

COUNTRIES AT THE CROSSROADS

Countries at the Crossroads 2012:

Kenya

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Introduction

Kenya entered a new political era in August 2010, following voters' overwhelming approval of a radically revised constitution that markedly enhances protection of basic rights, significantly constrains executive power, and provides limited devolution of powers across 47 newly created county governments. Elections most likely to be held in March 2013 will test the strength of new constitutional institutions—particularly the revived and strengthened judiciary—and the political will of Kenya's leaders and the Kenyan elite to respect the new dispensation and obey the rule of law.

Kenya gained independence from Britain in 1963, and quickly acquired a reputation for relative stability and prosperity within East Africa. Founding president Jomo Kenyatta and his successor, Daniel arap Moi, however, presided over the increasingly corrupt one-party rule of the Kenya African National Union (KANU), which respected few political and civil rights and on occasion violently suppressed opposition. Kenya transitioned gradually during the 1990s from authoritarian rule toward functional but weak multiparty democracy.

The 2002 election of President Mwai Kibaki, a top KANU leader and former vice president and finance minister who had broken with the party in 1992, raised hopes for a peaceful evolution to more equitable and responsive governance. Kibaki was elected as the head of a broad coalition, and his administration pledged zero tolerance of corruption. In its first years, it revived Kenya's economy through reforms that promoted investment, improved governmental operations, and made efforts to provide primary education and stimulate rural development. However, many worst practices of the previous patronage-based state were grafted onto the new, more democratic, structures. Corruption endured, impairing the government's effectiveness and damaging people's faith in elected leaders. Compounding the problem was modern Kenya's origin as a British colonial creation that grouped disparate ethnicities into an externally imposed

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polity within artificially drawn borders. (The Kikuyu, who principally inhabit central Kenya, comprise about 17 percent of Kenya's people and are the largest single group. The other main ethnic groups are the Luhya (13.8 percent), Kalenjin (12.9 percent), Luo (10.5 percent), Kamba (10.1 percent), Kenyans of Somali ethnicity (6.2 percent), Kisii (5.7 percent), Mijikenda (5.1 percent), Meru (4.3 percent), Turkana (2.6 percent), and Masai (2.1 percent).²

The Kikuyu long dominated Kenya's political and economic life, and Kenya's politics effectively became a contest between Kikuyu-dominated parties and coalitions and other parties and coalitions, led most notably by ethnic Luo politicians, that sought a more equitable sharing of national power and wealth. The relative Kikuyu population growth has slowed in recent years, at least partially due to their economic success and increasing urbanization. Future elections—if districting and vote counting is accurate—could reflect a decline in Kikuyu influence.

The 2002 multiethnic grand coalition collapsed shortly after its inception, and regio-ethnic parties again dominated the political spectrum. Leading up the December 2007 presidential and parliamentary elections, political parties worked tirelessly to mobilize support throughout the country, usually with few official constraints. Legislative and local elections suffered grave problems and electoral violations, including incitement to violence and the use of hate speech, particularly along ethnic and gender lines, by politicians and the media.³

Proclamation of Kibaki's victory, amid widespread evidence of vote-rigging, was met with incredulity that exploded into violent turmoil. Riots broke out in major cities. In rural areas, neighbors from opposing ethnic groups turned on each other, driving many people from their land. Conservative estimates found that at least 1,100 people were killed and more than 300,000 others displaced during three months of sporadic ethnic violence, much of which appeared to have been orchestrated by senior political figures, and was marked by widespread sexual assault and looting.

Under intense international pressure, the rival candidates formed a “grand coalition government” in February 2008, with Kibaki remaining president, opposition Orange Democratic Movement (ODM) leader Raila Odinga—the top challenger in the presidential vote—occupying the newly created prime minister post, and other cabinet posts split between the two main parties.

This arrangement pulled Kenya back from the precipice of a catastrophic civil war. But the aftermath of the post-election violence continues to be felt in the human cost of lives lost and people still displaced. Furthermore, the failure of the Kenyan justice system to properly

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investigate and prosecute alleged planners and perpetrators of the violence is shaping the run-up to the 2013 elections. The International Criminal Court announced in January 2012 that it is pursuing cases against two leading potential presidential candidates, Uhuru Kenyatta and William Ruto.⁴ In May 2012, a new unit of the Director of Public Prosecutions (DPP) that will include both local and non-Kenyan prosecutors was created to investigate post-election criminality in 2008, in part “to send a strong message to those interested in violence” in the 2013 elections.⁵

The DPP decision reflects the quickening pace of transition of many Kenyan institutions toward greater independence from politicized presidential authority toward accountability according to the new constitution. Yet the reform process remains fraught, and will be tested severely in the scheduled 2013 national and local elections.

Accountability and Public Voice

The August 2010 constitutional referendum was arguably the best-run electoral exercise in Kenyan history. Voter turnout topped 72 percent, and over two-thirds of the 12.4 million voters favored the new constitution’s radical reconstruction of the political system. However, implementation of its provisions has been slow, uneven, and incomplete.⁶ Various groups have fought to protect their particular interests. In some areas, such as combating corruption, there has been especially intense elite resistance. Many provisions in the 21 bills enacted by parliament as of August 2011 did not meet the requirements of the new constitution, and on some matters, the Commission for the Implementation of the Constitution was not consulted as required by law.⁷

The new constitution dramatically shifts the distribution of governing powers.⁸ Executive powers are sharply diminished, legislative oversight is strengthened, the judiciary’s autonomy is increased, and significant responsibilities are devolved from the central administration to 47 new county governments.

