

OBSTRUCTED & PARTLY FREE

**A CONTEXTUAL ANALYSIS OF THE
DEMOCRATIC SPACE IN KENYA**



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GLOSSARY OF TERMS

Haki Yangu The Quest for My Rights

Mapambano The Fight for Justice

Mwakenya Muungano wa Kukomboa Kenya

Mau Mau Freedom Movement in Kenya between 1940s to 1950s

Kenya Kwanza Kenya First

Azimio la Umoja Quest for Unity

Mzee An Elder

DEDICATION

This report is dedicated to all Kenyans who have fearlessly, resiliently and successfully resisted repressive policies by the ruling political and business elite from the 1905 to date. As Dedan Kimathi, Kenya's foremost freedom fighter said:

***“I would rather die
on my legs,
than live
on my knees”***

ACKNOWLEDGMENTS

This publication was realized through a collaborative effort that involved consultations with a Technical Working Group (TWG) on an enabling environment and protection of the civic space and other key civil society actors. First, we wish to thank the Aga Khan Foundation, Kenya for their financial support and being key participant in the consultative workshops held by the working group. We are indebted to the many civil society leaders and contributors who took time think with us and review the draft documents presented by the consultants. We also express gratitude to the teams that took part in the two validation meetings, and more specifically, leaders from the Civic Freedoms Forum (CFF) such as Kenya Human Rights Commission (KHRC), National Coalition of Human Rights Defenders, Article 19 East Africa, Poverty Eradication Network (PEN), Inuka Kenya ni Sisi, InformAction and Independent Medical Legal Unit (IMLU) just to mention a few. team played a key role in providing leadership and coordination, ensuring all the participating partners were kept in the loop.

Finally, we thank the consultants who put this publication together after intensive desk review and field interviews with some selected key informants. They have provided short case studies to illustrate how Kenyans beginning the colonial era have fought for their civil liberties under various regimes. We wish to thank Davis Malombe for leading this team which included Happy Olal, John Owegi, Ludivicus Omollo, Tabitha Kilatya, Fred Lau, Wachira Waheire, Michael Muga and Swaleh Githinji. It is our hope this initial work will form a baseline for future in-depth work on this important topic.

Chris Mbiti
Executive Director,





1. INTRODUCTION

The Kenyan flag. Image credits: freepik

“...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”²

1.1 CONTEXT OF THE STUDY

The history of contestations over rights and interests between the ruling elite and citizenry is as old as humankind and society. It is the reason countries across the world have gone through periods of repressive leaderships that have deepened limitations to human rights and related civil and political liberties. In the context of Kenya and Africa, the concept and struggles for “civic and democratic space” are deeply interrelated. This straddles the colonial and post-independence regimes to date. With a political economy and long-term analysis, one is able to understand the deep-seated interests that have informed the endless and unfinished fight for a democratic Kenya.

After the Berlin Conference that led to scramble and partition of Africa, Kenya came under British rule through control by the Imperial British East Africa Company (IBEAC). It is in that context that after close to 20 years of British expeditions, Kenya became a colonial State on June 11, 1920. Colonialism was basically a political system that was put in place to provide the administrative and legal facilitation of the economic and imperial interests at hand. This is because capitalism was in its imperialist, competitive phase that demanded additional resources and markets outside Europe.

The British rule, from its inception in 1905 and upon its formalization in 1920, subjected locals to retrogressive policies. These were geared towards enhancing their suppression as they strived to resist oppression and seek political and economic independence. These were perfected by the post-independence regimes as the successive elite consolidated power and deepened authoritarian and divisive rule through punitive and prohibitive actions.

The initial justification all over Africa was that the post-independence governments were novel and fragile and there was a need for decentralized and one-party States to preserve national cohesion

¹ Based on the analysis and classifications from the 2021 reports by CIVICUS and Freedom House. While CIVICUS declares Kenya Obstructed in 2021, Freedom House over, it is Partly Free. See Annex 1 for CIVICUS Rating tool.

² Preamble to the Universal Declaration of Human Rights-- [https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%201,in%20a%20spirit%20of%20brotherhood.](https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%201,in%20a%20spirit%20of%20brotherhood.;);

and integration. This period has witnessed massive resistance from the diverse social and political movements and individuals in the society. This historical context is important for it shows how this phenomenon has bedeviled our society over time, contrary to the emerging postulation that this is an emerging question in the world. As indicated by many scholars, this is made to undermine the legitimacy and efficacy of citizens and other independent voices and institutions as they mitigate the political and economic powers of State and corporate actors.

It is against this background that PEN³ in partnership with Civic Freedoms Forum (CFF Kenya), with financial support from Aga Khan Foundation (AKF), are undertaking a study on the contextual analysis of the democratic space in Kenya.

1.2 OBJECTIVES OF THE STUDY



a) The Main Objective

To conduct a contextual (and conceptual) analysis of the democratic space in the country and identify key actionable recommendations to the challenges identified.



b) Specific Objectives

- i. Develop a conceptual link between civic versus democratic spaces and human rights, and the link between these and democratic versus repressive regimes.
- ii. Review and advise on the existing frameworks for assessing the states of civic and democratic spaces in the society.
- iii. Carry out a contextual analysis and assessment of state of civic and democratic spaces from the colonial to post independence regimes in Kenya
- iv. Analyze the nature and extents of responses by the civic and independent actors to the repressive situations experienced in Kenya's political history to date
- v. Identify case studies of the critical liberal struggles that can inspire future civic organizing and empowerment in the protection of civil and political rights in Kenya
- vi. Provide recommendations on the necessary policy and political action points towards the consolidation of democratic space in the Kenyan society.

³ Partnerships 4 Empowerment & Networking in Kenya, and officially registered as Poverty Eradication Network. <https://penkenya.org/>;

Moreover, all the first 5 specific objectives form separate and substantive chapters of this report. Policy and political recommendations form the last section of the executive summary. Finally, all the six research objectives respond to corresponding and cross cutting conceptual and contextual gaps/questions around civic and democratic space in Kenya and beyond.

1.3 THEORETICAL AND CONCEPT FRAMEWORKS

To achieve the objectives of the study, the following analytical perspectives are key. Our local-Kenyan/ African viewpoints around these frameworks have been incorporated.

- i. On **contextual analysis**, political economy theory remains critical⁴. This is because political economy studies how political forces and economic interests interact. This is basically what informs the formation and operations of most of the colonial and post-independence States in Africa. This, as indicated in our report, created a severely oppressive and repressive State that is not protective of human rights and public interests.
- ii. It is important to note that our pre-colonial societies were deeply egalitarian for they were grounded in the philosophy of African Socialism. It on this basis that some progressive leaders and civic actors have since independence been advocating for the values of “utu”/ “ubuntu” (humanity) or “ujamaa”(family hood) among others. This remains relevant.
- iii. On **conceptual analysis**, human rights and democracy theories and principles apply. Human rights and democracy go hand in hand as democracy is the political system which embodies the autonomy of the individual inherent within the idea and concept of human rights⁵. This is critical because civic and democratic spaces is basically fundamental rights and freedoms, specifically the civil and political rights that apply mostly or ideally in a democratic society⁶. The “haki yangu”(quest for rights) culture remains critical in our context and analysis.
- iv. On the **responses to the repressive situations**, the notion of the “mapambano” remains integral. Mapambano is a Kiswahili word that refers to the culture of struggling for human rights and social justice. It derived from the Kiswahili word: “pambana or kupambana” which means fighting or advocating for. This has been popularized and legitimized to the extent that the word “bado mapambano”, implies the “struggle continues” or aluta continua.

This localized or “africanized” conception of liberation narratives is simply the politics of resistance”, also referred to as the ‘politics from below’. It is transformative in nature for the civic actors involved in, aim to contest and challenge the configuration of power relations.

4 Political Economy Definition (investopedia.com);

5 https://www.sociostudies.org/almanac/articles/the_relation_between_democracy_and_human_rights/#:~:text=Human%20rights%20and%20democracy%20go,and%20concept%20of%20human%20rights.&text=One%20possibility%20to%20legitimate%20human,dimension%20through%20a%20democratic%20process;

6 For Democracy cannot be defined without human rights and Human rights can be protected effectively only in a democratic state. The two are mutually constitutive.

Moreover, their goal has been analyzed as being concerned with democratizing governance or building emancipatory politics that can bring about social transformation and the end of relations of domination⁷. This links very well with the liberation movements in Kenya.

1.4 SCOPE AND METHODOLOGY

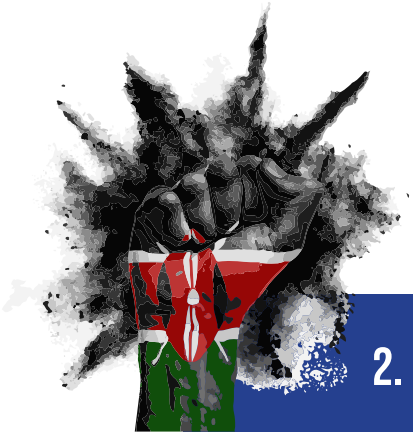
This was majorly a desktop study executed via qualitative methodologies. We have purposed to deliver on both the broad topic and main objective; and gone further to zooming into the core issues captured in the specific objectives. Each of the specific objectives has formed the basis for formulating the research questions and topical presentations in the final report.

The study has also seen administration of questions targeting 8 main liberation initiatives spanning the period from colonial to independence regimes. The intention here is to document their different achievements and challenges in their fight for human rights and democracy in Kenya. We have also strived to link the struggle across generations. For they built on and inspired each other. From all these, we developed an inception report, and later the draft report that was subjected to a virtual review and validation by stakeholders. From here, this final report/ brief/ strategy paper was developed and published. PEN and CFF have planned public and policy engagements.

1.5 CHALLENGES ABOUT THE STUDY

The fact that the project deals with many variables, concepts and processes covering a political journey of the Kenyan State over a century came with its own limitations. For instance, deconstructing and linking the notions of civic and democratic spaces; civil and political rights (fundamental rights and freedoms) against the shifting contexts and within the assumed states of democracy was an uphill task. Moreover, attempts to look at how civic and democratic spaces affect or what it means to county based communities and key marginalized groups would have overloaded and overstretched the focus and objectives of the study.

⁷ <https://miuc.org/politics-of-resistance/>;



2. EXECUTIVE SUMMARY

2.1 AN OVERVIEW

The report is entitled **Obstructed and Partly Free: A Contextual Analysis of the Democratic Space in Kenya** based on the analysis and classifications from the 2021 reports by CIVICUS and Freedom House. While CIVICUS declares Kenya Obstructed in 2021, Freedom House declares, it is **Partly Free**⁸. This means our civic and democratic spaces are:

“.....heavily contested by power holders, who impose a combination of legal and practical constraints on the full enjoyment of fundamental rights. Although civil society organisations exist, state authorities undermine them, including through the use of illegal surveillance, bureaucratic harassment and demeaning public statements. Citizens can organise and assemble peacefully but they are vulnerable to frequent use of excessive force by law enforcement agencies, including rubber bullets, tear gas and baton charges. There is some space for non-state media and editorial independence, but journalists face the risk of physical attack and criminal defamation charges, which encourage self-censorship⁹”.

The report is a novel and critical political education, advocacy, monitoring and response tool. For it provides deep reflections and understanding of the root causes of Kenya’s State, who are responsible and the interests at hand across regimes; the implications to freedoms and human rights and how such should be monitored and addressed in the society; how the people and their institutions have resisted this through corresponding liberation struggles; and how these developments shape the next political project about the republic envisioned in Article 10 of the Constitution: the “ Multiparty democratic State founded in the principles and values of good governance referred to in Article 10. It also helps to frame interventions that effectively addresses the root causes as opposed to the manifestations of the political and economic issues.

⁸ See Annex 1 for CIVICUS Rating tool.

⁹ <https://monitor.civicus.org/Ratings/#obstructed>; Thus we are in between open/ narrowed and repressed/ closed.

2.2 KEY FINDINGS AND RECOMMENDATIONS

A) FINDINGS

a) Regarding the Operational Context:

1. Kenya and other African countries were conceived as corporates and political entities that were made to and continue to advance the interests of the governing elite at the expense of the masses who form the majority of the population.
2. Punitive and prohibitive laws and policies were put in place to effect this state of affairs during the colonial era between 1905 to 1963. The post-independent regimes have perfected and sustained these oppressive political and economic systems, to date.
3. This explains the extent of the deepened culture of impunity in the governance of our affairs. Corporate and State power remains undeterred. This is simply **State Capture**. Such governance infrastructure has had adverse effects on fundamental rights and freedoms/ civil and democratic space at all levels in the society.
4. Civic/ democratic space is the set of legal conditions experienced as a lived environment that enables people—whether alone or with others, **physically or online**—to be active in their communities, to speak out, to organize, to gather together in protest or to help one another, and to participate in the governance of their community, area, or country¹⁰.
5. There is a direct link between civic space and democratic space. For ideally, civic space can only be realized within a liberal, democratic state and society. However, we have partly and newly established democracies or populist governments that come with restrictions because there are always anti-democratic elements that have selfish interests in the society¹¹.
6. There is positive correlation between civic and democratic spaces and human rights for the former is simply about creating a politically conducive environment that enables people to enjoy their fundamental freedoms especially rights to expression, association, assembly, access to information among others.
7. In Kenya, the most affected are the citizens, civil society organizations among other independent voices and institutions (both State and non-state). Thus the conversations go beyond civic space (citizens and their organizations) to the broader democratic spaces/ state.
8. Thus, actors advancing radical actions around human rights, electoral justice, climate and environmental justice, land and resource justice, reforms and rule of law; rights of the marginalized groups in governance have remained most exposed to political repression.

