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| **KENYA** |  | | |
| **Thematic Civil Society Report on the participation in public affairs**  **(Replies to the List of Issues CCPR/C/KEN/Q/4)**    For the Review of the fourth State Report of Kenya  (CCPR/C/KEN/4)  At the 131st session of the Human Rights Committee  (Geneva, 1-26 March 2021) |  | | |
| Submitted by: *KENYA HUMAN RIGHTS COMMISSION, ELOG-Kenya / Coalition / Network* | | |  |
| *Nairobi, 23rd Dec, 2020*  *Drafted by: Irene Soila*  *With the support of: Logo  Description automatically generated* | |  | |
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# Introduction

This is an alternative report compiled by civil society organizations in Kenya to respond to the List of Issues to the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights under article 25 of the Convention. The report is informed by the prevailing social and political environment in the State party and the past concluding observations, the previous reports and recommendations by the committee to the state.

The 2010 Constitution of Kenya provides for a progressive bill of rights, (chapter four of the constitution) which promotes the fundamental rights and freedoms that seek to realize among others, political rights, gender equality, freedom of expression, among other expressed rights. In an attempt to promote and realize participation in public affairs among Kenyans across all divides and clusters, the government of Kenya has put together legislative structures which includes an updated political parties act, policy and institutional frameworks, and an endeared independents and electoral and boundaries commission.

While we acknowledge the efforts put in place by Kenya to achieve an all-inclusive participation in public affairs, we continue to see marginalization of key groups that have suffered the non-inclusion since the country’s independence, the control of the space by political elite narrowing opportunities of marginalized groups, corruption and evolution of dynasty to capture Kenya’s democracy for their own interests.

The report takes a thematic approach of responding to article 25 of the convention and provision of recommendation on each list of issues listed herein.

## a. Joining organisations

This joint report is prepared by Kenya Human Rights Commission, Elections Observers Group- Kenya, and was supported by the Centre for Civil and Political Rights.

## b. Methodology

The Centre for Civil and Political Rights, IMLU and the Kenyan Human Rights Commission co-organised a series of webinars during the summer of 2020. These webinars aimed to coordinate civil society’s efforts in preparing a report for the review by the Human Rights Committee. One of the webinars focused on the participation of public affairs, and brought together organisations that work on this issue. During this online meeting, the participants discussed about the questions formulated in the List of Issues. The information from the discussions formed the basis of a first draft of the joint report. Additional information was added at a later stage by Irene Soila, who completed the drafting process, including with statistics and new evolutions in regard to the Coronavirus. The report was then shared with the original group, who validated the report before submitting it to the Human Rights Committee.

The following sources were used for the elaboration of this report:

* <https://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/206-exposing-the-governance-conundrum-in-kenya-1.html>
* <https://int.search.tb.ask.com/search/GGmain.jhtml?searchfor=A+Gender+Analysis+of+the2017>
* <https://africog.org/wp-content/uploads/2019/05/STATE-CAPTURE>

## c. Contact details

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# Civil Society Replies to the Issues identified in the LOI

## a. Anti-corruption measures (arts. 2 and 25)

**Issue 2:** *Please respond to reports of corruption within national and county government bodies in Kenya and provide information about efforts to address such phenomena, including details about the work of the Multi-Agency Team, the Ethics and Anti-Corruption Commission and the Office of the Director of Public Prosecutions. Please detail the additional anti-corruption measures set out in the Proceeds of Crime and Anti-Money Laundering Act 2009, and provide information about the number of investigations, prosecutions and convictions for corruption under this and other relevant legislation.*

**Reply / Comments from Civil Society**

Grand corruption has remained the main setback to governance in Kenya, despite bribery and corruption having been criminalized since 1956, with over a dozen major legislative amendments being enacted to better codify the offences, increased penalties and creation of a new anti-corruption institutions, the menace has remained persistent and in most instances glorified by a political culture that builds to protect their self-interests. Kenya grapple with an insufficiency of political will to purposefully fight against corruption. Kenya has built a political culture that not only condones corruption but also glorifies it.

