

Independent Reporting Mechanism

Results Report:
Kenya 2020–2022

Open
Government
Partnership



Independent
Reporting
Mechanism

Executive Summary

Government and civil society reformers made progress implementing the Access to Information Act, open contracting, and strengthening access to justice. Commitments that had strong government and civil society collaboration saw greater results. Reformers continued to improve the institutionalization of OGP in Kenya amid the COVID-19 pandemic and general elections. Looking ahead, the OGP Kenya community is encouraged to improve public information disclosure on open government reforms.

Kenya’s fourth national action plan (NAP IV) had a total of eight commitments. The IRM Action Plan Review identified four promising commitments on open contracting, public participation and legislative openness, access to information, and access to justice.¹ At the end of the action plan cycle, only the access to information commitment was substantially completed. The remaining seven commitments saw limited implementation.

Marginal progress was made in implementing the open contracting, access to information, and access to justice commitments. The other promising commitment on public participation and legislative openness did not generate any early open government results by the end of the implementation period.

Towards implementing the Access to Information (ATI) Act, the government and civil society drafted ATI implementing regulations. An ATI course at the Kenyan School of Government increased civil servants’ understanding of their obligations under the Act. Additionally, a model ATI law and toolkit facilitated the adoption of ATI legislation at the county level. The Commission on Administrative Justice (CAJ) recorded all access to information requests submitted to public institutions from 2020 to 2021.² However, procedural and administrative barriers, as well as difficulties accessing specific documents, especially those relating to government infrastructure projects, continue to inhibit public access to government-held information.

Under Commitment 2, the rollout of the upgraded Public Procurement Information Portal (PPIP) was an important step to advance open contracting reforms. The modification of PPIP to include all information on tendering opportunities and details of all contracts awarded by procuring entities allows for scrutiny by the public and other relevant government entities. Progress relies on efforts to increase disclosure compliance by procuring entities.

Civil society and the judiciary made marginal progress towards increasing access to justice. Civil society organization (CSO) Kituo Cha Sheria established the Kituo ICT Center, which enabled more than 300 indigent self-representing clients to access the Milimani Employment and Labor Relations Court. Dialogues between citizens and the government on alternative justice systems

IMPLEMENTATION AT A GLANCE

LEVEL OF COMPLETION

1/8

Complete or substantially complete commitments

EARLY RESULTS

4/8

Commitments with early results

0/8

Commitments with major or outstanding early results

COMPLIANCE WITH MINIMUM REQUIREMENTS

Not acting according to OGP process.

were held. However, opportunities to establish the Legal Aid Fund and full implementation of the Alternative Justice Systems Policy remain.

The onset of the COVID-19 pandemic and the 2022 general elections were the main challenges that limited the levels of completion across various commitment clusters. Other challenges included inadequate human resources, limited financial capacity, political interference, and lack of institutionalization and awareness about OGP across relevant government institutions and departments that play a key role in action plan implementation.

During the implementation cycle, the engagement of relevant OGP stakeholders took place at two levels: (1) at the level of the steering committee, where civil society and government co-convened follow-up meetings with members to monitor and discuss progress; and (2) at the commitment cluster level where the cluster co-leads organized meetings with their respective members. However, the levels of engagement and participation during implementation differed from one commitment cluster to another. The government did not maintain an online and up to date OGP repository with evidence of co-creation and implementation. Therefore, Kenya was found to be acting contrary to OGP process.

¹ “IRM Action Plan Review: Kenya 2020–2022,” Open Government Partnership, 16 August 2022, <https://www.opengovpartnership.org/documents/kenya-action-plan-review-2020-2022>.

² “CAJ Annual Report 2020–2021,” Commission on Administrative Justice, <https://www.ombudsman.go.ke/index.php/resource-center/all-reports/category/4-annual-report>.

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Section I: Key Observations

The implementation of NAP IV commenced in 2020 at a crucial time when the COVID-19 pandemic brought everything to a standstill. At the same time, Kenya was already moving into the 2022 presidential election period coupled with a tense political atmosphere.¹ These two factors resulted in a drastic shift in government priorities with a greater focus on fighting the pandemic as well as ensuring a free and fair electoral process. While both issues were of great concerns at the time, the shift had negative implications on the completion of all NAP IV commitments as they placed various constraints on the ability of relevant institutions to implement the commitments.

Key observation 1: Commitments aligned with government and civil society priorities saw greater ownership and collaboration among key implementers.

Strategically aligning OGP commitments with government and civil society priorities proved an effective approach to successful commitment implementation. Meaningful collaboration between civil society actors and the Commission on Administrative Justice (CAJ) facilitated stronger ownership of the Access to Information (ATI) Commitment. This resulted in the willingness to invest resources and time collectively towards realizing the milestones. At the county level, increased adoption of ATI legislation in line with the ATI model law benefited from strong alignment with the priorities and aspirations of county governments to fulfil their obligations under the County Government Act.

Similarly, the involvement of the Judiciary in the implementation of the commitment on access to justice helped realize progress in some milestones. However, lack of involvement by the National Legal Aid Services and the National Treasury—which sits within the Attorney General’s Office—derailed the implementation of the Alternative Justice Systems Policy and the operationalization of the Legal Aid Fund.² Stronger ownership of OGP commitments and meaningful collaboration between civil society and government actors on areas of common interest would help address some barriers to implementation, such as human resource and funding limitations.

Key observation 2: Greater institutionalization of OGP reinforced the implementation of open government reforms. However, opportunity still exists to enhance OGP’s resilience, especially during political transitions.

Kenya has advanced commitments to institutionalize OGP under the third and fourth action plans. The government has also taken a leadership role at the global level as a member of OGP Steering Committee. Progressively, there has been improved CSO-government engagement which was evident during the co-creation of NAP IV as compared to the implementation period of NAP III.³ Under NAP IV, it was expected that this commitment would further entrench its roots in the government, especially in the context of the anticipated 2022 general elections, although the elections ultimately had a negative effect on the implementation of the majority of Kenya’s OGP commitments. Some government institutions remain unaware of the OGP process, pointing to the need to intensify these efforts in the subsequent action plan. Sensitizing the newly convened OGP Parliamentary Caucus will be particularly key to advance legislations that are important to open government reforms.

Key observation 3: Strengthening the capacities and knowledge of relevant government bodies around open government legislation is key to ensure full implementation.

A lack of technical skills and knowledge as well as capacity gaps hindered effective implementation of commitments by government institutions. This was the case especially for

commitments that required the implementation of specific obligations under various legislative and policy frameworks. Often, weak implementation or non-enforcement arises as a result of lack of awareness and knowledge by public officers of their obligations to the public as prescribed in the law. The ATI commitment is an example of how strengthening the capacity of public officers could contribute to translating open governance aspirations into practice. Article 19 and the CAJ noted that the level of interest in the ATI course by public officers demonstrated the demand and need for such initiatives.⁴ This laid a foundation for sustainability measures and ensuring the institutionalization of ATI within government departments and ministries.⁵ Going forward, Kenya could replicate similar approach for other commitments, such as the ones on open contracting and access to justice.

Key observation 4: Kenyan counties participating in the OGP Local Program expanded during the action plan cycle. Closer alignment of national and county OGP processes has the potential to magnify open government results.

The devolved system of governance in Kenya aimed to make government more inclusive, transparent, and accessible by bringing leaders closer to the citizens. County governments therefore play a critical role in advancing the open government agenda as envisioned under Chapter 11 of the Constitution of Kenya and the County Government Act No. 17 of 2012.⁶ One of the key functions of county governments is to ensure effective and full participation of communities in decision-making processes within the counties and nationally. In fulfilling their mandates, national and county governments are expected to work in a collaborative and coordinated way for better governance. Although devolution still has its own challenges, positive progress has been realized over the past few years. The successful implementation of various OGP commitment milestones at county level such as the ATI Law and open contracting commitments demonstrated an increasing interest and appetite for open governance by local governments. The Elgeyo Marakwet County was a pioneer member of the OGP Local Program since 2016,⁷ before it was joined by Nandi, Makueni, and Nairobi Counties in 2020.⁸ Their experiences within the OGP Local Program can be used as a foundation to strengthen the link between national and local OGP processes and increase the scope of citizen engagement in the open government agenda.

Various models for expanding open government at the local level can be found across the region. Nigeria’s subnational OGP Program currently includes 25 out of 36 states. The subnational program aims to help national open government reforms implementation at the state level. A coalition of the OGP Nigeria Secretariat, National Orientation Agency, civil society, the World Bank, and other development partners have strengthened state-level institutionalization of OGP and open government reforms.⁹ Similarly, Morocco has launched a network of local open governments. This initiative builds on commitments in previous national action plans to expand open government at the regional level.¹⁰

¹ “Analysis: How Kenyatta won over a foe and lost his deputy,”

Al Jazeera, 21 June 2022, <https://www.aljazeera.com/features/2022/6/21/analysis-how-kenyas-president-won-over-a-foe-and-alienated-his>.