The draft constitution was drawn up by a committee of experts, including three non-Kenyans.⁹ Importantly, it stipulates, in Article 2 (5) and (6), that, “The general rules of international law shall form part of the law of Kenya,” and, “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

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Numerous established and transitional constitutions were reviewed, and the detailed and prescriptive document was developed in wide consultation with civil society. Executive power and the power of the central government were both reduced, although the devolution of powers and revenue to 47 counties will be limited and will not create a true federal system.¹⁰ The broader distribution of powers and funds could help reduce the attraction and power of the larger ethnic-based parties. Parliament will become bicameral, with the current unicameral National Assembly to be expanded and a Senate to be created. The National Assembly will increase to 350 members, including 80 new constituencies and a women's representative from each of the 47 new counties, for a total of 290 elected constituency members. Twelve additional members representing groups including the disabled, workers, and youth will be nominated by political parties according to their proportion of National Assembly seats, and a speaker will be elected as a member *ex officio*. The National Assembly will have far greater powers than past parliaments, including allocation of national budgets, approving presidential appointments, and approving states of emergency or declarations of war. Parliament forced President Kibaki to withdraw several unilateral appointments to senior positions, and the naming of Chief Justice Willie Mutunga was considered an important achievement for reformers. In April 2012, four of Kenya's ranking judges were removed from office after being found unfit by a vetting board, an event the *Nairobi Law Monthly* called "a turning point in reforming the judiciary."¹¹

A Senate will be established, comprising 47 members elected from each of the newly established counties; 16 women members nominated by political parties in proportion to their seats in the body; one man and one woman representing youth; and one man and one woman representing people with disabilities. The Senate's role will be to represent the counties and consider laws that affect county matters. It will help determine allocation of national revenues to county administrations. The Senate will hear impeachment charges against the president or vice president, which must be lodged by a member of the National Assembly with support of at least one-third of its members. Voters will have the right to recall elected legislators.

County governments will be led by an elected governor, who will appoint a council that must be approved by a county assembly of members elected from the local wards. As in the National Assembly and the Senate, county assemblies are subject to the constitutional requirement that no more than two-thirds of elected or appointed government bodies be comprised of the same gender.¹²

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The new constitution entrenches a very strong and expansive bill of rights. It strengthens protection of most civil and political rights. It includes equality and the freedom from discrimination as core rights, as well as specific provisions on the rights of women, minorities, persons with disabilities, children, youth, and the aged. It also guarantees economic, environmental, social, and cultural rights, and even consumer rights. Access to education, food, health, housing, sanitation, and water are included as enforceable rights. Kenya's economic status and the vast needs of its burgeoning population make the enforcement of these rights problematic, although the constitution does provide for an "Equalisation Fund" to assist marginalized groups. Chapter 6 of the constitution, entitled "Leadership and Integrity," sets high ethical standards for all office holders, and calls for the establishment of an independent ethics and anti-corruption commission. It is far from clear that parliament will assign such a commission the investigatory and prosecutorial powers to make it most effective, or allocate the resources it would need to become viable. But the stringent, if broadly worded, integrity standards are already being applied in some areas,¹³ and could prove to be a powerful tool against conflict of interest and corruption among public officials.

The proliferation of autonomous institutions in the 2010 constitution is crucial to Kenya's future democratic development. It reflects recognition of the damage that the misuse of highly concentrated presidential power, long nearly unassailable by the legislature or the judiciary, has inflicted on the country. Politicians aligned with leading business interests have been able to commandeer state power and resources. Members of parliament have been largely ineffective in exercising control over the state budget or resources, although between 2009 and 2011 there were signs of increasing assertiveness by some legislators, and parliament played a larger role in both drafting new bills and revising or rejecting executive-based proposals.

Chapter 15 of the constitution creates two independent offices (auditor general and controller of the budget) and 10 commissions: the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission (IEBC); the Parliamentary Service Commission; the Judicial Service Commission; the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission; and the National Police Service Commission. All these groups will be able to launch investigations, but only the Kenya National

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Human Rights and Equality Commission, the National Land Commission, and the Judicial Service Commission will have the power to summon witnesses.

These new bodies are designed to and may serve as important checks on the behaviors of both the executive and the legislature. But as in many other areas, the requisite enabling legislation could dilute their power or subvert their framers' intent. Numerous civil society groups, as well as statutory bodies such as the CIC, are monitoring such laws, which could be subject to numerous court challenges. How quickly and completely recommendations of special "task forces" on police reforms, prison reforms, devolved governance, and judicial reforms are embraced will be another measure of the government's willingness to accept genuine change.

One key body that has become fully functional is the Independent Election and Boundaries Commission (IEBC). In October 2011, Isaack Hassan was named head of the commission, and its nine members were approved by Kenya's parliament in November.¹⁴ Hassan had earned broad respect by leading the interim election body that replaced the discredited Electoral Commission of Kenya (ECK), and supervising the 2010 referendum and well-run parliamentary by-elections and local elections. Civil society groups have expressed serious concerns about the powers and constraints of the IEBC, however,¹⁵ and the next election cycle will be a serious test of its capacities, political will, and resilience.

The 2013 elections will see voting for president and both houses of parliament, including the entire Senate, all 290 redrawn National Assembly constituencies (including 80 additional constituencies) and special women's seats in the National Assembly on a county basis. It is as yet unclear how the constitutional requirement that no more than two-thirds of members of parliament be of the same sex will be met. At the same time, inaugural county-level elections will select assemblies and governors. The ballot papers will be complex, and the need for civic and voter education far greater than usual.