A survey conducted by the Ethics and Anti-Corruption Commission (EACC) in 2016 reveals that corruption is the third most pressing problem facing Kenyans at 21.6% after poverty at 35.7% and unemployment at 29.9%. The survey further shows that 79.3% of Kenyans feel that the level of corruption in Kenya is very high as compared to 73.9% in 2015 and 67.7% in 2012. At the same time, 63.4% of Kenyans feel that corruption levels are increasing compared to 11.8% who feel that it is the same.

It is vital to mention that corruption in Kenya is very high during the electioneering periods thereby impeding democracy and the rule of law. Its negatives widen the gap between the rich and the poor, conversion of public resources to private and individual resources.

The role of the deep state in impeding democracy and fueling corruption in the country has been felt in the past elections that have taken place. The deep state is an authoritarian, criminal and corrupt segments of the state that function in a democratic regime by exploiting and reproducing its deficiencies. The deep state operates under the shadows of formal governance institutions to operate and inform the politics of the country for their own longterm interests.

**Recommendations:**

1. Promote political good will in fighting corruption, stiff penalties on corrupt officers and promoting a sense of duty, efficacy and ethics in public service delivery.
2. Compulsory recovery of corruption proceeds, naming and shaming the corrupt, and barring the corrupt from holding public or elective office for life.
3. Thorough vetting of appointees to key governance institutions.
4. To review the Witness Protection Act and strengthen the agency to protect corruption witnesses and whistleblowers.
5. Provide civic education to enhance public awareness on the availability of witness protection agencies.
6. Proper mechanism for wealth and asset declaration measures and progress monitoring after the job offer.
7. Deconstruct disassociate with the deep state.

## b. The fight against impunity and past human rights violations (arts. 2, 6, 7 and 14)

**Issue 3:** *Please provide information about what steps the State party has taken to guarantee effective remedies for human rights violations and to address impunity, including, in particular, information about: (a) efforts to encourage the use of non-judicial dispute mechanisms, including the Task Force on Informal Justice Systems and the Alternative Justice Policy, and their compatibility with provisions in the Covenant, which include guarantees of access to judicial and other official mechanisms; (b) progress in implementing the recommendations of the Truth, Justice and Reconciliation Commission on redress for gross human rights violations that occurred between 1963 and 2008, including the status of the KSh 10 billion restorative justice fund, set up by the President, and the degree to which it has been utilized to provide redress to victims of human rights violations, bearing in mind the Committee’s previous recommendation in this regard; (c) the mechanisms that are in place to provide remedies for violence occurring in the context of elections held after 2008; and (d) measures taken to implement effectively the Victims Protection Act 2014, including the status of the Victim Protection Trust Fund.*

**Reply / Comments from Civil Society**

The state is mandated under Art. 48 of the Constitution of Kenya 2010 to ensure access to justice for all persons. Towards realization of this mandate, the Kenyan judiciary has been on the forefront in enhancement of justice to all by ensuring that there are court structures in place as established in the Constitution that are functioning and providing quality legal services to the people. We have witnessed a brave and committed leadership and administrative structure in the judicial corridors that is steadfast in protecting and upholding the Constitution as well as the fundamental rights of the people of Kenya when they have been violated. This is evidenced through the jurisprudence that has emanated from various court decisions that touch on historical human rights violations. The judiciary has also employed diverse strategies towards the realization of access to justice and redress mechanisms for human rights violations. This strategies include:

1. The efforts by the Chief Justice Hon. David Maraga to construct courts across the country have mobile courts and rehabilitate the old courts. A move which is towards the realisation of accessibility of courts to the people of Kenya.
2. The digitalisation and incorporation of Information technology in the judiciary which has enable the courts to continue functioning despite the COVID pandemic.
3. The promotion of Alternative Dispute Resolution Mechanisms through the incorporation of the court annexed mediations as well as the establishment of the Alternative Justice System Policy Framework. A policy framework that seeks to mainstream alternative dispute resolution mechanisms and ensure that they comply with human rights principles under the supervision of the judiciary.