¹⁰ <https://globalhumanrights.org/commentary/fund-101-what-is-civic-space/>

¹¹ Today, we have hybrid regimes that straddle the democracy and autocracy binary.

9. Because of retrogressive cultural and policy systems and practices; spaces and opportunities for women, youth, peoples with disabilities among other historically marginalized groups to effectively participate in governance processes at all levels in the society remain limited.
10. Moreover, county based civic and independent voices/actors face more exposures. This is informed by the fact that there has deeper consolidation of State and corporate power compounded by limitation of political and financial resources to continuously organize and overcome the same.
11. Moreover, in contexts where an incumbent President is running for a second term or has interests in the transitions, situations of security and health operations and emergencies have provided opportunities for limitation of civic and democratic spaces.
12. This has been witnessed during the many security and states of emergency operations from the colonial rule to date. The novel Corona Virus (COVID-19) pandemic experienced globally from December 2019 came with health protocols whose enforcement limited civic freedoms.
13. The main objective is to undermine the legitimacy and efficacy of the actors and initiative that threaten the interests of the above-mentioned elite, basically to advance oppression and self-preservation.
14. Developments within the international sphere have impacted on the political contexts and responses. For instance, while the global quest for markets and raw materials led to colonialization and its oppressive policies, the Cold War Era between 1945 and 1990 created an environment that tolerated repressive regimes, provided one was aligned to capitalist West or Communist East. Its end in 1990s ushered in the new era for democracy and respect for human rights. Currently, we are in global context where trade and business matter.
15. There are many monitoring frameworks and annual reports around civic space: The Freedom House's Framework of Freedoms; Human Freedom Index by the Cato Institute and the Fraser Institute, and CIVICUS Monitor Tracking Civic Space among others at national levels¹².
16. In the *CIVICUS* Global report released in December 2021, ***Kenya is classified as obstructed***. In the Freedom in the World 2022 report (by CIVICUS-January to December 2021, **Kenya is classified as Partly Free State**. Thus, the reason for classifying civic and democratic under the current Uhuru Kenyatta regime as both **Obstructed and Partially Free**.
17. Using the said CIVICUS framework, we wish to classify the previous regimes as follows¹³:
 - Colonial government (1920-1963): **CLOSED**
 - Jomo Kenyatta (1963 to 1978) and Daniel Arap Moi (1978-2002) regimes: **REPRESSED**.
 - Finally, Mwai Kibaki regime (2002 to 2013): **INITIALLY OPENED (2003-2004), LATER NARROWED (2005 to 2007) and FINALLY OPENED(2008 to 2013)**.

¹² For details see Chapters 4 and 5 of this report

¹³ For details, see Chapter 5 of the report.

b) Regarding Responses to these Constraining Contexts

18. The pro-democracy movement in Kenya is as old as colonialism itself, if not older. Kenyans are relentlessly cultured to resist domination and repression across regimes, thus the notions of “mapambano”(fight for justice) and “haki yangu”(quest for rights). The nature and gravity of oppression have determined the extent and character of resistance and actions.
19. This is what gave birth to the Kenyan civil and political organizations as a two-in-one movement. For what emerged were social and political movements. This, plus future context, have seen continuous actions between the civil society and political parties on critical issues.
20. The ensuing movements especially during major governance crisis have remained multi-ethnic. There are times the academia, clergy, media, trade unions became the front (fronted/led such movements. The role of the middle class in organizing the masses and articulating issues is paramount.
21. The movements and actions have ranged from violent to peaceful, underground, open, formal organizations depending on the context. The colonial State, owing to its brutal and cruel culture, saw the most violent confrontations and underground movements.
22. While women have been deeply involved, documentation of their different levels of leadership and participation remains limited. Mekatilili Wamenza, Moraa Moka Ng’iti, Syokimau among others, remain the precursors of the pro-independence struggles.
23. Most of the liberation heroes and heroes get involved in their tender youths. For instance, Harry Thuku (born 1895) led the 1922 struggles while in his 20s. The “7 bearded Sisters” and the “Mwakenya” activists resisted Kenyatta and Moi regimes respectively in their youth.
24. A great number of them learned from and inspired each other over time. Some of the movement leaders and members suffered and served across regimes. Mzee Gitu Kahengeri, who has been involved in the colonial and the later struggle to date, is a case in point.
25. While there is no specific classification of the epochs of the resistance and independence movements across regimes, there is a general consensus that there were three major phases: the first, second and third liberations.
26. The first liberation was about the fight against colonialism (1905-1963); the second was for human rights and new constitutional order (December 1963 to August 2010) and the third liberation (from August 2010 to date) is about moving Kenya into the anticipated constitutional democracy.
27. There have been overlaps between the second and third liberations. There are proposals to have the period between the day Rev Njoya declared the clamour for a new Constitution (July 7, 1990) and the promulgation of the constitution was realized (on August 27, 2010) as a separate epoch.

28. The period from the 1990s saw increased upsurge and formal registration of the human rights and governance organizations. This could be attributed to the end of the Cold War and collapse of communism that came with the global wave of democratization.
- 29. The major achievements are:** the emergence of a vibrant and resilient resistance movements across regimes; curtailing political and economic excesses over time; securing political independence of the republic of Kenya; fostering respect for human rights and the rule of law across generations; entrenching legal, political, administrative and constitutional reforms, that culminated with the adoption and implementation of the Constitution of Kenya 2010. New spaces and tools for organizing and responding within the social media spaces remains phenomenal. Mobilizing in both physical and online platforms has boosted political actions.
30. Some of the case studies we have sampled for cursory analyses across the epochs are: the Mau Mau Movement, Muindi Mbingu/ Ngelani community struggle, “the 7 bearded sisters”, the Mwakenya Movement, Citizens Coalition for Constitutional Change (4Cs), Community Struggles Against Kakuzi Corporate Impunities, Social Justice Centres, progressive court actions among others.
31. This subject and conversations remain timely as we go through the general elections slotted for August 2022. This is being exploited and twisted by the said political elite for self-interests:
- i) First, while the “Kenya Kwanza” presidential coalition under Deputy President William Ruto is running on the banner of creating “bottoms-up” and “pro-poor” economic policies, the “Azimio la Umoja”-One Kenya Alliance led by the leader of opposition Raila Odinga is profiling itself as the group to lead the anticipated “Third Liberation”.
 - ii) Secondly, as the Ruto group prides itself as being composed of the “hustlers” and indigenes of those who fought for the first liberation, the Raila side profiles itself as the group that spearheaded the second liberation, especially during the time of the former president Moi (1978-2002).
 - iii) Simply the put, the need to overhaul the economic and political systems that oppress the masses and curtail their spaces and rights in governance has been turned into parochial contests among the ruling elite responsible for the same atrocity.

B) Recommendations

1. Use the above-mentioned political economy analysis and understanding of the Kenya’s real governance problems to advance the political education, empowerment and engagement. For when people get to understand the real interests and actors behind their sufferings, they are in a better position to plan and intervene more proactively and effectively.
2. Optimize the history and culture of successful mapambanos/ struggles and movement building to catalyze organic civic organizing and actions on emerging civic and democratic space issues. We must create models that effectively mobilize people and progressive forces within the physical and online spaces around issues pertinent to them or critical matters of public interests.

The need to continue organizing across counties and sectors is critical.

3. Develop a framework or check list that enable different communities and actors at the county and national levels to have informed conversations on their civic space issues and contexts. For instance, their key concerns, contextual limitations, and possible strategies and actions.
4. Utilize the above issues to undertake continuous monitoring and responses on systemic violation of civil and political liberties. This could lead to the production and dissemination of periodic State of Civic Space reports-whether on quarterly, bi-annual and annual basis.
5. Invest in the interventions geared more towards expanding and consolidating as opposed to safeguarding and protecting civic space. This implies building a constituency of actors with the capability to claim back our country and deter any repressive forces. Such will also provide liberating and transformative power among those adversely impacted.
6. Advocate for the full implementation of the diverse official reports on past human rights violations and economic crimes. For instance, the Truth, Justice and Reconciliation Commission (TJRC) and the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land contain key findings and recommendations that can go a long way in resolving the historical injustices and enhancing the culture of accountability in the country.
7. Advance changes to all retrogressive laws and policies that undermine freedoms and democratic space in Kenya. This may take the forms of a miscellaneous amendment Bill within the National Assembly or legal action to have some of the laws and regulations declared unconstitutional. The compendium developed by Kenya Human Rights Commission (KHRC) remains a critical reference point.
8. Undertake advocacy at all levels. This calls for engaging with the national and county level mechanisms as well as the sub-regional, regional and international human rights processes. Forging and supporting strategic coalitions and network for responses and solidarity is key.
9. Use the ongoing electoral process to push the different parties to commit to the protection of human rights and good governance values enshrined in the Constitution. It also provides timely platform to commit to truly people driven agendas and manifestos. This is also a political opportunity to elect leaders at the county and national levels that can advance the next phase of third liberation of our state and society.
10. Utilize the provisions of the Constitution of Kenya and other national and transnational frameworks create the “Kenya We Want”: A multi-party Democratic State founded in the principles and values of good governance referred to in Article 10¹⁴. For the Constitution strives to roll back the culture of exclusion and repression by providing for the sovereignty of the people, principles and values of good governance; and human rights as the framework for social, economic and cultural policies; preserving the dignity of individuals and communities and protecting social justice and potential for all.

14 Article 4(2) of the Constitution of Kenya



3. CIVIC SPACE, HUMAN RIGHTS AND DEMOCRACY: CONCEPTUAL AND OPERATIONAL LINKS

The youth protesting in California. Image credits: Pexels

Global democracy has receded under pressure from authoritarian forces over the past 16 years. To help turn the tide, democratic governments and the private sector should cultivate opportunities for progress, hold dictators to account for corruption and rights abuses, and strengthen democratic institutions at home¹⁵.

3.1 ABOUT CIVIC SPACE AND ITS LINK TO HUMAN RIGHTS

According to the Global Fund on Human Rights, civic space is literally just that: a space, physical or digital, where people (not governments or businesses) come together to exercise their human rights and core freedoms. Civic work helps shape our politics, economies, and social realities.

Specifically, “civic space is the set of legal conditions experienced as a lived environment that enables people—whether alone or with others, physically or online—to be active in their communities, to speak out, to organize, to gather together in protest or to help one another, and to participate in the governance of their community, area, or country”¹⁶.

These conditions stem from international and regional treaties as well as domestic constitutions and laws, which enshrine people’s fundamental freedoms: **to express themselves, to associate with others, to assemble peacefully, and to access information**. They are intrinsic human rights that generations of activists have mobilized collectively to guarantee we can enjoy.

3.2 CIVIC AND DEMOCRATIC SPACES AND STATES

Civic Space is contextually dependent on the democratic space or state of the society. According to Lisa Horner and Andrew Pudderphatt, the term democratic space refers to the arena that exists between the state and the individual in which people interact to hold the state accountable, shape public debate, participate in politics and express their needs and opinions¹⁷. It can only be deemed to be democratic when it is underpinned by the values of liberal democracy such as individual autonomy,

¹⁵ <https://freedomhouse.org/policy-recommendations>..

¹⁶ <https://globalhumanrights.org/commentary/fund-101-what-is-civic-space/>

¹⁷ <https://gsdrc.org/document-library/democratic-space-in-asia-pacific-challenges-for-democratic-governance-assistance-and-deepening-civic-engagement/>;

political freedom, representative leadership, accountable governance and respect for human rights. It for this reason that democracy is generally appreciated as a progressive political system where human rights and independent voices and institutions are upheld. As recognized in the Vienna Declaration and Programme of Action, democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.

According to the Office of the High Commissioner for Human Rights:

“Democracy as a form of government is a universal benchmark for human rights protection; it provides an environment for the protection and effective realization of human rights. Today, after a period of increased democratization around the world, many democracies appear to be backsliding. Some Governments seem to be deliberately weakening independent checks on their powers, suffocating criticism, dismantling democratic oversight and ensuring their long-term rule, with negative impact on people’s rights”¹⁸.

While as indicated above democratic societies provide the best environments for advancing civic space/ civil and political rights, there are realities that almost every regime in the world has a natural proclivity towards curtailing other people’s freedoms for self-preservation. It is for this reason Prof Samuel argues:

Democratic regimes around the world find themselves besieged by antidemocratic groups that seek to use the electoral arena as a forum to propagandize their causes and rally their supporters. Virtually all democratic countries respond by restricting the participation of groups or political parties deemed to be beyond the range of tolerable conduct or viewpoints. The proscription of certain views raises serious problems for and liberal theory in which legitimacy turns on the democratic consent of the governed When stripped down to their essentials, all definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule¹⁹.

Today, we have hybrid regimes that straddle the democracy and autocracy binary. This takes the forms of either **partly democratic** or newly **established democracies** that come with more restrictions for people who wish to voice their concerns or claim their rights and freedoms. Thus, minority views are marginalized. There are also **populist democratic and autocratic regimes** keen in implementing repressive policies. As a result, citizens have less influence in political processes that impact their lives and are unable to hold their governments accountable²⁰.

