of a commissioner's brother, a driver, and a researcher's father. The Commission also spent Ksh416,400 on internet services at commissioners' homes.
- Ksh4.5 million paid for *per diems*, car hire, venues, food and beverages at conferences that were already fully sponsored by other stakeholders.
- Ksh3.4 million on *per diems* to officers, and fuel for motor vehicles for trips outside Nairobi, where copies of work-tickets supporting these payments had overlapping dates, suggesting they were falsified.
- payment vouchers and other supporting records for Ksh16.4 million, spent on conferences and hire of motor vehicles, not provided for audit review.
- Ksh31.5 million on rent for office space at Parklands Plaza for ten months, from 1 June 2011 to 30 March 2012, while the Commission was occupying offices at Delta House.

At the IEBC, the Auditor General took issue with the following expenditures:

- ksh 416,400 on internet services at residences of commissioners, contrary to guidelines issued through the Office of the President Circular No.OP/CAB/15 on economic utilisation and efficient delivery of telephone services in the public sector.
- monthly airtime allowances of Ksh50,000 for the chairman, 45,000 for the chief electoral officer and 30,000 for commissioners, all of which exceeded expenditure ceilings in the circular cited above.
- ksh153 million advance payments to private law firms as legal fees, which were procured directly, and where the legal fees chargeable at Ksh2 million per case had not been approved by the tender committee.
- ksh243 million on domestic travel, subsistence and other transportation costs where allowance rates exceeded those stipulated in the Circular Ref MSPS18/2A(89) OF 12 Dec 2009.

⁷⁶ Ken Opala, Nairobi Law Monthly, 2014, Four Presidents Sh 10 Billion Zero Fertilizer

Several queries were raised in connection to expenditure at specific state agencies and departments⁷⁷, as highlighted below.

4.1.1 Ethics & Anti -Corruption Commission

Considering that it is the government agency responsible for promoting public ethics, it was unfortunate and telling that the Ethics and Anti-Corruption Commission received only a qualified opinion from the Auditor General, which noted that the CEO received irregular allowances between July 2012 and September 2012, contrary to government policy. In 2011/2012 the same officer had received Ksh4.7 million while he was entitled to Ksh579,000. In total the CEO had received an overpayment of Ksh 5.9 million, which had not been recovered by 30 June 2013. The commission also lost stock (toners) worth Ksh 2.9 million under unclear circumstances, apparently through collusion of its former staff, which it was unable to recover. In addition, a project to develop a wealth declaration management system, to be completed in March 2013, spent funds without fully achieving the desired deliverables and goals.

4.1.2 Ministry of Higher Education

The Ministry of Higher Education Science and Technology was taken to task over the payment of Ksh22.3 million to M/s CMA CGM Kenya Ltd, to transport equipment from Mombasa to Inland Container Depots Embakasi, when the same works had been included in the contract awarded to another company - M/s Waki. In addition the ministry paid avoidable demurrage charges of Ksh 37.6 million.

4.1.3 Ministry of Public Works

The Auditor General uncovered several cases of overpricing of project vehicles and ineligible payment of maintenance costs at contracts under the Ministry of Public Works in Uasin Gishu, West Pokot and Turkana districts. In Uasin Gishu, a contractor was to procure a four wheel drive diesel vehicle at the cost

of Ksh4 million, to be used for project supervision, and charge running and maintenance costs of Ksh 1.6 million. However, the vehicle, a Ford Everest KBR 124B, was delivered nine months after the project had been completed and at a higher than planned cost of Ksh6.5 million. The auditor established that the contractor paid only Ksh4.8 million and registered it in his name. Since the vehicle was not used for the project supervision, the claim for maintenance costs was ineligible. The overpayment to the contractor of Ksh 1.7 million, together with the maintenance costs paid of Ksh 1.6 million, all totaling Ksh3.3 million, was therefore irregular and recoverable from the contractor.

Similar irregularities were unearthed in contracts for footbridges in Chepkemei, Muruny and Nakwijiit - Lokichar, where a contractor was paid Ksh4 million and Ksh1.2 million maintenance costs for a Ford Ranger double cabin pickup, registration KBP 319Q. The auditor established that the contractor paid only Ksh3.4 million for the vehicle, which included a three year warranty, meaning that the claim for maintenance costs was ineligible. The vehicle was also registered in the name of the contractor and was not transferred to the government at the end of the contract as required. The overpayment to the contractor of Ksh 634,000 on the purchase price, together with the maintenance costs paid of Ksh1.2 million, amounting to Ksh1.8 million, was therefore irregular and recoverable from the contractor.

Similar frauds were noted in construction of footbridges in Taita, Msambweni and Changamwe Districts of Coast Province. A contractor was paid Ksh4.8 million for a project vehicle, while investigations revealed it should have cost Ksh3.8 million. Kenya Revenue Authority (KRA) records indicated that the vehicle was jointly registered in the names of the contractor and Equity Bank, suggesting either that the contractor acquired the vehicle on loan despite having been paid for it, or that he used the vehicle as collateral.

⁷⁷ Appendix 1 of this report

4.1.4 National Social Security Fund (NSSF)

The National Social Security Fund is the institution mandated by law to offer social protection to all Kenyan workers. It registers members, receives and manages their financial contributions, and ultimately pays out benefits to eligible members or dependants. Mismanagement at NSSF places the retirement benefits of workers and their beneficiaries at great risk. Unfortunately, the Fund was in the spotlight on several occasions over various allegations of graft. In one instance, the Parliamentary Public Investments Committee was investigating the Fund regarding the loss of more than Ksh11 billion in cash and assets in 2009.⁷⁸ According to the Auditor General's report for that period, over Ksh3.5 billion in cash was collected but not banked. The Committee also sought answers from the Fund regarding the loss of more than Ksh 7.2 billion through its Westlands branch, as well as Ksh2 billion worth of land in Muthaiga, Karen, Ngong Road, Athi River and Nyali for which the fund lacked title deeds. The properties were reportedly in gazetted areas and cannot be owned, possessed, utilised or accessed by NSSF.