There have been challenges that have been faced with respect to the realisation of access to justice for the Kenyan People.

1. Delay in appointment of 41 judicial officers by the President who had been recruited, selected and recommended for appointment as judges to the Court of Appeal, Employment and Labour Relations Court and Land and Environment Court by the Judicial Service Commission. This has resulted in scaling down of court operations which has resulted in delayed justice.
2. Failure to establish the Judiciary Fund as established in the Constitution.
3. The continued disobedience of Court’s order by state agencies in blatant violation of the Constitution. A case in point is Petition no. 369 of 2019.
4. 2019: Adrian Kamotho Njenga v Attorney General & 3 others (2020) KLR where the President was ordered to appoint the 41 judges that had been selected by the Judicial Service Commission.

**Recommendations:**

The State Party should:

1) Respect the Constitution and the rule of law. This can only be realized if government officers can comply with court orders.

2) Establish a Judicial Fund to secure the independence of the judiciary.

3) Implement the Alternative Justice Policy Framework.

## c. Gender equality (arts. 3 and 26)

**Issue 6:** 6. In light of the Committee’s previous recommendation (CCPR/C/KEN/CO/3, para. 6), please report on measures taken to facilitate and improve women’s participation in the public and private sectors, including information about: (a) the implementation of the amendments made in 2011 to the Political Parties Act and to the corresponding codes of conduct; (b) steps taken to strengthen efforts to increase the participation of women in the public sector, including the implementation of constitutional provisions prohibiting more than two thirds of any elected body being of the same gender; (c) measures in place to protect women seeking elected office against violence, especially during rallies and elections; and (d) initiatives to increase women’s representation in the private sector, including any relevant disaggregated data.

**Reply / Comments from Civil Society**

Women rights remain a thorny issue in Kenya. Over the years, Women in Kenya are still fighting for equal rights, a historical injustice that draws back to independence. Whereas women played a major role in the attainment of independence, its enjoyments have been disproportionate as compared to their male counterparts. The 2010 Constitution addresses and provides a powerful framework that cures the inequality among genders in Kenya. Two third became a proposed formula that dictates not more than two thirds of the same gender should be at the decision-making table, this in the view on representation would have amplified the voices of women. Statistics on the scale of gender oppression in Kenya paint a consistent pattern of reluctance, if not resistance, towards guaranteeing women rights. The patriarchal society has remained aggressive shutting out women opportunities. Statistics reveal that women still face systemic discrimination and abuses that manifests through underrepresentation in decision-making, the gender gap, prevalent gender-based violence, as well as general inequity in civil, political, economic, and social rights. In a democracy like Kenya, that has adopted a multiparty approach on elections has given leverage to independent decision making. Women are not lesser Kenyans that do not deserve to enjoy this democracy, however, women have faced violence as a result of the decisions they make. Sexual violence among other heinous acts have been meted against women as targeting and punishment to opposers’ of dominant political factions or individuals. The damages are dire with long term consequences on the society. Young women have died in the hands of our political leaders who in the end do not face criminal charges or prosecution.

In a bid to promote and safeguard the rights of women and girls, Kenya has put in place progressive legislations, policies and institutional frameworks including enactment of laws like the Marriage Act, Protection against Domestic Violence Act, The Prohibition of Female Genital Mutilation Act, The Matrimonial Property Act, among other laws. The implementation of this laws remain a major gap.