18 <https://www.ohchr.org/en/about-democracy-and-human-rights>;

19 Fragile democracies by Samuel Issachar in Havard Law Review, Volume 120, Number 6, April 2007. https://www.jstor.org/stable/pdf/40042620.pdf?refreqid=excelsior%3A5338907228dba27e9b4001fedddc6de2&ab_segments=&origin=

20 <https://www.movedemocracy.org/defending-democratic-space>,



4. EXISTING FRAMEWORKS FOR ASSESSING THE STATES OF CIVIC AND DEMOCRATIC SPACES IN THE SOCIETY

Protesters in Nairobi call for an end to extrajudicial killings in July 2016. Image credits: REUTERS/Thomas Mukoya

In many countries therefore, democratic space appears to be shrinking and fragile. This seems to be the situation in Kenya as the country faces State capture perpetuated by the privileged elite. It is more precarious for the most vulnerable groups, including the poor, women, youth, persons with disabilities, sexual minorities, ethnic minorities, older members of the society among other disadvantaged groups. This is despite the fact that their rights are effectively enshrined in the Constitution of Kenya 2010²¹. Articles 1 and 27 of the Constitution declares the sovereignty of the people and equality and freedom from discrimination, respectively.

As a result, there is a need to continue linking and measuring the state of democracy and human rights. For the conversations around civic and democratic space require tangible human indicators for monitoring trends and shaping policy actions. It is clear the extent of realization of civil and political rights (especially the freedoms to express themselves, to associate with others, to assemble peacefully, and to access information among others) remains key. **Building on the existing initiatives is integral.**

To begin with, is The Freedom House's **framework of freedoms**. In their *Freedom in the World*²² (their flagship annual report), they assess and report on the condition of **political rights and civil liberties**. The report's methodology is derived in large measure from the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. This is based on the premise that these standards apply to all countries and territories, irrespective of geographical location, ethnic or religious composition, or level of economic development and that freedom for all people is best achieved in liberal democratic societies²³.

For each country and territory, Freedom in the World analyzes the electoral process, political pluralism and participation, the functioning of the government, freedom of expression and of belief, associational and organizational rights, the rule of law, and personal autonomy and individual rights. In the 2022 report (that covers January to December 2021), Kenya is classified as partly free State. States where the average for political and civil liberties differed from 1.0 to 2.5 are considered "free". States with values from 3.0 to 5.5 are considered "partly free" and those with values between 5.5 and 7.0 are considered "not free".

21 Articles 27, 52, 54, 55, 56 and 57 in the Bill of Rights of the Constitution of Kenya.

22 It is composed of numerical ratings and supporting descriptive texts for 195 countries and 15 territories. Freedom in the World has been published since 1973, allowing Freedom House to track global trends in freedom for over 40 years.

23 <https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology>;

Second, there is the *Human Freedom Index*, that provides more comprehensive details. The Human Freedom Index presents the state of human freedom in the world based on a broad measure that encompasses personal, civil, and economic freedom. Human freedom is a social concept that recognizes the dignity of individuals and is defined here as negative liberty or the absence of coercive constraint. Because freedom is inherently valuable and plays a role in human progress, it is worth measuring carefully.

The Human Freedom Index is a resource that can help to more objectively observe relationships between freedom and other social and economic phenomena, as well as the ways in which the various dimensions of freedom interact with one another. The report is co-published by the Cato Institute and the Fraser Institute.²⁴ In the 2020 Index, Kenya was ranked 96/ 162 on personal freedoms (with a score of 6.66) and 86/162 on economic freedoms (with a score of 6.84). Overall, Kenya was ranked number 93 out of 162 countries, with an average of 6.74.

Third, CIVICUS runs a Monitor Tracking Civic Space. Based on their constant analysis of multiple streams of data on civic space, each country is assigned a rating as follows: open, narrowed, obstructed, repressed and closed, with very clear indicators. According to their global report released in December 2021, 9 out of 10 people live in countries where civic freedoms are severely restricted; Detention of protesters is the top violation of civic freedoms in 2021; COVID-19 continues to be used as a pretext to restrict rights across the globe. Of Africa's 49 countries, six are rated as closed, 24 as repressed and 13 as obstructed²⁵. **Kenya is classified as obstructed**²⁶.

Finally, and in the context of Kenya, the civil society and independent State Commissions and Offices can advance their assessments and interventions on our Constitution that provides in Article 19 that the Bill of Rights is an integral part of Kenya's **democratic State** and is the framework for social, economic and cultural policies. We can build on the above frameworks and track the extent of respect of respect to critical civil and political rights and how the same we were applied in the realization of economic, social and cultural rights.

Such includes rights to life, access to information, freedom of association, rights of Assembly, demonstration, picketing and petition; electoral and political rights; freedoms of the media; expression; conscience, religion, belief and opinion; freedom and security of the person; freedom of movement; rights to fair administrative action and access to justice/ fair hearing.

Moreover, the extent to which equality and freedom from discrimination; rights to self-determination, development and participation; rights of the special interest groups and other marginalized communities in governance processes among others. Opportunities to claim and organize around Economic and social rights-quality standards of health, housing, sanitation, quality food, water, social security and education.

24 <https://www.cato.org/human-freedom-index/2020>

25 <https://findings2021.monitor.civicus.org/rating-changes.html>;

26 Civic space is heavily contested by power holders, who impose a combination of legal and practical constraints on the full enjoyment of fundamental rights. Although civil society organisations exist, state authorities undermine them, including through the use of illegal surveillance, bureaucratic harassment and demeaning public statements. Citizens can organise and assemble peacefully but they are vulnerable to frequent use of excessive force by law enforcement agencies. There is some space for non-state media and editorial independence, but journalists face the risk of physical attack and criminal defamation charges, which encourage self-censorship. <https://monitor.civicus.org/Ratings/#obstructed>; Thus we are in between open/ narrowed and repressed/ closed.



Mzee Jomo Kenyatta swearing in 1963. Image credits: Radiofynd . Sveriges Radio

5. A CONTEXTUAL ANALYSIS OF STATE OF CIVIC AND DEMOCRATIC SPACES FROM THE COLONIAL TO POST INDEPENDENCE REGIMES IN KENYA

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another....”²⁷.

Despite this powerful proclamation by the Universal Declaration on Human Rights (UDHR), Kenya will be remembered for the retrogressive political and legal contexts that have had adverse effects to civic and democratic spaces and related civil and political rights. There has been deepened State control by the entrusted political²⁸ and economic elite. This state of affairs is well captured in the report of the Truth, Justice and Reconciliation Commission (TJRC) in Kenya.

The TJRC noted that between 1895 and 1963, the British Colonial administration in Kenya was responsible for unspeakable and horrific gross violations of human rights; that between 1963 and 1978, President Jomo Kenyatta presided over a government that was responsible for numerous gross violations of human rights; and that between 2002 and 2008, President Mwai Kibaki presided over a government that was responsible for numerous gross violations of human rights²⁹. The President Uhuru Kenyatta regime (from 2013 to date) is equally culpable.

Developments within the international sphere has had positive and negative effects to the political contexts and responses. For instance, while the global quest for markets and raw materials led to colonialization and its oppressive policies, the Cold War Era between 1945 and 1990 created an environment that tolerated repressive regimes provided one was aligned to capitalist East or Communist East. Its end in 1990 ushered in the new era for democracy and respect for human rights. Currently we are in global context where trade and business matter.

Below see the nature and effects of the different regimes in Kenya on democratic space and civil and political rights.

²⁷ Article 1 of the Universal Declaration of Human Rights - [https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%201,in%20a%20spirit%20of%20brotherhood](https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%201,in%20a%20spirit%20of%20brotherhood;);

²⁸ The Kenyatta group was christened as the “Kiambu Mafia”. Kenyatta comes from the Kiambu county. The Moi’s was referred to as the “Kalenjin” or “Karbanet Mafia”. Those refers to his ethnic community and rural residences, respectively. The Kibaki mandarins were called “ Mt Kenya Mafia” in reference to the greater geo-political region where the former president came from.

²⁹ Report of the Truth, Justice and Reconciliation Commission, Vol.1, TJRC Kenya, 2011, p. vii.

5.1 THE CLOSED³⁰ COLONIAL REGIME

As indicated in the introduction, this context explains the deep-seated political economy problems bedeviling the Kenyan and other African States and the many contestations between the ruling elite and the people that have sustained the endless quest for a democratic and free society. We strive to clarify why we ended up with a governance system that is so captured and does not protect the interests of the people and nation at large. Or rather, why a State that is not born for, and by the people and is unable to protect their rights. Since the history is long and widely documented elsewhere, we will focus on the key political developments.

To begin with, the European and Arab presence in Kenya and other African countries dates to the Early Modern period, but European exploration of the interior began in the 19th century. This led to the scramble and partition of Africa that ended with a conference in Berlin between 1884 and 1885. The British East African Company (IBEAC) was granted a charter in 1888, which led to the colonization of present-day Kenya. This effectively bequeathed a corporate vested and driven State where the vested interests of the economic and political were grounded for good.

When IBEAC became bankrupt and the need for resources and State control increased, the British government took over the administration of the colony which they intended to use as gateway to Uganda, Buganda and Bunyoro because there were no minerals to exploit in Kenya. In order to subdue the colony, the British authorities forcibly took land, introduced forced labor and passed legislation that ensured natives became subjects of the British settlers³¹.

These were also used to curtail the movement of people and emerging rebellions from the locals. The initial ones were on taxation, identification and land matters³². They later criminalized civic spaces and responses via the Penal Code, Criminal Procedure Code, Public Order Act, Public Security Act other laws³³. It is therefore during this time that an oppressive criminal justice and public administration system and culture was entrenched.

Conflict and resentment marked the relationship between the colonial government and the 'native' Kenyans. The period between October 10 1952 (when the State of Emergency was declared) and 1956 saw the worst forms of repression and closing space. Up to 8,000 people were arrested during the first 25 days of the Operation Jock Scott. By January 7, 1956, the official death toll for Mau Mau activists killed by the British forces in Kenya since 1952 was put at 10,173.

30 This is based on the description provided in the CIVICUS framework attached in Annex 1

31 <https://www.blackhistorymonth.org.uk/article/section/african-history/the-colonisation-of-kenya/>;

32 As a means of consolidating power, the British introduced the hut tax in 1902. A certain amount of taxes was to be paid to the government for each hut a family owned. This meant that native Kenyans had to earn money which could only be achieved by working for someone else that could pay them wages. The punishment for not paying hut tax was a fine and which often when not paid led to forced labor thereby providing the British settlers with the cheap labor they were searching for. In 1913, the government passed a land bill that gave the white British settlers 999 year leases on the land and effectively created a monopoly on land use. Later, in 1919 British settlers introduced the Kipande system that required all Kenyan men to wear identity discs similar to the chitupa introduced in Southern Rhodesia (Zimbabwe) which limited movement labour. See: <https://www.blackhistorymonth.org.uk/article/section/african-history/the-colonisation-of-kenya/>;

33 For details about the law, see: <https://www.khrc.or.ke/mobile-publications/corporate-publications/227-compediu-of-laws-on-the-civic-space-in-kenya/file.html>;

***Using the CIVICUS ratings, we wish to describe
the operational context of the colonial state as closed.***

5.2 THE REPRESSED³⁴ JOMO KENYATTA AND DANIEL MOI REGIMES

The post-independence regimes have perfected and sustained the oppressive systems with slight adjustments to date. It is for this reason that scholars of history posit that the post-colonial state has largely built on the colonial heritage. It has successfully deracialized but at the same time ethicized the state as the political class continues to mobilize the citizenry around ethnic political parties. Lastly it has failed to democratize the state³⁵.

From December 1963 to August 1978, the founding President Mzee Jomo Kenyatta began by undermining the constitutional multiparty status we had adopted towards independence. Kenya transitioned into a centralized, autocratic and de facto one-party State under the Kenya African National Unity (KANU). This witnessed political assassinations of Pio Gama Pinto, Tom Mboya and J.M. Kariuki, and arbitrary detention of political opponents and activists.

From 1978, President Daniel Arap Moi took over with a promise to follow the “Nyayo”³⁶(footsteps) of Mzee Kenyatta. This effectively led to further and unprecedented repression against all forms of dissent. Most affected were the political opponents, the academia (students and lecturers), lawyers, media and human rights activists. Many were arbitrarily arrested, injured, killed, detained at different places and subjected under trumped up charges³⁷.

***Using the CIVICUS ratings(attached),
we proceed to describe the operational contexts
of both the Kenyatta and Moi regimes as REPRESSED.***

5.3 INITIALLY OPEN, LATER NARROWED AND OPEN³⁸ MWAI KIBAKI REGIME

From 2002, the KANU regime was replaced by the Mwai Kibaki led National Alliance Rainbow Coalition (NARC), a conglomeration of both the political and civic movements in the country. While this brought a short-lived modicum of fledgling democracy (where democratic space was quite opened in 2003), the regime began to consolidate power for political survival from 2004.

34 This is based on the description provided in the CIVICUS framework attached in Annex 1

35 <https://africanphilanthropy.issuelab.org/resources/19699/19699.pdf>;

36 That is why his regime was popularly known as the “Nyayo government”.

37 <https://www.theeastafrican.co.ke/tea/news/east-africa/tales-of-pain-and-survival-in-daniel-moi-torture-cells-1436798>;
<https://www.the-star.co.ke/opinion/2020-02-11-moi-regime-tortured-many/>;

38 This is based on the description provided in the CIVICUS framework attached in Annex 1

From 2003, the new government went through political differences between the Kibaki led National Alliance Party of Kenya and Raila Odinga driven Liberal Democratic Party. This together with an attempt to impose a new Constitution³⁹ to the people became a key issue of contestation. This situation led to many human rights violations⁴⁰, climaxing with the December 2007/ February 2008 Post-Election Violence (PEV).