In another incident, seven officers of the Fund faced charges of fraudulently making payments from the Fund to Discount Securities Limited (DSL) for shares amounting to Ksh1.6 billion, which the Ethics and Anti-Corruption Commission claimed were never purchased.⁷⁹

The Fund's suspense accounts illustrate the casual manner in which it treats monies entrusted to it by workers. In January 2012 the account stood at Ksh7 billion.⁸⁰ In essence, the NSSF held Ksh7 billion and did not know to whom the money belonged.

It is of concern that the NSSF will be receiving much more of workers' funds following the enactment of The National Social Security Fund Act, 2013. The Act, which was due to come into effect on 10 January, 2014, was suspended until 31 May, and raised the contribution rate from a flat rate of Ksh200 to 6% of earnings for both employer and employee. When fully implemented over the next six years, it is projected that the NSSF will be receiving Ksh15 billion per month, up from the Ksh600 million per month that it collected in the past. It is also of concern that where inquiries are undertaken and allegations confirmed, recommendations are sometimes not implemented, even when they emanate from the Parliamentary Oversight Committee. Such a case arose recently when CORD faulted President Kenyatta for directing the Treasury to pay the Anglo-Leasing debt, against the recommendation of the Parliamentary Accounts Committee (PAC) report. The PAC had been at the time had been chaired by Kenyatta himself, then leader of the official opposition⁸¹.

4.1.5 Putting the Loss into Perspective

In total, the Auditor General said that about one third of the national budget was lost to misappropriation and misuse. This amount lost annually is six times as large as the Anglo Leasing scandal, which took place 1999-2005 and twice as large as the Goldenberg fraud, which took place between 1990 and 1994. The opportunity cost to ordinary Kenyans in lost or foregone essential services is immense. These monies could have:

- funded the Basic Education Programme for 10 years at the Government of Kenya (GOK) recurrent spending rate on basic education of Ksh33 billion per annum.

⁷⁸ Daily Nation online, August 28, 2013, *NSSF ordered to explain over Ksh 11 Billion loss*. Available at: <http://mobile.nation.co.ke/News/NSSF+ordered+to+explain+Sh11bn+loss+/-/1950946/1971732/-/format/xhtml/-/x7ihyrz/-/index.html>

Transparency international Kenya, October, 2009, Adili, *Global Corruption Report, 2009: Corruption and the Private Sector*. Available at: <http://tikenya.org/phocodownload/adili113.pdf>.

⁷⁹ EACC Press Release, 2010. Available at: <http://www.eacc.go.ke/archives/pressreleases/nssf-suspects-court.pdf>.

⁸⁰ Anyang Nyongo, *The Standard*, October 26, 2008, *It has been a decade of plunder and scandal at Social Security Fund*

⁸¹ Patrick Mayoyo, *Daily Nation*, October 2, 2013, *Ports agency chiefs on the spot over Sh3bn tender*

- funded the Curative Health Programme for 15 years at the current GOK recurrent spending levels of Ksh20 billion per annum.
- funded the Preventive and Promotive Health Care Services programme for 20 years at the current government spending level of Ksh14 billion per annum.
- doubled the allocation to all 47 counties from Ksh210 billion each year, and still left enough to immediately repair Jomo Kenyatta International Airport (partially destroyed by fire in August 2013) and double the airport's passenger capacity by completing already planned expansion projects such as the Greenfield Project.⁸²

4.2 Parastatals

4.2.1 Parastatal Reforms

Parastatals were set for major reforms following recommendations from The Presidential Taskforce on Parastatal Reforms to dissolve, merge or transfer functions of various corporations. The declared rationale of reorganisation was to increase efficiency and effectiveness; rationalise areas of overlapping mandates; improve service delivery; enhance the ability of public agencies to meet their core regulatory and developmental mandates; and maximise the contribution to sectoral and national development goals under Kenya Vision 2030.⁸³

The reforms were expected to trim the number of parastatals and state agencies from 262 to 187. The task force recommended that 42 parastatals be dissolved, 28 be merged and 22 others have their roles transferred to other institutions.⁸⁴ If passed, the reforms would purportedly save the taxpayer billions of shillings. Largely as a result of mismanagement and looting, many of the parastatals were drowning in debt. However, others had been restructured and

were performing well. According to the task force report, Kenya Broadcasting Corporation for example, (a perennial loss maker that reported a loss of Ksh 4.1 billion in the year ended June) has a government-guaranteed loan of Ksh2.3 billion that it took in 1991, but defaulted on. Penalties and interest on the principal have brought the current liability to Ksh20 billion.

Key recommendations of the taskforce:

- implement a centralised ownership and oversight model of all government owned entities (GOEs);
- create a sovereign wealth fund, to be established by an Act of Parliament with the primary goal of securing income from current resources for future generations (in light of developments in the oil, gas and minerals sector);
- enact a single overarching law, the Government Owned Entities Bill 2013, to address the duplication, conflicting provisions, different founding legislation, and omissions in present laws and regulations;
- strengthen corporate governance to reduce the sizes of Boards of Directors, introduce open and competitive recruitment of Chief Executives, and introduce a uniform code of governance and leadership based on the Constitution of Kenya 2010, among other sweeping changes;
- require all GOEs to operate within the performance-contracting framework and be in alignment with the national development agenda.

Questions were raised on the appropriateness of the government's approach, regarding the justification for the reform proposals, the wisdom of throwing diverse organisations with widely varying performance into the same basket, and the appropriateness of

⁸² Mars Group Blog, 2013, *Things public money lost to misappropriation and misuse could have done*. Available at: <http://www.marsgroupkenya.org/blog/2013/10/15/things-kes-303-billion-missing-kenyas-budget-kenyans/#more-3214>.