² Annette Mbogo (Executive Director of Kituo Cha Sheria & CSO Co-Chair of the Access to Justice Commitment Cluster), interview by IRM researcher, 11 March 2023.

³ A detailed description of the multistakeholder engagement in Kenya’s NAP IV co-creation can be found in: “IRM Action Plan Review: Kenya 2020–2022,” Open Government Partnership, 16 August 2022, <https://www.opengovpartnership.org/documents/kenya-action-plan-review-2020-2022>.

⁴ Sarah Wesonga (Program Officer of Article 19) & Viola Ochola (Director of Access to Information at the Commission on Administrative Justice), interviews by IRM researcher, 16 March 2023.

⁵ Ochola & Wesonga, interviews.

⁶ See: “Kenya’s Constitution 2010,” available from: Constitute Project, https://www.constituteproject.org/constitution/Kenya_2010.pdf; “Law of Kenya No. 17 of 2012 on County Governments,” available from: The World Bank, [https://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/Kenya%20Devolution/County%20Governments%20Act%20\(2012\).pdf](https://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/Kenya%20Devolution/County%20Governments%20Act%20(2012).pdf).

⁷ See: “Elgeyo Marakwet, Kenya,” Open Government Partnership, <https://www.opengovpartnership.org/members/elgeyo-marakwet-kenya>.

⁸ See: “Makueni, Kenya,” Open Government Partnership, <https://www.opengovpartnership.org/members/makueni-kenya>; “Nandi, Kenya,” Open Government Partnership, <https://www.opengovpartnership.org/members/nandi-kenya>; “Nairobi, Kenya,” Open Government Partnership, <https://www.opengovpartnership.org/members/nairobi-kenya>.

⁹ “IRM Results Report: Nigeria 2019–2022,” Open Government Partnership, 22 June 2023, <https://www.opengovpartnership.org/documents/nigeria-results-report-2019-2022-for-public-comment>.

¹⁰ “Portail du gouvernement ouvert,” Open Government Morocco, <https://gouvernement-ouvert.ma/index.php?lang=fr>.

Section II: Implementation and Early Results

The following section looks at the four commitments that the IRM identified as having the strongest results from implementation. To assess early results, the IRM referred to commitments identified as promising in the Action Plan Review as a starting point. After verification of completion evidence, the IRM also took into account commitments or clusters that were not determined as promising but that, as implemented, yielded significant results.

Commitment 2: Open Contracting [Public Procurement Regulatory Authority (PPRA)]

Context and Objectives

The aim of this commitment was to implement a transparent e-government procurement system to enhance transparency and accountability in all procurement processes, and to reduce the chances of fraud and corruption. At position 124 out of 180 in the Corruption Perception Index, Kenya is perceived to be a highly corrupt country, whereas public procurement is one of the greatest avenues through which corruption is carried out.¹ Successful implementation of this commitment would have promoted open government and assisted the fight against corruption.

This commitment built on previous efforts² to strengthen public procurement and beneficial ownership transparency under prior action plans. During the 2018–2021 action plan, civil servants, the media, and civil society were trained on the Open Contracting Data Standard (OCDS). Additionally, the Kenyan Business Registration service established an internal beneficial ownership register and granted the PPRA read-only access.³

Some of the challenges foreseen during action plan review included the non-responsiveness of the National Treasury, lack of mechanism to incorporate citizen feedback, capacity gaps among public officials implementing the commitment, lack of awareness among citizens, and the inability to see through the commitments carried over from previous action plan cycles. Addressing these challenges would have been key in the implementation of this commitment.

Did it Open Government? Marginal

This commitment achieved marginal progress towards Kenya's longstanding aim to open public procurement to combat corruption. During the implementation period, the PPRA made the Public Procurement Information Portal (PPIP) fully operational, but efforts were still ongoing to achieve 100% compliance of procuring entities. Likewise, PPRA was continuing efforts to increase the compliance of companies to disclose beneficial ownership information, which was not fully achieved. Government and civil society partners also made progress on the transition to a comprehensive e-government procurement system and the finalization of a whistleblower legislation and reporting channels, but neither was finalized by the end of the cycle.

The overall level of completion of Commitment 2 is limited. Out of its ten milestones⁴, four (milestones 3, 9, 10 and 7) were not started; whereas three (milestones 1, 5, and 6) progressed substantially. The other three (milestones 2, 4, and 8) achieved limited completion.

Milestone 1 aimed to publish the beneficial ownership information of companies that won mining contracts through collaborative implementation under the beneficial ownership commitment. Some progress was made, such as maintaining a fully operational PPIP portal where information on publicly procured contracts are made accessible to citizens, but it was only partially complete.

On the PPIP portal, sections requiring the inclusion of details on the directors and beneficial ownership information of procuring entities are also provided. However, out of the procuring entities sampled in the portal during the research, no information on beneficial ownership is included. A PPRA representative stated that not all the entities have complied with the requirement to publish their beneficial ownership in the portal.⁵ Late in 2022, the PPRA Director General issued a circular requiring all companies to comply by 1 July 2023.⁶ As such, it is impossible to easily identify which companies won mining contracts from the data provided.

The second milestone sought to establish a new e-government procurement (EGP) system that was interoperable with the open contracting portals developed by national and devolved governments but was only partially completed. The national government's procurement system is currently largely automated through the Integrated Financial Monetary Information System (IFMIS). Save for Makueni and Elgeyo Marakwet,⁷ no other counties had a fully automated/open contracting system. Through this commitment, the government wanted to migrate from IFMIS to a new EGP system that would be interoperable with the PPIP to avoid duplication and have a centralized portal where data relating to procurement from all other entities can be published.⁸ At the time of writing this report, the commitment co-leads stated that a new contractor had been brought on board to support the development and piloting of the e-procurement system.⁹ However, it is worth noting that there was some evidence of enhancement of the IFMIS thanks to the introduction of a 'Supplier Invoice Tracking Solution', which renders it possible for one to track both the status of a supply as well as the processing of the supplier's invoice.¹⁰ Although this was not done in line with any specific NAP IV commitment, the improvement was made during the current action plan cycle and is likely to enhance the openness of government projects and reduce procurement fraud.

Milestones 3, 9, and 10 related to strengthening the whistleblower legal regime in Kenya¹¹ in order to encourage persons who are aware of unscrupulous dealings in the procurement process to come out publicly with the assurance that their safety is guaranteed. All three milestones were not started. PPRA and Development Gateway representatives stated that this milestone was broad and required a collective and collaborative approach to its implementation, especially with the public participation commitment cluster, since issues of whistleblowing were cross-cutting.¹² Although they remain incomplete, the researcher came across evidence of the introduction of the Whistleblower Protection Bill¹³ at the committee stage in the parliament, as well as the Protected Disclosure Bill, which aimed to strengthen the regime once it is passed into law.¹⁴ Notably, the PPRA has also developed two systems of filing complaints anonymously in relation to procurement processes, although they had not yet been launched publicly.¹⁵

Milestone 4 sought to develop open contracting policies among national and county governments but was still at the initial stages of deliberations on how to proceed with implementation. According to Development Gateway, interoperability workshops were held with four counties and other cluster lead actors such as the PPRA and the National Treasury to discuss what the commitment entailed, next steps, as well as identify the technical and policy needs.¹⁶ Makueni County commenced the process of developing its open contracting policy before this NAP made substantial progress in finalizing on the county draft policy.¹⁷

Substantial progress was made under milestone 5, which committed to fully operationalize the PPIP and ensure 100% registration of government suppliers. The PPIP portal is fully operational and provides for the registration of procuring agencies.¹⁸ It also has a list of the all the registered

procuring agencies and the particulars of the said agencies, including details of contracts awarded.¹⁹ In June 2022, the lead agency issued guidelines for Registration and Licensing of Procuring or Asset Disposal Agents. The authority gave procuring entities that do not have the capacity to establish an internal procurement department the liberty to employ the services of these firms, which must be registered by the lead agency.²⁰ Although the registration portal for procuring entities is active, the PPRA noted that one of the key challenges of fully implementing this milestone was the non-compliance of some procuring entities.²¹