The 2013 elections face additional challenges. Assuring that the scores of thousands of Kenyans still displaced by the postelection violence in 2007–08 can vote will be difficult and politically fraught. The internally displaced persons (IDPs) are mostly living in camps in areas of central Kenya where local elections are expected to be closely contested. Ethnic cleavages remain a crucial factor. The principal parties set to contest the 2012 elections were created around ethnic identities, which form the bases for patronage rather than ideology or issues. The president's power will be reduced through the devolution of certain political and financial

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responsibilities to 47 elected county governments. But in ethnically mixed counties, especially in areas of central Kenya that saw the worst postelection violence, local elections could engender renewed and perhaps violent rivalries.

The revised Political Parties Act, which came into force in November 2011 and is overseen by the Office of the Registrar of Political Parties, may help to reshape the party structure.¹⁶ The law imposes new requirements to reduce the number of small and geographically limited parties. Parties will be required to maintain offices and to have at least 1,000 members in no less than 24 of Kenya's 47 newly designated counties. Independent candidates will be permitted, but only if they have resigned from membership of any party at least three months before an election.¹⁷

The revised law is clearly intended to lessen the influence of ethnicity on Kenyan political parties, and to reduce chances of last-minute party hopping. However, some commentators warn that the tight controls placed by the act on changes in party membership, party alliances, and other party behaviors could allow for a dangerous level of politically motivated state interference in party activities, especially since parts of the law are expressed as general principles rather than clear regulations.¹⁸

The expanded role of a more capable and assertive civil society may also play an important role in the election process. Numerous groups are engaged in civic and voter education projects. Some are collaborating on uses of new technologies to help the IEBC more quickly and accurately gather and report election results. A platform for public reporting of alleged electoral abuses, Uchaguzi (election in Swahili), was launched for the 2010 referendum and is being refined for the 2012 elections.¹⁹ The platform allows people to use text message short codes to report violations and misbehavior. Importantly, groups focusing on new technologies are increasingly seeking to "protect" the entire electoral process as well as to gather information about events on polling day. Especially encouraging is the apparent willingness of electoral authorities to cooperate with civil society groups to help guarantee transparency in the electoral process.²⁰ Work of the autonomous National Cohesion and Integration Commission and the Truth, Justice, and Reconciliation Commission, both established in 2008, has brought attention to the structural causes of violence in Kenya and to its victims and survivors.

Kenya's many and diverse civil society groups generally operate with scant interference on a wide variety of issues, often with international funding. The pervasive and systematic

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repression of political dissidents and civil society activists that characterized the KANU regime is gone, but there have been instances of threats, harassment, intimidation, assaults, and even murder. Officials of the Gay and Lesbian Coalition of Kenya were targeted recently, as have several members of the grassroots group Bunge la Mwananchi (People's Parliament).²¹

There have been reports of apparently politically motivated burglaries at the offices of a few nongovernmental organizations (NGOs) where only some computer equipment was stolen, as well as a break-in at the *Nairobi Law Monthly* in September 2011 after it covered several corruption cases.²² The expulsion of a British human rights researcher in May 2011 on the grounds that her "presence in Kenya is contrary to national interest"²³ was a disturbing anomaly, although some Kenyans who have cooperated with international investigators have been intimidated or attacked (see below). The 1990 NGO Coordinating Act is viewed as codifying arbitrary and potentially unconstitutional provisions while also failing to provide clear guidelines for transparency and accountability among NGOs and other civil society groups.

Civil society groups with growing capacities to analyze, comment, and advise on official policies, legislation, and regulations were very active during the constitution-drafting process and remain central to monitoring its implementation. Local and community-based groups expect to become more influential as some political power and control over resources is devolved to the county level.²⁴ Several Kenyan NGOs are also launching web-based and text message platforms that allow citizens to monitor and report concerns over official service delivery.²⁵

Kenya's media is increasingly diverse and almost entirely free of direct censorship, especially in the print sector. The state retains control over the largest broadcast media network, the Kenyan Broadcasting Corporation, which under the 2010 constitution is meant to take on the role of a nonpartisan public broadcaster rather than an uncritical supporter of the incumbent administration. Kenya's new constitution expressly guarantees press freedom, although media operations remain subject to various laws and jurisdictions, some of which might violate the new constitution. Criminal libel and defamation laws are sometimes used against journalists in courts that possess a mixed reputation for fairness. Some journalists and editors believe that fear of defamation suits and concern over losing business advertising inhibit reporting on corruption or other sensitive subjects.²⁶ Yet Kenya's independent media continues to grow into a more powerful watchdog over government and other powerful interests, and some publications such as

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The Nairobi Law Monthly are offering in-depth investigative reports on alleged corruption by senior officials and other powerful interests.