⁸³ Report of The Presidential Taskforce on Parastatal Reforms, October 2013.

⁸⁴ Jevans Nyabiage, The Standard, November 26, 2013, *State on course to save billions*

including a sovereign wealth fund under this policy proposal. Constitutional concerns were expressed on plans to create an oversight body for both national and county parastatals, the National and County Agencies Oversight Office (NACAOO), answerable to the President.

Reports continue to be published on mismanagement, misuse and loss of public funds and controversies around these, as shown in the cases of the parastatals mentioned below.

4.2.2 Kenya Ports Authority

Several incidents of corruption were reported at the Kenya Ports Authority. One involved the award of a Ksh2.5 billion cranes tender, which the Public Procurement Administration Review Board stopped, pending investigations over allegations that procurement regulations were flouted. The Public Procurement Oversight Authority was also reportedly investigating irregularities in seven other tenders, including those for the supply, installation and commissioning of 1 pilot cutter, 13 reach stalkers, 14 new terminal tractors and 20 new skeletal trailers, as well as for supply of grabs, a mobile harbour crane and 10 ribbed type pneumatic rubber fenders. Alleged irregularities included lack of guaranteed fairness and competition in the processing of the bids, and non-evaluation of the tender in accordance with criteria in the tender document.⁸⁵

4.2.3 National Hospital Insurance Fund (NHIF)

Following more than a year's investigations, a former director of the NHIF (the public fund established to subsidise hospital expenses for contributing Kenyans), and the manager and directors of the Meridian Medical Centre were charged in court over the loss of Ksh116.9 million from the Ksh4.3 billion medical fund. This followed efforts by the medical

provider, Clinix, to block the anticipated arrest and prosecution of its directors by the EACC.⁸⁶ As reported in AfriCOG's Annual Governance Report (2012), a substantial amount received by the Meridian Medical Centre was earmarked for clinics it had yet to open. This money could have been used by the Ministry of Health to fund Kenya's other health related needs. The funding for the clinics had been suspended following these allegations and the EACC declared that it would embark on recovery of the funds.

4.2.4 The National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA)

Corruption was also reported at NACADA, the government agency mandated to deal with various matters related to the control of alcohol and drug abuse. The scandal at the agency involved collusion between senior management at NACADA headquarters and district agents in the issuance of licenses to bar operators and wine shops. An audit revealed that in Kisii Central District for example, bank slips presented to prove payments amounting to Ksh1.2 million were fake. The district could also not account for, or provide bank deposit slips totaling over Ksh3 million, earned from issued alcoholic drink licenses and application fees.⁸⁷

4.2.5 National Housing Corporation (NHC)

A former National Housing Corporation Managing Director, together with four former senior managers, were arrested by anti-corruption detectives and charged with illegal allocation of houses built by the corporation. The former managing director, James Wagemu Ruitha, allegedly allocated a house to his wife, Irene Wagemu, in the Langata Phase I housing scheme and also allocated another house in Madaraka Infill Sector A housing scheme to himself. A former NHC company secretary, Elizabeth Wambui Mbugua, was accused of allocating her husband a house in

⁸⁵ Patrick Mayoyo, Daily Nation, October 2, 2013, *Ports agency chiefs on the spot over Sh3bn tender*

⁸⁶ EACC Press Release, October 26, 2013. Available at: <http://www.eacc.go.ke/media.ASP?ID=502>

⁸⁷ Fred Mukinda, Sunday Nation, October 13, 2013, *Nacada audit reveals massive cash looting*

Langata Phase IV, besides securing three others for herself. A former technical manager, Bernard Ogolla, was accused of allocating himself a house that he later bought irregularly at Madaraka Infill Sector A; while a former senior Legal Officer and Finance Manager, William Kimutai Keitanny, and Chief Estate Officer, John Washington Otieno, were accused of abusing their authority to give houses to their spouses.⁸⁸

The NHC was also under investigation by the Ethics and Anti-Corruption Commission during the year for spending Ksh800 million on property that was not free from encumbrances, since it was located in an area with high voltage power lines. A tender committee, which had objected to the purchase, was allegedly dissolved; another committee reconstituted on the same day went ahead to discuss and award the tender.⁸⁹

4.2.6 Telkom Kenya

2013 brought reminders of the botched privatisation of Telkom⁹⁰. The saga dates back to 2007, when the government entered into an arrangement with France Telecom to restructure the company for profitability and subsequently privatise it. This turned out to be the most expensive privatisation in corporate Kenya.

The controversy during 2013 arose after the government reneged on an agreement to provide financial support to the Telkom Kenya (concluded in 2012), which resulted in the dilution of the government's stake in the company. The agreement, reached at a time when the government had met only part of its obligation, provided that its stake would be reduced to 30% in the event it failed to pay the balance. Several issues were raised by the

parliamentary Public Investments Committee (PIC) regarding the agreement. First, three key state agencies with the responsibility of overseeing the sale or transfer of state assets (The Communications Commission of Kenya, the Privatisation Commission of Kenya and the Office of the Auditor-General) were not involved. Second, the agreement was executed on suspect dates (December 31 and June 30). The PIC observed that no government office was open on the first date. The second date (June 30) on which the agreement was signed, fell during a period when the Office of the President had ordered all government deals over Ksh500 million to be halted until further notice.

4.2.7 Oil Refinery Scandal

This scandal involved the modernization of the Kenya Petroleum Refineries limited by Essar Energy Overseas Limited. The Indian company bought a 50% stake in Kenya Petroleum Refineries Limited in 2010. The deal was based on Essar's promise to invest between US\$400 and US\$500 million for modernization of the facility. The company also promised to pay to pay the government US\$11 million in goodwill for giving up its pre-emptive right to buy out its foreign partners. Four years on, the promised investments have proven to be a mirage. The refinery continued to perform dismally each year.