While the IRM did not receive information on the extent of compliance, the PPRA had not attained 100% registration at the time of writing this report.²² However, the PPRA published periodic reports summarizing statistics on the number of tenders and contracts, as well registered procuring entities and suppliers per financial year in compliance with milestone 6.²³ Milestone 7, aimed at adopting low-tech connectivity information dissemination mechanisms, was not started due to lack of financial resources.²⁴

Finally, milestone 8 sought to develop a public feedback mechanism during a project's life cycle that could inform decision making. At the national level, there is no systematic way of receiving feedback, although the PPRA is set to launch the two aforementioned systems for submitting complaints. A PPRA representative noted that currently, feedback is provided through channels such as social media.²⁵ At county level, the Makueni county put in place a structured mechanism for monitoring and feedback of public projects, including the county government level at the top and the village level at the base.²⁶ This feature could be borrowed by the national government as well as other county governments to increase the openness of public projects and remove the loopholes that are often exploited for corruption. A Development Gateway representative stated that Nandi and Elgeyo Marakwet counties are in discussions to roll out similar mechanisms.²⁷

This commitment is crucial and has great potential to significantly open government, even though its implementation was limited in this action plan cycle. The PPRA stated that the information on the PPIP has been useful in supporting them to carry out its mandate of monitoring, conducting assessments, and giving advise based on identified trends and issues. The system also generates reports on specific aspects such as direct procurement contracts that were terminated.²⁸ Some of the challenges attributed to the limited implementation of this commitment included limited scope of open contracting legal provisions, limited capacity of implementing officers, the use of outdated systems that are incompatible with the OCDS, the absence of comprehensive framework for the protection of whistleblowers, the political climate preceding the August 2022 general elections, lack of political goodwill, and poor resourcing.²⁹

Looking Ahead

Some of the recommendations on strengthening this commitment into the future included technical and policy changes at the PPIP and county systems to allow system integration, regular review process to monitor implementation, capacity building for implementers, and adequate financing for implementation. The IRM recommends the following:

- Coordination with other relevant government stakeholders to implement the whistleblower protection mechanism would fast track the implementation of milestones 3, 9, and 10. The whistleblower commitment touches on cross-cutting issues that would require the input and involvement of actors in other clusters. OGP Kenya could take advantage of the ongoing deliberations on the Whistleblower Bill and the Protected Disclosure Bill to achieve

this milestone. This will ensure that all policy and legislative reforms relating to whistleblower protection are coordinated and not implemented in silos.

- The PPRA should consider putting in place a mechanism to systematically monitor and document how relevant institutions such as the Ethics and Anti-Corruption Commission (EACC) and the general public using the information from the PPIP portal to advance efforts of reducing corruption.
- In the next action plan, reformers working to advance open contracting and beneficial ownership transparency could collaborate to focus efforts on publishing beneficial ownership information for procuring companies. Specific resources and recommendations are available in the 2023 IRM Co-Creation Brief for Kenya.³⁰

Commitment 6: Access to Information [Commission on Administrative Justice (CAJ)]

Context and Objectives

Under this commitment, the government undertook to operationalize Article 35 (1) of the 2010 Constitution of Kenya and the Access to Information (ATI) Act.³¹ This commitment was vital to implement key legislation and enable public access to information held by the state and other citizens. This commitment was prioritized by both the government and CSOs during co-creation,³² given its fundamental role for open government. It builds on Kenya’s 2016–2018 OGP action plan, under which the government passed the ATI Act and commenced implementation.³³

Did it Open Government? Marginal

Kenya made marginal progress towards implementing the ATI Act during the action plan period. Government agencies and civil society collaboratively drafted ATI regulations which were expected to be finalized soon. The Kenyan School of Government (KSG) introduced an ATI course for civil servants responsible for implementing the law. The Commission on Administrative Justice (CAJ) created a county governance toolkit and model county ATI law. Consequently, counties had begun to adopt ATI legislation by the end of the implementation period. The government had also developed a guide and monitoring tool for proactive information disclosure and published information on external debts.

This commitment reached a substantial level of completion, given progress across the 6 listed milestones. The primary outstanding activity under this commitment is the digitization of government records. However, CAJ established a steering and technical committees to develop the guiding standards for digitization. While the total number of information requests made to public institutions declined from the previous reporting cycle, information disclosure rate remained at approximately 99 percent.³⁴ This demonstrates a consistent level of response to requests for government-held information, although procedural and administrative barriers sometimes delay or render the process of accessing information bureaucratic and prohibitive.³⁵

Under the first milestone, the government undertook to pass the ATI regulations. While the ATI Act is a robust law, its operationalization has been delayed by the absence of regulations. The draft regulations³⁶ were prepared collaboratively by the CAJ, the Ministry of Information Communication and Technology (ICT), the National Law Reform Commission (NLRC), and a civil society representative from Article-19.³⁷ At the time of preparing this report, the draft regulations were being circulated for comments and awaiting official publication by the Cabinet Secretary in charge of ICT. Co-leads of the commitment from the CAJ and Article 19 stated that there had been engagement with relevant stakeholders to fast-track finalization of the regulations,

including with relevant parliamentary committees, the Cabinet Secretary in charge of ICT, as well as the Attorney General, who is tasked with publication of the final copy.³⁸ They reported the regulations are ready to be passed into law, but disruptive electioneering period as well as the COVID-19 pandemic proved to be major challenges.³⁹

The KSG's ATI course commenced in 2020 and has trained a total of four cohorts until 2022, comprising 90 individual participants who were mostly county officials.⁴⁰ While it was primarily established to offer management training, research, consultancy, and advisory services to the public sector,⁴¹ the KSG has recently expanded the scope of trainees to include the private sector. The government worked with the KSG to develop the curriculum for learners and a guide for course facilitators.⁴² The KSG also conducted a training of trainers expected to facilitate the course.⁴³ According to feedback from one participant of the ATI course, the training was very useful their work.⁴⁴ The training alumni urged the CAJ and the KSG to invest in creating more awareness among information officers at the county level and getting buy-in from ministries, departments, and agencies at the national level. It was also noted that the KSG could mobilize resources to monitor and evaluate the impact of the trainings.⁴⁵

The CAJ also advanced the adoption of ATI laws at the county level as provided in the County Governance Toolkit.⁴⁶ During implementation, the CAJ developed a county model law on access to information,⁴⁷ which aimed to assist counties to develop their ATI laws in compliance with the provisions of Section 96 of the County Government Act.⁴⁸ The model law was disseminated to all 47 counties, but only Embu and Kwale counties had developed an ATI Law guided by the model law by the end of the action plan cycle; whereas Kisumu, Laikipia, Nyamira, and Turkana counties were in the process of adopting such laws in their legislative assemblies.⁴⁹ The full impact of these efforts will become more evident once all county assemblies pass the legislation.

The fourth milestone pertained to implementing a reporting framework on proactive disclosure by public institutions. The Kenyan ATI legal regime is designed in such a manner that it requires public institutions to proactively disclose information. The CAJ developed "A Guide on Proactive Disclosure for Public Entities at National and County Government Level in Kenya"⁵⁰ and an online monitoring tool on proactive disclosure, which is used to monitor compliance of public entities.⁵¹ Among other things, the guide lays down the processes and practices to comply with proactive disclosure legal requirements. While the CAJ guidelines demonstrate intent, they focus on resolution of public complaints rather than provision of express guidelines on what public entities must proactively disclose. The CAJ noted that this milestone aligns with their mandate to monitor proactive disclosure by public entities.⁵²

The fifth milestone pertained to the digitization of records held by public institutions. According to the CAJ, this was a rather ambitious milestone and was not completed. The CAJ cited the absence of budget allocation for what would be a costly project that is implemented with limited technical know-hows. Most importantly, the CAJ the need to properly define what digitization entails and lay down the standards of digitization. Some work had been done to kickstart this process while steering and technical committees primarily set up by the ICT Authority were set up to develop the standards.⁵³

The final milestone under this commitment was to create an open and accessible public debt register. The National Treasury website already hosted a public debt register at the time of action plan development⁵⁴ and now contains information on external debt up to and including the

period of June 2022. Institutions such as Institute of Public Finance Kenya Limited and the media used information from the debt register to develop independent reports to create awareness on Kenya’s external debt situation,⁵⁵ noting frequent public backlash over heavy borrowing to finance government budgets.⁵⁶

The role of the CAJ in advancing information disclosure is becoming more prominent with many citizens perceiving it as a channel for seeking redress on matters related to access to information. Between 2020 and 2021, the CAJ estimated 77,845 information requests were received by public institutions—77,579 of which were disclosed, indicating a high level of disclosure (99.66%). The remaining 213 requests were transferred, while 28 requests were declined.⁵⁷ This represented a slight decline compared to 2019–2020, during which the CAJ disclosed 130,207 out of 130,492 information requests (99.78%).⁵⁸ This was partly due to the CAJ operating with fewer staff and restricted in-person operations amid the COVID-19 pandemic and budget limitation.⁵⁹