The Communications Commission of Kenya has significant powers to regulate broadcast media, and in October 2011 issued guidelines that mostly addressed “decency” issues.²⁷ The 2007 Press Act, which created the Media Council of Kenya, and the Kenya Communications (Amendment) Law 2008, enacted in January 2009, which includes curbs on “hate speech,” have increased the government’s ability to regulate media to a degree that free expression advocates consider excessive.²⁸ While the 2010 constitution more strongly protects media rights, it also provides the potential for greater governmental regulation, and introduces ill-defined strictures against media malpractices that could be misused to restrict open reporting. Local and international freedom of expression groups have called for changes to broadcasting regulations and media laws to reflect both the new constitution and international standards.²⁹ Some books have been officially banned in Kenya, and booksellers have feared reprisals if they offer others, such as Michaela Wrong’s corruption exposé, *It's Our Turn to Eat: The Story of a Kenyan Whistleblower*.³⁰

Both the government and civil society groups have stepped up efforts to sensitize and monitor local media, especially vernacular local radio stations, regarding potential incitement to violence. Kenya’s media played a mixed role in the 2007–08 election and postelection violence, reflecting its growing diversity and uneven levels of maturity. Some outlets provided useful voter education before the polls, urged restraint in the postelection period, and mobilized assistance for victims of clashes. Others were accused of inciting people to violence. A Kenyan journalist, Joshua Arap Sang, is facing charges at the International Criminal Court (ICC) for allegedly disseminating coded messages calling for violence during radio broadcasts. Shortly after the 2007 presidential election results were announced, all live news broadcasting was temporarily banned, at least partially because some vernacular radio stations were goading their communities to bloodshed.

Journalists have reported occasional threats, and there have been several seemingly spontaneous physical assaults on media workers in the field in recent years. An important unresolved case is the January 2009 murder in western Kenya of journalist Francis Kainda Nyaruri, who was reporting on local corruption and whose killing appears to have been premeditated. Two suspects are now on trial, but a lawyer for Nyaruri’s family has reportedly

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received death threats, and a senior policeman who allegedly threatened Nyaruri shortly before he was murdered remains uncharged and on the force.³¹

Article 33 of the constitution guarantees freedom of expression, while explicitly excluding propaganda for war; incitement to violence; hate speech; advocacy of hatred that constitutes ethnic incitement, vilification of others, or incitement to cause harm; or speech that is based on any of a wide range of grounds for discrimination. The breadth of the exceptions, and their interpretation, could be open to misuse. The Freedom of Information Network, a coalition of Kenyan civil society groups, has urged that a strong and explicit freedom of information law be enacted to realize access to information rights specified in Article 35 of the constitution.³²

The National Cohesion and Integration Act 2008 made it an offense to use threatening, abusive, or insulting words to seek to promote ethnic hatred. A case was brought against several politicians for allegedly using hate speech before the August 2010 referendum.³³ Civil society groups have sharply criticized a draft National Intelligence Service Bill that would allow warrantless monitoring of individual communications and private property searches.³⁴

Internet access is widely available in Kenya's cities and towns, and is not obstructed. Freedom of expression groups such as Article 19 Kenya have expressed concerns over data protection issues, and called for stronger laws in the area that will meet international standards.³⁵ In late 2011, the CIC was cooperating with civil society groups to draft legislation to implement the right to information established in the 2010 constitution.³⁶ Emerging information and communication technologies are increasingly helping shape politics as well, by providing new and more accessible sources of information and means of mobilization. Text messaging is an important means of communication, and Kenya has one of the highest rates of internet use on sub-Saharan Africa.³⁷

Civil Liberties

The 2010 constitution strengthens police oversight. Kenya's police and security forces still enjoy apparent impunity in committing abuses and remain highly resistant to reform.³⁸ Organized criminal gangs that are active in several areas appear linked to political leaders. The *Mungiki* and other criminal bands are a serious threat to the daily lives of many average Kenyans. Extortion of

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businesses is commonplace, especially in large cities and towns, and numerous kidnappings for ransom have been reported.

Extrajudicial killings and other assaults on suspected criminals or ordinary citizens by police are regularly and credibly reported.³⁹ The then-UN special rapporteur on extrajudicial executions, Philip Alston, stated in 2009 that “the police are free to kill at will.” He also said, “Systematic, widespread, and carefully planned extrajudicial executions are undertaken on a regular basis by the Kenyan police,” adding that “the proper response to criminality is not to shoot a suspect in the back of the head...but to investigate, arrest, and try the suspect in accordance with law.”⁴⁰ There have been very few prosecutions for police killings of alleged criminal suspects; the police claim that they are defending themselves against well-armed criminals, who have indeed murdered dozens of police in recent years. The Kenyan government’s response to the Alston report stated, “The assertion that police killings are widespread, opportunistic, reckless or personal is not supported by facts,” and denied the existence of police death squads.⁴¹

A follow-up report by Alston’s successor, Christof Heyns, in April 2011 indicates little change in police practice, despite a series of proposed reforms, including the creation of an Independent Policing Oversight Authority. The lack of effective witness protection is cited as a serious problem. Heyns’s report details continuing abuses, including threats and assaults on people who met with UN or ICC investigators.⁴²

One such case is the unresolved daylight murder of two prominent human rights activists, Oscar Kamau Kingara and John Paul Oulo, near President Kibaki’s official residence in central Nairobi on March 5, 2009. Kingara’s Oscar Foundation Free Legal Aid Clinic had alleged that more than 8,000 Kenyans had been tortured to death or executed by police in a crackdown on the Mungiki criminal gang between 2002 and 2007.⁴³ No arrests have been made in these assassinations, and witnesses have been intimidated, with some forced to flee Kenya. Another human rights defender who met with Alston, Kenneth Kirimi Mbae, was detained and beaten in April 2010 while being interrogated about his contacts with the UN rapporteur.⁴⁴ In March 2009, a protection unit was formally launched under a new Witness Protection Act that had come into effect in September 2008, but it remains untested and underfunded.