Claiming that the oil refinery scandal was bigger than Goldenberg, House Majority Leader, Aden Duale sought direction from Speaker Justin Muturi to have the matter investigated by a parliamentary committee⁹¹. Muturi so directed, and fresh details emerged on the scandal⁹² when Duale subsequently appeared before the Parliamentary Public Investment Committee (PIC) and claimed that 'wheeler-dealers' in

⁸⁸ EACC Annual Report, 2012/2013. Available at: <http://eacc.go.ke/docs/Quartely-Report-July-Sept-201a3.pdf> Vincent Agoya, Daily Nation, October 17, 2013. *Former NHC bosses deny allotting houses to themselves and relatives*

⁸⁹ Andrew Teyie, Sunday Nation, September 8, 2013, *Anti-graft team probes NHC over land deal*

⁹⁰ AfriCOG Report, 2008, *Deliberate Loopholes: Transparency Lessons from the Privatisation of Telkom and Safaricom*

⁹¹ David Mwere, The Star, September 19, 2013, *Petrol Scandal is Bigger than Goldenberg – Duale*

⁹² AfriCOG Report 2010, *Analysis of the Triton Oil Scandal*

the previous government had orchestrated the loss of over Ksh20 billion in a murky deal: they transferred half of the equity at Kenya Petroleum Refinery Limited (KPRL) to an Indian firm –Essar – for 10 million. Duale claimed that the government made only US\$2 million from the deal, which was paid two years after Essar took over at the refinery. He argued that this was only a fraction of the value of the equity transferred, as the land on which the refinery stands is valued at Ksh 350 million. He further claimed that during the last 29 months of the coalition government, the refinery lost Ksh13.7 billion, and that every litre of kerosene bought in Kenya puts Ksh3.30 in the pockets of powerful individuals at the National Treasury and other key offices on Harambee Avenue.⁹³

4.2.8 Kenya at 50 celebrations

A new committee formed to manage the country's 50th independence anniversary celebrations demonstrated the proclivity of state officers to use every opportunity to squander public funds. The committee reportedly planned to spend Ksh2.5 billion on the event. Its proposed budget included Ksh50 million for a bronze statue of retired President Kibaki, Ksh690 million for event management and logistics, Ksh286 million for a conference and exhibition during the one week celebration, Ksh300 million for publicity and communication, Ksh365 million for entertainment and Ksh 320 million towards identifying Kenya's most prominent personalities.⁹⁴ The Committee was disbanded following exposure by the media⁹⁵.

4.3 Youth Enterprise Development Fund

In a country where youth unemployment is extremely high, there were unfortunate reports of graft at the government agency established to support youth in business. Press reports in June alleged that the Chief Executive of Youth Enterprise Development Fund, Juma Mwatata Mwangala, had been suspended after multiple audit reports by different government agencies, including one by the Efficiency Monitoring Unit, unearthed massive mismanagement of resources. The irregularities included the purchase of 1,050 egg incubators at an inflated cost of Ksh208 million, questionable procurement of 210 motorcycles resulting in the loss of Ksh13 million (also an inflated cost) and the approval of a larger than usual travel allowance for top management for a trip to Slovakia where the Fund spent Ksh20 million.⁹⁶ This was a disappointing repeat of the issues that plagued the "Kazi kwa Vijana" initiative, set up after the conclusion of the National Accord and Reconciliation Act (NARA), which identified youth unemployment as a major driver of the post-election violence⁹⁷.

4.4 Land Issues

The National Land Commission (NLC) Commission was sworn in on 27 February with Mohamed Swazuri as Chairman. Six months later, Swazuri, announced: "The Commission has so far received 359 documents for registration from non-Kenyans, 2,566 grants and leases from Kenyans. It has verified 825 allotment letters where 82 have been allocated to public institutions. These institutions have also given the Commission over 200 responses over their status on land."⁹⁸

⁹³ Alphonse Shiundu, The Standard, September 25, 2013, *MPs told how State lost Sh20b in oil refinery deal*

⁹⁴ Peter Leftie Mutibo, Daily Nation, July 27, 2013, *Sh2.5bn budget for Kenya's golden bash*

⁹⁵ Oliver Mathenge, The Star, August 3, 2013, *Uhuru disbands 'Kenya at 50' Committee over Budget*

⁹⁶ Macharia Kamau, The Standard, June 2, 2013, *Youth Fund board suspends Chief Executive Officer Juma Mwatata Mwangala amid claims of graft*

⁹⁷ AfriCOG, Kenya Governance Report 2011, p.29

⁹⁸ National Land Commission, 2013, *NLC reaches out to key stakeholders*

However, the National Land Commission and the Lands Ministry have been at loggerheads over which entity is authorized to allocate public land and sign title deeds. The CIC weighed in, saying “section 23 and 24 of the Land Act does not grant powers to NLC to register, issue or sign titles.”⁹⁹ This statement came after the Commission advertised that they were the only institution authorised to sign title deeds. This inadequate policy response was further weakened by theft.

Press reports in October revealed a scheme through which unscrupulous businessmen, colluding with influential public servants, were plotting to swindle the public of over Ksh2 billion. The scheme involved suing the government for revoking the title to a piece of land in Westlands, Nairobi. The land title, which initially reportedly belonged to the Kingdom of Kuwait, had been illegally transferred. The ‘wheeler-dealers’ went to court demanding Ksh2.3 billion compensation from the government. This sum included Ksh1.6 billion in “loss of profits for the expected development.”¹⁰⁰

4.4.1 Evictions

The government, under the guise of protecting the Mau Forest’s biodiversity, embarked on removal of the Cherangany community from the Embobut area of the Mau. This contravened a High Court order in March 2013 against the evictions. Members of the Cherangany said they had neither been consulted nor compensated adequately for the evictions. Human

rights organisations pointed out that the evictions infringed on the constitutional rights of inhabitants of the area, to occupy their ancestral lands.¹⁰¹

In March 2013, The African Union Court on Human and People’s Rights, calling to mind Kenya’s regional human rights obligations, ordered the Kenyan government to halt evictions of the Ogiek people from their ancestral lands in the Mau forest. Despite this order, the government began the evictions, marked by seizing of land and violence towards members of the Ogiek community.¹⁰²

4.5 Transfer Pricing and Illicit Financial Flows

A report by Global Financial Integrity indicated that Kenya had lost over Ksh73 billion in the last 10 years to illicit financial flows involving crime, corruption and tax evasion.¹⁰³ Funds from tax evasion form a significant part of international illicit financial flows, even when some of them are earned from legitimate activities. If they are transferred abroad in violation of regulations and laws then they become illicit.