These legislations have progressively supported women participation since the promulgation of the 2010 constitution. The 2017 elections did represent a step forward for women’s representation, albeit an incremental one. Compared to the elections in 2013, more women won seats at all levels, except for the presidential race, which remained exclusively male. For the first time, women became governors and senators in 2017, compared to none in 2013 while more women were elected to the national and county assemblies 23 members of the national assembly in 2017 vs. 16 in 2013 and 96 members of county assemblies in 2017 vs. 82 in 2013. Women running as independent candidates were also elected for the first time. While these are positive changes, women comprised just 9.2 percent of the 1,835 elected individuals in 2017, a marginal increase from 7.7 percent in 2013.

Some examples show that the struggle for women’s equal participation to public affairs, remains a challenge:

a) The Constitution requires that no more than two thirds of the same gender are represented in public bodies or elected positions. This provision in the Constitution has been ignored, to the point that there are Court decisions on this subject, in which it was ruled that the Parliament as it is today, is unconstitutional because of this lack of representation. The Parliament has given no follow-up to these court cases. In 2013, the Supreme Court decided that the Court decision could be implemented progressively.

b) There was a country action plan under CEDAW that was launched in 2015. Its implementation remains a challenge, because nothing has been done since. It is not a priority in the political space.

c) Violence is a means to keep women out of the electoral process: not only candidates, but also female voters or those who publicly support a political party, face that threat. There was a case of 2008, but also one more recently where a woman was beaten up. It is important to refer to the Elections Offenses Act of 2016, which is a robust document that contains penalties for election-related offenses. Some cases have gone to court, based on this law. For example, Elizabeth Moboro was fined for violence in a polling station.

d) There is a report about the number of women active in the private sector, by KEPSA. There are no official initiatives to increase women’s representation in the private sector.

**Recommendations:**

The State Party should:

1. Political institutions in Kenya, require further reform to achieve gender parity.
2. The IEBC, ORPP and other institutions should review the current legislative frameworks and enforce the existing laws to ensure greater gender compliance.
3. Comprehensive efforts to create funding mechanisms for marginalized candidates
4. Strengthen its efforts to increase the participation of women in the public and private sectors, and where necessary, through appropriate temporary special measures to give effect to the provisions of the Covenant.
5. Collect and make available disaggregated statistical data on the representation of women in the private sector.

## d. Participation in public affairs (arts. 7, 14, 25 and 26)

**Issue 25**: *Please indicate what measures have been taken to guarantee free and transparent elections, and comment on the efficacy of the Independent Electoral and Boundaries Commission in supervising the 2017 electoral process. In relation to the 2017 election and post-election period, please provide information about reports of: (a) excessive use of force by the police, including against unarmed persons and those who did not pose a direct threat to life; (b) violence, including sexual violence, based on political affiliation, ethnicity and gender; (c) reports of the harassment and suppression of civil society organizations working on promoting democracy and good governance.*

**Reply / Comments from Civil Society**

Independent Electoral and Boundaries Commission faced numerous challenges in administering the 2017 elections in Kenya. The commissioners joined a few months (seven months) to the general elections. This contributed to the challenges and inefficiency having had very limited time to deal with issues that arise in the lead up the election. The commission presented an inconsistent voter registration process, which included an independent audit and corrective actions to address some of the many errors that were identified in the list. The delay in procurement of ballot paper and the Kenya Integrated Elections Management System (KIEMS) posed serious implication to the elections. These delays caused uncertainty in the Kenya populous regarding the IEBCs ability to successfully fulfill their mandate for the 2017 general election. The process of tallying and tabulating of final results were delayed and lacked transparency. This worsened by the increased political tension across various parts of the country.

The postponement of elections in 25 constituencies because of security concerns impeded citizens’ ability to exercise their right to vote. Further the annulment of the presidential results resulted led to a more divided and volatile country. The rerun led to a boycott by the opposition asking their members to boycott the repeat voting exercise. At the time of rerun, the government deployed security forces in the opposition strongholds citing projection of violence and interference in the repeat elections.