Obstacles to accessing information continue to persist, especially where it touches on specific types of information, such as infrastructure projects.⁶⁰ Civil society actors also noted that procedural and administrative barriers such as delayed responses, convoluted bureaucracy, and associated costs also contribute to public frustration.⁶¹ However, recent legal rulings have advanced access to information, particularly around public infrastructure contracts. In May 2022, for example, the court ruled that the non-disclosure clauses in the Official Secrets Act cannot override public interest. Consequently, the government was compelled to provide information on a multi-billion standard gauge railway construction contract.⁶²

Looking Ahead

Kenya has made notable progress building the capacity of public officers on access to information. Reformers can advance access to information under future action plans through a number of avenues, including:

- Collaborating with thematic clusters to advance proactive disclosure of government-held information in support of open government reforms such as public procurement, beneficial ownership, access to justice, climate change, etc.
- Supporting participatory development, passage, and implementation of ATI legislation at the county level.
- Establishing procedures and institutions for the digitization of government records.
- Increasing public awareness on the right to access information and building their capacity to use the enacted laws and regulations to exercise their rights.
- Making guidelines and procedures for proactive disclosure, especially of high-value infrastructure projects.

Kenyan reformers could look to Morocco’s various access to information commitments for examples and opportunities for peer learning. Morocco’s access to information regime is a work in progress, which under the 2018 action plan aimed to expand public awareness of their right to information (Commitment 1), appoint and train ATI officers (Commitment 2), and establish archive units across government bodies (Commitment 3). Commitment 6 on the development of a citizens’ guide on ATI requests and a transparency portal, where citizens’ access to information requests are submitted, passed to the relevant government body, and publicly tracked⁶³ was a particularly strong example. Commitment 21 in the 2021 action plan built on this by strengthening ATI at the territorial level by connecting local governments to the transparency portal and

providing a model portal for local governments to adopt.⁶⁴ Broadly, these commitments demonstrate possible areas of focus for future access to information commitments in Kenya.

Commitment 7: Access to Justice [The Judiciary, National Legal Aid Service, Kituo Cha Sheria]

Context and Objectives

The judiciary, being one of the three branches of government, is a critical player in the advancement of open governance. It acts as a watchdog of the executive and legislature by ensuring that all administrative actions of the government and the laws passed by the legislature are lawful and compliant with the Kenyan Constitution. The judiciary also ensures citizens' right to oversee the executive and legislature as well as to participate in critical decisions. This commitment aimed to increase the state's capacity to provide legal aid for indigent clients and implement the Alternative Justice Systems (AJS) policy.⁶⁵

These objectives are informed by the challenges that ordinary Kenyans face in accessing the judicial system, including high court fees, limited geographical access, lack of adequate staff, and case backlog.⁶⁶ It is hoped that promoting alternative justice systems, backed by the Kenyan judiciary, will help to supplement efforts in securing the rights of Kenyans of access to justice. Similarly, assisting the indigent to access justice, through a state-backed legal aid programme ensures that everyone—irrespective of their financial status—can demand accountability of the actions of the government as well as those in authority.

While this commitment was partly implemented, it faced challenges that prevented its full implementation. This included delays from obtaining the requisite approvals from the Chief Justice and Chief Registrar of the Judiciary, lack of capacity among the paralegals expected to assist in legal aid, and lack of funding.⁶⁷

Did it Open Government? Marginal

The Kenyan Judiciary and civil society partners made modest progress in strengthening access to justice by sensitizing citizens on AJS policy through piloting a virtual court center for labor disputes and advocating for greater legal financial aid. Initial progress was made around government-citizen dialogues on AJS to supplement the formal justice system in resolving disputes. The objective to co-reference cases between the Mombasa Legal Aid Unit and AJS reported little traction with limited conversations about first establishing the county's justice needs. While there was no evidence of operationalization of the Legal Aid Fund, a Judiciary Fund was launched. Civil society organization Kituo Cha Sheria established a virtual court center that assisted over 300 indigent clients in accessing the Employment and Labor Relations Court.

The citizen-government dialogues sought to create acceptance of AJS policy by sensitizing citizens on its applications, robustness, and formal recognition. The judiciary and civil society engaged the public across the country as well as community elders in the North Rift,⁶⁸ Turkana,⁶⁹ and Kajiado⁷⁰ counties. A key concern raised in the dialogues was the slow-paced nature of resolving disputes through the formal justice system, noting that there is currently a backlog of approximately 617,000 cases.⁷¹ Land and succession matters were among the key disputes which formed a bulk of the cases before the formal justice system, and are targeted for resolution through AJS mechanism.

The CSO Kituo Cha Sheria, who co-led the implementation of this commitment, convened a public interest regional colloquium which was graced by Kenya's Chief Justice on 7–8 March

2022.⁷² On social media, the Alternative Justice Systems Kenya taskforce runs a vibrant Twitter feed through which the online community is engaged in their activities. Executive Director of Kituo Cha Sheria noted that the public has been generally receptive to the idea of AJS as the majority have historically preferred using AJS rather than formal justice systems to address their issues, save for a few legal professionals who view it as a threat to their profession.⁷³

The second milestone sought to enhance the co-referencing of cases between the Mombasa Legal Aid Unit and AJS mechanisms, but only recorded limited progress. Kituo Cha Sheria alluded to the fact that they commenced dialogues to establish the AJS needs for Mombasa County through a joint survey with the Kenyan Judiciary. However, they did not provide any evidence of these discussions. Executive Director of Kituo Cha Sheria shared that not much progress had been made and suggested that this activity needs to be carried over to the next action plan cycle even as they consider the possibility of introducing similar initiatives in other counties within Kenya. Lack of funding was cited as the biggest implementation hurdle.

The third milestone, aimed to source funding to implement the AJS policy and operationalize the Legal Aid Fund, was not started.⁷⁴ Efforts to meet with the Treasury as well as the National Legal Aid Service did not materialize. Kituo Cha Sheria noted that the completion of this milestone was highly dependent on the operationalization of the Judiciary Fund, which took effect on 1 July 2022.⁷⁵ After its launch, the Kenyan Treasury Department deposited Ksh 9 billion into the kitty.⁷⁶ It remains to be seen whether this will translate to the implementation of the milestones and other activities which were dependent on the operationalization of the Fund. Kituo Cha Sheria also perceived the two-year timeline as rather ambitious and suggested that the milestone be carried over to the next action plan cycle.⁷⁷

Under the fourth milestone, Kenya established a virtual court at Kituo Cha Sheria's ICT Centre to enable indigent self-representing litigants to access the Employment and Labor Relations Court in Nairobi. The court resolves disputes between employees and employers in both the private and public sector. Shift to online judicial process in response to the COVID-19 pandemic further excluded indigent citizens with employment disputes. The virtual court helped indigent people to access court sessions, digitally file their court documents, lodge complaints, and virtually attend court sessions before judges for the hearing of their cases.⁷⁸ Over 300 indigent people benefited from the program in its pilot phase in 2022 despite the center operating with only four laptops. Other challenges noted in the implementation of this milestone include lack of capacity of community-based paralegals, delayed approvals by the Chief Justice and Chief Registrar of the Judiciary, and lack of financial support.

The last milestone under this commitment was for Kenya to benchmark with other OGP global justice actors using technology to promote access to justice. Executive Director of Kituo Cha Sheria reported that conversations between the Kenyan OGP community and its regional counterparts with an access to justice commitment, such as Sierra Leone and South Africa, had commenced. The Kenyan OGP community also organized panel discussions with Sierra Leone on AJS implementation, engaged in broader conversations with all regional OGP members, and discussed a five-year access to justice strategy in collaboration with the African Center of Excellence for Access to Justice. In addition, Kenya intends to engage OGP to make access to justice a priority area in the coming years. However, the IRM did not receive evidence of these engagement. As work on this milestone continues to be underway, Kituo Cha Sheria suggested that for it to be carried over to the next action plan cycle.⁷⁹

Looking Ahead

Kenya is among the few OGP members that are pioneering commitments on alternative justice systems. Specific recommendations on how Kenyan access to justice champions can continue their efforts are provided in the 2023 IRM Co-Creation Brief.⁸⁰ Moving forward, reformers can also take the following into consideration:

- Greater collaboration and cooperation between the judiciary, the Attorney General’s Office, and justice sector CSOs towards the implementation of AJS could lower the burden of case-backlog. Similarly, the adoption of AJS could reduce the duration which litigants have to spend in the formal courts.
- The government could consider allocating more budget to the judiciary to enable the scaling up of AJS activities to other counties beyond Mombasa and Nairobi. The government can also consider additional funding for setting up more virtual court ICT centers to serve a wider spectrum of indigent clients.