Kenya Revenue Authority (KRA) was reported to have averted the loss of billions of shillings arising from understatement of profits by multinational companies. An audit of 40 multinationals discovered widespread abuse of transfer pricing, through which the country was losing massive amounts of revenue. Transfer pricing, while not necessarily illegal, is frequently used to evade taxation.¹⁰⁴ KRA

⁹⁹ Patrick Beja and Philip Mwakio, *The Standard*, October 13, 2013, *CIC says National Land Commission should not sign land title deeds*

¹⁰⁰ Peter Mutibo, *Daily Nation*, October 19, 2013, *Charity Ngilu drawn into plot to defraud State of Millions*

¹⁰¹ New Internationalist, January 23, 2014, *Indigenous Kenyans evicted in the name of ‘conservation’*. Available at: <http://newint.org/features/web-exclusive/2014/01/23/sengwer-forest-evictions/>

Cultural Survival, January 8, 2014, *Imminent Forced Eviction by Kenya Threatens Indigenous Communities’ Human Rights and Ancestral Forest*. Available at: <http://www.culturalsurvival.org/news/imminent-forced-eviction-kenya-threatens-indigenous-communities-human-rights-and-ancestral>

¹⁰² Survival International, February 15, 2014, *Ogiek are violently evicted from ancestral home in Kenya*. Available at: <http://www.survivalinternational.org/news/9969>.

¹⁰³ Dev Kar and Brian Le Blanc, *Global Financial Integrity 2002-2011*, December 11, 2013, *Illicit Financial Flows from Developing Countries*

¹⁰⁴ Oxfam, September 1, 2013, *Tax evasion damaging poor country economies*. Available at: <http://www.oxfam.org/en/pressroom/pressreleases/2013-09-01/tax-evasion-damaging-poor-country-economies>.

found several multinational companies used transfer pricing to declare losses in order to evade corporate tax. The culpable companies used transactions with subsidiaries located in other countries with lower rates of tax, to create accumulated book losses of Ksh8 billion¹⁰⁵. By comparing market prices for goods and services to the inflated prices declared by international companies, the Authority identified Ksh 4 billion in tax revenues which would otherwise have been lost to tax evasion.¹⁰⁶ This practice by KRA could become an ongoing tax revenue stream for Kenya's needs, as research suggests that illicit financial flows area major source of domestic resource leakage.

An investigation carried out through AfriCOG's Investigative Journalism Programme found out over a dozen firms being probed for possible transfer pricing abuses¹⁰⁷, selected by KRA selected after scrutiny of over 300. The transfer pricing abuse involves drastically reducing payable tax so as to transfer profits to associated companies in tax havens outside Kenya.¹⁰⁸

4.6 Opacity in government operations

4.6.1 Slow Progress on Open Governance

In July 2011, Kenya became the second African country after Morocco to launch an online portal through which the public could access all government data – the Kenya Open Data Initiative. This was followed by the government's declared intention to commit to the Open Government Partnership (OGP). Kenya voluntarily joined the OGP in 2012 in what was seen

as a step towards openness in government, access to information, transparency, better service delivery, public participation and combating corruption. The fanfare that surrounded both these events has proved premature. Government ministries are reluctant to give data for publishing on the portal and traffic to the website has reduced. At the first Africa Regional OGP meeting, held in Mombasa in 2013, Fred Matiang'i, Cabinet Secretary for Information and Communication, acknowledged that his ministry had difficulty getting information from government agencies for the portal.

Furthermore, there is no legal framework to support access to information as guaranteed by Article 35 of the Constitution.¹⁰⁹ The Freedom of Information Bill, despite being drafted, has not yet passed through Parliament. According to Albert Kamunde, Chair of the International Commission of Jurists – Kenya Chapter (ICJ), "...it has been more than ten years in putting in efforts for the enactment of legislation framework on information."¹¹⁰

"Lack of the Freedom of Information Act means that we cannot take any action on government bodies that refuse to release data or refuse to respond," said the then Information and Communications Permanent Secretary Bitange Ndemo, at the Africa OGP regional conference.¹¹¹

The government has also yet to implement the 'End-to-End' initiative whose aim is to enable citizens to

¹⁰⁵ Jevans Biyungu, 2012, *KRA probes multinationals over tax abuse*. Available at: http://www.africog.org/ij/2012/KRA_probes_multinationals_over_tax_abuse

¹⁰⁶ Geoffrey Irungu, Business Daily, September 12, 2013, *KRA busts Sh8bn tax evasion scam involving multinationals*

¹⁰⁷ Biyungu, loc.cit

¹⁰⁸ ibid

¹⁰⁹ Article 35 of the Constitution of Kenya 2010 provides that every citizen has the right of access to information held by the state, including access to information held by another person that is required for the exercise of rights.