Eruption of violence in the country during the election period has a major effect on participation of special interests groups in the electoral process. 2017 elections period was marred with targeting violence that was ethnically and gender based. Reports of sexual violence during the elections were recorded in most parts of the opposition strongholds demonstrating the inability of the authorities to prevent such crimes. The government does not also put efforts to hold perpetrators accountable during and after the election period. There are no proper statistics of sexual violence during the elections due to the sensitivity of the matter and most times the cases go unreported. Because of this and lack of proper redress mechanism, a persistent trend of this violence is recorded

In general, the IEBC faced many challenges during the whole 2017 election process (August): there were problems with voter registration, the audit of registered voters, with enforcing improper influence laws, practical problems on election day where registered voters did not turn up on lists, where the result forms did not match, etc. The Supreme Court ruled in a decision in favor of the opposition that there was no transparency in the results of the election, and ordered fresh elections.

In October, these elections took place, and civil society monitored the same problems. However, civil society was now not allowed to submit a court case.

One of the Commissioners of the IEBC fled from Kenya in fear of her life, and has since been criticizing the work of the Commission, and the partisan divide that is present on the inside. No reforms have been carried out.

1. It would be useful to add some statistics here. No one has been charged, disciplined, or taken to court for excessive use of force. There is a KHRC report on violence committed by State agencies, called Mirage at Dusk.
2. This especially happened in the areas under opposition control. Nothing has been done, the government has never pronounced itself on this. There is an ongoing court case brought by civil society about the failure to protect in 2008. The judgement date was set in June.
3. There are many examples of harassment, people being followed and threats to reveal the location of the analysis centre, etc. There was an attempt to raid the offices of AfriCog, where the tax authorities had a warrant to take everything in the offices. This was done before the elections of 2017, in order to disorganise organisations that were closely monitoring the situation. Luckily, this was avoided by a court order. This also fits in a general ongoing harassment of civil society to shrink civic space. Often, the excuse of tax avoidance or terrorism is used to freeze accounts of organisations.

**Recommendations:**

The State Party should:

1. Respect independent and constitutional commissions and bodies including the Electoral Management Body.
2. Enhance and implement a recommendation by the Independent Review Commission to have commissioners in office at least two years prior to any election.
3. Spearhead multi-sectoral reforms geared towards reforming the police sector.
4. Consider legislative amendments that secures financial independence of the EMB.
5. Ensure that all law enforcement agencies strictly discharge their mandate.
6. Address increasing shrink to the civic space in Kenya.
7. Put in place structures and systems to address all historical injustices especially.

## e. Covid-19 pandemic

**Reply / Comments from Civil Society**

On March 13th 2020, Kenya recorded its first case of the Corona virus. This created a state of panic among Kenyans as we had already observed the fatalities that in developed countries. The Countries that had recorded major deaths were developed and well-resourced like Italy. This was alarming for Kenyans as the countries preparedness was not guaranteed and the reality of a poor health structures that are already unraveled. Kenyans only hoped that the government would take the necessary measures to mitigate the spread of the virus through ensuring all Kenyans have access to sanitary conditions, hospitals are well equipped to manage the global pandemic. As a first response measure to the presence of the virus in the country, the president gave a stay-at-home recommendation to Kenyans advising that only those involved in essential services to remain open and mobile. He further placed the country’s borders on lockdown to any incoming flights but remained open to road access to the East African Countries. One could argue that this directive was appropriate given the fact that it is what had been applied in other countries that had reported high cases of the virus. This move did not however reduce the infections rates as Kenya continued to record high rates of infections.

To conclude, the response of the government to the pandemic has been focused on public order and brutal crackdowns on the general public.

**Recommendations:**

The State Party should:

1) Improve the Counties health systems and infrastructure.

2) Develop policies and procedures of addressing (domestic) violence during pandemics.

3) Ensure that measures taken to fight against the pandemic, are in compliance with the rights guaranteed in the ICCPR.