A coalition government was set up from February 2008 to March 2013. Owing to this, plus the human rights, transitional justice and reforms agenda entrenched into the post PEV negotiations⁴¹, global exposure and accountability that came with it, respect for human rights and fundamental freedoms was more enhanced between 2008 to 2013.

***Using the CIVICUS ratings(attached),
we proceed to describe the operational contexts of Kibaki regime
was initially OPEN, and later NARROWED.***

5.4 THE OBSTRUCTED AND PARTLY FREE UHURU KENYATTA REGIME⁴²

“April 9th 2013 to April 2014 has been a period within which freedom of association and freedom of peaceful assembly have been constantly under threat, freedom of expression and of the press have been seriously infringed, and fundamental rights of non-discrimination have been jeopardized in various ways. This undermining of these and other constitutional human rights gains must stop if Kenya is to truly follow the path of democracy and the rule of law”.⁴³

The Uhuru Kenyatta regime that took over from April 2013 has been involved in shrinking the democratic space further by enforcing extremely draconian tactics targeting almost every independent institution and voice, both within and outside the government. Such include the civil society organizations (also called the Public Benefits Organizations (PBOs), Faith Based Organizations (FBOs), media organizations, trade unions, political parties, the judiciary, Parliament, Constitutional Commissions among other actors.

39 Mainly the so called the Kilifi, Naivasha and Wako drafts, mainly developed by the State with minimal stakeholder consultations.

40 For instance, the Truth, Justice and Reconciliation Commission set up in February 2008 found that between 2002 and 2008, President Mwai Kibaki presided over a government that was responsible for numerous gross violations of human rights. These violations include: unlawful detentions, torture and ill-treatment; assassinations and extra judicial killings; and economic crimes and grand corruption. See Report of the Truth, Justice and Reconciliation Commission, Vol.1, TJRC Kenya, 2011, p. vii.

41 Especially Agenda Number of 4 of the Kenya National Dialogue and Reconciliation process. <https://constitutionnet.org/sites/default/files/Project-context-and-summary-of-findings.pdf>

42 See the CIVICUS and Freedom House rating above. Also the CIVICUS ratings in Annex 1

43 Kenya: One Year in Office for Uhuru Kenyatta and William Ruto; Human Rights Record Marred by Abuses (fidh.org)



Some of repressive tactics being applied by the Government against these actors include⁴⁴:

- i. Burdensome registration requirements and threats of deregistration
- ii. Actual deregistration of civil society organizations and shut down of some media platforms.⁴⁵
- iii. Broad discretion to seize assets on suspicion of terrorism financing without any due diligence.
- iv. Disproportionate penalties for non-compliance with regulatory laws/ severe reporting requirements.
- v. Difficulty in getting approvals from governments especially for governance programmes as compared to humanitarian programmes.
- vi. Limited government consultation with respect to policy development and governance processes.
- vii. Undue surveillance by security forces/ restrictions on online access and spaces.
- viii. Punitive court decisions against HRDs including exorbitant bails and costs for suits.
- ix. Restrictions to financing from foreign sources/ threatening donors/restraining them from funding certain institutions.
- x. Harassment, arrests, intimidation, targeting, clampdowns and vilification of actors/ activists.
- xi. Banning, criminalization and violent disruption of protests and other forms of picketing.
- xii. Limitations in obtaining work permits and visas and in country registration of international agencies.
- xiii. Introduction of draconian and non-constitutional laws in a hurried and undemocratic manner that restrict freedom of association, assembly and expression⁴⁶.
- xiv. Delays in the commencement and implementation of the PBO Act enacted in January 2013.
- xv. Negative profiling of the different state and non-state institutions:-for instance, the civil society as the “evil society” and the Supreme Court Judges as “Wakora.”⁴⁷

44 See Davis Malombe in: <https://www.khrc.or.ke/mobile-publications/policy-position-papers/199-re-opening-and-consolidating-democratic-space-in-kenya-contextual-conceptual-and-political-perspectives/file.html>

45 Both mainstream and social media (bloggers, twitter and face book accounts among others).

46 For instance, harmful amendments within the Security Amendment Bill of December 2014; media laws; Public Benefits Organizations Act (PBO Act) etc. There is a Bill before the National Assembly proposing amendments to the Public Order Act to the effect that the organizer of public actions will be responsible for any damages or violence that emerge from such.

47 This is Swahili for “thugs” or “criminals”. It was adversely coined by President Uhuru Kenyatta in October 2018 after the Supreme Court reversed the outcome of August president elections in which he had been declared the winner.

- xvi. Cuts on the finances of the key government institutions, for instance, the judiciary, commissions and independent offices, county governments.
- xvii. Executive efforts to exert unconstitutional controls over Parliament, Judiciary, Council of Governors, National Police Service among other critical state institutions.
- xviii. Creation of divisions within the trade unions or a times a refusal to collect and remit remittances from members who are public officers thus curtailing their operations.
- xix. Initiating divisions within; or cooption of other political parties, thus weakening the opposition.
- xx. Increased cases of self-censorship by the different organizations for fear of political reprisals, which create challenges while organizing and resisting all these tactics.
- xxi. Interfering with/slowing/shutting down of Internet and enactment of computer and cybercrime laws whose application further undermine civil liberties.
- xxii. Securitization of public institutions – Nairobi Metropolitan Services.

Generally, the Presidency has instrumentalized the following institutions: Ministry of Interior and the Coordination of National Government, Ministry of Foreign Affairs, ICT Ministry; Immigration Department, the National NGOs Board, National Police Service, Communications Authority of Kenya, National Assembly, Kenya Revenue Authority and in some cases the courts, Central Bank of Kenya and commercial banks (both public and private).

This trend worsened during and after the 2017 General elections. Mostly, when the incumbent is seeking a second term, there is a tendency to create control of the entire electoral and other governance processes and outcomes. It is in this context that period between August 2017 and March 2018 saw the worst repressive tendencies against the civil society, the political opposition, judiciary and media.

This eased up a bit after a political détente between the President Uhuru Kenyatta and the leader of Opposition Raila Odinga. The two got into an “handshake” grounded on the Building Bridges Initiative (BBI), which, like the 2008 Kenya National and Dialogue and Reconciliation processes, were geared towards addressing the unresolved historical human rights and governance issues but to no avail. There has been very limited political will to revisit our horrendous past and move the country to the Promised Land.

It is for this reason that both CIVICUS and Freedom House described the state of Kenya’s civic and democratic spaces in 2021 as OBSTRUCTED and PARTLY FREE.

This implies civic space is heavily contested by power holders, who impose a combination of legal and practical constraints on the full enjoyment of fundamental rights. Although civil society organizations exist, state authorities undermine them, including through the use of illegal surveillance, bureaucratic harassment and demeaning public statements.

5.5 REASONS FOR TARGETING OR LIMITING SPACE INDEPENDENT VOICES AND ACTORS

As indicated above, all regimes have employed prohibitive laws and regulations to constrain political space for the diverse civic and independent state institutions in Kenya. Most targeted are persons and organizations within sectors that work on issues and strategies that expose and undermine the interests of the governing class. The intention is mainly to limit either their legitimacy or efficacy (and/or both) in the fight for against impunity and bad governance advanced by that privileged class.

The most exposed actors are those who robustly advocate or stand for human rights, rule of law, security accountability, land and resource justice, environmental and climate justice, electoral justice, anti-corruption and public finance governance among others. There are also many exposures to the marginalized groups; the national and county-based civil society groups.

The level of vulnerability mainly depends on how the actor is framing and responding to these issues. In short, the most targeted are those who demand for transformative and human rights centered governance of the Kenyan State. This is because there are many players who intervene on the same issues but remain safe because of their conservative approaches that do not threaten the status quo.

Moreover, the period preceding and after elections where an incumbent president is running or has interests in the transition as witnessed in 1969, 1974, 1992, 1997, 2007, 2017 and 2022 remains precarious. In addition to this, regimes coming with legitimate deficits tend to survive through coercion. This was a major factor during the entire colonial, Kenyatta and Moi regimes⁴⁸, and the first terms of the Mwai Kibaki and Uhuru Kenyatta governments⁴⁹.

Finally, major security and health emergencies and other operations run by the State come with regulations that create room for limitation of freedoms and accountability. It is for this reason that the emergence of the novel Corona Virus in December 2019(COVID-2019) and the containment measures by governments in the world provided opportunities for violation of human rights and democratic space.

This was basically in the enforcement of health and security protocols and regulations around public gatherings, movement of people, wearing of face masks, washing of hands, social distancing others⁵⁰.

48 Mainly after Kenyatta fell out within his vice president and many other leaders immediately after independence. For Moi, it began in 1982 immediately after the failed military coup.

49 Especially when Kibaki lost the support of LDP and civil society between 2004 and 2007 and owing to the fact that Uhuru Kenyatta won with slim margin and together with his Deputy were facing charges of crimes against humanity before the International Criminal Court (ICC). The ICC cases saw limited global acceptance

50 The 2021 global report published by CIVICUS on civic space affirms the same in their finding thus: It is nearly two years since the start of the COVID-19 pandemic and the virus is having a dire impact on civic freedoms globally, one that will have lasting impact if remedial action is not taken. Our research shows the detention of protesters and the use of restrictive laws to muzzle dissent are becoming more prevalent, as governments use the pandemic to introduce or implement additional restrictions on civic freedoms. <https://findings2021.monitor.civicus.org/rating-changes.html>;



Mau Mau suspect is interrogated in the Abadere Forrest. Image credits: Quartz africa

6. NATURE AND EXTENTS OF RESPONSES BY THE CIVIC ACTORS TO THE REPRESSIVE SITUATIONS IN KENYA- FROM 1905 TO DATE

“Liberators before us showed the way in fighting negative ethnicity⁵¹.”

a) Background

As earlier indicated, while the history of Kenya from 1905 is characterized by the above-mentioned oppressive and repressive regimes and systems, it is equally exemplified by stories of attempted and successful resistance movements where both civic and political movements were born. It is on that basis that political critics and activists like Willy Mutunga argue that the pro-democracy movement in Kenya is as old as colonialism itself, if not older.

History records that it has been a culture of Kenyans to resist domination, oppression and exploitation across regimes⁵². Women were deeply involved in the same. Documentation of their critical role remains quite limited.

b) The First, Second and Third Liberational Struggles

While there is no specific classification of the epochs of the liberation struggles from 1905 to date, there is a general consensus that there were three major phases: The first liberation was about the fight against colonialism (1905-1963); the second was for human rights and new constitutional order (December 1963 to August 2010) and the third liberation (from August 2010 to date) is about moving Kenya into the anticipated constitutional democracy.

There have been overlaps between the second and third liberations. There are also proposals to have the period between the day the clamour for a new Constitution was declared (by Rev Njoya on July 7, 1990) and the promulgation was realized (on August 27, 2010) as a separate epoch.

⁵¹By Wairimu Nderitu, in <https://www.theeastafrican.co.ke/tea/oped/comment/liberators-showed-the-way-in-fighting-negative-ethnicity-1908152>

⁵² Dr Willy Mutunga, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*, SAREAT/ Mwengo, 1999, p. 1

During the first liberation struggle, some of the key leaders and movements were the Nandi Resistance from around 1900; MeKatilili Wamenza (a Kenyan women freedom fighter-1913⁵³); Kikuyu Central Association (1921), The East African Association(1921), Kikuyu Central Association (1924), Kavirondo Tax Payers Association (1921), Ukambani Members Association (1938), Coast African Association (1943), Taita Hills Association(1939), the independent schools and churches; the Mau Mau Movement (1950s), and the political parties and trade unions that emerged decades before independence⁵⁴.

In February 1946, the African nationalist organization, the Kenya African Study Union changed its name to Kenya African Union (KAU). There was a close co-operation between the trade unions and KAU with many trade union officials being active in political organizations. In 1949, the East African Trade Union Congress was formed. It was both a federation of trade unions and a group within the dominant nationalist political party, the Kenya African Union (KAU)⁵⁵.

In 1956, when the colonial administration allowed the formation of political parties (at district level) in the country, most of the leaders of the parties that sprang were from the labour movement. When the district political parties were allowed to progress and come together to form two national parties: the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU), labour movement personalities like Tom Mboya were deeply involved in the organization of the national political parties.

In the national elections of May 1963, KANU won a majority of seats in both houses of parliament. KADU dissolved voluntarily in 1964 and joined KANU. In March 1966, Kenya People's Union (KPU) was formed as a result of ideological differences, leadership struggles, and the repression of dissent within KANU. However, KPU was banned in 1969. From then up to August 1982, Kenya became a de facto one-party State.

The second liberation picked up immediately after independence following the failure of the incoming elite to address the social and political needs of Kenyan. This was initially led by Pio Gama Pinto and Oginga Odinga (then vice president who defected from the ruling party KANU to form Kenya Peoples Union) in the 1960s. The 1970 and 80s saw the struggle being led by the progressive academia, political class, media and religious groups.

The term "Second Liberation" became familiar between 1982 and 1992 — a period birthing several occurrences such as Kenya becoming a one-party state by law in June 1982. This was followed by the August 1982 attempted coup that saw government criminalizing dissent and violating press freedom⁵⁶. The 1990s and 2000s witnessed the emergence of pro-democracy political parties and governance civil society groups that agitated for political, administrative and constitutional reforms.