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² “IRM Transitional Results Report: Kenya 2018–2021,” Open Government Partnership, 11 May 2023, <https://www.opengovpartnership.org/documents/kenya-transitional-results-report-2018-2021>.

³ “IRM Transitional Results Report: Kenya 2018–2021,” Open Government Partnership.

⁴ “Kenya OGP Action Plan 2020–2022,” Government of Kenya, 1 March 2021, <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022>.

⁵ Ahmed Jibril Mohamed (Public Procurement Regulatory Authority) & Charlene Migwe-Kagume (Development Gateway), interview by IRM researcher, 14 April 2023.

⁶ Mohamed & Migwe-Kagume, interview.

⁷ Alex Macbeth, “Makueni: the small county leading action on open procurement in Kenya,” Open Contracting Partnership, 12 January 2021, <https://www.open-contracting.org/2021/01/12/makueni-the-small-county-leading-action-on-open-procurement-in-kenya>; Taryn Davis & Charlene Migwe-Kagume, “Scaling open contracting in Kenya,” Development Gateway, 18 May 2021, https://developmentgateway.org/blog/scaling_open_contracting_in_kenya.

⁸ Mohamed & Migwe-Kagume, interview.

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¹⁰ Dennis Mwangi, “Good news for suppliers as Treasury upgrades IFMIS platform,” Pulse Live Kenya, 14 February 2022, <https://www.pulselive.co.ke/news/treasury-issues-statement-on-upgraded-ifmis-platform/js23wjf>.

¹¹ “Kenya OGP Action Plan 2020–2022,” Government of Kenya.

¹² Mohamed & Migwe-Kagume, interview.

¹³ “The Whistleblower Protection Bill, 2021,” Kenya Gazette Supplement, 29 October 2021, <http://parliament.go.ke/sites/default/files/2021-11/The%20Whistleblower%20Protection%20Bill%2C%202021.pdf>.

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¹⁵ See: “PPRA’s complaints management system,” Public Procurement Regulatory Authority, <https://cms.ppra.go.ke>; “ARB Board’s administrative review case management system,” Public Procurement Regulatory Authority, <https://arcms.ppra.go.ke/#>.

¹⁶ Mohamed & Migwe-Kagume, interview.

¹⁷ Mohamed & Migwe-Kagume, interview.

¹⁸ See: <https://www.tenders.go.ke>; <https://www.tenders.go.ke/PeRegistration>.

¹⁹ See: <https://www.tenders.go.ke/ProcuringEntities>.

²⁰ “A snapshot of the PPRA guidelines for registration and licensing of procuring of asset disposal agents Gerivia Advocates LLP,” Gerivia Advocates LLP, 29 August 2022, <https://gerivia.co.ke/1722/a-snapshot-of-the-ppra-guidelines-for-registration-and-licensing-of-procuring-or-asset-disposal-agents>.

²¹ Mohamed & Migwe-Kagume, interview.

²² Mohamed & Migwe-Kagume, interview.

²³ See: <https://tenders.go.ke/Home>.

²⁴ Mohamed & Migwe-Kagume, interview.

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- ²⁸ Mohamed & Migwe-Kagume, interview.
- ²⁹ Charlene Migwe-Kagume & Joshua Mbai, “Back to Office Report: Kenya Open Contracting Cluster Meeting,” 29 March 2022.
- ³⁰ “Kenya Co-Creation Brief 2023,” Open Government Partnership, 14 March 2023, <https://www.opengovpartnership.org/documents/kenya-co-creation-brief-2023>.
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- ³³ “IRM End-of-Term Report: Kenya 2016–2018,” Open Government Partnership, 31 August 2020, <https://www.opengovpartnership.org/documents/kenya-end-of-term-report-2016-2018>.
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- ³⁹ Ochola & Wesonga, interviews.
- ⁴⁰ Joshua Ochuka (Senior Principal Lecturer at Kenya School of Government’s Centre for Leadership, Public Value, and Ethics), interview by IRM researcher, 18 August 2023.
- ⁴¹ “Social Protection,” Kenya School of Government, <https://socialprotection.org/connect/stakeholders/kenya-school-government-ksg>.
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Section III. Participation and Co-Creation

Government and civil society collaboration during co-creation and implementation continued to improve. The Technical Committee oversaw the OGP process, while Commitment Clusters provided space for multistakeholder partnership to advance reforms. Clusters with higher levels of engagement saw more progress on their commitments. There remains opportunity to expand the understanding of OGP beyond the core community. Kenya is acting contrary to OGP process due to the absence of an OGP repository as well as public information on co-creation and implementation during the action plan period.

The OGP leadership in Kenya is shared equally between the civil society and government. Both the OGP Steering Committee and the commitment cluster leads include an equal representation of government and civil society actors. After the 2022 elections, OGP shifted from the Office of the Deputy President to the new Office of the Prime Cabinet Secretary. Mzalendo Trust, has been the Civil Society co-lead and co-convener for the OGP process since the beginning of the creation of NAP IV and works closely with their government counterpart to oversee the process.

The co-creation process saw stronger collaboration than previous action plan cycles. Commitments were proposed and prioritized by government and civil society in the “open dialogue” forum. Commitments that aligned with government priorities were prioritized for inclusion, to help the action plan withstand forthcoming elections. Cluster working groups then drafted commitments and joined the Technical Committee to oversee implementation.¹

The MSF plays a critical role in ensuring the successful implementation of the NAP commitments. In addition to playing an oversight role, they are also co-implementers with the relevant government institutions. During the OGP implementation cycle, the engagement of relevant OGP stakeholders took place at 2 levels: (1) at the level of the MSF generally where the civil society and government co-conveners organized follow-up meetings with members to monitor and discuss progress² and (2) at the commitment cluster level where the cluster co-leads would organize meetings with their cluster members.

Based on the interview responses, the level of engagement and participation during implementation differed from one commitment cluster to another and this had an implication on the level of completion of commitments. In the access to information commitment, for instance, the active involvement and contribution of both the civil society actors and the government contributed to the successful substantial completion of the commitment.³ The level of engagement under the access to justice commitment was however low during the implementation cycle, compared to the co-creation stage pointing to a general lack of ownership or sense of collective responsibility by different stakeholders.⁴ A CSO representative attributed this lack of ownership to inadequate resources to enable members to express stronger commitment to contributing or supporting the implementation process.⁵

More broadly, the OGP CSO co-lead, Caroline Gaita, was of the view that there was improved and abroad participation during the implementation cycle because more stakeholders beyond the OGP community were involved in the process.⁶ The co-leads and cluster leads took steps to encourage the engagement of other CSOs outside and beyond the OGP community.⁷ For instance, under the Access to Information commitment, members were encouraged to take

charge of and oversee the implementation of at least 1 or 2 milestones in order to strengthen each member’s sense of ownership of the process.⁸

Compliance with the minimum requirements

The IRM assesses whether member countries met the minimum requirements under OGP’s Participation and Co-Creation Standards for the purposes of procedural review.⁹ During co-creation, Kenya acted according to the OGP process. The two minimum requirements listed below must achieve at least the level of ‘in progress’ for a country to have acted according to OGP process.

Key:

- Green = Meets standard
- Yellow = In progress (steps have been taken, but standard is not met)
- Red = No evidence of action

Acted according to OGP process during the implementation period?	
The government maintained an OGP repository that is online, updated at least once during the action plan cycle, and contains evidence of development and implementation of the action plan. Kenya’s OGP website was not functional for the majority of the action plan cycle. Therefore, evidence of co-creation and implementation was not publicly available. ¹⁰	Red
The government provided the public with information on the action plan during the implementation period. Kenya’s OGP community maintains strong communication among members, including through cluster meetings. A check-in for implementers was held during Open Gov Week in May 2022. However, communication and dissemination of information to the broader public was limited.	Yellow

¹ “IRM Action Plan Review: Kenya 2020–2022,” Open Government Partnership, 16 August 2022, <https://www.opengovpartnership.org/documents/kenya-action-plan-review-2020-2022>.

² Caroline Gaita (Director of Mzalendo Trust), interview by IRM researcher, 17 February 2023.

³ Viola Ochola (Director of Access to Information at the Commission on Administrative Justice) & Sarah Wesonga (Program Officer of Article 19), interviews by IRM researcher, 16 March 2023.