¹¹⁰ <http://www.icj-kenya.org/index.php/media-centre/news/530-icj-kenya-launches-campaign-to-advocate-for-transparency-in-kenyas-system-of-governance#sthash.tRhPauJ2.dpuf>

¹¹¹ Freedom Info, May 2013, *Kenyan officials say lack of foi hampers open data*

access all government-issued identity information, such as birth, death and voter registration records, through one portal. This initiative, mentioned as one of the country's OGP action plan commitments, was meant to come into effect in February 2013, but has yet to materialise.¹¹²

This slow progress on openness earned Kenya a low score in a 2013 open data index ranking by the UK-based Open Knowledge Foundation. Of 70 countries assessed, the UK and the US rank highest for open data, while St Kitts & Nevis, the British Virgin Islands, Kenya and Burkina Faso have the lowest scores. Ranking was based on the availability and accessibility of information in ten key areas: government spending, election results, transport timetables, pollution levels, government budget, company register, national statistics, legislation, postcodes and a high level copy of a national map.¹¹³

4.6.2 Standard Gauge Railway Project

There was growing concern over the opacity surrounding the government's implementation of the Standard Gauge Rail Project. The government decided to finance the project through a government-to-government deal brokered by the China Roads and Bridges Company. Government-to-government procurement arrangements might not be illegal, but they go against the spirit of the Public Procurement and Disposal Act 2005, enacted to promote fair competition, transparency and accountability, as well as local participation in public procurements. In this case, the China Roads and Bridges Company offered to conduct a free feasibility study and facilitate a government-to-government deal supported by concessional loans from China Exim Bank in return for

receiving the contract without competitive bidding. In effect, the China Roads and Bridges Company single-handedly put the whole project together, raising serious questions about transparency. As one commentator put it,

"Where is transparency in an arrangement where a foreign contractor conducts the feasibility study on terms of references it has itself drawn, does the engineering designs on its own, and then proceeds to facilitate you to get a loan from his country? When a contractor does for you feasibility studies and designs, and where there is no competitive bidding, how can you be sure of getting value for money?"¹¹⁴

Besides the lack of transparency, the Nairobi Law Monthly alleged that the rail tender was inflated when compared to a similar project in Ethiopia. The publication further claimed that an immediate former cabinet minister, a senior official in the Ministry of Transport, a top politician and a businessman based in Mombasa shared among themselves bribes amounting to Ksh32 billion relating to the tender.¹¹⁵

In addition, there seems to be no economic justification for spending billions of shillings of taxpayers' money to build the standard gauge railway. The loan requested for the project would be the biggest loan that Kenya has ever taken, requiring repayments of over Ksh600 million by each county every year for the next 10 years. Even in use, the railway would be unlikely to pay for itself, or offer long-term public benefits to Kenyans.¹¹⁶ It is still unclear how the stretch beyond Nairobi will be financed, making this exorbitantly expensive new line a probable white

¹¹² Open Government Partnership, May 2013, Kenya Nation Action Plan Progress Report. Available at: <http://www.opengovpartnership.org/sites/default/files/KENYA%20PROGRESS%20REPORT.pdf>

¹¹³ Ami Sedghi, Guardian UK, October 28, 2013, The UK tops the 2013 open data index but how do other countries compare?

¹¹⁴ Jaiindi Kisero, Daily Nation, November 28, 2013, *China rail project lacks transparency*

¹¹⁵ Ken Opala, Nairobi Law Monthly, December 2, 2013, *Storm Over Rail Tender*

¹¹⁶ David Ndii, Kenya Today, February 15, 2014, *Uhuru's Standard Gauge Railway will bring economic suffering to Kenyans*

elephant. An analysis by the World Bank described the building of an entirely new standard gauge railway, on a new right of way, as the most expensive and least feasible option of several available. The Bank recommended the extensive rehabilitation and upgrading of the existing railway line as the most practicable alternative. The intransigence with which the government clung to a project about which numerous, apparently well-founded public reservations had been expressed raised serious concerns as to the true underlying motives.

4.6.3 Extractive Industries and Cancellation of Mining Contracts

Very few countries disclose the contracts made with private companies to develop natural resources. In Kenya, pressure for more transparency has grown. After cancellation of the mining contracts, the International Monetary Fund (IMF) began to pressure the Kenyan Government to disclose the terms of the contracts, along with details of deals signed with oil exploration and mining firms. Despite the pressure, officials on the IMF team disclosed that the government denied them access to the documents. This continues the governmental trend of denying the public access to information, in defiance of the

law that grants this right on demand and under reasonable circumstances. With this information withheld, Kenyans can only guess how the country is faring with regard to exploration and exploitation of mineral deposits.¹¹⁷

In July 2013, the government revoked all 43 prospecting and mining licences granted during the first five months of 2013 and suspended the Commissioner of Mines, Moses Masibo. Most of these licences were reported to have been issued under questionable circumstances, to unqualified companies, and during the transition period after elections when issuance of licenses was prohibited. Mining Minister Najib Balala told a news conference that the licences had been issued in a hurry and without transparency. He added that he wished to ensure such deals were more transparent and to introduce new legislation in the sector. The history of such transactions in periods of transition between governments raises concerns as to the true motives behind some of these moves that have not been allayed. Without transparency in contracting, it is difficult to judge whether this represents genuine progress in governance or raise the spectre of “competitive corruption”.

¹¹⁷ Freedom Info, August 16, 2013, *Kenya Debating Transparency of Natural Resource Contracts*



5. Insecurity and Transnational Crime

Kenya continues to face terrorism, animal poaching, human trafficking, illegal firearms trading, piracy, money laundering, and cybercrime – all transnational crimes that weaken the security, economy, and political stability of any nation¹¹⁸.

5.1 Organised Crime

Between January and August 2013, 190 elephants and 34 rhinos were killed, while the Kenya Wildlife Service (KWS) lost two rangers in encounters with poachers. To combat poaching, the government formed a special inter-agency unit, under the command of KWS.¹¹⁹

Poaching has also been linked to the funding of terrorist activity. Terrorism has been a major problem for a number of years, leading Kenya to deploy the Kenya Defence Forces against Al Shabaab militias after a series of attacks linked to the group in several parts of the country.