53 Menza's motivation for resistance was led by economic and social-cultural concerns. Menza wanted to prevent any Giriama laborers from being employed by the colonial authorities, in order to ensure that they would remain in Giriama territory and only contribute to the well-being of Giriama people. She also was concerned about the increasing Western influence in Kenya, which she saw as eroding the Giriama culture; see https://en.wikipedia.org/wiki/Mekatilili_Wa_Menza;

54 <https://www.atikaschool.org/kcsehistorynotes/political-developments-and-struggle-for-independence-in-kenya-1919-1963>;

55 <http://www.enzimuseum.org/after-the-stone-age/independent-kenya>;

56 <https://www.theeastafrican.co.ke/tea/oped/comment/liberators-showed-the-way-in-fighting-negative-ethnicity-1908152>;

The outcome of this was the removal of Section 2A that paved way for the return of multi-party political system in 1991, the adoption of the minimal constitutional reforms towards the 1997 elections, the development of the draft Constitution of Kenya (2002); and the removal of President Moi and KANU (through a combination of the civil society and political movements in December 2002).

The period after 2003 saw further agitation for radical reforms that ended up with the adoption of the Constitution of Kenya in August 2010 and a raft of other reforms that came in the midst of the Agenda Number 4 of the Kenya National Dialogue and Reconciliation process. The dialogue process came in the midst of the 2007/2008 post-election violence. Agenda 4 was dedicated to addressing the long-term issues that remained unresolved from the colonial to post-colonial regimes and were thought to be the root cause of the violence.

The Third Liberation and the New Constitutional Dispensation. This phase has seen the popular adoption and partial implementation of the new Constitution (popularly referred to as Constitution of Kenya 2010-COK 2010)⁵⁷. It enshrines very radical provisions that envision a multi-party democratic State that is founded on the principles and values of good governance referred to in Article 10. It also espouses the sovereignty of the people, supremacy of the Constitution, and a progressive Bill of Rights, where civil and political rights among other freedoms related to civic and democratic space are entrenched.

It also provides for integrity, accountability and public participation in the management of public affairs and resources (from financial to land based). The implementation of the new Constitution was frustrated by the Kibaki regime (between 2010 and 2013) and the incoming Uhuru Kenyatta government from 2013 to date).

***However, the civil society and other independent voices
have kept the fight alive with positive impacts
on human rights and governance.***

⁵⁷ The constitution was presented to the Attorney General of Kenya on 7 April 2010, officially published on 6 May 2010, and was subjected to a referendum on 4 August 2010. The new Constitution was approved by 67% of Kenyan voters. It was finally promulgated on August 27, 2010. https://www.google.com/search?q=adoption+of+the+constitution+of+kenya+2010&rlz=1C1GCEU_enKE973KE973&oq=adoption+of+the+constitution+of+kenya+2010&aqs=chrome..69i57j33i-160j33i22i29i30i7.22944j0j7&sourceid=chrome&ie=UTF-8;



7. CASE STUDIES OF SELECT CIVIC AND POLITICAL INITIATIVES IN KENYA

Image credits: freepik

“But to free oneself or assist in liberating others involves taking risks, being suspicious of the status quo, leaving the safety of the shore and launching out into the deep and the unknown. This is a very lonely calling as one immerses oneself into the whole reality with courage to confront and listen. Yet, the calling is not to be the liberator of the oppressed but to make a commitment to fight alongside them.”⁵⁸

ANNEXURES

A. CIVICUS RATINGS⁵⁹

Based on a constant analysis of multiple streams of data on civic space, each country is assigned a rating as follows: open, narrowed, obstructed, repressed and closed. Since ratings alone may offer a crude measure of the state of civic space in any given context, CIVICUS Monitor emphasizes the importance of up-to-date, locally generated analysis to complement the ratings. Nonetheless, it believes a rating system enables useful comparisons to be made across different countries, and also encourages the tracking of a country’s overall civic space conditions over time. Civic space conditions under each category are broadly understood as follows:

Open

The state both enables and safeguards the enjoyment of civic space for all people. Levels of fear are low as citizens are free to form associations, demonstrate in public places and receive and impart information without restrictions in law or practice. The authorities are tolerant of criticism from civil society groups and provide space and platforms for open and robust dialogue with members of the public. As a rule, the police protect public protestors, and laws governing the freedom of peaceful assembly adhere to international law and standards. There is a free media, online content is uncensored and citizens can access government information easily.

⁵⁸ Paulo Freire, *Pedagogy of the Oppressed*, p 19

⁵⁹ Ratings - CIVICUS - Tracking conditions for citizen action;

Narrowed

While the state allows individuals and civil society organizations to exercise their rights to freedom of association, peaceful assembly and expression, violations of these rights also take place. People can form associations to pursue a wide range of interests, but full enjoyment of this right is impeded by occasional harassment, arrest or assault of people deemed critical of those in power. Protests are conducted peacefully, although authorities sometimes deny permission, citing security concerns, and excessive force, which may include tear gas and rubber bullets, are sometimes used against peaceful demonstrators. The media is free to disseminate a wide range of information, although the state undermines complete press freedom either through strict regulation or by exerting political pressure on media owners.

Obstructed

Civic space is heavily contested by power holders, who impose a combination of legal and practical constraints on the full enjoyment of fundamental rights. Although civil society organizations exist, state authorities undermine them, including through the use of illegal surveillance, bureaucratic harassment and demeaning public statements. Citizens can organize and assemble peacefully but they are vulnerable to frequent use of excessive force by law enforcement agencies, including rubber bullets, tear gas and baton charges. There is some space for non-state media and editorial independence, but journalists face the risk of physical attack and criminal defamation charges, which encourage self-censorship.

Repressed

Civic space is significantly constrained. Active individuals and civil society members who criticize power holders risk surveillance, harassment, intimidation, imprisonment, injury and death. Although some civil society organizations exist, their advocacy work is regularly impeded and they face threats of de-registration and closure by the authorities. People who organize or take part in peaceful protests are likely to be targeted by the authorities through the use of excessive force, including the use of live ammunition, and risk mass arrests and detention. The media typically reflects the position of the state, and any independent voices are routinely targeted through raids, physical attacks or protracted legal harassment. Websites and social media platforms are blocked and internet activism is heavily monitored.

Closed

There is complete closure - in law and in practice - of civic space. An atmosphere of fear and violence prevails, where state and powerful non-state actors are routinely allowed to imprison, seriously injure and kill people with impunity for attempting to exercise their rights to associate, peacefully assemble and express themselves. Any criticism of the ruling authorities is severely punished and there is virtually no media freedom. The internet is heavily censored, many websites are blocked and online criticism of power holders is subject to severe penalties.

B. CASE STUDIES OF SELECT CIVIC AND POLITICAL INITIATIVES IN KENYA

“But to free oneself or assist in liberating others involves taking risks, being suspicious of the status quo, leaving the safety of the shore and launching out into the deep and the unknown. This is a very lonely calling as one immerses oneself into the whole reality with courage to confront and listen. Yet, the calling is not to be the liberator of the oppressed but to make a commitment to fight alongside them.⁶⁰”



Interview questions that provided broad guidelines to the case studies

- i. When and why was the initiative or movement established?
- ii. How was the political space and state of human rights during that time? Who are the key perpetrators?
- iii. What was its key legacy/ successes-especially its contribution to political freedoms and independence in Kenya?
- iv. What made your struggle successful-how did you organize and implement your strategies? What were the challenges?
- v. How did it build on previous struggles in Kenya? How did you inspire future struggles in Kenya and other countries?
- vi. Any key lessons and recommendations within the current state of affairs and for the future generations?

⁶⁰ Paulo Freire, *Pedagogy of the Oppressed*, p 19

A

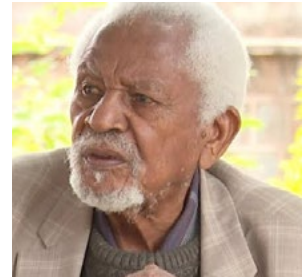
THE FIRST LIBERATION STRUGGLES 1905 TO 1963



MUTHONI NYANJIRU



NGELANI COMMUNITY-
MUINDI MBINGU



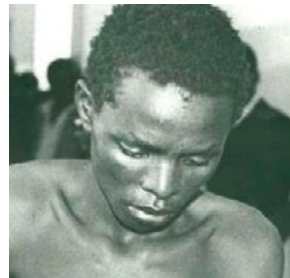
MZEE GITU KAHENGERI

B

THE SECOND LIBERATION STRUGGLES 1963 TO 2010



THE SEVEN BEARDED SISTERS



THE MWAKENYA MOVEMENT



CITIZENS COALITION FOR
CONSTITUTIONAL CHANGE

C

THE THIRD LIBERATION STRUGGLES 2010 TO DATE



THE SOCIAL JUSTICE CENTERS'



CORPORATE IMPUNITY



THE PBO ACT



A. THE FIRST LIBERATION STRUGGLES-1905 TO 1963

Field Marshal Muthoni Nyanjiru. Image credits: The Elephant

I. MUTHONI NYANJIRU, THE IRON LADY KILLED IN 1922 FOR DEFENDING HARRY THUKU

A Write up by Tabitha Kilatya⁶¹

Mary Muthoni Nyanjiru was a Kikuyu woman born in Weithaga, in the current Murang'a county. She was a political activist and is remembered for leading the protest after the arrest of Harry Thuku in March 14, 1922. Harry Thuku was the secretary of Young Kikuyu Association (later known as the East African Association-EAA) and was known throughout Kikuyuland as “chief of women” mainly for his support of women especially around the issues of physical and sexual abuse, as well as forced labor.

The day following his arrest after a strike was called by the EAA and thousands peacefully marched to the then Kingsway Police Station (now Nairobi Central Police Station) where he was being held. The strikers came to demonstrate and secure his release. After praying for Thuku's safety the crowd dispersed. That evening, the women supporters engaged in a practice called oathing, a custom exclusive to men. Oath taking by women violated Kikuyu tradition as women were considered to be mentally unfit and bodily unable to endure the ordeal of taking oath. James Njoroge of the EAA was the oath giver.

Oaths were administered to over 200 women in the crowd, thus binding them to execute a specific action plan. The women acted in unity the following day when it was clear that Thuku would not be released. On the morning of March, 16 1922, a delegation of six men were chosen to meet with Sir Charles Bowring, the Colonial Secretary, who assured them that Thuku was safe and was only being detained while waiting for the government to grant him full hearing that would fairly determine his fate.

The delegation was encouraged to return to the crowd to ask them to peacefully disperse. Upon their return, they announce that Thuku was to be tried instead of released, then urged the strikers to go home.

⁶¹ Tabitha Kilatya is the Executive Director for Peace for Peace, a civil society organization focused in addressing the conflicts and injustices caused by bad governance in the society. <https://www.standardmedia.co.ke/thenairobi/adblock?u=https://www.standardmedia.co.ke/thenairobi/politics/2001441097/muthoni-nyanjiru-undressed-and-incited-men-to-fight-colonialists>; https://en.wikipedia.org/wiki/Mary_Muthoni_Nyanjiru;

As many in the crowd were incensed, this was fruitless. A large group of agitated women started pushing forcefully toward the gate, some shouting at the men that they were cowards and accusing them of having been bribed. Hearing this, the men who had started to disperse changed their minds and returned.

Mary Muthoni Nyanjiru leapt to her feet, ran to the front of the crowd, lifted her dress over her head, and cried, “You take my dress and give me your trousers. You men are cowards. What are you waiting for? Our leader is in there. Let’s get him.” This act was viewed as a powerful symbol of women’s defiance. As her actions unfolded, many of the women present ululated their approval in response and the crowd surged forward until the police or askaris opened fire. Nyanjiru was among the first people killed.

She remains one of the women and nationalists to have openly and fearlessly defied the colonial impunity during the early years of our struggles. She is remembered as a heroine in folklore, song and poetry. The song “Kanyegenuri” memorializes the actions and bravery of Nyanjiru and was sang during the Mau Mau resistance as an anthem of opposition. This and other anthems of heroic African women were banned as they were considered to be a political threat.

***The year 2022 is a centenary(100 years) since her bold political action.
Her powerful story should inspire people across genders
and regions to stand up against impunity irrespective of consequences.***



II. THE NGELANI COMMUNITY STRUGGLE LED BY MUINDI MBINGU FROM 1938

Freedom Fighter Muindi Mbingu. Image credits: Hivisasa

Write Up by Fred Lau following an interview with Mzee Luka ⁶²

The Ngelani Community Struggle under the Muindi Mbingu Memorial Association was initiated in 2010 to commemorate the demonstration and protests led by Muindi Mbingu who had resigned

as an employee of the colonial government to help his Ngelani community, in 1938 against the colonialists who had taken herds of cattle. They walked all the way into Nairobi which led to their arrests and detention in separate detention sites. While Muindi Mbingu was detained in Lamu, the rest were taken to Kapenguria. This was to keep them away from their community that they had mobilized hence scare them away. It is estimated that over 30,000 herds of cattle were taken away.

Moreover, men were beaten, tortured and physically disabled and injured with many losing their lives.