Kenya ratified the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1997, and after a long delay submitted its first state report in June

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2007. Yet torture by the state remains commonplace. The Independent Medico-Legal Unit, an NGO that works to rehabilitate torture victims, has issued numerous reports with victim testimonies and detailed forensic evidence of torture in Kenya. The group states that “the need for clear, comprehensive and consolidated legislation on torture cannot be overemphasized.”⁴⁵

There were also widespread abuses reported during operations against a local militia/criminal group, the Sabaot Land Defence Force, in the Mount Elgon area in northwestern Kenya in 2008. Rights groups have urged the ICC to investigate these killings in the face of inaction by Kenyan authorities.⁴⁶

Authorities attributed two grenade attacks that killed several people in Nairobi in October 2011 to the Somalia-based Islamist group Al-Shabaab. Counterterrorism efforts have included illegal detention and improper rendition of non-Kenyans, as well as discrimination against Kenyans of Somali origin (see below).

Conditions in Kenya’s prisons include a “high number of persons in pre-trial detention,” and “overcrowding, lack of appropriate health services and high levels of violence inside the prisons, including inter-prisoner violence,” according to the United Nations.⁴⁷ Kenya’s prison population is nearly three times its official capacity, and about 40 percent of all people incarcerated are pretrial detainees or on remand. New Chief Justice Willie Mutunga’s commitment to modernize and expand Kenya’s overburdened court system faces serious challenges. In May 2009, there were 863,000 cases pending in the Kenyan courts.⁴⁸ The government has responded to these problems by increasing public access to prisons, including paralegal programs by NGOs, and ordering a review of the Prisons Act. Detainees and prisoners may file complaints with the Public Complaints Standing Committee. However, Kenya’s prisons remain severely underfunded. Most detainees and prisoners lack the information and access necessary to pursue complaints, and the response from the overburdened and at times incompetent and/or corrupt justice system is sluggish at best.

The autonomous Kenya National Commission on Human Rights (KNCHR) is widely perceived as independent, although the government has restricted its investigatory powers. The KNCHR serves as the primary rights watchdog and has the authority to review prison conditions and receive complaints regarding prison conditions. It is the source of redress for all Kenyan abuse victims. More than 700 prison officials have been trained since 2010, and “human rights

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desks” are operating in all prisons.⁴⁹ The KNHCR has authority to order the release of detainees as well as compensation for rights abuse victims, but lacks prosecutorial powers.

Kenyan law prohibits gender-based discrimination, and the new constitution strengthens requirements for gender equality. Traditional practices continue to restrict women’s rights, however, and women’s property rights have been limited under customary and formal laws of inheritance and succession. A court ruled in early 2011 that the new constitution clearly forbids any restriction on a woman’s inheritance rights based on her marital status.⁵⁰ The constitution also includes a provision allowing a woman to pass citizenship to her children or spouse. Kenya is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women. The 2011 Matrimonial Property Bill also provides new safeguards for married women’s property rights.⁵¹

Women and girls are particular targets for sexual violence, although there have been increasing reports of rape of men and boys as well. IDPs and refugees are especially vulnerable. Many women and girls were sexually assaulted during the 2007–08 post-election violence, reportedly including by police.⁵² Reported cases of gender-based violence rose sharply in 2010.⁵³ The police have launched a special unit to investigate and address gender-based violence, although its effectiveness remains to be proven.⁵⁴

Female genital mutilation (FGM) is now definitively forbidden by a law adopted in September 2011 that strengthens a widely ignored prohibition against its practice on minors enacted in 2001.⁵⁵ However, FGM is still widely practiced, and education campaigns among rural women will likely be more important than legal strictures in ending FGM.

Women were only about 10 percent of the 222 members of parliament elected in 2007. That proportion will rise sharply in the legislature to be elected in 2013. There are special women’s seats for each new county, and there will be several women among nominated members. Observers believe that there will be legal challenges demanding the 2010 constitution’s requirement that all state bodies include no more than two-thirds of one gender be applied precisely and vigorously, but that the courts will find that it may be interpreted as a guideline rather than a strict rule.⁵⁶

Kenya is among several African countries where a rising tide of homophobia is backed by law and public figures. A colonial-era law allows up to 14 years’ imprisonment for

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consensual homosexual acts, and senior political figures and religious leaders publicly make homophobic remarks.

Civil society groups lead efforts to advance disabled rights, which are expressly, if in rather general terms, addressed in Article 54 of the 2010 constitution, and receive only limited protection under current law. The constitution calls for “reasonable access to all places, public transport and information” and “the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.” An estimated 7 percent of Kenyans have some form of disability. The situation of women with disabilities is especially difficult.⁵⁷ The 2004 Persons with Disabilities Act established the National Council for Persons with Disabilities, but the law “is apparently plagued with inherent operational and legal impediments to its utilization,” observed one advocacy group. “[A] factor that renders the Act unenforceable is the fact that the Act is too apt in giving discretionary powers where mandatory powers seemed the only viable alternative.”⁵⁸

UNICEF reports that “Kenya is a fast-growing source country, as well as a transit and destination country, for human trafficking.”⁵⁹ Until October 2010, Kenya had no legislation specifically banning human trafficking. The new Counter Trafficking in Persons Act provides up to 30 years’ imprisonment and heavy fines for convicted traffickers, but permeable frontiers and official corruption facilitates continued trafficking. An October 2011 report describes an expanding network of trafficking of Somali women and girl refugees from northern Kenya, who are “trafficked for prostitution, the sex industry, and forced labor.”⁶⁰ The pervasive drought in northern Kenya and across the Horn of Africa has created an immense pool of vulnerable people; as many as 10,000 people each year are trafficked through Kenya’s Coast Province.⁶¹ Pedophile tourism remains a concern.