In the second half of the year, an operation across Eastern and Southern Africa, targeting a range of cross-border crimes, rescued over 300 victims of human trafficking, and seized drugs, guns, stolen vehicles and smuggled goods, including ivory and diamonds. Thirty eight trafficking suspects were arrested in Ethiopia; a further 28 human trafficking victims were rescued in Uganda, and a woman in possession of six kilograms of heroin was arrested at Nairobi's JKIA international airport.¹²⁰

A report on cross border smuggling from Somalia produced under AfriCOG's Investigative Journalism programme found a lucrative trade on the Kenya/Somalia border, including the smuggling of arms, facilitated by Kenyan security officers¹²¹.

It is still under discussion whether the International Crimes Division of the Kenya High Court will deal with such crimes when established.¹²²

5.2 Westgate

At around noon on 21 September 2013, explosions and gunfire rent the air in one of the city's upmarket shopping centres, the Westgate Mall. It soon became clear that this was not 'ordinary' burglary. Heavily armed terrorists inside the mall were attacking shoppers indiscriminately, including women and children.

The attack on Westgate Mall and the subsequent siege lasted four days, and left 67 dead, 170 injured, and at least 39 unaccounted for.¹²³ The Somali militant group Al-Shabaab claimed responsibility for the attack, stating that Kenya would remain a legitimate target while Kenyan troops remained in Somalia.¹²⁴

In a press conference that same day, President Kenyatta vowed that the terrorists would be apprehended and face the full force of the law for their actions.¹²⁵ Once the siege ended, little action followed. Kenyans were left to speculate on what actually transpired at Westgate. Though the President promised a Commission of Inquiry, no report has been released to date. However, the President's lawyers cited pressing security issues stemming from Westgate in an attempt to delay his trial at the ICC.

¹¹⁸ International Peace Institute, 2011, *Termites at Work*

¹¹⁹ Kenya Wildlife Service, August 8, 2013, *Government Forms Special Crack Unit to curb poaching*

¹²⁰ Interpol, August 8, 2013, *Human, drugs and arms traffickers targeted in operations across Eastern and Southern Africa*

¹²¹ Adow Jubat, Africog, 2013, *Correlation between bandits and sugar smugglers*

¹²² Judy Kaberia, Capital FM News, April 30, 2013, *Cash hinders set up of international crimes court in Kenya*

¹²³ David Rising and Rodney Muhumuza, *Military Times*, September 30, 2013, *Red Cross: 39 still missing after Kenya Mall attack*

¹²⁴ CBS, December 11, 2013, *NYPD Report: Just 4 of al-shabab gunmen with AK 47s staged Kenya Westgate Mall attack*

¹²⁵ President Kenyatta Addresses the Nation on Westgate. Available at: https://www.youtube.com/watch?v=ebWrTI_9gso.

Through media reports, many from foreign journalists, it became evident that the forces deployed to end the siege were poorly coordinated, to the extent that inter-force rivalry caused the death of two policemen. It was also clear that the authorities did not know how many terrorists were involved, or their exact locations, failing to make use of the closed circuit TV cameras inside the building. CCTV footage obtained by media houses revealed soldiers emptying cash registers into plastic Nakumatt bags. Most shop-owners reported looting, while ATMs, banks, and a casino also lost funds¹²⁶. The siege finally ended on 25 September after the Kenyan army used mortar shells to partially destroy the building.

Westgate revealed the adverse effects of the politicisation of Kenya's security apparatus. Al Jazeera reported that rivalry and unclear command lines within Kenyan security agencies were the likely reasons behind the failure to prevent the attack. Al Jazeera spoke to a security analyst who confirmed, "The problem with the Kenyan intelligence service for the last couple of years is that it has been politicised." The analyst added that the intelligence service is "not run like a professional outfit. They are dealing with internal issues, neutralising political opponents, rather than protecting the country from internal and external aggression."¹²⁷

Following the attack, 15 senior immigration officials were sacked after being implicated in issuing Kenyan identity documents illegally. Subsequent investigations by the Standard newspaper revealed that for as little as Ksh100,000 a person could corruptly acquire all the documents needed to prove

citizenship, including a birth certificate, school leaving certificate, national identity card, certificate of good conduct, driving licence and a Kenyan passport.¹²⁸ It is highly likely that Al-Shabaab exploited this culture of corruption when planning its attack.

Four persons were arrested after the attack and charged with aiding the gunmen, and are currently on trial. Even as these four men are tried, Kenyans are none the wiser about what happened to the assailants. Reports of their deaths as the building collapsed conflict with reports of their possible escape.

It is still not clear whether the government has recognised the security failures before and during the attack, or what measures have been taken to prevent a repeat. In lieu of significant security reforms, the government has mounted targeted extra-legal killings and mass round ups of Somali Kenyans, refugees, and Muslims. Meanwhile, further grenade and gun attacks have occurred across the country.

Until there are reliable investigations into the Westgate attack, with the results made public, together with reforms to security and intelligence forces, Kenyans will have little confidence in the government's ability to protect them.

The joint committee on Administration and National Security and Defence and Foreign Relations took up the matter for further investigation. They found that during the month of August 2013, senior Kenyan security forces and the Ministry of Internal Security may have ignored warnings on imminent terrorist attacks (as tabled in Parliament in December 2013,

¹²⁶ The Star, October 3, 2013, *CCTV Footage Shows Soldiers Looting Mall*

¹²⁷ Mohammed Yusuf, Al Jazeera, October 1, 2013, *Horn of Africa Security Analyst Abdullahi Halakhe speaking to Al-Jazeera*

¹²⁸ The Standard, October 27, 2013, *Booming passports, IDs sale*

6. The Year Ahead



and marked for later debate in Parliament).

6.1 Some Good News

The year under review was not all gloom. There were a number of positives to be carried forward.