During that time, the political space was very constricted with Africans not allowed to assemble or associate in groupings. There was gross violation of human rights such as restriction of movement, assembly, forced labour, rape cases, physical torture and injury, arbitrary arrests and permanent disappearances of people, destocking of Kamba community livestock, forceful taxations, auctions and burning of houses among others. The key perpetrators were Africans who were employed by the colonialists as security agents and home guards. Majorly those who perpetuated the acts in Muindi Mbingu community were from the other regions with direct supervision of the colonialists.

The key success was that before arrests and detention of Muindi Mbingu and the three others, they had started a political movement known as 'The Akamba Union' which still continued even after their detention under other leaders. Other political movements such as the Mau Mau had started reaching to them to form alliances. After Muindi Mbingu was released, Mzee Jomo Kenyatta reached out to him and they formed alliance for the freedom struggles. The clamor for independence took the centre stage and the fight for compensation of the cattle taken away faded off. This led to suspicion that Muindi Mbingu had betrayed them from a section of those whose cattle had been taken away. This saw Muindi Mbingu being stabbed to death by one man who had lost his cattle in a local brew den "Kaluvuni" in Koma.

⁶² Fred Lau is a human rights defender, a community mobilizer and leader from Machakos County. This write up is based on his interview with Mzee Luka, the Chair of the Muindi Mbingu Memorial Association.

The struggle was made successful by uniting the people and also backing from the Kikuyu who were the trading partners of the Akamba community. Muindi Mbingu being an employee and being literate saw him sneak out information to the community, encourage and organize night meetings, passage of resolutions and commission of oaths of secrecy at Kamuthanga area due to restrictions on movement and assembly. To organize on how to counter the colonialists and security agencies, there were also documentation and data collection, records as as ' Woni (vision) were kept. The main challenges were restrictions of movement, poverty, illiteracy, arbitrary arrests and torture by security agencies.

The initiative has revived the struggle for compensation of the lost herds of cattle for the community and the atrocities committed to the Muindi Mbingu Community. Moreover, Muindi Mbingu Memorial Association was formed and now has a membership of over 700 of descendants of those who lost their cattle and grazing fields. In 2020 the community initiative reached out to Kenya Human Rights Commission (KHRC) for support and assistance in pursuit for compensation from the British government.

After data collection and analysis, a publication entitled: Human Rights Abuses Committed during the Colonial Era: A Case Study of Muindi Mbingu was developed and launched in January 2022 at Mutituni Lilongwe stadium, Machakos. This event brought together other struggle movements such as the Mau Mau group, the survivors of detention and torture under former President Moi, the human Rights defenders and organizations and political leaders. The Governor of Makueni County, Prof Kivutha Kibwana, Hons Agnes Kavindu and Joyce Kamene (Machakos Senator and Women Representatives, respectively), Hon Akala (Chief Administrative Officer, Labour) among other leaders who attended the launch committed to take up this with both the Senate and National Assembly. Mzee Luka notes: "We saw a new dawn, we were remembered at last, we saw our cattle" as he loudly laughs with satisfaction.

The key lessons as indicated by Mzee Luka are: Unity is strength and there is no need to despair in struggles; there is need to keep proper records all the time; networking and collaboration are critical in meeting all aspirations in a struggle; there is need for political good will from the government to compensate those who suffered during the struggle for independence; all the positive gains must be protected by all for the present and future generations; and the expanded democratic space must not be used as a platform to take citizens to the dark days.

A photograph of an elderly man with white hair and a beard, wearing a light-colored suit jacket over a dark shirt. He is looking slightly to his left with a thoughtful expression. The background is a blurred brick wall and some green foliage.

III. EXPERIENCES SHARING BY MZEE GITU KAHENGERI ON THE MAU MAU STRUGGLE

Mzee Gitu Kahengeri during an interview. Image credits: Maumau Chronicles

A brief by Michael Mungai, following an interview with Mzee Gitu⁶³

Begin by sharing your name and profile

My name is Shujaa Gitu wa Kahengeri (OGW)⁶⁴, a freedom fighter involved in the struggle to liberate Kenya and its African people from British colonial dictatorship and subjugation.

When and why the Mau Mau Movement was established?

First Kenyans of all regions started wars of resistances from the 18th century when British colonisers started grabbing and occupying Kenyan land through the trigger of precision guns. The Mau Mau movement build on this when it united the armed political resistances of across tribes and regions into mass liberation movements from the 1940s to 50s drive to out colonialists from Kenya.

What was the situation of political space and human rights situation?

Although Kenyans and Africans had their ways of solving their political, economic, and social matters, in their way of living, all these were downplayed by colonial administration, leaving people without political space in their own country.

Who were the key perpetrators?

The colonialist administrators with all powers given to them by their home government – The British empire are responsible for committing many human rights violations. Their word was law.

In addition, they bribed and intimidated some unpatriotic Kenya nationals who submitted and worked under them as traitors, loyalists, sycophants. The deadly “home guards”⁶⁵ and other forms of collaborators presided over killings and other forms of brutality against thousands of freedom fighters.

What were the successes of the political struggle for independence?

According to me, there were two major successes: a) the recovery of political independence on

63 Mungai is a personal assistant of Mzee Gitu Kahengeri. Mzee Gitu is a Freedom Fighter as the Secretary General of the Mau Mau War Veterans Association(MMWVA). MMWVA is a n initiative of the freedom fighters in Kenya. They have continued to fight for freedoms in Kenya from the 1940s to date.

64 “Shujaa” is Kiswahili word for heroes/ heroines-persons who have made major contributions in diverse spheres of our society. OGW stands for Order of Golden Warriors, a presidential award in recognition of heroes/ heroines.

65 These were government paramilitary force in Kenya from early 1953 until January 1955. They were instrumentalized by the colonial regime to implement oppressive colonial policies.

December 12th, 1963; b) the enjoyment of political, social and economic activities in our freed/ liberated land.

What made the struggle successful?

- a) Unity of purpose in advancing the struggle for freedoms in one way or the other, by all tribes of Kenyan without exception.
- b) We organized the struggle by passing verbal information from one location to the other.
- c) We had a binding commitment as evidenced in the sacrificing of our wealth, body strength, intelligence and to the extreme our lives.

What Challenges did you experience?

We braved a lot of challenges like being killed on sight, detention without trial, lack of food, lack of medical care in detention torture camps.



What are the lessons and recommendations for future generations?

- a) learn to be patriotic-in order to work for your country selflessly.
- b) teach yourselves to be helpful to other human beings
- c) teach yourselves to work in teams – because no human being is self-sufficient.
- d) dedicate in working for – development of your country and its people
- e) fight impunity and corruption in every way you possibly can !!

***In conclusion, our Mau Mau struggle for independence,
equally inspired successful struggles in other African countries
and democratic space in our own land through political contacts and history***



B. THE SECOND LIBERATION STRUGGLES-1963 TO 2010

Koigi Wamwere, one of the "the seven bearded sisters". Others were Lawrence Sifuna, James Orengo, Mwashengu wa Mwachofi, Abuya Abuya, George Anyona and Chelagat Mutai. Image credits: HistoryKE

I. THE SEVEN BEARDED SISTERS FROM THE LATE 1970S⁶⁶

Literature Review by Tabitha Kilatya⁶⁷

The then Kenyan Attorney General, Charles Njonjo coined the term "Seven bearded sisters" in 1981 to refer to the political radicals who were opposed to the rule of KANU by President Moi. Njonjo had picked this term from a 1974 book by Anthony Sampson, "The Seven Sisters" referring to the Great Oil Companies and the world they shaped through conspiring to overthrow governments. These politicians included: Koigi Wamwere, James Orengo, Abuya Abuya, Chelagat Mutai, Chibule wa Tsuma, Mwashengu wa Mwachofi and Lawrence Sifuna.

These MPs held socialist ideologies and became vocal in opposing most of the government's policies which were associated with the Western powers. **They are billed as the most radical politicians our parliament has ever had.** They proposed and debated motions in parliament directed at the bad governance by Moi regime. They eventually became buddies and garnered a lot of support from university students and lecturers, especially the then powerful SONU⁶⁸ and Academic Staff Union. During that time Kenya was a de facto one party, hence President Moi introduced punitive measures on any individual who dreamt of liberating the country.

The politics of Cold War ensured Moi was financially supported to suppress any movement opposed to his government. All freedoms and fundamental rights were denied by power of the police. Examples include freedom of assembly, expression and conscience. Right to life was almost not guaranteed to the political oppositionists. Most of the oppressive measures were undertaken by the Kenya police and the pro-Moi government officials who acted on orders from above.

Since independence, these MPs were the first to openly and vocally defy the government policies in parliament. They were pro-democracy and pressurized the Moi regime to repeal Section 2A of the Lancaster Kenya Constitution to pave way for multiparty democracy. Their efforts bore results in 1992 when this section of the constitution was repealed.

66 https://en.wikipedia.org/wiki/Seven_Bearded_Sisters; accessed 25/05/22; <https://www.standardmedia.co.ke>, accessed 25/05/22; <https://www.africaportal.org> accessed 26/05/22

67 Tabitha Kilatya is the Executive Director for Peace for Peace, a civil society organization focused in addressing the conflicts and injustices caused by bad governance in the society.

68 Student Organization of Nairobi University

This opened doors for other actors to come in and join hands in demanding for the release of political prisoners and protection of fundamental rights and freedoms. In addition, the call for constitutional change began.

The wave for new constitution-making began and most of the elites spearheaded this process. This garnered a lot of support from the grass root network of activists who acted in solidarity.

The seven bearded sisters organized through public rallies mostly held at Kamukunji grounds. Some of their followers included the young lawyers from LSK (Law Society of Kenya). The Green Movement and Women's Movements, the clergy and the national Christian organizations, university and college students as well as some trade unions. These networks organized since 1990 for a year cautiously underground as many feared intimidation detentions and even assassination.

In November 1991, international organizations led by the World Bank and IMF suspended all new development aid to Kenya until a democratic multi-party government was elected in a "free and fair" election. Moi was then forced to begin the process toward a multi-party election. Some of the challenges faced by these MPs and their allies included detention, intimidations and going on exile. There were cases where detainees died, and others became terminally sick or incapacitated.

The agitation for democracy and multi-party politics borrowed a lot from the struggles by freedom fighters. Hence, most of the followers of the bearded sisters were inspired by former Mau Mau fighters. For example, formation of underground movements, use of coded messages, dress code and strong brotherhood and sister-hood bond. With the advent of multipartism, future generations are at liberty to associate and enjoy freedom of expression through political parties or as independent candidates to represent interests of other Kenyans. This has translated to vibrant civil society that also has inspired others regionally and internationally.

The major lessons for current state of affairs concerns those in positions of leadership to publicly and vocally take firm positions against democratic malpractices. We need people to lead by example. Those in power should respect opinion of others and provide for freedom of expression. Hence, the struggle must continue to safeguard the gains in the Kenyan Constitution and the culture of constitutionalism. This can be confirmed by the persistence in struggle by some of the remnants of the seven bearded sisters such as James Orengo. The role of the academic and the middle class remains critic



II. THE MWAKENYA MOVEMENT IN THE 1980S

James Musyoka, who was charged with obtaining 180 copies of Mwakenya, is escorted to the court. Image credits: Nation

Reflections by Wachira Waheire⁶⁹.

The movement which is an abbreviation of the name Muungano Wa Kuikomboia Kenya (a front for the liberation of Kenya) was a continuation and culmination of past struggles that can be traced as far back as during the colonial period in the 40s and 50s when the Mau Mau movement was established to fight for the return of land that had been taken away from them by the British colonial authorities. After independence some of these seeds remained dormant as the new regime that took over from 1963 started also exhibiting repressive tendencies. This awakened the spirit of resistance immediately after independence.

The followers of Mwakenya mainly championed by leadership of students and lecturers or the intelligentsia class managed to raise the political consciousness by organising around the University of Nairobi which was then the only public university. The search for knowledge went hand in hand with the discussions about how to improve the country's political trajectory.

It is same time that such formations as the December 12th Movement which used to communicate through its newsletter "Pambana" (Struggle) was established. This is said to be the precursor of the Mwakenya, underground movement whose communication mode was the "Mpatanishi" or Reconciler around 1982 just prior to the attempted coup by members of the then Keya Air Force.

As a result of Mwakenya underground activities, the Student Organization of Nairobi University (SONU) was proscribed. Then secondly the Academic Staff Union (ASU) was also banned and deregistered. The repressive Moi/ KANU regime had the effects of forcing diverse political expressions and underground associations. Mwakenya was one such an example. This thrived because of campaigns and lobbying international organizations like Amnesty International, United Nations, foreign government Missions.

There were very powerful groups based in places like London, USA and other Nordic countries and this in itself was very helpful because the story about what was going on inside Kenya became an international a concern so when Kenyan ministers or the president traveled outside the country, they were confronted by demonstrations and subjected to very uncomfortable questions about what was happening back home.

⁶⁹ Wachira is the National Coordinator of the National Victims and Survivors Association, a movement for all Kenyans who went through mass injustices during the President Daniel Moi/ KANU dictatorship. Wachira is also the Chief Executive Officer/ Secretary, Centre for Memory and Development.

But basically, Mwakenya used to operate political cells or discussion groups and to distribute information and or Communication from the Central Committee which was not known. To date information is scanty and contested as to who were the real leaders of Mwakenya. For from the days of the December 12 movement predating 1982, underground political publications like Mpatanishi and Mwakenya are distributed in a clandestine manner.

One main important lesson is that in any struggle for change, there needs to be a committed cadre and a sustained eternal vigilance especially as relates to the main social contract between the leaders and their citizens and that is the constitution. Anytime that people drop their guard then the political class takes advantages to dismantle that has been secured, like the progressive new Constitution of Kenya.