For decades, political patronage has entrenched an informal system of favoritism that has disproportionately and adversely impacted Kenya’s smaller ethnic communities, even though the country’s legal structures prescribe equality for its many ethnic groups. Discrimination on the basis of a person’s “race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth” is forbidden in Article 27 of the new constitution. Ethnic Somali Kenyans have suffered particular neglect and abuse. Somali Kenyans are the only ethnic group required to produce two identification cards to prove citizenship. They also face unequal economic opportunities due to scant

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government development efforts in the North Eastern Province and discrimination in hiring for jobs within the police, military, and civil service. An “Equalization Fund” of one-half percent of annual revenue collected by the national government is mandated by Section 204 of the 2010 constitution. It aims “to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.” Realizing the Equalization Fund’s goal, however, will face the same challenges of corruption and capacity that marred programs like the Constituency Development Fund.⁶² There is some optimism that decentralization of budgets and oversight will help reduce corruption.

Some civil society organizations promoting indigenous rights and their donors have reportedly come under government pressure.⁶³ Kenya has not ratified International Labour Organization Convention 169 on Indigenous and Tribal Peoples nor approved the United Nations Declaration on the Rights of Indigenous Peoples. UN Special Rapporteur on Indigenous Issues Rodolfo Stavenhagen wrote in 2007 that the “livelihoods and cultures” of Kenya’s pastoralist, hunter-gatherer, and forest tribes “have been traditionally discriminated against and their lack of legal recognition and empowerment reflects their social, political and economic marginalization,” adding, “most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources.” Several provisions of the 2010 constitution could strengthen protection and increase empowerment of indigenous groups characterized as “marginalized communities.” In the Bill of Rights, Article 56 specifically calls for affirmative action to promote participation of minorities in all spheres of national life.⁶⁴

Kenyans are free to practice any religion. Christians comprise about 80 percent of the population, and Muslims approximately 10 percent, mostly in the coastal area. The role of traditional Islamic *Kadhi* courts is contentious. The 2010 constitution gives *Kadhi* courts jurisdiction over Muslim family law, a provision opposed by many Christian church leaders. The decision in September 2011 by Chief Justice Willie Mutunga to appoint female magistrates to *Kadhi* courts sparked controversy in the Muslim community.⁶⁵ Muslims have alleged societal and official discrimination, including the arrest and illegal deportation, on national security grounds, of non-Kenyan Muslims.

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By late 2011, there were approximately 600,000 refugees in Kenya. Most refugees are from Somalia, and about a half million were quartered in camps at Dadaab in northeastern Kenya, which has also been affected by a severe drought. Refugees sometimes fall prey to criminal gangs and security forces. The situation of an estimated 100,000 refugees in and around Nairobi is also difficult.⁶⁶

Article 41 of the 2010 constitution, “Labor Relations,” guarantees the right of all workers, except members of the security forces, to form and join trade unions without government interference, to strike, and to enter collective bargaining agreements. A right to fair remuneration and reasonable working conditions is also established, the meaning of which will be contested in the courts as well as via industrial action. Article 162 provides for a new Labor Court to be established within the courts system. It will take considerable effort to harmonize Kenya’s existing labor laws with the new constitution. The new Labor Court will supersede Kenya’s current Industrial Court, which operated under the Labor Ministry and often declared strikes illegal. Employers have retaliated against union organizers or simply refused to recognize unions, particularly in export processing zones. In October 2010, striking tea workers of the Kenya Plantation and Agricultural Workers’ Union were reportedly detained by police and mistreated.⁶⁷

The constitutional right to public assembly is not always respected, and security forces sometimes use extreme force to suppress even peaceful and lawful protests. Some people arrested at protests have alleged beatings and sexual abuse while in police custody.

Rule of Law

The justice system is a crucial area of reform in the new constitution. A new Supreme Court, Court of Appeal, and Constitutional Court have been established over the high courts and magistrate courts. A Land and Environment Court and a Labor Court are also new superior courts. Under the Judicial Service Act 2011, an independent eight-member Judicial Service Commission (JSC) is empowered by constitutional mandate to “promote and facilitate the independence and accountability” of the judiciary.⁶⁸ The JSC will oversee vetting of all of Kenya’s sitting judges as well as new appointments. The commission was praised in 2011 for its

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public interviews of nominees for chief justice and deputy chief justice. Yet where a strong independent body has not been empowered, new appointments have followed old patterns. Selection of the new director of public prosecutions followed an opaque process that produced a candidate whom many civil society groups felt was unsuited to the job.⁶⁹

The new chief justice, Willie Mutunga, has pledged, “The Supreme Court will be modern, paperless, and the home of progressive and robust Kenyan jurisprudence.”⁷⁰ Four months after taking office in June 2010, he reported, “We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.” Mutunga created an ombudsperson post to receive public complaints and a judicial leadership committee to press reforms on a broad front, including, “Excessive bureaucracy...; backlog of cases; endemic corruption; inefficient and ineffective case flow management; poor terms and conditions of service for judicial and administrative staff; [and] poor infrastructure.”⁷¹ The results of his agenda for reviving and reconstructing Kenya’s judiciary will be a litmus test—and perhaps catalyst and guarantor—for wider reforms in the country.