Some county governments did move to clean up the mess left behind by former county councils. In Kisumu, the governor suspended six officers over alleged gross corruption and mismanagement of resources worth more than Ksh1.2 billion. His action followed an audit of county assets and liabilities carried out by the Transition Authority in all 47 counties. The suspended officials were alleged to have taken advantage of the transition period to offer over 500 houses and council estates, valued at over Ksh1.1 billion, to private developers. They were also alleged to have run a parallel system with fake receipts and accounting documents to siphon revenue collected from traders and other businesses. The audit revealed unbanked revenue worth more than Ksh80 million and receipt books of over Ksh52 million, which had not been entered in the council's official records.¹²⁹

In Nairobi, the new county government unearthed a scandal to inflate prices, involving collusion between suppliers and employees, in the procurement and finance departments. In one such case a supplier was reportedly paid Ksh3.4 million for supplying 5500 high pressure sodium lamps at Ksh6,800 apiece, when the market rate per lamp was Ksh1,500. This resulting loss amounted to Ksh2.65 million.¹³⁰ Following the scam, a chief finance officer who signed most of the payments, and eight senior officers in the city treasury and procurement departments, were indefinitely suspended to allow investigation.

A larger audit of government departments, begun in July, the audit identified over 10,000 ghost workers in the public service across all counties.¹³¹ Salaries paid to these ghost workers, estimated to exceed Ksh1.5 billion each year, could clearly be better channelled.

6.1.1 Reports from the Ethics and Anti-Corruption Commission

The Ethics and Anti-Corruption Commission (EACC) also gave Kenyans reasons to cheer while discharging its mandate as the lead agency fighting corruption. In its annual report for the year 2011-2012, the EACC reported that it had recovered illegally acquired public assets, including Uhuru Gardens in Mombasa worth about Ksh500 million, and land belonging to the Kenya Agricultural Research Institute (KARI) worth about Ksh 20 million. It also traced illegally acquired assets with an estimated worth of Ksh125.3 million, in addition to disrupting corruption to avert the loss of Ksh1.21 billion. Activities halted by the EACC include:

- irregular payment of an insurance premium of Ksh321 million by the City Council of Nairobi in favour of the Alexander Forbes Company, without approval and due process;
- payment of Ksh155 million to a private company for garbage collection by the City Council of Nairobi;
- fraudulent acquisition of a 25 acre beach plot worth about Ksh300 million through the collusion of lands officers at the Ministry of Lands and other parties¹³².

¹²⁹ Evelyn Kwamboka, The Standard, September 6, 2013, *Six sent packing over loss of Sh. 1.2 billion*

¹³⁰ The Standard, October 27, 2013, *Nairobi County loses millions as employees collude with suppliers to inflate prices*

¹³¹ Bosire Boniface, All Africa, August 13, 2013, *Kenyan Counties move to axe over 10,000 ghost workers*

¹³² Ethics and Anti-Corruption Commission. Annual Report 2011-2012. Available at: <http://www.eacc.go.ke/docs/EACC%20annual%20report%20-%202011-2012-final.pdf>.

In its quarterly reports, pursuant to section 36 of the Anti-Corruption and Economic Crimes Act 2013, the EACC indicated that between January and September 2013, it forwarded 39 files to the Director of Public Prosecutions with various recommendations. Notable was the recommendation to prosecute various senior government officials on allegations of irregularities in the procurement of a chancery and ambassador's residence for the Kenyan Embassy in Tokyo. EACC alleged that the price of the property was exaggerated by Ksh700 million, that procurement laws were not followed, and that some officials concealed information. It recommended that the Permanent Secretary in the Ministry of Foreign Affairs, the Charge d' Affairs Kenyan Embassy in Tokyo, and former Deputy Director of Administration in the Ministry of Foreign Affairs, be jointly charged with abuse of office, wilful failure to comply with law relating to procurement, and conspiracy to commit offences of corruption contrary to sections 46,48,45, and 47 of ACECA.¹³³ They were subsequently charged in February 2013.

In a rare application of Section 39 (3) b of ACECA, EACC also recommended the prosecution of an employee of the Kenya Ports Authority who allegedly offered a bribe of Ksh20,000 to a security officer at KPA to release a truck that had been detained.¹³⁴ The section makes it an offence to give or offer a bribe and its application is a seldom-used tool against the supply side of corruption.

6.2 Going Forward

The various scandals reported during the year generated surprisingly little outrage – with a few exceptions. The NSSF Bill, for example was enacted with hardly a dissenting voice. A comment here and

there was all that was elicited by the Auditor General's report over the wastage of Ksh300 billion. Other than parliamentary committees, whose intentions are in some cases suspect, there appears to be a growing apathy among organisations and the public who have a role to play in holding the state to account.

This is a matter of grave concern. The need to hold leaders to account has never been greater. Devolution has resulted in the proliferation of opportunities for corruption, both in terms of units of government and the amount of resources going to county level. The growing appetite within government for mega-projects and increasing use of opaque processes such as government-to-government procurement, calls for greater vigilance among watchdog organisations and the public at large. The in-fighting between different arms of government, which shows no sign of abating, is also cause for concern, not only because it diverts precious energies from crucial issues, but also because it is often resolved through horse trading, which generally compromises accountability.

The current administration's attempts to curtail the work of institutions that call for financial probity and accountability should be a rallying call to civil society. The attention of the country over the last year was largely consumed by the intrigues surrounding the ICC cases. As predicted by some elements of civil society, the new government devoted a large portion of its time, resources and energy to fighting off what had been described as a personal challenge. Senior officials were diverted from their core responsibilities to engage in the anti-ICC campaign. It remains unclear what amount of public resources were spent on this campaign.

¹³³ Ethics and Anti-Corruption Commission, The First Quarterly Report for the Year 2013 covering the Period 1st January to 31st March 2013.

¹³⁴ Ethics and Anti-Corruption Commission. The First Quarterly Report for the Year 2013 covering the Period 1st April to 30th June 2013.



Africa Centre for Open Governance
P.O. Box 18157-00100, Nairobi, Kenya
Telephone: +254 20-4443707/0737463166
Email: admin@africog.org
Website: www.africog.org