⁴ Annette Mbogo (Executive Director of Kituo Cha Sheria & CSO Co-Chair of the Access to Justice Commitment Cluster), interview by IRM researcher, 11 March 2023.

⁵ Mbogo, interview.

⁶ Gaita, interview.

⁷ Gaita, interview.

⁸ Mbogo, interview.

⁹ Please note that future IRM assessment will focus on compliance with the updated OGP Participation and Co-Creation Standards that came into effect on 1 January 2022: “OGP Participation and Co-Creation Standards,” Open Government Partnership, <https://www.opengovpartnership.org/ogp-participation-co-creation-standards>.

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Section IV. Methodology and IRM Indicators

This report supports members’ accountability and learning through assessment of (i) the level of completion for commitments’ implementation, (ii) early results for commitments with a high level of completion identified as promising or that yielded significant results through implementation, and (iii) participation and co-creation practices throughout the action plan cycle. The IRM commenced the research process after the first year of implementation of the action plan with the development of a research plan, preliminary desk research, and verification of evidence provided in the country’s OGP repository.¹

In 2022, OGP launched a consultation process to co-create a new strategy for 2023–2028.² The IRM will revisit its products, process, and indicators once the strategy co-creation is complete. Until then, Results Reports continue to assess the same indicators as previous IRM reports:

Completion

The IRM assesses the level of completion for each commitment in the action plan, including commitments clustered in the Action Plan Review.³ The level of completion for all commitments is assessed as one of the following:

- *No evidence available*
- *Not started*
- *Limited*
- *Substantial*
- *Complete*

Did it Open Government?

The IRM assesses changes to government practices that are relevant to OGP values, as defined in the OGP Articles of Governance, under the “Did it open government?” indicator.⁴ To assess evidence of early results, the IRM refers to commitments or clusters identified as promising in the Action Plan Review as a starting point. The IRM also takes into account commitments or clusters with a high level of completion that may not have been determined as “promising” but that, as implemented, yielded significant results. For commitments that are clustered, the assessment of “Did it open government?” is conducted at the cluster level, rather than the individual commitment level. Commitments or clusters without sufficient evidence of early results at the time of assessment are designated as “no early results to report yet.” For commitments or clusters with evidence of early results, the IRM assesses “Did it open government?” as one of the following:

- *Marginal:* Some change, but minor in terms of its effect on level of openness
- *Major:* A step forward for government openness in the relevant policy area but remains limited in scope or scale
- *Outstanding:* A reform that has transformed “business as usual” in the relevant policy area by opening government

This report was prepared by the IRM in collaboration with Eva Maria Okoth and was reviewed by Brendan Halloran, IRM external expert. The IRM methodology, quality of IRM products and review process is overseen by the IRM’s International Experts Panel (IEP). The current IEP membership includes:

- Snjezana Bokulic
- Cesar Cruz-Rubio

- Mary Francoli
- Maha Jweied
- Rocio Moreno Lopez

This review process, including the procedure for incorporating comments received, is outlined in greater detail in Section III of the Procedures Manual⁵ and in Kenya’s Action Plan Review 2020–2022. For more information, refer to the “IRM Overview” section of the OGP website.⁶ A glossary on IRM and OGP terms is available on the OGP website.⁷

¹ Kenya does not currently have a functioning, public OGP repository.

² See: “Creating OGP’s Future Together: Strategic Planning 2023–2028,” Open Government Partnership, <https://www.opengovpartnership.org/creating-ogps-future-together>.

³ The IRM clusters commitments that share a common policy objective during the Action Plan Review process. In these instances, the IRM assesses “potential for results” and “Did it open government?” at the cluster level. The level of completion is assessed at the commitment level. For more information on how the IRM clusters commitments, see Section IV on Methodology and IRM Indicators of the Action Plan Review.

⁴ See: “Open Government Partnership Articles of Governance,” Open Government Partnership, 17 June 2019, https://www.opengovpartnership.org/wp-content/uploads/2019/06/OGP_Articles-of-Governance_2019.pdf.

⁵ “IRM Procedures Manual, v3,” Open Government Partnership, 16 September 2017, <https://www.opengovpartnership.org/documents/irm-procedures-manual>.

⁶ “IRM Overview,” Open Government Partnership, <https://www.opengovpartnership.org/irm-guidance-overview>.

⁷ “OGP Glossary,” Open Government Partnership, <https://www.opengovpartnership.org/glossary>.

Annex I. Commitment Data¹

Commitment 1: Beneficial Ownership

- | | |
|--|---|
| <ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest | <ul style="list-style-type: none"> • Completion: Limited • Did it open government? No early results to report yet |
|--|---|

This commitment aimed to enhance transparency and strengthen public accountability by publishing a central public register of company beneficial ownership information for all entities wishing to provide goods, works, and services across all national and county governments.

The commitment had four milestones, two of which were carried forward from the previous NAP.² CSO cluster co-lead Transparency International noted the first milestone under the open contracting commitment³ also belonged to this commitment.⁴ As such, the analysis under this section will only focus on the four initial milestones included under this commitment.

Out of the four milestones, three were not yet started and one was completed to a limited extent. Milestones 1 and 2 which required the government to publish information on foreign and local companies buying property and committed to the publication of information on companies and individuals convicted of corruption and bribery respectively were carried forward from NAP III, having not been completed.⁵ The milestones, as drafted, were ambiguous and would require further discussions between different actors on how to clarify milestones and their implementation. These actors include the Business Registration Services (BRS), the Public Procurement Regulatory Authority (PPRA), and the Ethics and Anti-Corruption Commission (EACC). The current database on the PPIP portal could also be further enhanced to achieve these milestones by categorizing information in the portal according to the nature of contracts.

The third milestone on the publication of the list of firms which have been debarred from public tendering was ongoing owing to an amendment in the Public Procurement Regulations. Companies engaged in unethical business practices in violation of procurement laws are named in a “list of shame” on the PPRA website.⁶ The effect of debarment implies that such firms are not eligible to participate in public tenders during the period of debarment.

The fourth milestone required the government to apply the existing beneficial ownership (BO) data standards to the current BO register. A Transparency International representative reported that this milestone was ongoing. However, no evidence was provided to demonstrate the steps taken towards its implementation.⁷

According to the CSO co-lead, the commitment was designed with little input from the BRS, who was expected to be a key implementer. It is highly likely that the commitment did not align with government priorities and this contributed to the low level of completion. Other obstacles included lack of adequate funds, human resource constraints, COVID-19 pandemic, and political uncertainty associated with the general electioneering period.

During implementation, the government strengthened BO transparency through Legal Notice No. 32 of 2022 on Companies (Beneficial Ownership Information) (Amendment) Regulations. The regulations expanded the scope of beneficial ownership information disclosure to include procuring entities participating in public procurement and assets disposal under the Public Procurement and Asset Disposal Act of 2015, companies participating in a public private partnership arrangement under the Public Private Partnership Act of 2013, and where information effects the country. Key principles for beneficial ownership disclosure included freely downloadable, searchable, and reusable by the public, as well as without a fee, proprietary software, or the need for registration. There is a need for a more comprehensive legislative framework to help improve BO information disclosure and facilitate achieving Kenya’s OGP commitments and international obligations under FATF. Some bills which will strengthen the BO legislative framework are also under consideration, including the Business Laws (Amendment) Bill of 2022, the Companies (Beneficial Ownership Information) Regulations of 2022, the Partnerships (Beneficial Ownership Information) Regulations of 2022, and the Registrar of Companies Forms Rules of 2022.

Commitment 2: Open Contracting

- | | |
|---|---|
| <ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial | <ul style="list-style-type: none"> • Completion: Limited • Did it open government? Marginal |
|---|---|

This commitment is assessed in Section II above.

Commitment 3: Open Data for Development

- | | |
|--|---|
| <ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest | <ul style="list-style-type: none"> • Completion: Limited • Did it open government? No early results to report yet |
|--|---|

This commitment sought to lower the barriers and increase access to timely, affordable, up-to-date, and accurate data for socio-economic development in order to reduce inequality and improve evidence-based decision making for enhanced service delivery.

Milestone 1 aimed to establish an up-to-date open data portal, which is housed by the Kenya National Bureau of Statistics⁸. It contains an array of information pertaining to Kenya’s economy, such as population, economic indicators, inflation, and export-import data. However, the data on the portal was not up to date with information for the year 2023 at the time of writing this report. The commitment text was also too general and lacked specificity on the frequency of updates, hence making it difficult to assess the precise level of completion.