Kenyan law presumes innocence until proven guilty, guarantees a public hearing, and allows consultation with an attorney. The government provides attorneys only in capital cases. Most defendants cannot afford legal counsel and the scale of free legal aid services cannot meet the enormous need. The government and courts sometimes use secrecy laws to withhold evidence from defendants. Requirements that detainees must be charged within 24 hours or 14 days in non-capital and capital cases, respectively, are often not honored. Many suspects are held for months or years in pretrial detention under dreadful conditions despite provisions for their release on bail or bond. High court fees, poor knowledge of legal rights, language barriers, and, in many rural areas, lack of legal infrastructure also present grave obstacles to access to justice.⁷²

Land rights are another vexing issue, and land distribution is a root cause of group conflict. An independent National Land Commission is mandated by the 2010 constitution, which in Article 162 also provides for a new Land and Environment Court. Legislation to implement the land commission has been criticized by some NGOs; one, the Legal Resources Foundation Trust, wrote that unless “the commission takes a center stage role in the land issues,” the land reforms will not be realized.”⁷³ A study on how the 2010 constitution addresses the land issue recommends the “establishment of a Land Claims Tribunal to handle land restitution

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claims, including land repossession, in a clearly defined process,” and “that redistribution and resettlement programs must be guided by a legal framework to ensure fairness and transparency.”⁷⁴

There is a long record of alienation of traditional lands from smaller ethnic groups and favoritism in land allocation toward the Kikuyu that began in colonial times. A government report issued in December 2004 estimated that more than 200,000 illegal allocations had been made since independence in 1963: “‘Land grabbing’ became part and parcel of official grand corruption through which land meant for public purposes... has been acquired by individuals and corporations.”⁷⁵ Land seizures for public purposes are sometimes arbitrary. Land-motivated displacement was a key underlying cause of the post-2007 election violence, particularly in the Rift Valley. Any changes will be politically contentious, and will likely elicit resistance from large landowners and groups that have benefited under previous regimes.

Stronger protections for disadvantaged communities have been urged by NGOs such as the Kenya Land Alliance and the Center for Housing Rights and Evictions. Some courts have already applied the right to housing clause in the 2010 constitution, although enabling legislation has yet to be enacted.⁷⁶ In northern Kenya and other arid areas, desertification and growing population pressures are intensifying land-related resource competition, including widespread cattle raiding and conflict between herders and farmers.⁷⁷ Drought, associated displacement and hunger are chronically acute in these regions, exacerbated by economic dislocation caused by violence, governmental ineffectiveness, and corruption. A Ministry for Northern Kenya and Other Arid Lands was formed in 2008 to address the increasingly desperate situation of food security in the north.

Kenya’s military numbered about 29,000 personnel in 2009, according to World Bank figures.⁷⁸ Kenyan forces have served as part of numerous UN peacekeeping missions, but the October 2011 invasion of Somalia, after cross-border attacks allegedly perpetrated by Al-Shabaab, was their first serious battle experience since independence. The armed forces were closely aligned with the authoritarian KANU regime, and individuals from former president Moi’s Kalenjin group filled many senior posts during his rule. The only overt military effort to take power was a failed coup in 1982, and the army has accepted civilian oversight during the country’s fitful transition to multiparty democracy since 1992. Various police units, including better-equipped paramilitary groups, carry out most domestic security operations. There are fears

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that the military could fracture along ethnic lines if it is asked to suppress large-scale ethnic conflict. It is alleged that senior military appointments are politically motivated and tied to corrupt practices.⁷⁹

Allegations of corruption in military procurement have not resulted in serious investigations, largely due to the fact that security and defense contracting has been exempt from regular procurement regulations. Numerous scandals have arisen in recent years, and more continue to come to light through investigative reporting by Kenyan media, notably the *Nairobi Law Monthly*.⁸⁰ The now-defunct Kenya Anti-Corruption Commission (KACC) investigated 18 security-related contracts in relation to the Anglo Leasing case and forwarded seven to the attorney general for prosecution. Appeals and petitions filed by defendants have resulted in repeated delays of the only two prosecutions undertaken.⁸¹

Anticorruption and Transparency

Deeply entrenched and pervasive official and societal corruption remains an enormous challenge to rights, governance, and development in Kenya. Graft is reportedly rife at all levels, from military procurement to market inspectors in Nairobi's sprawling slums to rural land distribution, on a scale that affects Kenya's economic health, its attractiveness to foreign investors, and the security of its citizens.

The abrupt removal in August 2011 of P.L.O. Lumumba as head of the KACC after less than one year in the position again demonstrated a profound lack of will by Kenya's political elite to address corruption.⁸² Lumumba and his staff were removed through provisions in a law passed by parliament establishing the KACC's successor, the Ethics and Anti-Corruption Commission. Even with increased activity during Lumumba's short tenure, the KACC was unable, absent independent prosecutorial powers, to seriously tackle major high-level scandals. The highly politicized office of Attorney General Amos Wako, who stepped down in 2011, failed to pursue senior officials or business people accused of malfeasance. As Lumumba pointed out, many of the parliamentarians pressing hardest for his removal were under investigation by his office. "We began to move into areas of public service that were very sensitive," he said,

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adding, “Some of the gains we thought we made under the new constitution are being clawed back. The new [anti-corruption] body is even weaker.”⁸³

An NGO governance analyst, Kakai Kissinger, agreed, stating, “Corruption is mutating and is very well-coordinated. Unless and until the anti-corruption commission is given powers to fully investigate and prosecute, we are wasting our time in trying to address corruption in our country.”⁸⁴ More optimistic observers believe that the incipient revival of Kenya’s independent judiciary will allow the proper pursuit and punishment of corruption at all levels by regular courts.