In other words, it is always important to remember that the political class in Kenya and many African countries owe their allegiance not to the people who elected them but to themselves and their benefactors. Moreover, and as noted above, the role of the middle class in steering movements and the need for courage, creativity and flexibility in organizing is critical. Finally, the interests western powers and the support of the international community are important factors.



The late Martin Shikuku (left) and James Orengo (center) in 1990. Image credits: Ntv Kenya

Literature Review of Dr. Willy Mutunga's Perspectives⁷⁰ by Tabitha Kilatya⁷¹

The Citizens Coalition for Constitutional Change(4Cs) was initiated in 1994 as an outcome of the Coalition for National Convention (CNC) in 1992 during the struggle for multipartyism. It comprised of many actors such NGOs, religious groups, political parties, trade unions, women groups and youth

groups among others. This outfit dealt with constitution making and democratization process. The major drivers of the work were the elites within the civil society.

4C's was to take a radical approach like the Mau-Mau Movement during the pre-independence period. It was actually a continuation of the Mwakenya movement now advancing the requisite reforms towards a democratic Kenya. The academia and other progressive elite remained at the centre of this struggle. It was necessary to continue countering the status quo that persisted within the KANU government.

The process of forming 4C's led to the establishment of highly technical steering committee which was charged with broadening the civic base for popular participation. It was led by a small number of highly dedicated and able intellectuals in Kenya. The constitution making project offered scholars an opportunity to interrogate their theoretical positions. It set up a National Convention Assembly(NCA) which became a forum for negotiations on constitutional reforms and provided an alternative site to Parliament for public debates and forging consensus.

To the civil society, the 4Cs was an arena for sharing experiences, weaknesses and strengths of civic initiative in transition politics. The 4C's project was a middle-class in outlook, however, this did not hinder the interests of common mwananchi⁷² from getting involved in the constitution making. This was an added advantage since this middle class understood the issues better and could agitate on their behalf without any vested interests.

⁷⁰ As documented in his book, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*, Mengo/ SAREAT, Nairobi, 1999. Dr Mutunga was then the co-chair of 4Cs, co-convenor of the National Convention Assembly(NCA) and its executive arm, National Convention Executive Council(NCEC) and Executive Director of the Kenya Human Rights Commission(KHRC). In the 1980s, he was part of movements led by the academia. He was detained between 1982-1983. He later became the Chief Justice of the Republic of Kenya.

⁷¹ Tabitha Kilatya is the Executive Director for Peace for Peace, a civil society organization focused in addressing the conflicts and injustices caused by bad governance in the society.

⁷² Mwananchi is Kiswahili for a citizen/ member of public

There were hurdles in accessing the views of those at the grass root on the need for constitutional change. The Moi-KANU regime had blocked all the routes to the communities. 4C's embarked on mobilizing and sensitizing the poor and vulnerable Kenyans on the need to participate in the constitution process. This came with a lot of state resistance where activists braved all forms of violence such as tear-gas, clobbering, arrests and gunshots among others. Finally, the grass root was opened and a various community groups got engaged.

The above struggle saw repeal of other laws that made popular participation by the masses at the community level possible. An example was the Public Order Act that allowed for public gatherings and mass action. Also, the media became more liberal, and people could express their opinion without fear.

Moreover, it produced a draft constitution which offered fresh perspectives on the role and organization of the state. It received considerable sympathy and support from the foreign community, uneasy with the Moi regime, but unsure how to deal with it.



4C's had to deal with various challenges towards liberating the country and effecting the changes in the constitution. Some of these include:

- i. Intra-class conflicts among the elites who do not identify with the majority low class.
- ii. Domination by the foreign interests where the donors, specifically, would direct the process of constitution making and the pace it took.
- iii. The divergent views between the middle-class draft constitution and the people's constitution by the grass root communities.
- iv. Confronting the status quo where the state was reluctant to indulge fully in constitution making.
- v. The state unwillingness to address the issues raised in the constitution-making process. This was seen as a source of instability for the country.



The following lessons are important.

- i. The potential of pressures that can be generated from below, from the realms of the civil society on the barricades of the state.
- ii. It demonstrates the deep roots of discontent with the arbitrariness, corruption and tyranny of the Moi regime.
- iii. It deepened the people's imagination to organize and fight for their space. For it pushed the frontiers of the right to protest and criticize government further than has ever been done since independence.
- iv. There are limits of the civil society in promoting fundamental political and constitutional change.



Kenyans march in Nairobi on 8 June to protest against police brutality during the coronavirus pandemic. Image credits: The star

I. THE SOCIAL JUSTICE CENTERS' ACTIONS AGAINST ATROCITIES IN THE SOCIETY

Reflections by Happy Olal⁷³

The social Justice Movement was initiated in 2014 to address the injustices that were happening in our slums and informal settlements majorly police killings, enforced disappearances, gender-based violence and corruption in Kenya.

Before the formation of social justice centers, some areas had normalized human rights violations such as police killings in Nairobi slums. In Dandora Estate alone, we used to lose up to 20 young people through the police killings and around 10 persons through enforced disappearance cases, gender-based violence was also on the rise and action was never taken for the perpetrators annually.

The main perpetrators were police, the provincial administration and the citizens especially gang groups. Most citizens were also not participating in governance and public participation on issues that were affecting them and very few were involved in social audits. Lack of basic government services such as provision of water, health care and education were also normalized.



It is this horrible state of human rights that necessitated the formation of the Social Justice Movement(SJM) and Working Group.

The successes of the movement include:

- i. The expansion of the civic space from 1 Social justice center in 2014 to over 50 social justice centers in 2022 adding over 1500 members to the Human Rights movement.
- ii. We have placed communities at the heart of the human rights discourse. People are more aware of their rights and are more likely to report and take actions against any human rights violations.
- iii. Communities have stopped normalization of human rights violations, for the social justice centers document human rights violations and refer them to relevant organizations.

⁷³ Olal is a human rights activist and the National Coordinator, Social Justice Working Group

- iv. We have used protests to bring out community issues such as the Saba Saba⁷⁴ March for our lives.
- v. Participation in social audits has increased.
- vi. The founders of the movement have been in the struggles for some time and have taken over the reforms movement and moved it forward.
- vii. Whereas previous movements delivered the new Constitution, the SJM has taken the same to the next level of full implementation through the #TekelezaKatiba campaign⁷⁵.
- viii. We have shaped the campaign against extra judicial killings, enforced disappearances, high cost of living, access to affordable food among other injustices and violations affecting the poor in Kenya.
- ix. We have inspired our comrades in Uganda who have followed the model and now have 6 social justice centers in Kampala.
- x. The movement has deepened the notion of social justice, radical framework in challenging the culture of impunity in the society. For the human rights approach on its own has many limitations.
- xi. The above successes can be attributed to the spirit of volunteerism and comradeship. Compared to national CSOs that depend on paid workers, SJM is run by ordinary community members and volunteers who are passionate about community and societal issues.



The movement has experienced the following challenges:

- i. Lack of enough funds to effectively run and manage the Social Justice Centers and its programs.
- ii. Sustainability challenges for it is never easy to work with unpaid volunteers.
- iii. Internal conflicts coupled with lack of capacity to fundraise and effectively manage funds.

The major lessons are, the need to have progressive approaches, remain fearless and committed in exposing and confronting the social, political and economic injustices affecting the poor in the society. We must continue organizing, the struggle for human rights and social justice is a lifelong struggle.

⁷⁴ Saba is Kiswahili for Seven(7). July 7th is the day for the progressive civil and political societies in Kenya to celebrate the struggles for political and constitutional reforms initiated on the same day in 1990.

⁷⁵ A call to fully implement the constitution of Kenya .



Graffiti by Kenyan artist Banksy. Image credits: Urban Kultur blog

II. THE CAMPAIGN AGAINST CORPORATE IMPUNITY BY KAKUZI KENYA LTD (2000 TO DATE)

Reflections by Swaleh Githinji⁷⁶

This is one of the intriguing struggles where the power and interests of the state and corporates have continued to converge over 100 years and deprive impacted communities' justice. The peoples campaign against Kakuzi Plc dates back to around 1902 when British imperial settlers embarked on widespread evictions of indigenous communities to have way for commercial agriculture of coffee and sisal at the expense of the community. The local Communities mobilized and organized and

actively resisted this invasion which had threatened to take away its dignity.

By 1932, the British government had already appreciated the enormity of the local resistance which led to the formation of the Kenya Land Commission which produced the famous 1932 Morris Carter Report-a report that acknowledged that all the Land known as Kakuzi Fibre Land was native Kikuyu land stretching from Punda milia to Kituamba lands where the community utilized it for grazing, subsistence farming and hunting. The present area today known as Ithanga was owned and controlled by Mbari ya Gathanga⁷⁷.

As the struggle against a dominant Multinational backed by a repressive colonial government intensified, the political and civic space shrank to unimaginable levels. Its during around between 1940 and 1948 when the local Kituamba and Makuyu Police Stations were established with the twin aim of suppressing the land and forced labour resistance and safeguard the imperial interests of Kakuzi. Many people were killed, while others were taken into detention and restriction and the rest confined into ethnic labour camps to provide labour at very low wages and inhumane conditions.

When Kenya gained independence in 1963, Kakuzi continued with informal repression which advanced into a culture of impunity whose manifestation ranged from wanton abuse of workers' rights, violent land evictions which included burning of houses and destruction of food crops, assaults, rape and killings.

⁷⁶ Swaleh is a foremost human rights, governance and land justice campaigner. He is the coordinator of the Ndula Resource Centre, an organization that has been at the centre of this campaign in partnership with the Kenya Human Rights Commission.

⁷⁷ Kikuyu for Clan of Githanga

On the other hand, state security agencies and the executive arm of the government continued to support Kakuzi actions by using the criminal justice system to silence the community through arbitrary arrests and malicious prosecution, denial of the right to assembly and protest amongst others.

On the other hand the judiciary and the legislature arms of the government either turned a blind eye to the human rights abuses and or were active accomplices of Kakuzi Company.

The turning point was in the year 2002 when the impacted communities took advantage of the opening up of civic space in Kenya by partnering with established civil society groups. The Ndula Resource Centre and the Kenya Human Rights Commission(KHRC) has been the lead organizations in the campaign.

Through a combination of strategies which included capacity strengthening, media and publicity, protests and mass action, engaging the government through Petitions and advocacy meetings, the story of change in Kakuzi was born and revamp for good.

Between 2004 and 2010, the partnership between the impacted communities and human rights groups had forced the then lethargic and oppressive government to start engaging through various interventions such as Security and Intelligence fact finding missions to the affected areas, Stakeholders engagement meetings, Ministerial Task force activities, stoppage of further evictions, Ministry of Labour intervention,TJRC amongst other progressive measures.

By the year 2018, the collaborative partnership had found a firm footprint with the National Land Commission and the Kenya National Commission on Human Rights while at the global level powerful allies such as the United Nations business and human rights working group,SOMO, Rainforest Alliance, Ethical Trading Initiative(ETI)and Leigh Day had joined the struggle.

By the year 2019,key outcomes had been realized including the suspension of Kakuzi Rainforest Alliance certification, the NLC gave a landmark Public utilities award against Kakuzi,the U.N report had been filed and discussed during the full UNGA in Geneva and British law firm,Leigh day had already commenced investigation against Kakuzi company.

By December 2021,85 Victims of human rights abuses had been compensated to a tune of almost Kes 700 Million, three British leading supermarkets had suspended business with Kakuzi, Kakuzi company had effected significant Board leadership and Operational changes,a plethora of other interventions such as a Task force of the County Assembly of Muranga, Human Rights Impact Assessment, Human Rights Defenders Policy, Operational Grievance Mechanism amongst other painful and costly prescriptions had been forced on the company.Conclusive and holistic resolution of Historical land injustices remains in abeyance while gains on labour rights appear to be on a downward spiral.

The major challenges entail the length of time it has taken in this campaign, over 100 years. This is owing to the fact the struggle has been between the poor communities and the powerful Kakuzi Ltd which enjoys deep State connections and international influence through its mother company, Camelia Park(UK). The State security and administration apparatus has been dispatched many times to curtail this initiative.



The important lessons drawn from the Kakuzi struggle are:

- i. Community Centred and driven mobilizing and organizing cannot be overemphasized.
- ii. Continuous capacity strengthening of democratically elected and gender sensitive leadership structures are key ingredients to success and sustainability.
- iii. Building Community resilience must be informed through participatory and inclusive approaches.
- iv. Duty bearers both state and non-state shall never grant rights voluntarily. Struggles are earned and won. There are no particular time frames but every little success is very important.
- v. Horizontal and vertical partnerships are of extreme importance. They bring synergy, new and refreshing ideas, skills, knowledge and experience. Such Partnerships should be allowed to nurture progressively and should not be rushed.
- vi. Global networks have come in handy. Such advocacy spaces cannot be manipulated and are out of reach from compromised state operatives.
- vii. Monitoring and continuous documentation of Human Rights abuses by Kakuzi residents was our greatest strength .It still is. Kakuzi Ltd had underestimated this stubborn and cancerous timeless fact.
- viii. The need to remain resilient and fearless in the struggles against powerful perpetrators. The long time and many hurdles witnessed calls for patience in social and political justice struggles.
- ix. Understanding the root causes and manifestations of the violations has ensured strategic interventions. This campaign has remained focused on the land, labour, environmental and corporate injustices committed by the company and using diverse strategies for advocacy.
- x. Role of the influential Ndula Resource and KHRC has help to tame the many threats targeted to the local communities. The institutions have continued to provide the requisite resources and leverage.
- xi. It is very possible to stand against the so-called powerful state and corporate impunity and power and achieve justice, even if in milestones.