Milestones 2 and 3 sought the inclusion of Geographic Information Systems (GIS) information of capital projects in county budgets, the establishment of conditional grants to support the development of GIS Labs, and digitization of development control. While there was no evidence of the inclusion of GIS information on capital project budgets, there was indication of the utilization of GIS information to streamline operations in select counties. Nairobi County, for instance, employed the use of GIS information to streamline revenue collection.⁹ At the same time, Mandera County and 17 other county governments established functional GIS

laboratories, whereas 20 other counties were in the process of establishing conditional grants to support the development of GIS laboratories.¹⁰ These capital intensive yet hidden projects are major conduits for corrupt dealings and could have the potential of enhancing transparency within the counties. Lack of prioritization and financing was the main challenges to achieve full implementation.

According to the National Land Commission (NLC), only seven out of the 47 Counties in Kenya had successfully formulated and approved a county spatial plan in compliance with milestone 4 by the end of the 2021–2022 fiscal year.¹¹ According to UN Habitat, some challenges inhibiting the implementation of this milestone included weak technical knowledge and skills as well as lack of effective tools and technology.¹²

No progress was made under milestones 5 and 6 on disaster reduction and mitigation. However, the National Assembly discussed and approved two bills relating to disaster management during this action plan cycle. These included the National Disaster Management Authority Bill of 2019, which was passed on 16 February 2022, and the National Disaster Risk Management Bill of 2021, which was passed on 12 May 2022. Both Bills were still going through the remaining stages of the legislative process at the time of writing this report.¹³

Milestones 7, 8, and 9 related to the development of data policies and their subsequent public dissemination and utilization. The researcher did not find any evidence of the commencement of any of the three milestones. All the three milestones were couched in a manner that did not demonstrate a measurable outcome. As such, assessing the completion status was difficult.

Commitment 4: Public Participation and Legislative Openness

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|---|---|
| <ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial | <ul style="list-style-type: none"> • Completion: Limited • Did it open government? No early results to report yet |
|---|---|

This is one of the most crucial commitments in Kenya’s quest for open government. The commitment as a whole has Constitutional underpinnings¹⁴, and Kenya’s judiciary has on several occasions struck down legislation and castigated administrative actions which are deemed to have sailed through without public participation. Most notably, the Supreme Court of Kenya upheld the High Court’s determination which struck down the Building Bridges Initiatives (BBI) Bill for lack of public participation among other reasons, notwithstanding the fact that it was spearheaded by the sitting president then.¹⁵

Public participation and legislative openness have been part of Kenya’s commitment in every NAP with varying degrees of results.¹⁶ Public participation is recognized as a vehicle for legislative openness as it ensures that no laws are passed by parliament without the voice of the common citizens. However, public participation has been hampered by lack of interest from government actors in creating meaningful spaces for participation, lack of standards, inadequate access to information, non-inclusivity, as well as high cost and inadequate budgeting for public participation activities in practice,¹⁷ barring the suggestion of stronger CSO involvement in implementing this commitment.

The commitment's limited level of implementation was the primary factor in its unrealized potential to open government. However, the use of social media to share the proceedings of parliament at national level is a commendable practice that continues from the previous NAP. The August 2022 general elections and political division within government just before the elections significantly affected the full implementation of this commitment as many of the key players shifted their focus and priorities on the political campaigns.¹⁸

Through the first milestone, Kenya achieved mixed results to entrench legislative openness through timely and proactive disclosure of information as well as access to parliamentary and county assembly plenary and committee proceedings.¹⁹ The plenary proceedings of the Senate and the National Assembly are often broadcasted through mainstream media, which is accessible nationally.²⁰ The National Assembly has also made a laudable attempt to keep citizens updated of its work, as everyday there is a session broadcasted through its official Twitter and Facebook channels. For instance, house business that was transacted on Wednesday, 1 March 2023, was published in a summarized manner through the official Facebook Channel on the same day.²¹ There is still work to be done regarding committee proceedings at the national level. However, at the county level, save for snippets of parliamentary sessions on social media, there was no evidence pertaining to County Assembly proceedings in the manner designed and implemented at the national level.

The second milestone sought to develop a publicly accessible petition tracker for parliament and select county assemblies. At the time of developing this milestone, the parliament already operationalized its petition tracker which is accessible to the public.²² However, according to Mzalendo Trust, the idea of this commitment was to create a petition tracker that could help petitioners track the progress or stage in which their petition is within the parliament's process, without necessarily having to follow up. This has not been done yet. Instead, they developed a compendium and hope to automate this data into a petition tracker that is up to date and accessible to the public.²³ With the development of the compendium, this milestone is ongoing and should be carried forward to the next action plan cycle.

Milestones 3, 4, and 5 to pass legislation enshrining public participation in government were among the most ambitious elements of this commitment. These milestones were not completed due to the supremacy battles between the Senate and the National Assembly.²⁴ Under milestone 3, the Public Participation Bill was passed by the Senate but has not been passed in the National Assembly. This law never saw the light of day in the recently concluded 12th Parliament. Similarly, milestone 4 to draft the Civic Education Legislation was not started. Regarding milestone 5, the Public Benefits Organization Act was passed in 2013, but has not been operationalized and remained waiting for the action of the relevant Cabinet Secretary. Definite timelines were set for its implementation but it was not adhered to. It can be carried over to the next action plan cycle.

Mzalendo Trust reported progress on milestone 6 to adopt and enhance the use of technology as an enabler of public participation.²⁵ Mzalendo Trust has been central to the use of mainstream and social media to broadcast parliamentary operations to the public. The Parliament of Kenya has an active YouTube channel with over 44,000 subscribers at the time of writing this report through which citizens can follow live proceedings.²⁶ They also have an official Twitter²⁷ and Facebook²⁸ page which have 168,000 and 71,000 followers respectively.

While these numbers are small in comparison to Kenya’s population of approximately 52 million, it indicates positive steps in the right direction. The use of technology as an enabler of public participation has been a theme for Kenya since prior action plan cycles.²⁹

Milestone 7 on the development of guidelines to guarantee inclusivity in public participation to include women, youth, persons with disability, minority, and marginalized communities was not started largely due to the fact that the Public Participation Bill was not implemented.³⁰

With regards to the implementation of milestone 8 which sought for the institutionalization of OGP at the political and technical levels in the parliament through the speaker’s roundtable, Mzalendo Trust confirmed that there is an OGP directorate or desk at the Senate but not at the National Assembly.³¹ The IRM researcher was unable to confirm that a speaker’s roundtable had been convened to describe the institutionalization of the OGP. The implementation of this milestone was hampered by the electioneering period as a majority of the expected key implementers were running for office.³²

The parliament and its partners did not complete milestone 9 to establish five service centers to bring the parliament closer to citizens. Article 119 of the 2010 Constitution of Kenya allows anyone to petition the parliament to consider any matter within its authority to enact, amend, and repeal any legislation.³³ Service centers in remote counties would better enable citizens to petition parliament or participate in the budget process. Mzalendo Trust stated that whilst the physical service centers were not established, a lot of work was being done in the background whose impact would be seen if the milestone is carried over to the next action plan cycle.³⁴

Considerable efforts should shift towards opening parliament and enhancing public participation within county assemblies. It is evident that parliamentary openness at the national level has improved over time. The same cannot be said of parliamentary processes at the county level where citizens still find it difficult to easily access information and monitor county assembly activities. Open access to parliaments at county level would bring legislators and leaders closer to the citizens and create space for effective dialogue and participation.

Commitment 5: Improving Public Service Delivery Performance

<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest 	<ul style="list-style-type: none"> • Completion: Limited • Did it open government? No early results to report yet
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This commitment was modelled around the African Peer Review Mechanism, which is a tool designed for identifying and sharing experiences and best practices amongst member states with the aim of fostering positive values such as democracy, economic growth, and sustainable development among others. By seeking to develop and implement such a framework for application at the county level, Kenya sought to improve public service delivery by ensuring sustained citizen engagement with their county government. By implementing the County Peer Review Mechanism (CPRM), Kenya sought to promote inter-county governance assessments, publicize individual county’s action plan via an online platform to enable citizen-engagement, lobby for a legislation to anchor the CPRM process and promote the adoption of review reports



by the Senate and individual county assemblies to ensure oversight. There were five key milestones central to the implementation of this commitment.

At the action plan review stage, it had been recommended that for the commitment to attain the desired effect in the context of the OGP framework, the government ought to have ensured that there was sufficient civic participation by creating a space for citizens to use the data published to provide feedback. There was no evidence to demonstrate that this was done and hence rendered the potential for results to be coded as modest.