Slow and sometimes corrupt commercial court proceedings constrain growth in Kenya’s modern commercial sector. The Heritage Foundation reported in 2011 that “weak protection of property rights and extensive corruption continue to hold back overall economic freedom.”⁸⁵ The Kenya Association of Manufacturers has issued a long list of “burdensome” regulations and licenses it believes require simplification.⁸⁶ However, new policies in 2010 and 2011 have sped up the process for registering a new business and digitizing the records.⁸⁷

In 2011, Kenya was ranked 154 out of 183 countries in Transparency International’s annual Corruption Perceptions Index.⁸⁸ Apparent elite impunity damages both governmental efficiency and people’s faith in democratic rule. Repeated and enterprising media exposés detailing allegations of high-level corruption have not led to meaningful investigations. A web of massive high-level corruption during Moi’s regime was never effectively pursued.⁸⁹

A 2006 report by John Githongo, the former head of Kenya’s Office of Governance and Ethics, alleging that then vice president Moody Awori and senior ministers had misappropriated more than \$600 million in government funds in the Anglo Leasing scandal, has never been acted on.⁹⁰ The Anglo Leasing scandal is just one of many where graft in government procurement and budgeting processes has spotlighted the inability to gain reliable information about government operations. New scandals continue to emerge, and there is little indication that these will be addressed any more seriously than those that have gone unpunished in the past, such as the massive “Goldenberg” affair, which may have cost Kenya as much as \$600 million in the 1990s.⁹¹

The illicit gold trade helps fuel arms trading and insecurity in eastern Democratic Republic of Congo and allegedly involves prominent Kenyans. A principal suspect fled Kenya after being granted low bail.⁹²

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Drug trafficking is another serious and growing problem. According to the U.S. State Department's 2011 International Narcotics Control Strategy Report, it has "has permeated all strata of the society. Drug trafficking is linked to the prevailing culture of impunity, and presents serious ramifications to the nation's health, security, and stability."⁹³ An October 2011 report by the International Peace Institute reported evidence that drug profits are infiltrating politics, that high-level Kenyans are linked to international drug rings that smuggle cocaine and heroin into and through Kenya, and that Somali militia groups have joined the drug trade.⁹⁴ Responding to the report, Kenya Prime Minister Raila Odinga warned that money from the drugs trade was strongly influencing Kenyan politics, but he has not, as demanded by political opponents, named people he believes are "drug barons."⁹⁵

The propriety of administration and distribution of international aid—desperately needed as Kenya faces its worst drought in a generation along with numerous other social challenges—has repeatedly come under question. Several countries and donors have at times suspended assistance to Kenya amid allegations of corruption in areas such as food procurement, distribution of medicines, and education projects.⁹⁶

State activity in the economy remains substantial despite the fact that several state-owned enterprises have been fully or partially privatized in recent years. Opportunities for direct political interference, patronage, and corruption are numerous as state-owned enterprises report directly to politically appointed ministers. Several recent changes to official revenue collection could increase efficiency and reduce malfeasance. Beginning in 2011, payroll taxes were administered quarterly instead of annually. The development of an electronic tracking system has allowed the Revenue Authority to more effectively monitor and process cargo for customs clearance.⁹⁷

The new constitution's creation of ten commissions and two independent offices discussed earlier could be an important step in fighting corruption. The largely ineffective Public Complaints Standing Committee will be transformed into an autonomous Commission on Administrative Justice serving as a public ombudsman.

In June 2011, an audit report discovered nearly \$47 million of funds missing in the education ministry from a program designed to bring free primary education to all Kenyans. The discovery led to calls for Education Minister Sam Onger's resignation; however he maintains that he was not involved and brought the case to be investigated as soon as he was made aware.

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The case has also jeopardized the continuation of the project, with the largest contributor, the UK's Department for International Development, demanding all of its \$77 million funding for the project be returned.⁹⁸

Kenya remains weak in providing its citizens with budget information, according to the 2010 Open Budget Index.⁹⁹ A number of new measures under the 2010 constitution are intended to address revenue and budget transparency and accountability. The controller of budget will have to approve all disbursements from the national Consolidated Fund, the Equalization Fund for marginalized groups, and Revenue Funds to devolved county governments. A Commission on Revenue Allocation will also be established.¹⁰⁰ In August 2011, Kenya agreed to join the Open Government Partnership, a global effort that commits participants to a high level of transparency,¹⁰¹ and it has already launched a "citizen's budget" and online tools to access budget information.¹⁰²

Recommendations

- Kenya's elites should accept, respect, and obey the rule of law as defined in the 2010 constitution and interpreted by the country's judiciary.
- The government and all political actors should respect the independence and integrity of the Independent Boundaries and Election Commission, which should receive funding sufficient to oversee proper and efficient election processes.
- The government and police should cooperate fully with the International Criminal Court in pursuing cases related to 2007-8 post-election violence, and the newly-established unit in the Director of Public Prosecutions to investigate those events should be given strong support.
- The government should prioritize the restructuring and strengthening of the judiciary.
- Commissions and independent offices created by the 2010 constitution should be fully empowered by legislation and given resources to pursue a reform agenda that addresses

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corruption as a priority and provides genuine oversight of governmental actions.

- Police and other security forces should be held accountable for past human rights abuses, and gain leadership and training to help prevent future abuse.
- Devolution of decision-making and funding to local governments as provided in the 2010 constitution should be a priority to allow greater empowerment and voice for Kenya's diverse communities.
- Kenya's land question should be addressed in an open and transparent manner to resolve deep grievances and help begin to heal a core cause of ethnic and societal conflict.

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