Kenyans in a peaceful demonstration. Image credits: FIDH

III. ADVOCACY ON THE ENACTMENT AND COMMENCEMENT OF THE PBO ACT (2006 TO DATE)

Reflections by John Owegi⁷⁸ and Ludivicus Omollo⁷⁹



The Processes leading to the enactment of the Public Benefits Organizations Act:

In February 2006, the Parliament of Kenya adopted a Sessional Paper on Non-Governmental Organizations as the first ever government policy on the sector, setting up the stage and the pace for the review of the outmoded Non-Governmental Organizations Coordination Act of 1990. This was the first ever government policy on the not-for-profit organizations. Sessional Paper No. 1 on Non-Governmental Organizations was the culmination of a consultative policy formulation process that started in December 2001. In its development, the NGOs Coordination Board involved stakeholders, culminating in the adoption of a comprehensive regulatory framework that would reflect the Government’s plan towards enhanced, efficient and quality service delivery in the public benefit organizations sector. Review of the Non-Governmental Organizations Coordination Act [1990] was the main directive principle of Sessional Paper No. 1 of 2006, culminating in the adoption by Parliament of the Public Benefit Organizations.

Bill in 2012 and its subsequent assent by former President H.E. Emilio Mwai Kibaki on January 14, 2013 into the Public Benefit Organizations Act, 2013. Prior to the adoption of the PBO Act, there were two parallel processes after a falling out between the NGO Coordination Board and the NGO Council on the one hand, and CSOs under the auspices of the Civil Society Reference Group on the other hand. The CSO-driven process wanted a broader democratic ownership and went about consulting stakeholders in regional meetings. The NGOs Coordination Board and its allies in the NGO Council process was mainly preoccupied with the fate of the board and staff members and went developing clauses to secure their future in the event of transition to the new law. In June 2012, a Joint Working Group bringing together the CSRG-allied actors and the NGO Coordination Board was established to harmonize the two parallel process. From June 2012, the CSRG, then operating as a loosely structured group formed to mobilize participation of civil society organisations (CSOs) in the law review process worked jointly with the NGOs Coordination Board to reach a common understanding on the type of legal framework that would have the best possible effect of ensuring

⁷⁸ John Owegi is the CFF Coordinator

⁷⁹ Ludivicus Omollo is the M&E Officer at PEN

good governance by CSOs on the one hand, while protecting legitimate civil society activity on the other. The collaboration resulted in joint proposals by the CSOs and Regulator to the Public Benefit Organizations Bill. In August 2012, there was a Stakeholders Retreat hosted by the Parliamentary Committee on Labour and Social Welfare at the Naro Moru River Lodge at which the joint proposals were tabled before the Parliamentary Committee. In September 2012, further amendments were submitted on the Draft Bill, incorporating the concerns on transition that had become the main preoccupation of the NGO Coordination Board and the National Council of NGOs. But even as proponents of the Bill raced against time to finalize the Bill, there was one hurdle to overcome: Who would be the sponsor and mover of the Bill once it was ready for tabling in Parliament? Hon. Sophia Abdi Noor had increasingly become a middle-of the roader, not too keen to support ODM's scathing attacks on Kibaki's government that had become acerbic especially in the period leading to the 2013 elections. This, combined with her previous role in Womankind, and the fact of coming from the ethnic Somali minority and a marginalized community that had over the years suffered historical injustices, became her biggest strength as the sponsor of the Public Benefit Organizations Bill, 2012. The strategy worked. The Bill received enormous support from ODM and PNU-allied MPs. Even the fringe political parties in the Assembly supported it overwhelmingly.



The Attempts for Amendment of the PBO Act:

On 13th November 2013, the Statute Law (Miscellaneous Amendments) Bill, 2013 was tabled in the National Assembly. The Bill sought to introduce several amendments to the PBO Act that would have significant impact on civil society in Kenya, through among other things, restricting the amount and sources of income available to PBOs; and limiting the Independence of the PBO Regulatory Authority. The Statutes Law Miscellaneous Amendment Bill of 2013, was rejected by Parliament in December 2013. Lawmakers from both political divides challenged the Bill saying it contained many provisions that violated the Constitution. They also questioned the manner in which the controversial amendments, most of which sought to substantially change the PBO Act, were presented, since Statute Law Miscellaneous (Amendments) Bills are intended to be used as a vehicle to introduce nominal changes that do not alter the substance of a law. In contravention of the Constitution, the amendments were drawn up without consultation of the sector. As a result, Majority Leader Aden Duale withdrew the proposals on the PBO Act from the Miscellaneous Amendments Bill. Between 2014 and 2015, there were three additional attempts to introduce constraining amendments to the PBO Act through various bills in Parliament. The Statute Law (Miscellaneous Amendments) Bill 2014, which was published on 30th May 2014, sought to confer sweeping discretionary powers on the PBO Regulatory Authority and to dilute the independence of the Regulator through altering the composition of the PBO Authority's board in favour of the Executive, while reducing the representation of independent members and civil society organisations. The proposals to amend the PBO Act were withdrawn from the Statutes Law Miscellaneous Amendment Bill, 2014, when the Bill came up for debate in Parliament.

Again, in December 2014, another attempt to change the PBO Act was made through the Security Laws (Miscellaneous Amendment) Bill 2014. The Bill, which sought to amend several laws, including the PBO Act, proposed to confer sweeping discretionary powers on the PBO Authority, including powers

to classify PBOs in a prescribed manner. The Bill was passed by Parliament. The amendments are contained in the Revised Version of the PBO Act of 2014. The fourth Bill, the PBO Act (Amendment) Bill 2015, lapsed due to time. It was tabled by the Executive, and contained proposals in line with recommendations from a report by a Task Force on the review of the PBO Act, which was set up by the Ministry of Devolution. In May 2016, CSOs met with the Cabinet Secretary, Ministry of Devolution and Planning, for discussions on the operationalization of the PBO Act. The Ministry sought views on proposals to amend certain provisions of the PBO Act 2013, as part of the steps it wanted to take towards operationalization of the law. On 9 September 2016, the Cabinet Secretary for the Ministry of Devolution announced that the Public Benefit Organisations (PBOs) Act 2013 had become operational. However, the Office of the Attorney General failed to submit the notice of commencement for gazette. On Oct 28, 2016 through a presidential directive, the coordination of the NGO sector was moved from the Ministry of Devolution and Planning to the Ministry of Interior and National Coordination. In 2017, the Ministry of Interior drafted the PBO Amendment Bill 2017, which contained a raft of proposed amendments for the PBO Act. The Ministry set up a committee to make recommendations on the proposed amendments in the draft Bill. The Ministerial Committee submitted its recommendations to the Cabinet Secretary. On 28 August and October 19th, 2018 the NGO Coordination Board convened a meeting between CSO representatives and members of the Board to discuss the commencement of the PBO Act. During the meeting, the board shared the Ministry of Interior's latest proposed amendments to the PBO Act and stated the Ministry's objective to amend the Act before commencement. The CSO representatives gave their feedback on the proposed amendments and reiterated the sector's position, that is, that the PBO Act should be commenced before any amendments are introduced.



Efforts by the Civil Society towards commencement the PBO Act:

- i. On 21st November 2013, CSOs submitted 13,032 signed petitions against the Statutes Law Miscellaneous Amendment Bill of 2013 to the Clerk of the National Assembly. The petition was received by Hon. Gladys Wanga representing Homa County, on behalf of the Clerk of the National Assembly. Hon. John Mbadi, Hon. Keynan Adan and Hon. Gladys Wanga made speeches, acknowledging the impact of Civil Society in Kenya and supported rejection of the proposed amendments.
- ii. On 21st November 2013, CSOs met with the Cabinet Secretary, Ministry of Planning and Devolution, Hon. Anne Waiguru. The CSOs stated their rejection of the proposed amendments to the PBO Act, through the miscellaneous amendment bill, on grounds that the process of its development was not participatory or transparent, and that the proposals breached provisions enshrined in the Constitution.
- iii. On 3rd December 2013, CSOs met with members of the National Assembly Justice and Legal Affairs Committee and appealed to them to reject proposals to amend the PBO Act. They also met with officials from the office of the Solicitor General, to seek support for rejection of the proposed amendments to the PBO Act.

- iv. In January 2014, members of the CSO Reference Group met with the Attorney General in an effort to garner support from his office in pressing for the commencement of the PBO Act and to advice against proposed amendments to the PBO Act;
- v. On March 12, 2014, Civil Society Organisations presented a public petition to the Cabinet Secretary Ministry of Devolution and Planning, urging her to commence the PBO Act 2013.
- vi. In May 2014, CSOs met with members of the National Assembly's Justice and Legal Affairs Committee and appealed to them to reject proposals to amend the PBO Act, which went against enabling the sector. The Committee members reassured the CSOs that they were unlikely to support the 15% cap on funding for PBOs and stated that they would propose amendments to make the Regulatory Authority an independent regulatory body answerable to the National Assembly.
- vii. In June 2015, Civil Society Organisations filed a constitutional Petition (No. 351 of 2015) seeking orders to compel the Cabinet Secretary for Devolution and Planning to commence the PBO Act, 2013. On October 31st, 2016, through Honorable Justice J.L. Onguto, the court ruled that by failing to appoint a date for the coming into operation of the PBO Act, the Cabinet Secretary for the Ministry of Devolution and Planning, contravened the Constitution and acted contrary to the wishes of Parliament. He gave the Cabinet Secretary 14 days to appoint and publicize a date for the coming into operation of the PBO Act. The judge also declared that the decision by the Ministry to appoint a Taskforce to amend and or propose amendments to the PBO Act, before it became operational, was illegal and contravened Articles 10, 94, 116(2), 129 and 153(4) of the Constitution.
- viii. In March 2016, Civil Society Organisations, with the support of the MP for Ndhiwa Constituency, Hon. Agostinho Neto, tabled a bill in Parliament – the PBO (Amendment) Bill, 2016 – seeking to commence the PBO Act. The Bill sought to amend the clause in the PBO Act that gives the Cabinet Secretary of the Ministry of Devolution and National Development, the discretion to decide when the PBO Act 2013 shall commence. The Bill went through the first reading on April 27, 2016 and through the second reading on August 11, 2016.
- ix. In June, 2016 the clerk of the National Assembly called upon the public to submit memoranda on the Bill, in line with public participation requirements. However, Parliament was annulled before the Bill made it to the third reading or last stage in the legislative process.
- x. In December 2016, CSOs filed contempt of court proceedings against the Cabinet Secretary, Ministry of Devolution and Planning, the Ministry of Interior and National Coordination and the Attorney General, for failing to obey court orders to commence the PBO Act.
- xi. On 12th May 2017, Justice Mativo found the CS, Ministry of Interior to be in contempt of court and directed him to obey court orders and operationalize the PBO Act. To date the orders have not been complied with.
- xii. In February, 2017, civil society leaders held the 2nd PBO Leaders' Summit. The Summit sought to facilitate policy dialogue between the sector and the new parent Ministry of the Interior

and Coordination of National Governmental and discuss collective strategies towards the transformation of the sector. The Ministry did not participate in the meeting.

- xiii. On 7, July, 2017, the Civil Society Reference Group convened the 3rd PBO Leaders' Summit. During the meeting six candidates/representatives for office of the President candidates signed pledges assuring CSOs that they would work towards protecting the civic space before, during and after the elections. Specifically, they pledged to commence or support the commencement of the PBO Act following the elections.
- xiv. On 11, October 2018, the CSOs under the auspices of Civil Society Reference Group petitioned the National Assembly Committee on Implementation raising concerns over the inordinate delay in commencing the Public Benefit Organizations Act.
- xv. On 8, November 2018, the National Assembly Committee on Implementation accorded the CSRG delegation a hearing, and pledged to support the civil society in its efforts to unlock the impasse on the operationalization of the PBO Act. The Committee asked the CSRG delegation to supply it with additional information it needed on efforts that the sector had made to get the Executive to act and operationalize the PBO Act.
- xvi. On 23, November 2018, the CSRG communicated with the Implementation Committee, filing with the Office of Clerk of the National Assembly, additional information and a policy brief on actions it could take to get the relevant government Ministry to put the PBO At into operation. In 2019, the Civil Society Reference Group sent a follow-up letter to the Committee on Implementation after it went mute. The civil society was concerned that after showing so much enthusiasm, the Committee did not appear interested in getting back to the sector on any progress it had made on the matter. The Committee never communicated to the CSRG thereafter.
- xvii. On August 20, 2019, the Civil Society Reference Group petitioned the former Prime Minister and African Union High Representative for Infrastructure Development in Africa, the Right Hon. Raila Odinga to intercede and appeal to his colleague in 'The Handshake' H.E. President Uhuru Kenyatta.



“Our children may learn about heroes of the past. Our task is to make ourselves architects of the future.”

- Mzee Jomo Kenyatta



Tel: +254 020 8164164 | +254 720 600656 | +254 734 450645

6th floor, Sir Francis Ibiyam House, AACC Compound, Waiyaki Way, Westlands

P. O. Box 4932-00200, Nairobi. | Email: info@penkenya.org

Website: <http://penkenya.org>