However, according to the OGP Civil Society Multistakeholder Forum Report, some progress was made towards the implementation of some of the milestones.³⁵ All 47 Counties agreed to be part of the CPRM framework, whereas 16 out of the 47 counties received training on the use of the CPRM tools. Furthermore, 8 counties had already prepared their county self-assessment reports and were waiting for funding confirmation to proceed with interviews at the ward level. Two counties—Meru and Tharaka Nithi—had completed their final self-assessment reports which were awaiting validation by the panel of eminent persons, which although not listed as one of the milestones under this commitment, was appointed by the President of Kenya to steer and oversee the implementation of CPRM.³⁶ Meanwhile, there was no evidence of the commencement of milestones 3 and 5 on the hosting of the CPRM summit and parliamentary engagement on the use of the APRM as a tool for oversight respectively.

While it is reported that two counties had prepared their final self-assessment reports, there was no evidence of civic engagement. As a consequence, it is difficult to assess the impact on service delivery as well as the impact on open governance. This milestone could be carried on to the next action plan cycle with more focus on citizen engagement.

Commitment 6: Access to Information

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| <ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial | <ul style="list-style-type: none"> • Completion: Substantial • Did it open government? Marginal |
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This commitment is assessed in Section II.

Commitment 7: Access to Justice

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| <ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial | <ul style="list-style-type: none"> • Completion: Substantial • Did it open government? Marginal |
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This commitment is assessed in Section II.

Commitment 8: Building Open Government Resiliency

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| <ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest | <ul style="list-style-type: none"> • Completion: Limited • Did it open government? No early results to report yet |
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Carried over from the previous action plan, this commitment underscores Kenya’s commitment to the OGP process vis-a-vis its leadership role at the regional level. Kenya was recently elected to the global OGP Steering Committee and the sustenance of this commitment into the current NAP serves to showcase the country’s commitment to attain the high standards set by OGP. As written, this commitment sought to promote the institutionalization of OGP in government activities by onboarding the highest level of political support and engaging relevant stakeholders from CSOs, public institutions, private sector, and the academia throughout OGP process as well as to strengthen multilateralism with other OGP members.

During NAP III, the government onboarded CSOs, high level-political support in parliament, spread the tentacles of the OGP process to the sub-national level, developed an OGP website, and engaged in peer learning activities from other OGP countries in Africa. While this NAP IV commitment was expected to take the OGP process to the next level and entrench its roots in government, there was little evidence to demonstrate meaningful progress in implementation.

Of its seven milestones, the commitment recorded some progress under milestones 2, 5, and 6. In addition to reviewing the implementation status of commitments, the OGP technical team held various meetings with cluster leads to take stock of progress to date and map out next steps. This was achieved at the national level and at the county level—specifically counties participating in the OGP Local program—through peer review learning in order to deepen domestic OGP network as well as ensure engagement and active participation of county governments, independent commissions, and the judiciary. Kenyan government and civil society stakeholders have also co-convened robust stakeholder engagement to accelerate delivery and impact for citizens. Milestone 4 recorded some progress in 2023, which was beyond the period under review. No evidence was presented for milestones 1, 3, and 7.

Similar to other commitments implementation of this commitment was inhibited by a multitude of factors that included the COVID-19 pandemic, the 2022 election, and political activities which overshadowed OGP action plan. This had a particular impact on this commitment noting that the then-Vice President—who co-led the implementation of this commitment—was a major contender in the presidential race.³⁷

¹ Editorial notes:

1. Commitments’ short titles may have been edited for brevity. For the complete text of commitments, please see: “Kenya OGP Action Plan 2020–2022,” Government of Kenya, 1 March 2021, <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022>.
2. For more information on the assessment of the commitments’ design, see: “IRM Action Plan Review: Kenya 2020–2022,” Open Government Partnership, 16 August 2022, <https://www.opengovpartnership.org/documents/kenya-action-plan-review-2020-2022>.

² The two milestones that were carried forward from NAP III of 2018–2020 included: (1) the establishment of a central register of foreign and local companies bidding on public contracts and buying property; and (2) building a module on the beneficial ownership register information of companies and individuals convicted of bribery and corrupt practices.

³ The commitment is aimed at publishing beneficial ownership information on foreign and local companies bidding for and winning mining contracts.

⁴ Harriet Wachira (Transparency International), interview by IRM researcher, 14 March 2023.

⁵ Wachira, interview.

⁶ “Debarred firms,” Public Procurement Regulatory Authority, <https://ppra.go.ke/debarred-firms>.

- ⁷ Wachira, interview.
- ⁸ “Kenya Data Portal,” KNBS, <https://kenya.opendataforafrica.org>.
- ⁹ Omullo Collins, “City Hall bets on GIS maps for revenues, service turnaround,” Business Daily, 25 February 2021, <https://www.businessdailyafrica.com/bd/data-hub/city-hall-gis-maps-for-revenues-service-turnaround-3303134>.
- ¹⁰ “H.E.’s speech on launch of GIS Mapping and County Website,” Mandera County Government, 28 February 2022, <https://mandera.go.ke/h-es-speech-on-launch-of-gis-mapping-and-county-website-28th-feb-2022>.
- ¹¹ “Annual Report 2021–2022,” National Land Commission, <https://landcommission.go.ke/download/annual-report-2021-2022/?wpdmdl=18312&refresh=644295455d9391682085189>.
- ¹² “Capacity development on county spatial planning in Kenya,” UN Habitat, <https://unhabitat.org/project/capacity-development-on-county-spatial-planning-in-kenya>.
- ¹³ “Bills Tracker,” Parliament of Kenya, 20 June 2022, <http://www.parliament.go.ke/sites/default/files/2022-06/BILLS%20TRACKER%20AS%20AT%2010%20JUNE%202022.pdf>.
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- ¹⁵ Jemimah Mueni, “BBI proponents failed public participation test on creation of constituencies: Koome,” Capital News, 31 March 2022, <https://www.capitalfm.co.ke/news/2022/03/there-was-no-public-participation-in-bbi-cj-koome-rules>.
- ¹⁶ “IRM Action Plan Review: Kenya 2020–2022,” Open Government Partnership.
- ¹⁷ “IRM Action Plan Review: Kenya 2020–2022,” Open Government Partnership, 9.
- ¹⁸ Caroline Gaita (Director of Mzalendo Trust), interview by IRM researcher, 17 February 2023.
- ¹⁹ Gaita, interview.
- ²⁰ “National Assembly Live Proceedings,” National Assembly of Kenya, <http://www.parliament.go.ke/the-national-assembly/live-proceedings>; “Senate Live Proceedings,” Senate of Kenya, <http://www.parliament.go.ke/index.php/the-senate/live-proceedings>.
- ²¹ Parliament of Kenya, “Brief on business transacted on Wednesday March 1, 2023,” Facebook, 1 March 2023, https://www.facebook.com/story.php?story_fbid=pfbid02yqqkKdmpWxuCm9bUGTt85PH3et4ESKKp1wKRxJiqqcmDLAQUvoduPgnRTiKJdgA3l&id=100064733196911.
- ²² “Petition Tracker,” Senate of Kenya, <http://www.parliament.go.ke/the-senate/house-business/petitions-tracker>.
- ²³ Gaita, interview.
- ²⁴ Gaita, interview.
- ²⁵ Gaita, interview.
- ²⁶ “Parliament of Kenya,” YouTube, <https://www.youtube.com/@ParliamentofKenyaChannel>.
- ²⁷ “National Assembly of Kenya,” Twitter, <https://twitter.com/NAssemblyKE>.
- ²⁸ Parliament of Kenya, “Facebook,” <https://www.facebook.com/ParliamentKE>.
- ²⁹ “IRM Transitional Results Report: Kenya 2018–2021,” Open Government Partnership, 11 May 2023, <https://www.opengovpartnership.org/documents/kenya-transitional-results-report-2018-2021>.
- ³⁰ Gaita, interview.
- ³¹ Gaita, interview.
- ³² Gaita, interview.
- ³³ “Constitution of Kenya 2010,” Government of Kenya.
- ³⁴ Gaita, interview.
- ³⁵ “Kenya OGP Civil Society Multistakeholder Forum Report,” 23 February 2023.
- ³⁶ Ayega Davis, “Uhuru appoints 9 eminent persons to serve in County Peer Review Mechanism Panel,” Capital News, 5 July 2022, <https://www.capitalfm.co.ke/news/2022/07/uhuru-appoints-9-eminent-persons-to-serve-in-county-peer-review-panel>.
- ³⁷ “William Ruto is ‘confident’ that he will win the Kenyan presidential elections,” Africanews, 19 July 2022, <https://www.africanews.com/2022/07/18/william-ruto-is-confident-he-will-win-the-kenyan-presidential-elections/>.